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OFFICIAL REPORTS

OF

THE SUPREME COURT

MAY 14 THROUGH JUNE 11, 2018

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE
AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE
AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE
AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

END OF VOLUME

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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Vol. 584 (Pp. 381–838; 970–1094) UNITED STATES REPORTS Part 2

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
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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 June 27, 2017, viz.:

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

For the First Circuit, STEPHEN BREYER, Associate Justice.

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

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

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

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

For the Sixth Circuit, ELENA KAGAN, Associate Justice.

For the Seventh Circuit, ELENA KAGAN, Associate Justice.

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

For the Ninth Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Tenth Circuit, SONIA SOTOMAYOR, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

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

June 27, 2017.

(For next previous allotment, see 582 U. S., Pt. 2, p. III.)

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NOTE: All undesignated references herein to the United States Code are to the 2012 edition, one of its supplements, or both.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if the attorney is a member of the Court's Bar at the time the case is argued.

Syllabus

UNITED STATES *v.* SANCHEZ-GOMEZ ET AL.

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

No. 17–312. Argued March 26, 2018—Decided May 14, 2018

The judges of the United States District Court for the Southern District of California adopted a districtwide policy permitting the use of full restraints—handcuffs connected to a waist chain, with legs shackled—on most in-custody defendants produced in court for nonjury proceedings by the United States Marshals Service. Respondents Jasmin Morales, Rene Sanchez-Gomez, Moises Patricio-Guzman, and Mark Ring challenged the use of such restraints in their respective cases and the restraint policy as a whole. The District Court denied their challenges, and respondents appealed to the Court of Appeals for the Ninth Circuit. Before that court could issue a decision, respondents' underlying criminal cases ended. The court—viewing the case as a "functional class action" involving "class-like claims" seeking "class-like relief," 859 F. 3d 649, 655, 657–658—held that this Court's civil class action precedents saved the case from mootness. On the merits, the Court of Appeals held the policy unconstitutional.

Held: This case is moot. Pp. 385–394.

(a) The Federal Judiciary may adjudicate only "actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Genesis HealthCare Corp.* v. *Symczyk*, 569 U. S. 66, 71. Such a dispute "must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser* v. *Newkirk*, 422 U. S. 395, 401. A case that becomes moot at any point during the proceedings is thus outside the jurisdiction of the federal courts. See *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 91. Pp. 385–386.

(b) In concluding that this case was not moot, the Court of Appeals relied upon this Court's class action precedents, most prominently *Gerstein* v. *Pugh*, 420 U. S. 103. That reliance was misplaced. *Gerstein* was a class action respecting pretrial detention brought under Federal Rule of Civil Procedure 23. The named class representatives' individual claims had apparently become moot before class certification. This Court held that the case could nonetheless proceed, explaining that due to the inherently temporary nature of pretrial detention, no named representative might be in custody long enough for a class to be certified. *Gerstein* does not support a freestanding exception to mootness outside the class action context. It belongs to a line of cases that this

Court has described as turning on the particular traits of Rule 23 class actions. See, *e. g., Sosna* v. *Iowa*, 419 U. S. 393; *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388; *Genesis HealthCare*, 569 U. S. 66. The Federal Rules of Criminal Procedure establish for criminal cases no vehicle comparable to the civil class action, and this Court has never permitted criminal defendants to band together to seek prospective relief in their individual cases on behalf of a class. Here, the mere presence of allegations that might, if resolved in respondents' favor, benefit other similarly situated individuals cannot save their case from mootness. See *id.*, at 73. That conclusion is unaffected by the Court of Appeals' decision to recast respondents' appeals as petitions for supervisory mandamus. Pp. 386–390.

(c) Respondents do not defend the reasoning of the Court of Appeals, and instead argue that the claims of two respondents—Sanchez-Gomez and Patricio-Guzman—fall within the "exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review." *Kingdomware Technologies, Inc.* v. *United States*, 579 U. S. 162, 170 (internal quotation marks omitted). Respondents claim that the exception applies because Sanchez-Gomez and Patricio-Guzman will again violate the law, be apprehended, and be returned to pretrial custody. But this Court has consistently refused to "conclude that the case-or-controversy requirement is satisfied by" the possibility that a party "will be prosecuted for violating valid criminal laws." *O'Shea* v. *Littleton*, 414 U. S. 488, 497. Respondents argue that this usual refusal to assume future criminal conduct is unwarranted here given the particular circumstances of Sanchez-Gomez's and Patricio-Guzman's offenses. They cite two civil cases—*Honig* v. *Doe*, 484 U. S. 305, and *Turner* v. *Rogers*, 564 U. S. 431—in which this Court concluded that the expectation that a litigant would repeat the misconduct that gave rise to his claims rendered those claims capable of repetition. But *Honig* and *Turner* are inapposite because they concerned litigants unable, for reasons beyond their control, to prevent themselves from transgressing and avoid recurrence of the challenged conduct. Sanchez-Gomez and Patricio-Guzman, in contrast, are "able—and indeed required by law"—to refrain from further criminal conduct. *Lane* v. *Williams*, 455 U. S. 624, 633, n. 13. No departure from the settled rule is warranted. Pp. 390–394.

859 F. 3d 649, vacated and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

Allon Kedem argued the cause for the United States. With him on the briefs were *Solicitor General Francisco*,

Acting Assistant Attorney General Cronan, *Deputy Solicitor General Kneedler*, and *Eric J. Feigin.*

Reuben Camper Cahn argued the cause for respondents. With him on the brief were *Shereen J. Charlick*, *Vincent J. Brunkow*, *Kara L. Hartzler*, and *Ellis Murray Johnston III.**

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Four criminal defendants objected to being bound by full restraints during pretrial proceedings in their cases, but the District Court denied relief. On appeal, the Court of Appeals for the Ninth Circuit held that the use of such restraints was unconstitutional, even though each of the four criminal cases had ended prior to its decision. The question presented is whether the appeals were saved from mootness either because the defendants sought "class-like relief" in a "functional class action," or because the challenged practice was "capable of repetition, yet evading review."

I

It is the responsibility of the United States Marshals Service to "provide for the security . . . of the United States District Courts." 28 U. S. C. § 566(a). To fulfill that duty, the United States Marshal for the Southern District of California requested that the judges of that district permit the use of full restraints on all in-custody defendants during nonjury proceedings. When "full restraints" are applied, "a defendant's hands are closely handcuffed together, these handcuffs are connected by chain to another chain running around the defendant's waist, and the defendant's feet are shackled and chained together." 859 F. 3d 649, 653 (CA9 2017) (en

*Briefs of *amici curiae* urging affirmance were filed for Former Judges et al. by *Meir Feder*, *Judith Resnik*, and *Stephen I. Vladeck*; and for the National Association of Federal Defenders by *Daniel L. Kaplan*, *Donna F. Coltharp*, and *Sarah S. Gannett.*

banc). In support of his proposal, the Marshal cited safety concerns arising from understaffing, past incidents of violence, and the high volume of in-custody defendants produced in the Southern District. The judges agreed to the Marshal's request, with modifications providing that a district or magistrate judge may require a defendant to be produced without restraints, and that a defendant can request that this be done. See App. 78–79.

Respondents Jasmin Morales, Rene Sanchez-Gomez, Moises Patricio-Guzman, and Mark Ring were among the defendants produced by the Marshals Service for pretrial proceedings in full restraints. They raised constitutional objections to the use of such restraints in their respective cases, and to the restraint policy as a whole. They noted that the policy had resulted in the imposition of full restraints on, for example, a woman with a fractured wrist, a man with a severe leg injury, a blind man, and a wheelchair-bound woman. The District Court denied their challenges.

Respondents appealed to the Court of Appeals for the Ninth Circuit, but before the court could issue a decision, their underlying criminal cases came to an end. Morales, Sanchez-Gomez, and Patricio-Guzman each pleaded guilty to the offense for which they were charged: Morales, to felony importation of a controlled substance, in violation of 21 U. S. C. §§ 952 and 960; Sanchez-Gomez, to felony misuse of a passport, in violation of 18 U. S. C. § 1544; and Patricio-Guzman, to misdemeanor illegal entry into the United States, in violation of 8 U. S. C. § 1325. The charges against Ring—for making an interstate threat in violation of 18 U. S. C. § 875(c)—were dismissed pursuant to a deferred-prosecution agreement.

A panel of the Court of Appeals nonetheless concluded that respondents' claims were not moot, and went on to strike down the restraint policy as violating the Due Process Clause of the Fifth Amendment. 798 F. 3d 1204 (CA9 2015). Those rulings were reaffirmed on rehearing en banc. 859

F. 3d 649. The en banc court understood the "main dispute" before it to be a challenge to the policy itself, not just to the application of that policy to respondents. *Id.*, at 655. The court then construed respondents' notices of appeal as petitions for mandamus, which invoked the court's supervisory authority over the Southern District. *Id.*, at 657. The case was, in the court's view, a "functional class action" involving "class-like claims" seeking "class-like relief." *Id.*, at 655, 657–658. In light of that understanding, the Court of Appeals held that this Court's civil class action precedents kept the case alive, even though respondents were no longer subject to the restraint policy. *Id.*, at 657–659 (citing *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975)). On the merits, the Court of Appeals concluded that the restraint policy violated the Constitution. 859 F. 3d, at 666.

Judge Ikuta, writing in dissent for herself and four colleagues, rejected the majority's application of class action precedents to the individual criminal cases before the court and would have held the case moot. *Id.*, at 675. She also disagreed with the majority on the merits, concluding that the restraint policy did not violate the Constitution. *Id.*, at 683.

We granted certiorari. 583 U. S. 1036 (2017).

II

To invoke federal jurisdiction, a plaintiff must show a "personal stake" in the outcome of the action. *Genesis HealthCare Corp.* v. *Symczyk*, 569 U. S. 66, 71 (2013). "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Ibid.* Such a dispute "must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975). A case that becomes moot at any point during the proceedings is "no longer a 'Case' or 'Controversy'

for purposes of Article III," and is outside the jurisdiction of the federal courts. *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 91 (2013).

A

In concluding that this case was not moot, the Court of Appeals relied upon our class action precedents, most prominently *Gerstein* v. *Pugh*. That reliance was misplaced.*

Gerstein, a class action brought under Federal Rule of Civil Procedure 23, involved a certified class of detainees raising claims concerning their pretrial detention. 420 U. S., at 106–107. By the time this Court heard the case, the named representatives' claims were moot, and the record suggested that their interest might have lapsed even before the District Court certified the class. See *id.*, at 110–111, n. 11. Normally a class action would be moot if no named class representative with an unexpired claim remained at the time of class certification. See *ibid.* (citing *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975)). The Court nevertheless held that the case remained live. As we explained, pretrial custody was inherently temporary and of uncertain length, such that we could not determine "that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." *Gerstein*, 420 U. S., at 110–111, n. 11. At the same time, it was certain that there would always be some group of detainees subject to the challenged practice. *Ibid.* Given these circumstances,

*Shortly after the panel decision in this case, the Southern District altered its policy to eliminate the routine use of full restraints in pretrial proceedings. The Government represents, however, that the Southern District intends to reinstate its policy once it is no longer bound by the decision of the Court of Appeals. Tr. of Oral Arg. 29. We agree with the Court of Appeals that the rescission of the policy does not render this case moot. A party "cannot automatically moot a case simply by ending its unlawful conduct once sued," else it "could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where [it] left off, repeating this cycle until [it] achieves all [its] unlawful ends." *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 91 (2013).

the Court determined that the class action could proceed. *Ibid.*; see *Swisher* v. *Brady*, 438 U. S. 204, 213–214, n. 11 (1978) (employing same analysis in a class action challenging juvenile court procedures).

The Court of Appeals interpreted *Gerstein* to cover all "cases sufficiently similar to class actions" in which, "because of the inherently transitory nature of the claims," the claimant's "interests would expire before litigation could be completed." 859 F. 3d, at 658. *Gerstein* was an action brought under Federal Rule of Civil Procedure 23, but the Court of Appeals decided that such "a procedural mechanism to aggregate the claims" was not a "necessary prerequisite" for application of the *Gerstein* rule. 859 F. 3d, at 659 (alteration omitted). Respondents, the court noted, sought "relief [from the restraint policy] not merely for themselves, but for all in-custody defendants in the district." *Id.*, at 655. Those "class-like claims" seeking "class-like relief" were sufficient to trigger the application of *Gerstein* and save the case from mootness, despite the termination of respondents' criminal cases. 859 F. 3d, at 655.

We reject the notion that *Gerstein* supports a freestanding exception to mootness outside the class action context. The class action is a creature of the Federal Rules of Civil Procedure. See generally 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1751 *et seq.* (3d ed. 2005). It is an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," and "provides a procedure by which the court may exercise . . . jurisdiction over the various individual claims in a single proceeding." *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701 (1979). "The certification of a suit as a class action has important consequences for the unnamed members of the class." *Sosna*, 419 U. S., at 399, n. 8. Those class members may be "bound by the judgment" and are considered parties to the litigation in many important respects. *Devlin* v. *Scardelletti*, 536 U. S. 1, 7, 9–10 (2002). A certified

class thus "acquires a legal status separate from the interest asserted by the named plaintiff." *Genesis HealthCare*, 569 U. S., at 74 (quoting *Sosna*, 419 U. S., at 399; alterations omitted).

Gerstein belongs to a line of cases that we have described as turning on the particular traits of civil class actions. The first case in this line, *Sosna* v. *Iowa*, held that when the claim of the named plaintiff becomes moot after class certification, a "live controversy may continue to exist" based on the ongoing interests of the remaining unnamed class members. *Genesis HealthCare*, 569 U. S., at 74 (citing *Sosna*, 419 U. S., at 399–402); see *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 755–756 (1976). The "fact that a putative class acquires an independent legal status once it is certified" was, we later explained, "essential to our decision[ ] in *Sosna*." *Genesis HealthCare*, 569 U. S., at 75; see *Kremens* v. *Bartley*, 431 U. S. 119, 131–133 (1977) (explaining that, under *Sosna*'s rule, "only a 'properly certified' class . . . may succeed to the adversary position of a named representative whose claim becomes moot"); *Alvarez* v. *Smith*, 558 U. S. 87, 92–93 (2009) (same).

Gerstein, announced one month after *Sosna*, provides a limited exception to *Sosna*'s requirement that a named plaintiff with a live claim exist at the time of class certification. The exception applies when the pace of litigation and the inherently transitory nature of the claims at issue conspire to make that requirement difficult to fulfill. See *Sosna*, 419 U. S., at 402, n. 11 (anticipating the *Gerstein* rule as an exception); *Gerstein*, 420 U. S., at 110–111, n. 11 (describing its holding as "a suitable exception" to *Sosna*). We have repeatedly tied *Gerstein*'s rule to the class action setting from which it emerged. See, *e. g.*, *Genesis HealthCare*, 569 U. S., at 71, n. 2 (describing *Gerstein*'s rule as "developed in the context of class actions under Rule 23 to address the circumstance in which a named plaintiff's claim becomes moot prior to certification of the class"); *United States Parole Comm'n*

v. *Geraghty*, 445 U. S. 388, 397–399 (1980) (highlighting *Gerstein* as an example of the Court "consider[ing] the application of the 'personal stake' requirement in the class-action context").

In concluding that *Gerstein* reaches further, the Court of Appeals looked to our recent decision in *Genesis HealthCare Corp.* v. *Symczyk*. But in that case the Court refused to extend *Gerstein* beyond the class action context, even with respect to a procedural device bearing many features similar to a class action. *Genesis HealthCare* addressed whether a "collective action" brought under the Fair Labor Standards Act (FLSA) by a plaintiff on behalf of herself "and other 'similarly situated' employees" remained "justiciable when the lone plaintiff's individual claim bec[ame] moot." 569 U. S., at 69. In an effort to continue her case on behalf of others, the plaintiff turned to *Sosna* and its progeny, including *Gerstein*. But those cases, we explained, were "inapposite," not least because "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis HealthCare*, 569 U. S., at 74. Such collective actions, we stressed, do not "produce a class with an independent legal status, or join additional parties to the action." *Id.*, at 75.

This case, which does not involve *any* formal mechanism for aggregating claims, is even further removed from Rule 23 and *Gerstein*. The Federal Rules of Criminal Procedure establish for criminal cases no vehicle comparable to the FLSA collective action, much less the class action. And we have never permitted criminal defendants to band together to seek prospective relief in their individual criminal cases on behalf of a class. As we said when declining to apply nonparty preclusion outside the formal class action context, courts may not "recognize . . . a common-law kind of class action" or "create *de facto* class actions at will." *Taylor* v. *Sturgell*, 553 U. S. 880, 901 (2008) (alterations omitted); see *Smith* v. *Bayer Corp.*, 564 U. S. 299, 315–316 (2011) (same); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U. S. 424, 430

(1976) (rejecting in mootness context the idea that "the failure to obtain the class certification required under Rule 23 is merely the absence of a meaningless 'verbal recital' ").

The court below designated respondents' case a "functional class action" because respondents were pursuing relief "not merely for themselves, but for all in-custody defendants in the district." 859 F. 3d, at 655, 657–658. But as explained in *Genesis HealthCare*, the "mere presence of . . . allegations" that might, if resolved in respondents' favor, benefit other similarly situated individuals cannot "save [respondents'] suit from mootness once the[ir] individual claim[s]" have dissipated. 569 U. S., at 73.

Our conclusion is unaffected by the decision of the court below to recast respondents' appeals as petitions for "supervisory mandamus." See 859 F. 3d, at 659 (viewing such a petition, like the civil class action, as a procedural vehicle to which the *Gerstein* rule applies). Supervisory mandamus refers to the authority of the Courts of Appeals to exercise "supervisory control of the District Courts" through their "discretionary power to issue writs of mandamus." *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 259–260 (1957). There is no sign in our scant supervisory mandamus precedents that such cases are exempt from the normal mootness rules. See generally *Will* v. *United States*, 389 U. S. 90 (1967); *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964); *La Buy*, 352 U. S. 249. Indeed, as the court below acknowledged, "[s]upervisory mandamus cases require live controversies." 859 F. 3d, at 657.

B

Respondents do not defend the reasoning of the Court of Appeals. See Brief for Respondents 58 (arguing that this Court need not reach the functional class action issue and should "discard[ ]" that label); Tr. of Oral Arg. 43 (respondents' counsel agreeing that they "have not made any effort to defend" the functional class action approach). In respondents' view, functional class actions and *Gerstein*'s rule

are beside the point because two respondents—Sanchez-Gomez and Patricio-Guzman—retain a personal stake in the outcome of their appeals.

Sanchez-Gomez and Patricio-Guzman are no longer in pretrial custody. Their criminal cases, arising from their illegal entry into the United States, ended in guilty pleas well before the Court of Appeals issued its decision. Respondents contend, however, that the claims brought by Sanchez-Gomez and Patricio-Guzman fall within the "exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review." *Kingdomware Technologies, Inc.* v. *United States*, 579 U. S. 162, 170 (2016) (internal quotation marks omitted). A dispute qualifies for that exception only "if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner* v. *Rogers*, 564 U. S. 431, 439–440 (2011) (alterations and internal quotation marks omitted). The parties do not contest that the claims at issue satisfy the first prong of that test, but they sharply disagree as to the second.

Respondents argue that Sanchez-Gomez and Patricio-Guzman meet the second prong because they will again violate the law, be apprehended, and be returned to pretrial custody. But we have consistently refused to "conclude that the case-or-controversy requirement is satisfied by" the possibility that a party "will be prosecuted for violating valid criminal laws." *O'Shea* v. *Littleton*, 414 U. S. 488, 497 (1974). We have instead "assume[d] that [litigants] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct." *Ibid.*; see, *e. g.*, *Spencer* v. *Kemna*, 523 U. S. 1, 15 (1998) (reasoning that a claim regarding a parole revocation order was moot following release from custody because any continuing consequences of the order were "contingent upon [the claimant] violating the law, getting caught, and

being convicted"); *Honig* v. *Doe*, 484 U. S. 305, 320 (1988) ("[W]e generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."); *Lane* v. *Williams*, 455 U. S. 624, 632–633, n. 13 (1982) (concluding that case was moot where the challenged parole revocation could not "affect a subsequent parole determination unless respondents again violate state law, are returned to prison, and become eligible for parole").

Respondents argue that this usual refusal to assume future criminal conduct is unwarranted here given the particular circumstances of Sanchez-Gomez's and Patricio-Guzman's offenses. They cite two civil cases—*Honig* v. *Doe* and *Turner* v. *Rogers*—in which this Court concluded that the expectation that a litigant would repeat the misconduct that gave rise to his claims rendered those claims capable of repetition. Neither case, however, supports a departure from the settled rule.

Honig involved a disabled student's challenge to his suspension from school for disruptive behavior. We found that given his "inability to conform his conduct to socially acceptable norms" or "govern his aggressive, impulsive behavior," it was "reasonable to expect that [the student would] again engage in the type of misconduct that precipitated this suit" and "be subjected to the same unilateral school action for which he initially sought relief." 484 U. S., at 320–321. In *Turner*, we determined that an indigent person repeatedly held in civil contempt for failing to make child support payments, who was at the time over $13,000 in arrears, and whose next hearing was only five months away, was destined to find himself in civil contempt proceedings again. The challenged denial of appointed counsel at his contempt hearing was thus capable of repetition. See 564 U. S., at 440.

Respondents contend that Sanchez-Gomez and Patricio-Guzman, like the challengers in *Honig* and *Turner*, are likely

to find themselves right back where they started if we dismiss their case as moot. Respondents cite a Sentencing Commission report finding that in 2013 thirty-eight percent of those convicted and sentenced for an illegal entry or illegal reentry offense "were deported and subsequently illegally reentered at least one time." United States Sentencing Commission, Illegal Reentry Offenses 15 (2015) (cited by Brief for Respondents 51). Respondents emphasize the economic and familial pressures that often compel individuals such as Sanchez-Gomez and Patricio-Guzman to repeatedly attempt to enter the United States. And respondents note that both men, after their release, actually *did* cross the border into the United States, were apprehended again, and were charged with new illegal entry offenses. All this, respondents say, adds up to a sufficient showing that Sanchez-Gomez and Patricio-Guzman satisfy the "capable of repetition" requirement. Because the Court of Appeals was not aware that Sanchez-Gomez and Patricio-Guzman had subsequently reentered the United States illegally, respondents invite us to remand this case for further proceedings.

We decline to do so because *Honig* and *Turner* are inapposite. Our decisions in those civil cases rested on the litigants' inability, for reasons beyond their control, to prevent themselves from transgressing and avoid recurrence of the challenged conduct. In *Honig*, such incapacity was the very reason the school sought to expel the student. And in *Turner*, the indigent individual's large outstanding debt made him effectively incapable of satisfying his imminent support obligations. Sanchez-Gomez and Patricio-Guzman, in contrast, are "able—and indeed required by law"—to refrain from further criminal conduct. *Lane*, 455 U. S., at 633, n. 13. Their personal incentives to return to the United States, plus the elevated rate of recidivism associated with illegal entry offenses, do not amount to an inability to obey the law. We have consistently refused to find the case or

controversy requirement satisfied where, as here, the litigants simply "anticipate violating lawful criminal statutes." *O'Shea*, 414 U. S., at 496.

III

None of this is to say that those who wish to challenge the use of full physical restraints in the Southern District lack any avenue for relief. In the course of this litigation the parties have touched upon several possible options. See, *e. g.*, Tr. of Oral Arg. 12 (indicating circumstances under which detainees could bring a civil suit). Because we hold this case moot, we take no position on the question.

* * *

We vacate the judgment of the Court of Appeals for the Ninth Circuit and remand the case to that court with instructions to dismiss as moot.

It is so ordered.

Syllabus

BYRD *v.* UNITED STATES

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

No. 16–1371. Argued January 9, 2018—Decided May 14, 2018

Latasha Reed rented a car in New Jersey while petitioner Terrence Byrd waited outside the rental facility. Her signed agreement warned that permitting an unauthorized driver to drive the car would violate the agreement. Reed listed no additional drivers on the form, but she gave the keys to Byrd upon leaving the building. He stored personal belongings in the rental car's trunk and then left alone for Pittsburgh, Pennsylvania. After stopping Byrd for a traffic infraction, Pennsylvania State Troopers learned that the car was rented, that Byrd was not listed as an authorized driver, and that Byrd had prior drug and weapons convictions. Byrd also stated he had a marijuana cigarette in the car. The troopers proceeded to search the car, discovering body armor and 49 bricks of heroin in the trunk. The evidence was turned over to federal authorities, who charged Byrd with federal drug and other crimes. The District Court denied Byrd's motion to suppress the evidence as the fruit of an unlawful search, and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car.

Held:

1. The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. Pp. 402–410.

(a) Reference to property concepts is instructive in "determining the presence or absence of the privacy interests protected by [the Fourth] Amendment." *Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12. Pp. 402–404.

(b) While a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it, see, *e. g.*, *Jones* v. *United States*, 362 U. S. 257, 259, legitimate presence on the premises, standing alone, is insufficient because it "creates too broad a gauge for measurement of Fourth Amendment rights," *Rakas*, 439 U. S., at 142. The Court has not set forth a single metric or exhaustive list of relevant considerations, but "[l]egitimation of expectations of privacy must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permit-

ted by society." *Id.*, at 144, n. 12. These concepts may be linked. "One of the main rights attaching to property is the right to exclude others," and "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Ibid.* This general property-based concept guides resolution of the instant case. Pp. 404–405.

(c) The Government's contention that drivers who are not listed on rental agreements always lack an expectation of privacy in the car rests on too restrictive a view of the Fourth Amendment's protections. But Byrd's proposal that a rental car's sole occupant always has an expectation of privacy based on mere possession and control would, without qualification, include thieves or others who have no reasonable expectation of privacy. Pp. 405–410.

(1) The Government bases its claim that an unauthorized driver has no privacy interest in the vehicle on a misreading of *Rakas.* There, the Court disclaimed any intent to hold that passengers cannot have an expectation of privacy in automobiles, but found that the passengers there had not claimed "any legitimate expectation of privacy in the areas of the car which were searched." 439 U. S., at 150, n. 17. Byrd, in contrast, was the rental car's driver and sole occupant. His situation is similar to the defendant in *Jones,* who had a reasonable expectation of privacy in his friend's apartment because he "had complete dominion and control over the apartment and could exclude others from it." *Rakas, supra,* at 149. The expectation of privacy that comes from lawful possession and control and the attendant right to exclude should not differ depending on whether a car is rented or owned by someone other than the person currently possessing it, much as it did not seem to matter whether the defendant's friend in *Jones* owned or leased the apartment he permitted the defendant to use in his absence. Pp. 406–407.

(2) The Government also contends that Byrd had no basis for claiming an expectation of privacy in the rental car because his driving of that car was so serious a breach of Reed's rental agreement that the rental company would have considered the agreement "void" once he took the wheel. But the contract says only that the violation may result in coverage, not the agreement, being void and the renter's being fully responsible for any loss or damage, and the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Pp. 407–408.

(3) Central, though, to reasonable expectations of privacy in these circumstances is the concept of lawful possession, for a " 'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search," *Rakas, supra,* at 141, n. 9. Thus, a car thief would not have a reasonable expectation of privacy in a stolen car

Syllabus

no matter the degree of possession and control. The Court leaves for remand the Government's argument that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief. Pp. 409–410.

2. Also left for remand is the Government's argument that, even if Byrd had a right to object to the search, probable cause justified it in any event. The Third Circuit did not reach this question because it concluded, as an initial matter, that Byrd lacked a reasonable expectation of privacy in the rental car. That court has discretion as to the order in which the remanded questions are best addressed. Pp. 410–411.

679 Fed. Appx. 146, vacated and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 412. ALITO, J., filed a concurring opinion, *post*, p. 413.

Robert M. Loeb argued the cause for petitioner. With him on the briefs were *E. Joshua Rosenkranz*, *Thomas M. Bondy*, *Jeremy Peterman*, *Charles W. Tyler*, *Heidi R. Freese*, and *Frederick W. Ulrich*.

Eric J. Feigin argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Deputy Solicitor General Dreeben*, *Frederick Liu*, and *Thomas E. Booth*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Jeffrey T. Green*, *David D. Cole*, *Rachel Wainer Apter*, and *Joshua L. Dratel*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for Fourth Amendment Scholars by *Matthew A. Abee* and *A. Mattison Bogan*; for the National Association for Public Defense et al. by *David Debold*, *Janet Moore*, *Daniel L. Kaplan*, *Donna F. Coltharp*, and *Sarah S. Gannett*; for the National Motorists Association by *Aaron M. Panner*; for Restore the Fourth, Inc., by *Mahesha P. Subbaraman*; for Morgan A. Cloud by *Sarah M. Shalf*; and for Lindsey N. Ursua et al. by *Norman M. Garland* and *Michael M. Epstein*, both *pro se*.

A brief of *amici curiae* urging affirmance was filed for the State of Arizona et al. by *Mark Brnovich*, Attorney General of Arizona, *Dominic Draye*, Solicitor General, and *Andrew G. Pappas*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Leslie Rutledge* of Arkansas, *Matt Denn* of Delaware, *Lawrence*

JUSTICE KENNEDY delivered the opinion of the Court.

In September 2014, Pennsylvania State Troopers pulled over a car driven by petitioner Terrence Byrd. Byrd was the only person in the car. In the course of the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin.

The evidence was turned over to federal authorities, who charged Byrd with distribution and possession of heroin with the intent to distribute in violation of 21 U. S. C. § 841(a)(1) and possession of body armor by a prohibited person in violation of 18 U. S. C. § 931(a)(1). Byrd moved to suppress the evidence as the fruit of an unlawful search. The United States District Court for the Middle District of Pennsylvania denied the motion, and the Court of Appeals for the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. Based on this conclusion, it appears that both the District Court and Court of Appeals deemed it unnecessary to consider whether the troopers had probable cause to search the car.

This Court granted certiorari to address the question whether a driver has a reasonable expectation of privacy in a rental car when he or she is not listed as an authorized driver on the rental agreement. The Court now holds that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of

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G. Wasden of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Andy Beshear* of Kentucky, *Doug Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Christopher S. Porrino* of New Jersey, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, and *Sean D. Reyes* of Utah.

privacy in it even if the rental agreement does not list him or her as an authorized driver.

The Court concludes a remand is necessary to address in the first instance the Government's argument that this general rule is inapplicable because, in the circumstances here, Byrd had no greater expectation of privacy than a car thief. If that is so, our cases make clear he would lack a legitimate expectation of privacy. It is necessary to remand as well to determine whether, even if Byrd had a right to object to the search, probable cause justified it in any event.

I

On September 17, 2014, petitioner Terrence Byrd and Latasha Reed drove in Byrd's Honda Accord to a Budget car-rental facility in Wayne, New Jersey. Byrd stayed in the parking lot in the Honda while Reed went to the Budget desk and rented a Ford Fusion. The agreement Reed signed required her to certify that she had a valid driver's license and had not committed certain vehicle-related offenses within the previous three years. An addendum to the agreement, which Reed initialed, provides the following restriction on who may drive the rental car:

> "I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form. These other drivers must also be at least 25 years old and validly licensed.
>
> "PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID AND MY BEING FULLY RESPONSIBLE

> FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES." App. 19.

In filling out the paperwork for the rental agreement, Reed did not list an additional driver.

With the rental keys in hand, Reed returned to the parking lot and gave them to Byrd. The two then left the facility in separate cars—she in his Honda, he in the rental car. Byrd returned to his home in Patterson, New Jersey, and put his personal belongings in the trunk of the rental car. Later that afternoon, he departed in the car alone and headed toward Pittsburgh, Pennsylvania.

After driving nearly three hours, or roughly half the distance to Pittsburgh, Byrd passed State Trooper David Long, who was parked in the median of Interstate 81 near Harrisburg, Pennsylvania. Long was suspicious of Byrd because he was driving with his hands at the "10 and 2" position on the steering wheel, sitting far back from the steering wheel, and driving a rental car. Long knew the Ford Fusion was a rental car because one of its windows contained a barcode. Based on these observations, he decided to follow Byrd and, a short time later, stopped him for a possible traffic infraction.

When Long approached the passenger window of Byrd's car to explain the basis for the stop and to ask for identification, Byrd was "visibly nervous" and "was shaking and had a hard time obtaining his driver's license." *Id.*, at 37. He handed an interim license and the rental agreement to Long, stating that a friend had rented the car. Long returned to his vehicle to verify Byrd's license and noticed Byrd was not listed as an additional driver on the rental agreement. Around this time another trooper, Travis Martin, arrived at the scene. While Long processed Byrd's license, Martin conversed with Byrd, who again stated that a friend had rented the vehicle. After Martin walked back to Long's patrol car, Long commented to Martin that Byrd was "not on the renter agreement," to which Martin replied, "yeah, he

has no expectation of privacy." 3 App. to Brief for Appellant in No. 16–1509 (CA3), at 21:40.

A computer search based on Byrd's identification returned two different names. Further inquiry suggested the other name might be an alias and also revealed that Byrd had prior convictions for weapons and drug charges as well as an outstanding warrant in New Jersey for a probation violation. After learning that New Jersey did not want Byrd arrested for extradition, the troopers asked Byrd to step out of the vehicle and patted him down.

Long asked Byrd if he had anything illegal in the car. When Byrd said he did not, the troopers asked for his consent to search the car. At that point Byrd said he had a "blunt" in the car and offered to retrieve it for them. The officers understood "blunt" to mean a marijuana cigarette. They declined to let him retrieve it and continued to seek his consent to search the car, though they stated they did not need consent because he was not listed on the rental agreement. The troopers then opened the passenger and driver doors and began a thorough search of the passenger compartment.

Martin proceeded from there to search the car's trunk, including by opening up and taking things out of a large cardboard box, where he found a laundry bag containing body armor. At this point, the troopers decided to detain Byrd. As Martin walked toward Byrd and said he would be placing him in handcuffs, Byrd began to run away. A third trooper who had arrived on the scene joined Long and Martin in pursuit. When the troopers caught up to Byrd, he surrendered and admitted there was heroin in the car. Back at the car, the troopers resumed their search of the laundry bag and found 49 bricks of heroin.

In pretrial proceedings Byrd moved to suppress the evidence found in the trunk of the rental car, arguing that the search violated his Fourth Amendment rights. Although Long contended at a suppression hearing that the troopers

had probable cause to search the car after Byrd stated it contained marijuana, the District Court denied Byrd's motion on the ground that Byrd lacked "standing" to contest the search as an initial matter, 2015 WL 5038455, *2 (MD Pa., Aug. 26, 2015) (citing *United States* v. *Kennedy*, 638 F. 3d 159, 165 (CA3 2011)). Byrd later entered a conditional guilty plea, reserving the right to appeal the suppression ruling.

The Court of Appeals affirmed in a brief summary opinion. 679 Fed. Appx. 146 (CA3 2017). As relevant here, the Court of Appeals recognized that a "circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement"; but it noted that Circuit precedent already had "spoken as to this issue . . . and determined such a person has no expectation of privacy and therefore no standing to challenge a search of the vehicle." *Id.*, at 150 (citing *Kennedy*, *supra*, at 167–168). The Court of Appeals did not reach the probable-cause question.

This Court granted Byrd's petition for a writ of certiorari, 582 U. S. 966 (2017), to address the conflict among the Courts of Appeals over whether an unauthorized driver has a reasonable expectation of privacy in a rental car. Compare *United States* v. *Seeley*, 331 F. 3d 471, 472 (CA5 2003) (*per curiam*); *United States* v. *Wellons*, 32 F. 3d 117, 119 (CA4 1994); *United States* v. *Roper*, 918 F. 2d 885, 887–888 (CA10 1990), with *United States* v. *Smith*, 263 F. 3d 571, 581–587 (CA6 2001); *Kennedy*, *supra*, at 165–168, and with *United States* v. *Thomas*, 447 F. 3d 1191, 1196–1199 (CA9 2006); *United States* v. *Best*, 135 F. 3d 1223, 1225 (CA8 1998).

II

Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions

of privacy wrought by "general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence." *Chimel* v. *California*, 395 U. S. 752, 761 (1969). Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit "police officers unbridled discretion to rummage at will among a person's private effects." *Arizona* v. *Gant*, 556 U. S. 332, 345 (2009).

This concern attends the search of an automobile. See *Delaware* v. *Prouse*, 440 U. S. 648, 662 (1979). The Court has acknowledged, however, that there is a diminished expectation of privacy in automobiles, which often permits officers to dispense with obtaining a warrant before conducting a lawful search. See, *e. g.*, *California* v. *Acevedo*, 500 U. S. 565, 579 (1991).

Whether a warrant is required is a separate question from the one the Court addresses here, which is whether the person claiming a constitutional violation "has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge." *Rakas* v. *Illinois*, 439 U. S. 128, 133 (1978). Answering that question requires examination of whether the person claiming the constitutional violation had a "legitimate expectation of privacy in the premises" searched. *Id.*, at 143. "Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." *Id.*, at 144, n. 12. Still, "property concepts" are instructive in "determining the presence or absence of the privacy interests protected by that Amendment." *Ibid.*

Indeed, more recent Fourth Amendment cases have clarified that the test most often associated with legitimate expectations of privacy, which was derived from the second Justice Harlan's concurrence in *Katz* v. *United States*, 389 U. S. 347 (1967), supplements, rather than displaces, "the traditional property-based understanding of the Fourth Amend-

ment." *Florida* v. *Jardines*, 569 U. S. 1, 11 (2013). Perhaps in light of this clarification, Byrd now argues in the alternative that he had a common-law property interest in the rental car as a second bailee that would have provided him with a cognizable Fourth Amendment interest in the vehicle. But he did not raise this argument before the District Court or Court of Appeals, and those courts did not have occasion to address whether Byrd was a second bailee or what consequences might follow from that determination. In those courts he framed the question solely in terms of the *Katz* test noted above. Because this is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), it is generally unwise to consider arguments in the first instance, and the Court declines to reach Byrd's contention that he was a second bailee.

Reference to property concepts, however, aids the Court in assessing the precise question here: Does a driver of a rental car have a reasonable expectation of privacy in the car when he or she is not listed as an authorized driver on the rental agreement?

III

A

One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it. More difficult to define and delineate are the legitimate expectations of privacy of others.

On the one hand, as noted above, it is by now well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it. See *Jones* v. *United States*, 362 U. S. 257, 259 (1960); *Katz*, *supra*, at 352; *Mancusi* v. *DeForte*, 392 U. S. 364, 368 (1968); *Minnesota* v. *Olson*, 495 U. S. 91, 98 (1990).

On the other hand, it is also clear that legitimate presence on the premises of the place searched, standing alone, is not

enough to accord a reasonable expectation of privacy, because it "creates too broad a gauge for measurement of Fourth Amendment rights." *Rakas*, 439 U. S., at 142; see also *id.*, at 148 ("We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling"); *Minnesota* v. *Carter*, 525 U. S. 83, 91 (1998).

Although the Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy, it has explained that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U. S., at 144, n. 12. The two concepts in cases like this one are often linked. "One of the main rights attaching to property is the right to exclude others," and, in the main, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Ibid.* (citing 2 W. Blackstone, Commentaries on the Laws of England, ch. 1). This general property-based concept guides resolution of this case.

B

Here, the Government contends that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone. This *per se* rule rests on too restrictive a view of the Fourth Amendment's protections. Byrd, by contrast, contends that the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control. There is more to recommend Byrd's proposed rule than the Government's; but, without qualification, it would include within its ambit thieves and others who, not least because of their lack of any property-based

justification, would not have a reasonable expectation of privacy.

1

Stripped to its essentials, the Government's position is that only authorized drivers of rental cars have expectations of privacy in those vehicles. This position is based on the following syllogism: Under *Rakas*, passengers do not have an expectation of privacy in an automobile glove compartment or like places; an unauthorized driver like Byrd would have been the passenger had the renter been driving; and the unauthorized driver cannot obtain greater protection when he takes the wheel and leaves the renter behind. The flaw in this syllogism is its major premise, for it is a misreading of *Rakas*.

The Court in *Rakas* did not hold that passengers cannot have an expectation of privacy in automobiles. To the contrary, the Court disclaimed any intent to hold "that a passenger lawfully in an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it." 439 U. S., at 150, n. 17 (internal quotation marks omitted). The Court instead rejected the argument that legitimate presence alone was sufficient to assert a Fourth Amendment interest, which was fatal to the petitioners' case there because they had "claimed only that they were 'legitimately on [the] premises' and did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched." *Ibid.*

What is more, the Government's syllogism is beside the point, because this case does not involve a passenger at all but instead the driver and sole occupant of a rental car. As Justice Powell observed in his concurring opinion in *Rakas*, a "distinction . . . may be made in some circumstances between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an auto-

mobile or of its locked compartments." *Id.*, at 154. This situation would be similar to the defendant in *Jones*, *supra*, who, as *Rakas* notes, had a reasonable expectation of privacy in his friend's apartment because he "had complete dominion and control over the apartment and could exclude others from it," 439 U. S., at 149. Justice Powell's observation was also consistent with the majority's explanation that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude," *id.*, at 144, n. 12, an explanation tied to the majority's discussion of *Jones*.

The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it, much as it did not seem to matter whether the friend of the defendant in *Jones* owned or leased the apartment he permitted the defendant to use in his absence. Both would have the expectation of privacy that comes with the right to exclude. Indeed, the Government conceded at oral argument that an unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a carjacker. Tr. of Oral Arg. 48–49.

2

The Government further stresses that Byrd's driving the rental car violated the rental agreement that Reed signed, and it contends this violation meant Byrd could not have had any basis for claiming an expectation of privacy in the rental car at the time of the search. As anyone who has rented a car knows, car-rental agreements are filled with long lists of restrictions. Examples include prohibitions on driving the car on unpaved roads or driving while using a handheld cellphone. Few would contend that violating provisions like

these has anything to do with a driver's reasonable expectation of privacy in the rental car—as even the Government agrees. Brief for United States 32.

Despite this concession, the Government argues that permitting an unauthorized driver to take the wheel of a rental car is a breach different in kind from these others, so serious that the rental company would consider the agreement "void" the moment an unauthorized driver takes the wheel. *Id.*, at 4, 15, 16, 27. To begin with, that is not what the contract says. It states: "Permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement. This may result in any and all coverage otherwise provided by the rental agreement being void and my being fully responsible for all loss or damage, including liability to third parties." App. 24 (emphasis deleted).

Putting the Government's misreading of the contract aside, there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it—perhaps the renter is drowsy or inebriated and the two think it safer for the friend to drive them to their destination. True, this constitutes a breach of the rental agreement, and perhaps a serious one, but the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Stated in different terms, for Fourth Amendment purposes there is no meaningful difference between the authorized-driver provision and the other provisions the Government agrees do not eliminate an expectation of privacy, all of which concern risk allocation between private parties—violators might pay additional fees, lose insurance coverage, or assume liability for damage resulting from the breach. But that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she otherwise has lawful possession of and control over the car.

The central inquiry at this point turns on the concept of lawful possession, and this is where an important qualification of Byrd's proposed rule comes into play. *Rakas* makes clear that "'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search." 439 U. S., at 141, n. 9. "A burglar plying his trade in a summer cabin during the off season," for example, "may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" *Id.*, at 143–144, n. 12. Likewise, "a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile." *Id.*, at 141, n. 9. No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.

On this point, in its merits brief, the Government asserts that, on the facts here, Byrd should have no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset, all to aid him in committing a crime. This argument is premised on the Government's inference that Byrd knew he would not have been able to rent the car on his own, because he would not have satisfied the rental company's requirements based on his criminal record, and that he used Reed, who had no intention of using the car for her own purposes, to procure the car for him to transport heroin to Pittsburgh.

It is unclear whether the Government's allegations, if true, would constitute a criminal offense in the acquisition of the rental car under applicable law. And it may be that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright.

The Government did not raise this argument in the District Court or the Court of Appeals, however. It relied instead on the sole fact that Byrd lacked authorization to drive the car. And it is unclear from the record whether the Government's inferences paint an accurate picture of what occurred. Because it was not addressed in the District Court or Court of Appeals, the Court declines to reach this question. The proper course is to remand for the argument and potentially further factual development to be considered in the first instance by the Court of Appeals or by the District Court.

IV

The Government argued in its brief in opposition to certiorari that, even if Byrd had a Fourth Amendment interest in the rental car, the troopers had probable cause to believe it contained evidence of a crime when they initiated their search. If that were true, the troopers may have been permitted to conduct a warrantless search of the car in line with the Court's cases concerning the automobile exception to the warrant requirement. See, *e. g.*, *Acevedo*, 500 U. S., at 580. The Court of Appeals did not reach this question because it concluded, as an initial matter, that Byrd lacked a reasonable expectation of privacy in the rental car.

It is worth noting that most courts analyzing the question presented in this case, including the Court of Appeals here, have described it as one of Fourth Amendment "standing," a concept the Court has explained is not distinct from the merits and "is more properly subsumed under substantive Fourth Amendment doctrine." *Rakas*, *supra*, at 139.

The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before

reaching the merits. *Arizona Christian School Tuition Organization* v. *Winn*, 563 U. S. 125, 129 (2011) ("To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution"); see also *Rakas*, *supra*, at 138–140. Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim. On remand, then, the Court of Appeals is not required to assess Byrd's reasonable expectation of privacy in the rental car before, in its discretion, first addressing whether there was probable cause for the search, if it finds the latter argument has been preserved.

V

Though new, the fact pattern here continues a well-traveled path in this Court's Fourth Amendment jurisprudence. Those cases support the proposition, and the Court now holds, that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. The Court leaves for remand two of the Government's arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event. The Court of Appeals has discretion as to the order in which these questions are best addressed.

* * *

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

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

Although I have serious doubts about the "reasonable expectation of privacy" test from *Katz* v. *United States*, 389 U. S. 347, 360–361 (1967) (Harlan, J., concurring), I join the Court's opinion because it correctly navigates our precedents, which no party has asked us to reconsider. As the Court notes, Byrd also argued that he should prevail under the original meaning of the Fourth Amendment because the police interfered with a property interest that he had in the rental car. I agree with the Court's decision not to review this argument in the first instance. In my view, it would be especially "unwise" to reach that issue, *ante*, at 404, because the parties fail to adequately address several threshold questions.

The Fourth Amendment guarantees the people's right to be secure from unreasonable searches of "their persons, houses, papers, and effects." With this language, the Fourth Amendment gives "*each* person . . . the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects." *Minnesota* v. *Carter*, 525 U. S. 83, 92 (1998) (Scalia, J., concurring). The issue, then, is whether Byrd can prove that the rental car was *his* effect.

That issue seems to turn on at least three threshold questions. First, what kind of property interest do individuals need before something can be considered "their . . . effec[t]" under the original meaning of the Fourth Amendment? Second, what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else? Third, is the unauthorized use of a rental car illegal or otherwise wrongful under the relevant law, and, if so, does that illegality or wrongfulness affect the Fourth Amendment analysis?

The parties largely gloss over these questions, but the answers seem vitally important to assessing whether Byrd can

claim that the rental car is his effect. In an appropriate case, I would welcome briefing and argument on these questions.

JUSTICE ALITO, concurring.

The Court holds that an unauthorized driver of a rental car is not always barred from contesting a search of the vehicle. Relevant questions bearing on the driver's ability to raise a Fourth Amendment claim may include: the terms of the particular rental agreement, see *ante*, at 407–408; the circumstances surrounding the rental, *ante*, at 409; the reason why the driver took the wheel, *ante*, at 408; any property right that the driver might have, *ante*, at 403–404; and the legality of his conduct under the law of the State where the conduct occurred, *ante*, at 409. On remand, the Court of Appeals is free to reexamine the question whether petitioner may assert a Fourth Amendment claim or to decide the appeal on another appropriate ground. *Ante*, at 411. On this understanding, I join the opinion of the Court.

Syllabus

McCOY *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 16–8255. Argued January 17, 2018—Decided May 14, 2018

Petitioner Robert McCoy was charged with murdering his estranged wife's mother, stepfather, and son. McCoy pleaded not guilty to first-degree murder, insisting that he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. Although he vociferously insisted on his innocence and adamantly objected to any admission of guilt, the trial court permitted his counsel, Larry English, to tell the jury, during the trial's guilt phase, McCoy "committed [the] three murders." English's strategy was to concede that McCoy committed the murders, but argue that McCoy's mental state prevented him from forming the specific intent necessary for a first-degree murder conviction. Over McCoy's repeated objection, English told the jury McCoy was the killer and that English "took [the] burden off of [the prosecutor]" on that issue. McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. The jury found him guilty of all three first-degree murder counts. At the penalty phase, English again conceded McCoy's guilt, but urged mercy in view of McCoy's mental and emotional issues. The jury returned three death verdicts. Represented by new counsel, McCoy unsuccessfully sought a new trial. The Louisiana Supreme Court affirmed the trial court's ruling that English had authority to concede guilt, despite McCoy's opposition.

Held: The Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Pp. 421–428.

(a) The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence." The defendant does not surrender control entirely to counsel, for the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta* v. *California*, 422 U. S. 806, 819–820. The lawyer's province is trial management, but some decisions are reserved for the client—including whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs

in this reserved-for-the-client category. Refusing to plead guilty in the face of overwhelming evidence against her, rejecting the assistance of counsel, and insisting on maintaining her innocence at the guilt phase of a capital trial are not strategic choices; they are decisions about what the defendant's objectives in fact *are*. See *Weaver* v. *Massachusetts*, 582 U. S. 286, 295. Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did here. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium attending admission that he killed family members, or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. See Tr. of Oral Arg. 21–22. Thus, when a client makes it plain that the objective of "his defence" is to maintain innocence of the charged criminal acts and pursue an acquittal, his lawyer must abide by that objective and may not override it by conceding guilt. Pp. 421–424.

(b) *Florida* v. *Nixon*, 543 U. S. 175, is not to the contrary. Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon "was generally unresponsive" during discussions of trial strategy and "never verbally approved or protested" counsel's proposed approach. *Id.*, at 181. He complained about counsel's admission of his guilt only after trial. *Id.*, at 185. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. Citing *Nix* v. *Whiteside*, 475 U. S. 157, the Louisiana Supreme Court concluded that English's refusal to maintain McCoy's innocence was necessitated by a Louisiana Rule of Professional Conduct that prohibits counsel from suborning perjury. But in *Nix*, the defendant told his lawyer that he intended to commit perjury. Here, there was no avowed perjury. English harbored no doubt that McCoy believed what he was saying; English simply disbelieved that account in view of the prosecution's evidence. Louisiana's ethical rules might have stopped English from presenting McCoy's alibi evidence if English knew perjury was involved, but Louisiana has identified no ethical rule requiring English to admit McCoy's guilt over McCoy's objection. Pp. 424–426.

(c) The Court's ineffective-assistance-of-counsel jurisprudence, see *Strickland* v. *Washington*, 466 U. S. 668, does not apply here, where the client's autonomy, not counsel's competence, is in issue. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *id.*, at 692. But here, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. Violation of a defendant's Sixth Amendment-secured autonomy has been ranked "structural" error; when present, such an error is not subject to harmless-error re-

view. See, *e. g.*, *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8; *United States* v. *Gonzalez-Lopez*, 548 U. S. 140; *Waller* v. *Georgia*, 467 U. S. 39. An error is structural if it is not designed to protect defendants from erroneous conviction, but instead protects some other interest, such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U. S., at 295 (citing *Faretta*, 422 U. S., at 834). Counsel's admission of a client's guilt over the client's express objection is error structural in kind, for it blocks the defendant's right to make a fundamental choice about his own defense. See *Weaver*, 582 U. S., at 295–296. McCoy must therefore be accorded a new trial without any need first to show prejudice. Pp. 426–428.

2014–1449 (La. 10/19/16), 218 So. 3d 535, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS and GORSUCH, JJ., joined, *post*, p. 429.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Danielle Spinelli*, *Catherine M. A. Carroll*, *David M. Lehn*, Jonathan A. Bressler, *Richard Bourke*, *Joseph W. Vigneri*, *Meghan Shapiro*, *Alan E. Schoenfeld*, and *Michael D. Gottesman.*

Elizabeth B. Murrill, Solicitor General of Louisiana, argued the cause for respondent. With her on the brief were *Jeff Landry*, Attorney General of Louisiana, *Colin Clark*, Deputy Solicitor General, *Andrea Barient*, Assistant Attorney General, and *J. Schuyler Marvin.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Hilarie Bass*, *Michael J. Gottlieb*, *Matthew L. Schwartz*, and *Albert Giang*; for the Cato Institute by *Clark M. Neily III* and *Jay R. Schweikert*; for the Criminal Bar Association of England & Wales by *Jenay Nurse*, *Corrine Irish*, and *George H. Kendall*; for the National Association of Criminal Defense Lawyers by *Clifford M. Sloan*, *Peter M. Kerlin*, and *Barbara E. Bergman*; and for Ten Law School Professors et al. by *Lawrence J. Fox*, *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Steve Marshall*, Attorney General of Alabama, *Andrew L. Brasher*, Solicitor General, and *Lauren Simpson*, Assistant Attorney

JUSTICE GINSBURG delivered the opinion of the Court.

In *Florida* v. *Nixon*, 543 U. S. 175 (2004), this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects," *id.*, at 178. In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. *Id.*, at 186. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, *id.*, at 181, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy, *id.*, at 192.

In the case now before us, in contrast to *Nixon*, the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. App. 286–287, 505–506. Yet the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant "committed three murders. . . . [H]e's guilty." *Id.*, at 509, 510. We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right "to have the *Assistance* of Counsel for *his* defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage,

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General, and by the Attorneys General of their respective States as follows: *Leslie Rutledge* of Arkansas, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Timothy C. Fox* of Montana, *Adam Paul Laxalt* of Nevada, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming.

or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

I

On May 5, 2008, Christine and Willie Young and Gregory Colston were shot and killed in the Youngs' home in Bossier City, Louisiana. The three victims were the mother, stepfather, and son of Robert McCoy's estranged wife, Yolanda. Several days later, police arrested McCoy in Idaho. Extradited to Louisiana, McCoy was appointed counsel from the public defender's office. A Bossier Parish grand jury indicted McCoy on three counts of first-degree murder, and the prosecutor gave notice of intent to seek the death penalty. McCoy pleaded not guilty. Throughout the proceedings, he insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. App. 284–286. At defense counsel's request, a court-appointed sanity commission examined McCoy and found him competent to stand trial.

In December 2009 and January 2010, McCoy told the court his relationship with assigned counsel had broken down irretrievably. He sought and gained leave to represent himself until his parents engaged new counsel for him. In March 2010, Larry English, engaged by McCoy's parents, enrolled as McCoy's counsel. English eventually concluded that the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase.[1] McCoy, English reported, was "furious" when told,

[1] Part of English's strategy was to concede that McCoy committed the murders and to argue that he should be convicted only of second-degree murder, because his "mental incapacity prevented him from forming the requisite specific intent to commit first degree murder." 2014–1449 (La. 10/19/16), 218 So. 3d 535, 570. But the second-degree strategy would have encountered a shoal, for Louisiana does not permit introduction of evidence of a defendant's diminished capacity absent the entry of a plea of not guilty by reason of insanity. *Ibid.*, and n. 35.

two weeks before trial was scheduled to begin, that English would concede McCoy's commission of the triple murders. *Id.*, at 286.[2] McCoy told English "not to make that concession," and English knew of McCoy's "complet[e] oppos[ition] to [English] telling the jury that [McCoy] was guilty of killing the three victims"; instead of any concession, McCoy pressed English to pursue acquittal. *Id.*, at 286–287.

At a July 26, 2011 hearing, McCoy sought to terminate English's representation, *id.*, at 449, and English asked to be relieved if McCoy secured other counsel, *id.*, at 458. With trial set to start two days later, the court refused to relieve English and directed that he remain as counsel of record. *Id.*, at 461. "[Y]ou are the attorney," the court told English when he expressed disagreement with McCoy's wish to put on a defense case, and "you have to make the trial decision of what you're going to proceed with." *Id.*, at 469.

At the beginning of his opening statement at the guilt phase of the trial, English told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than Robert McCoy was the cause of these individuals' death." *Id.*, at 504. McCoy protested; out of earshot of the jury, McCoy told the court that English was "selling [him] out" by maintaining that McCoy "murdered [his] family." *Id.*, at 505–506. The trial court reiterated that English was "representing" McCoy and told McCoy that the court would not permit "any other outbursts." *Id.*, at 506. Continuing his opening statement, English told the jury the evidence is "unambigu-

[2] The dissent states that English told McCoy his proposed trial strategy eight months before trial. *Post*, at 431. English did encourage McCoy, "[a] couple of months before the trial," to plead guilty rather than proceed to trial. App. 66–67. But English declared under oath that "the first time [he] told [McCoy] that [he] intended to concede to the jury that [McCoy] was the killer" was July 12, 2011, two weeks before trial commenced. *Id.*, at 286. Encouraging a guilty plea pretrial, of course, is not equivalent to imparting to a defendant counsel's strategic determination to concede guilt should trial occur.

ous," "my client committed three murders." *Id.*, at 509. McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. In his closing argument, English reiterated that McCoy was the killer. On that issue, English told the jury that he "took [the] burden off of [the prosecutor]." *Id.*, at 647. The jury then returned a unanimous verdict of guilty of first-degree murder on all three counts. At the penalty phase, English again conceded "Robert McCoy committed these crimes," *id.*, at 751, but urged mercy in view of McCoy's "serious mental and emotional issues," *id.*, at 755. The jury returned three death verdicts.

Represented by new counsel, McCoy unsuccessfully moved for a new trial, arguing that the trial court violated his constitutional rights by allowing English to concede McCoy "committed three murders," *id.*, at 509, over McCoy's objection. The Louisiana Supreme Court affirmed the trial court's ruling that defense counsel had authority so to concede guilt, despite the defendant's opposition to any admission of guilt. See 2014–1449 (La. 10/19/16), 218 So. 3d 535. The concession was permissible, the court concluded, because counsel reasonably believed that admitting guilt afforded McCoy the best chance to avoid a death sentence.

We granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection. 582 U. S. 967 (2017). Compare with the instant case, *e. g., Cooke* v. *State*, 977 A. 2d 803, 842–846 (Del. 2009) (counsel's pursuit of a "guilty but mentally ill" verdict over defendant's "vociferous and repeated protestations" of innocence violated defendant's "constitutional right to make the fundamental decisions regarding his case"); *State* v. *Carter*, 270 Kan. 426, 440, 14 P. 3d 1138, 1148 (2000) (counsel's admission of client's involvement in murder when client adamantly

maintained his innocence contravened Sixth Amendment right to counsel and due process right to a fair trial).

II

A

The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence." At common law, self-representation was the norm. See *Faretta* v. *California*, 422 U. S. 806, 823 (1975) (citing 1 F. Pollock & F. Maitland, The History of English Law 211 (2d ed. 1909)). As the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized. *Faretta*, 422 U. S., at 824–828. Even now, when most defendants choose to be represented by counsel, see, *e. g.*, Goldschmidt & Stemen, Patterns and Trends in Federal *Pro Se* Defense, 1996–2011: An Exploratory Study, 8 Fed. Cts. L. Rev. 81, 91 (2015) (0.2% of federal felony defendants proceeded *pro se*), an accused may insist upon representing herself—however counterproductive that course may be, see *Faretta*, 422 U. S., at 834. As this Court explained, "[t]he right to defend is personal," and a defendant's choice in exercising that right "must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Ibid.* (quoting *Illinois* v. *Allen*, 397 U. S. 337, 350–351 (1970) (Brennan, J., concurring)); see *McKaskle* v. *Wiggins*, 465 U. S. 168, 176–177 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused.").

The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta*, 422 U. S., at 819–820; see *Gannett Co.*

v. *DePasquale*, 443 U. S. 368, 382, n. 10 (1979) (the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense"). Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez* v. *United States*, 553 U. S. 242, 248 (2008) (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. See *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983).

Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*. See *Weaver* v. *Massachusetts*, 582 U. S. 286, 295 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.").

Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He

may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. See Tr. of Oral Arg. 21–22 (it is for the defendant to make the value judgment whether "to take a minuscule chance of not being convicted and spending a life in . . . prison"); Hashimoto, Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case, 90 B. U. L. Rev. 1147, 1178 (2010) (for some defendants, "the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence"); cf. *Jae Lee* v. *United States*, 582 U. S. 357, 371 (2017) (recognizing that a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certai[n]" conviction (emphasis deleted)). When a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. U. S. Const., Amdt. 6 (emphasis added); see ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of representation").

Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles. See *Gonzalez*, 553 U. S., at 249 ("[n]umerous choices affecting conduct of the trial" do not require client consent, including "the objections to make, the witnesses to call, and the arguments to advance"); cf. *post*, at 436. Counsel, in any case, must still develop a trial strategy and discuss it with her client, see *Nixon*, 543 U. S., at 178, explaining why, in her view, conceding guilt would be the best option. In this case, the court had determined that McCoy was competent to stand trial, *i. e.*, that McCoy had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Godinez* v. *Moran*, 509 U. S. 389, 396 (1993)

(quoting *Dusky* v. *United States*, 362 U. S. 402 (1960) (*per curiam*)).[3] If, after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection. English could not interfere with McCoy's telling the jury "I was not the murderer," although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction. See Tr. of Oral Arg. 21–23.

B

Florida v. *Nixon*, see *supra*, at 417, is not to the contrary. Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective. Nixon "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested" counsel's proposed approach. 543 U. S., at 181. Nixon complained about the admission of his guilt only after trial. *Id.*, at 185. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. See App. 286–287, 456, 505–506. See also *Cooke*, 977 A. 2d, at 847 (distinguishing *Nixon* because, "[i]n stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty"). If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way. See *Gonzalez*, 553 U. S., at 254 (Scalia, J.,

[3] Several times, English did express his view that McCoy was not, in fact, competent to stand trial. See App. 388, 436.

concurring in judgment) ("[A]ction taken by counsel over his client's objection . . . ha[s] the effect of revoking [counsel's] agency with respect to the action in question.").

The Louisiana Supreme Court concluded that English's refusal to maintain McCoy's innocence was necessitated by Louisiana Rule of Professional Conduct 1.2(d) (2017), which provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." 218 So. 3d, at 564. Presenting McCoy's alibi defense, the court said, would put English in an "ethical conundrum," implicating English in perjury. *Id.*, at 565 (citing *Nix* v. *Whiteside*, 475 U. S. 157, 173–176 (1986)). But McCoy's case does not resemble *Nix*, where the defendant told his lawyer that he intended to commit perjury. There was no such avowed perjury here. Cf. ABA Model Rule of Professional Conduct 3.3, Comment 8 ("The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false."). English harbored no doubt that McCoy believed what he was saying, see App. 285–286; English simply disbelieved McCoy's account in view of the prosecution's evidence. English's express motivation for conceding guilt was not to avoid suborning perjury, but to try to build credibility with the jury, and thus obtain a sentence lesser than death. *Id.*, at 287. Louisiana's ethical rules might have stopped English from presenting McCoy's alibi evidence if English knew perjury was involved. But Louisiana has identified no ethical rule requiring English to admit McCoy's guilt over McCoy's objection. See 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 11.6(c), p. 935 (4th ed. 2015) ("A lawyer is not placed in a professionally embarrassing position when he is reluctantly required . . . to go to trial in a weak case, since that decision is clearly attributed to his client.").

The dissent describes the conflict between English and McCoy as "rare" and "unlikely to recur." *Post*, at 430, 433–434, and n. 2. Yet the Louisiana Supreme Court parted ways

with three other State Supreme Courts that have addressed this conflict in the past twenty years. *People* v. *Bergerud*, 223 P. 3d 686, 691 (Colo. 2010) ("Although defense counsel is free to develop defense theories based on reasonable assessments of the evidence, as guided by her professional judgment, she cannot usurp those fundamental choices given directly to criminal defendants by the United States and the Colorado Constitutions."); *Cooke*, 977 A. 2d 803 (Del. 2009); *Carter*, 270 Kan. 426, 14 P. 3d 1138 (2000). In each of the three cases, as here, the defendant repeatedly and adamantly insisted on maintaining his factual innocence despite counsel's preferred course: concession of the defendant's commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses. See *Bergerud*, 223 P. 3d, at 690–691; *Cooke*, 977 A. 2d, at 814; *Carter*, 270 Kan., at 429, 14 P. 3d, at 1141. These were not strategic disputes about whether to concede an element of a charged offense, cf. *post*, at 435; they were intractable disagreements about the fundamental objective of the defendant's representation. For McCoy, that objective was to maintain "I did not kill the members of my family." Tr. of Oral Arg. 26. In this stark scenario, we agree with the majority of state courts of last resort that counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission.

III

Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland* v. *Washington*, 466 U. S. 668 (1984), or *United States* v. *Cronic*, 466 U. S. 648 (1984), to McCoy's claim. See Brief for Petitioner 43–48; Brief for Respondent 46–52. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *Strickland*, 466 U. S., at 692. Here, however, the violation of McCoy's protected autonomy right was complete when the court al-

lowed counsel to usurp control of an issue within McCoy's sole prerogative.

Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. See, *e. g.*, *McKaskle*, 465 U. S., at 177, n. 8 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"); *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 150 (2006) (choice of counsel is structural); *Waller* v. *Georgia*, 467 U. S. 39, 49–50 (1984) (public trial is structural). Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U. S. 279, 310 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U. S., at 295 (citing *Faretta*, 422 U. S., at 834). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U. S., at 295–296 (citing *Gonzalez-Lopez*, 548 U. S., at 149, n. 4, and *Sullivan* v. *Louisiana*, 508 U. S. 275, 279 (1993)).

Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. See *Cooke*, 977 A. 2d, at 849 ("Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceed-

ings as a whole."). Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.[4]

* * *

Larry English was placed in a difficult position; he had an unruly client and faced a strong government case. He reasonably thought the objective of his representation should be avoidance of the death penalty. But McCoy insistently maintained: "I did not murder my family." App. 506. Once he communicated that to court and counsel, strenuously objecting to English's proposed strategy, a concession of guilt should have been off the table. The trial court's allowance of English's admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment. Because the error was structural, a new trial is the required corrective.

For the reasons stated, the judgment of the Louisiana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[4] The dissent suggests that a remand would be in order, so that the Louisiana Supreme Court, in the first instance, could consider the structural-error question. See *post*, at 438–439. "[W]e did not grant certiorari to review" that question. *Post*, at 438. But McCoy raised his structural-error argument in his opening brief, see Brief for Petitioner 38–43, and Louisiana explicitly chose not to grapple with it, see Brief for Respondent 45, n. 5. In any event, "we have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance." *Yates* v. *Evatt*, 500 U. S. 391, 407 (1991) (citing *Rose* v. *Clark*, 478 U. S. 570, 584 (1986)).

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting.

The Constitution gives us the authority to decide real cases and controversies; we do not have the right to simplify or otherwise change the facts of a case in order to make our work easier or to achieve a desired result. But that is exactly what the Court does in this case. The Court overturns petitioner's convictions for three counts of first-degree murder by attributing to his trial attorney, Larry English, something that English never did. The Court holds that English violated petitioner's constitutional rights by "admit[ting] h[is] client's guilt of a charged crime over the client's intransigent objection." *Ante*, at 426.[1] But English did not admit that petitioner was guilty of first-degree murder. Instead, faced with overwhelming evidence that petitioner shot and killed the three victims, English admitted that petitioner committed one element of that offense, *i. e.*, that he killed the victims. But English strenuously argued that petitioner

[1] When the Court expressly states its holding, it refers to a concession of guilt. See *ante*, at 417 ("We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty"); *ante*, at 426 ("[C]ounsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission"). The opinion also contains many other references to the confession or admission of guilt. See, *e. g.*, *ante*, at 417 ("confessing guilt"; "admit guilt"); *ante*, at 420 ("admitting guilt"; "concede guilt"); *ante*, at 422 ("maintaining her innocence at the guilt phase"; "concession of guilt"); *ante*, at 423 ("conceding guilt"); *ante*, at 424 ("assertion of his guilt"); *ante*, at 425 ("conceding guilt"; "admit McCoy's guilt"); *ante*, at 428 ("concession of guilt"; "admission of McCoy's guilt").

At a few points, however, the Court refers to the admission of criminal "acts." *Ante*, at 417, 423, 426. A rule that a defense attorney may not admit the *actus reus* of an offense (or perhaps even any element of the *actus reus*) would be very different from the rule that the Court expressly adopts. I discuss some of the implications of such a broad rule in Part III of this opinion.

was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense. App. 508–512. So the Court's newly discovered fundamental right simply does not apply to the real facts of this case.

I

The real case is far more complex. Indeed, the real situation English faced at the beginning of petitioner's trial was the result of a freakish confluence of factors that is unlikely to recur.

Retained by petitioner's family, English found himself in a predicament as the trial date approached. The evidence against his client was truly "overwhelming," as the Louisiana Supreme Court aptly noted. 2014–1449 (La. 10/19/16), 218 So. 3d 535, 565 (2016). Among other things, the evidence showed the following. Before the killings took place, petitioner had abused and threatened to kill his wife, and she was therefore under police protection. On the night of the killings, petitioner's mother-in-law made a 911 call and was heard screaming petitioner's first name. She yelled: "'She ain't here, Robert . . . I don't know where she is. The detectives have her. Talk to the detectives. She ain't in there, Robert.'" *Id.*, at 542. Moments later, a gunshot was heard, and the 911 call was disconnected.

Officers were dispatched to the scene, and on arrival, they found three dead or dying victims—petitioner's mother-in-law, her husband, and the teenage son of petitioner's wife. The officers saw a man who fit petitioner's description fleeing in petitioner's car. They chased the suspect, but he abandoned the car along with critical evidence linking him to the crime: the cordless phone petitioner's mother-in-law had used to call 911 and a receipt for the type of ammunition used to kill the victims. Petitioner was eventually arrested while hitchhiking in Idaho, and a loaded gun found in his possession was identified as the one used to shoot the victims. In addition to all this, a witness testified that peti-

tioner had asked to borrow money to purchase bullets shortly before the shootings, and surveillance footage showed petitioner purchasing the ammunition on the day of the killings. And two of petitioner's friends testified that he confessed to killing at least one person.

Despite all this evidence, petitioner, who had been found competent to stand trial and had refused to plead guilty by reason of insanity, insisted that he did not kill the victims. He claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho. Petitioner believed that even his attorney and the trial judge had joined the plot. App. 509.

Unwilling to go along with this incredible and uncorroborated defense, English told petitioner "some eight months" before trial that the only viable strategy was to admit the killings and to concentrate on attempting to avoid a sentence of death. 218 So. 3d, at 558. At that point—aware of English's strong views—petitioner could have discharged English and sought new counsel willing to pursue his conspiracy defense; under the Sixth Amendment, that was his right. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 144 (2006). But petitioner stated "several different times" that he was "confident with Mr. English." App. 411, 437.

The weekend before trial, however, petitioner changed his mind. He asked the trial court to replace English, and English asked for permission to withdraw. Petitioner stated that he had secured substitute counsel, but he was unable to provide the name of this new counsel, and no new attorney ever appeared. The court refused these requests and also denied petitioner's last-minute request to represent himself. (Petitioner does not challenge these decisions here.) So petitioner and English were stuck with each other, and petitioner availed himself of his right to take the stand to tell his wild story. Under those circumstances, what was English supposed to do?

The Louisiana Supreme Court held that English could not have put on petitioner's desired defense without violating state ethics rules, see 218 So. 3d, at 564–565, but this Court effectively overrules the state court on this issue of state law, *ante*, at 425. However, even if it is assumed that the Court is correct on this ethics issue, the result of mounting petitioner's conspiracy defense almost certainly would have been disastrous. That approach stood no chance of winning an acquittal and would have severely damaged English's credibility in the eyes of the jury, thus undermining his ability to argue effectively against the imposition of a death sentence at the penalty phase of the trial. As English observed, taking that path would have only "help[ed] the District Attorney send [petitioner] to the death chamber." App. 396. (In *Florida* v. *Nixon*, 543 U. S. 175, 191–192 (2004), this Court made essentially the same point.) So, again, what was English supposed to do?

When pressed at oral argument before this Court, petitioner's current counsel eventually provided an answer: English was not required to take any affirmative steps to support petitioner's bizarre defense, but instead of conceding that petitioner shot the victims, English should have ignored that element entirely. Tr. of Oral Arg. 21–23. So the fundamental right supposedly violated in this case comes down to the difference between the two statements set out below.

> *Constitutional*: "First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I submit to you that my client did not have the intent required for conviction for that offense."
>
> *Unconstitutional*: "First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I admit that my client shot and killed the victims, but I submit to you that he did not have the intent required for conviction for that offense."

The practical difference between these two statements is negligible. If English had conspicuously refrained from endorsing petitioner's story and had based his defense solely on petitioner's dubious mental condition, the jury would surely have gotten the message that English was essentially conceding that petitioner killed the victims. But according to petitioner's current attorney, the difference is fundamental. The first formulation, he admits, is perfectly fine. The latter, on the other hand, is a violation so egregious that the defendant's conviction must be reversed even if there is no chance that the misstep caused any harm. It is no wonder that the Court declines to embrace this argument and instead turns to an issue that the case at hand does not actually present.

II

The constitutional right that the Court has now discovered—a criminal defendant's right to insist that his attorney contest his guilt with respect to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come. Why is this so?

First, it is hard to see how the right could come into play in any case other than a capital case in which the jury must decide both guilt and punishment. In all other cases, guilt is almost always the only issue for the jury, and therefore admitting guilt of all charged offenses will achieve nothing. It is hard to imagine a situation in which a competent attorney might take that approach. So the right that the Court has discovered is effectively confined to capital cases.

Second, few rational defendants facing a possible death sentence are likely to insist on contesting guilt where there is no real chance of acquittal and where admitting guilt may improve the chances of avoiding execution. Indeed, under such circumstances, the odds are that a rational defendant will plead guilty in exchange for a life sentence. By the same token, an attorney is unlikely to insist on admitting

guilt over the defendant's objection unless the attorney believes that contesting guilt would be futile. So the right is most likely to arise in cases involving irrational capital defendants.[2]

Third, where a capital defendant and his retained attorney cannot agree on a basic trial strategy, the attorney and client will generally part ways unless, as in this case, the court is not apprised until the eve of trial. The client will then either search for another attorney or decide to represent himself. So the field of cases in which this right might arise is limited further still—to cases involving irrational capital defendants who disagree with their attorneys' proposed strategy yet continue to retain them.

Fourth, if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal.

Finally, even if all the above conditions are met, the right that the Court now discovers will not come into play unless the defendant expressly protests counsel's strategy of admitting guilt. Where the defendant is advised of the strategy and says nothing, or is equivocal, the right is deemed to have been waived. See *Nixon*, 543 U. S., at 192.

In short, the right that the Court now discovers is likely to appear only rarely,[3] and because the present case is so

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[2] The Court imagines cases in which a rational defendant prefers even a minuscule chance of acquittal over either the social opprobrium that would result from an admission of guilt or the sentence of imprisonment that would be imposed upon conviction. *Ante*, at 422–423. Such cases are likely to be rare, and in any event, as explained below, the defendant will almost always be able to get his way if he acts in time.

[3] The Court responds that three State Supreme Courts have "addressed this conflict in the past twenty years." *Ante*, at 426. Even if true, that would hardly be much of a rebuttal. Moreover, two of the three decisions were not based on the right that the Court discovers and applies here, *i. e.*, "the right to insist that counsel refrain from admitting guilt." *Ante*,

unique, it is hard to see how it meets our stated criteria for granting review. See this Court's Rules 10(b)–(c). Review would at least be understandable if the strategy that English pursued had worked an injustice, but the Court does not make that claim—and with good reason. Endorsing petitioner's bizarre defense would have been extraordinarily unwise, and dancing the fine line recommended by petitioner's current attorney would have done no good. It would have had no effect on the outcome of the trial, and it is hard to see how that approach would have respected petitioner's "autonomy," *ante*, at 421, 422, 424, 426, 427, any more than the more straightforward approach that English took. If petitioner is retried, it will be interesting to see what petitioner's current counsel or any other attorney to whom the case is handed off will do. It is a safe bet that no attorney will put on petitioner's conspiracy defense.

III

While the question that the Court decides is unlikely to make another appearance for quite some time, a related—and difficult—question may arise more frequently: When guilt is the sole issue for the jury, is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged? If today's decision were understood to address that question, it would have important implications.

Under current precedent, there are some decisions on which a criminal defendant has the final say. For example, a defendant cannot be forced to enter a plea against his wishes. See *Brookhart* v. *Janis*, 384 U. S. 1, 5–7 (1966). Similarly,

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at 417. In *People* v. *Bergerud*, 223 P. 3d 686 (Colo. 2010), the court found that defense counsel *did not* admit guilt, and the court's decision (which did not award a new trial) was based on other grounds. *Id.*, at 692, 700, 707. In *State* v. *Carter*, 270 Kan. 426, 14 P. 3d 1138 (2000), defense counsel did not admit his client's guilt on all charges. Instead, he contested the charge of first-degree murder but effectively admitted the elements of a lesser homicide offense. *Id.*, at 431–433, 14 P. 3d, at 1143.

no matter what counsel thinks best, a defendant has the right to insist on a jury trial and to take the stand and testify in his own defense. See *Harris* v. *New York*, 401 U. S. 222, 225 (1971). And if, as in this case, a defendant and retained counsel do not see eye to eye, the client can always attempt to find another attorney who will accede to his wishes. See *Gonzalez-Lopez*, 548 U. S., at 144. A defendant can also choose to dispense with counsel entirely and represent himself. See *Faretta* v. *California*, 422 U. S. 806, 819 (1975).

While these fundamental decisions must be made by a criminal defendant, most of the decisions that arise in criminal cases are the prerogative of counsel. (Our adversarial system would break down if defense counsel were required to obtain the client's approval for every important move made during the course of the case.) Among the decisions that counsel is free to make unilaterally are the following: choosing the basic line of defense, moving to suppress evidence, delivering an opening statement and deciding what to say in the opening, objecting to the admission of evidence, cross-examining witnesses, offering evidence and calling defense witnesses, and deciding what to say in summation. See, *e. g.*, *New York* v. *Hill*, 528 U. S. 110, 114–115 (2000). On which side of the line does conceding some but not all elements of the charged offense fall?

Some criminal offenses contain elements that the prosecution can easily prove beyond any shadow of a doubt. A prior felony conviction is a good example. See 18 U. S. C. § 922(g) (possession of a firearm by a convicted felon). Suppose that the prosecution is willing to stipulate that the defendant has a prior felony conviction but is prepared, if necessary, to offer certified judgments of conviction for multiple prior violent felonies. If the defendant insists on contesting the convictions on frivolous grounds, must counsel go along? Does the same rule apply to all elements? If there are elements that may not be admitted over the defendant's objection, must counsel go further and actually contest those

elements? Or is it permissible if counsel refrains from expressly conceding those elements but essentially admits them by walking the fine line recommended at argument by petitioner's current attorney?

What about conceding that a defendant is guilty, not of the offense charged, but of a lesser included offense? That is what English did in this case. He admitted that petitioner was guilty of the noncapital offense of second-degree murder in an effort to prevent a death sentence. App. 651.[4] Is admitting guilt of a lesser included offense over the defendant's objection always unconstitutional? Where the evidence strongly supports conviction for first-degree murder, is it unconstitutional for defense counsel to make the decision to admit guilt of any lesser included form of homicide—even manslaughter? What about simple assault?

These are not easy questions, and the fact that they have not come up in this Court for more than two centuries suggests that they will arise infrequently in the future. I would leave those questions for another day and limit our decision to the particular (and highly unusual) situation in the actual case before us. And given the situation in which English found himself when trial commenced, I would hold that he did not violate any fundamental right by expressly acknowledging that petitioner killed the victims instead of engaging in the barren exercise that petitioner's current counsel now recommends.

IV

Having discovered a new right not at issue in the real case before us, the Court compounds its error by summarily con-

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[4] The Court asserts that, under Louisiana law, English's "second-degree strategy would have encountered a shoal" and necessarily failed. *Ante*, at 418, n. 1. But the final arbiter of Louisiana law—the Louisiana Supreme Court—disagreed. It held that "[t]he jury was left with several choices" after English's second-degree concession, "including returning a responsive verdict of second degree murder" and "not returning the death penalty." 2014–1449 (La. 10/19/16), 218 So. 3d 535, 572 (2016).

cluding that a violation of this right "ranks as error of the kind our decisions have called 'structural.'" *Ante*, at 427.

The Court concedes that the Louisiana Supreme Court did not decide the structural-error question and that we "'did not grant certiorari to review' that question." *Ante*, at 428, n. 4. We have stated time and again that we are "a court of review, not of first view" and, for that reason, have refused to decide issues not addressed below. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005); see also, *e. g.*, *Jennings* v. *Rodriguez*, 583 U. S. 281, 312 (2018); *McWilliams* v. *Dunn*, 582 U. S. 183, 200 (2017); *County of Los Angeles* v. *Mendez*, 581 U. S. 420, 429, n. (2017); *BNSF R. Co.* v. *Tyrrell*, 581 U. S. 402, 415 (2017); *Goodyear Tire & Rubber Co.* v. *Haeger*, 581 U. S. 101, 115 (2017); *McLane Co.* v. *EEOC*, 581 U. S. 72, 85 (2017); *Expressions Hair Design* v. *Schneiderman*, 581 U. S. 37, 48 (2017); *Manuel* v. *Joliet*, 580 U. S. 357, 372 (2017).

In this case, however, the court-of-review maxim does not suit the majority's purposes, so it is happy to take the first view. And the majority does so without adversarial briefing on the question. See Brief for Respondent 45–46, n. 5.[5] Under comparable circumstances, we have refrained from taking the lead on the question of structural error. See, *e. g.*, *Sandstrom* v. *Montana*, 442 U. S. 510, 526–527 (1979); *Faretta*, 422 U. S., at 836; *id.*, at 852 (Blackmun, J., dissenting). There is no good reason to take a different approach in this case.

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[5] Indeed, the Court actually *faults* the State for not "grappl[ing] with" an argument raised for the first time in petitioner's opening brief. *Ante*, at 428, n. 4. But how can it blame the State? This Court has said, time and again, that when "petitioners d[o] not raise [an] issue" until the merits stage, "we will not consider [the] argument." *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, 354, n. (1995); see also, *e. g.*, *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 645–646 (1992). That is also what our Rules say. See *Yee* v. *Escondido*, 503 U. S. 519, 535–538 (1992). Why is this case any different?

* * *

The Court ignores the question actually presented by the case before us and instead decides this case on the basis of a newly discovered constitutional right that is not implicated by what really occurred at petitioner's trial. I would base our decision on what really took place, and under the highly unusual facts of this case, I would affirm the judgment below.

I therefore respectfully dissent.

Syllabus

DAHDA *v.* UNITED STATES

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

No. 17–43. Argued February 21, 2018—Decided May 14, 2018*

Under federal law, a judge normally may issue a wiretap order permitting the interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U. S. C. § 2518(3). Here, a judge for the District of Kansas authorized nine wiretap Orders as part of a Government investigation of a suspected drug distribution ring in Kansas. For the most part, the Government intercepted communications from a listening post within Kansas. But each Order also contained a sentence purporting to authorize interception outside of Kansas. Based on that authorization, the Government intercepted additional communications from a listening post in Missouri. Following the investigation, petitioners Los and Roosevelt Dahda were indicted for participating in an illegal drug distribution conspiracy. They moved to suppress the evidence derived from all the wiretaps under subparagraph (ii) of the wiretap statute's suppression provision because the language authorizing interception beyond the District Court's territorial jurisdiction rendered each Order "insufficient on its face." § 2518(10)(a)(ii). The Government agreed not to introduce any evidence arising from its Missouri listening post, and the District Court denied the Dahdas' motion. On appeal, the Tenth Circuit rejected the Dahdas' facial-insufficiency argument on the ground that the challenged language did not implicate Congress' core statutory concerns in enacting the wiretap statute.

Held: Because the Orders were not lacking any information that the statute required them to include and would have been sufficient absent the challenged language authorizing interception outside the court's territorial jurisdiction, the Orders were not facially insufficient. Pp. 446–452.

(a) The Tenth Circuit applied the "core concerns" test from *United States* v. *Giordano*, 416 U. S. 505, and held that subparagraph (ii) applies only where the insufficiency reflects an order's failure to satisfy the "statutory requirements that directly and substantially implement the congressional intention to limit the use of" wiretapping, *id.*, at 527.

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*Together with *Dahda* v. *United States* (see this Court's Rule 12.4), also on certiorari to the same court.

Syllabus

The court identified two such core concerns and concluded that neither applies to the statute's territorial limitation. But *Giordano* involved a different suppression provision—subparagraph (i)—which applies only when a "communication was unlawfully intercepted." § 2518(10)(a)(i). The underlying point of *Giordano*'s limitation was to help distinguish subparagraph (i) of § 2518(10)(a) from subparagraphs (ii) and (iii). It makes little sense to extend the "core concerns" test to subparagraph (ii) as well. Subparagraph (ii) therefore does not include a *Giordano*-like "core concerns" requirement. Pp. 446–449.

(b) That said, this Court also cannot fully endorse the Dahdas' interpretation of the statute. The Dahdas read subparagraph (ii) as applying to any legal defect that appears within the four corners of an order. Clearly, subparagraph (ii) covers at least an order's failure to include information required by §§ 2518(4)(a)–(e). But that does not mean that every defect that may conceivably appear in an order results in an insufficiency. Here, the sentence authorizing interception outside Kansas is surplus. Its presence is not connected to any other relevant part of the Orders. Absent the challenged language, every wiretap that produced evidence introduced at the Dahdas' trial was properly authorized under the statute. While the Orders do not specifically list the territorial area where they could lawfully take effect, they clearly set forth the authorizing judge's territorial jurisdiction—the District of Kansas. And the statute itself presumptively limits every Order's scope to the issuing court's territorial jurisdiction. This interpretation of the term "insufficient" does not, as the Dahdas contend, produce bizarre results. Rather, it makes sense of the suppression provision as a whole. Pp. 449–452.

853 F. 3d 1101 (first judgment) and 852 F. 3d 1282 (second judgment), affirmed.

BREYER, J., delivered the opinion of the Court, in which all other Members joined, except GORSUCH, J., who took no part in the consideration or decision of the cases.

Kannon K. Shanmugam argued the cause for petitioners. With him on the briefs were *Amy Mason Saharia*, *Allison Jones Rushing*, *Charles L. McCloud*, *J. Liat Rome*, and *Rick E. Bailey.*

Zachary D. Tripp argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Deputy Solici-*

tor General Dreeben, *Eric J. Feigin*, and *Finnuala K. Tessier*.†

JUSTICE BREYER delivered the opinion of the Court.

A federal statute allows judges to issue wiretap orders authorizing the interception of communications to help prevent, detect, or prosecute serious federal crimes. See Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.* The statute requires the judge to find "probable cause" supporting issuance of the order, and it sets forth other detailed requirements governing both the application for a wiretap and the judicial order that authorizes it. See § 2518.

The statute provides for the suppression of "the contents of any wire or oral communication" that a wiretap "intercept[s]" along with any "evidence derived therefrom" if

> "(i) the communication was unlawfully intercepted;
> "(ii) the order of . . . approval under which it was intercepted is insufficient on its face; or
> "(iii) the interception was not made in conformity with the order of authorization or approval." § 2518(10)(a).

This litigation concerns the second of these provisions—the provision that governs the "insufficien[cy]" of an order "on its face." § 2518(10)(a)(ii).

Los and Roosevelt Dahda—defendants in the trial below and petitioners here—sought to suppress evidence derived from nine wiretap Orders used to obtain evidence of their participation in an unlawful drug distribution conspiracy. They argue that each Order is "insufficient on its face" be-

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†Briefs of *amici curiae* urging reversal were filed for the Electronic Frontier Foundation et al. by *Ilana H. Eisenstein*, *Jason D. Gerstein*, *Jeffrey T. Green*, *Jennifer Lynch*, and *Andrew Crocker*; for the Electronic Privacy Information Center by *Marc Rotenberg* and *Alan Butler*; and for The Rutherford Institute by *Erin Glenn Busby*, *Lisa R. Eskow*, and *John W. Whitehead*.

cause each contains a sentence authorizing interception "*outside* the territorial jurisdiction" of the authorizing judge, App. 97 (emphasis added), even though the statute normally allows a judge to authorize wiretaps only *within* his or her "territorial jurisdiction," § 2518(3).

In deciding whether each Order was "insufficient on its face," we assume that the Dahdas are right about the "territorial" requirement. That is to say, we assume the relevant sentence exceeded the judge's statutory authority. But none of the communications unlawfully intercepted outside the judge's territorial jurisdiction were introduced at trial, so the inclusion of the extra sentence had no significant adverse effect upon the Dahdas. Because the remainder of each Order was itself legally sufficient, we conclude that the Orders were not "insufficient" on their "face."

I

A

As we just said, the relevant statute permits a judge to issue an order authorizing the Government to intercept wire communications for an initial (but extendable) period of 30 days. § 2518(5). To obtain that order, the Government must submit an application that describes the particular offense being investigated as well as the type of communications it seeks to intercept; that sets forth the basis for an appropriate finding of "probable cause"; that explains why other less intrusive methods are inadequate, have failed, or are too dangerous to try; and that meets other requirements, showing, for example, authorization by a specified governmental official. § 2518(1). If the judge accepts the application, finds probable cause, and issues an authorizing order, that order must itself contain specified information, including, for example, the identity of the "person" whose "communications are to be intercepted"; the "nature and location of the [relevant] communications facilities"; a "particular description of the type of communication sought to be inter-

cepted"; a statement of the "particular offense" to which the intercept "relates"; the "identity of the agency authorized to intercept"; the identity of the "person authorizing the application"; and "the period of time during which" the "interception is authorized." §§2518(4)(a)–(e).

A judge's authorizing authority normally extends only within statutorily defined bounds. The statute specifies that an order can permit the interception of communications "within the territorial jurisdiction of the court in which the judge is sitting." §2518(3). (There is an exception allowing interception beyond the judge's territorial jurisdiction if the judge authorizes a "mobile interception device," *ibid.*, but the parties now agree that exception does not apply to these Orders.) The Government here adds (without the Dahdas' disagreement) that an intercept takes place *either* where the tapped telephone is located *or* where the Government's "listening post" is located. See §2510(4) (defining "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device"); see also Brief for Petitioners 11; Brief for United States 6. As so interpreted, the statute generally requires that one or the other or both of these locations must be found within the authorizing judge's "territorial jurisdiction."

B

In 2011, the Government began investigating a suspected drug distribution ring based in Kansas. It submitted an application asking a federal judge for the District of Kansas to issue nine related wiretap Orders, and the judge issued them. For present purposes we assume, see *infra*, at 451, that all nine Orders met all statutory requirements with one exception. Each Order contained a sentence that read as follows:

> "Pursuant to Title 18, United States Code §2518(3), it is further Ordered that, in the event TARGET TELE-

> PHONE #1, TARGET TELEPHONE #3 and TARGET TELEPHONE #4, are transported *outside the territorial jurisdiction of the court*, interception may take place in any other jurisdiction within the United States." App. 105 (under seal) (emphasis added); see also *id.*, at 97, 114, 123, 132, 140, 149, 158, 166, 174 (Orders containing identical language but targeting different telephones).

Although they disputed it below, the parties now agree that this sentence could not lawfully allow a wiretap of a phone that was located outside Kansas in instances where the Government's listening post was also located outside of Kansas.

Pursuant to these Orders, the Government listened from a listening post within Kansas to conversations on mobile phones that were located within Kansas and conversations on mobile phones that were located outside of Kansas. But, in one instance, the Government listened from a listening post *outside* of Kansas (in Missouri) to conversations on a mobile phone that was also outside of Kansas (in California). That one instance concerned a mobile phone (Target Telephone #7) belonging to Philip Alarcon.

In 2012, the Government indicted the Dahdas and several others, charging them with conspiracy to buy illegal drugs in California and sell them in Kansas. Prior to trial, the Dahdas moved to suppress all evidence derived from the wiretaps authorized by the nine Orders on the ground that the District Court could not authorize the interception of calls from the Missouri listening post to and from Alarcon's mobile phone in California. In its response, the Government said it would not introduce any evidence arising from its Missouri listening post. A Magistrate Judge and subsequently the District Court denied the Dahdas' suppression motion. App. to Pet. for Cert. 59a–76a.

The Dahdas appealed. They argued that, even though the Government did not use any wiretap information from the Missouri listening post, the court should have suppressed all

evidence derived from any of the Orders. That, they said, is because each Order was "insufficient on its face" given the extra sentence authorizing interception outside Kansas. Hence the second subparagraph of the statute's suppression provision required the evidence to be suppressed. § 2518(10)(a)(ii).

The U. S. Court of Appeals for the Tenth Circuit rejected this argument on the ground that the claimed insufficiency concerned the statute's territorial requirement. 853 F. 3d 1101, 1114–1116 (2017). That requirement, in its view, did not "'implemen[t]'" Congress' core statutory concerns in enacting the wiretap statute. *Id.*, at 1114 (quoting *United States* v. *Giordano*, 416 U. S. 505, 527 (1974)). And for that reason a violation of the territorial requirement did not warrant suppression. See also 852 F. 3d 1282, 1290 (2017).

The Dahdas filed a petition for certiorari, seeking review of the Tenth Circuit's determination. And, in light of different related holdings among the Circuits, we granted that petition. Compare 853 F. 3d, at 1114–1116 (suppression was not required for orders authorizing suppression beyond the District Court's territorial jurisdiction), and *Adams* v. *Lankford*, 788 F. 2d 1493, 1500 (CA11 1986) (same), with *United States* v. *Glover*, 736 F. 3d 509, 515 (CADC 2013) (suppression required for territorial defect).

II

A

The question before us concerns the interpretation of the suppression provision's second subparagraph, which requires suppression where a wiretap order is "insufficient on its face." § 2518(10)(a)(ii). The Dahdas ask us to read subparagraph (ii) as applying to any legal defect that appears within the four corners of the order. The Government replies that the Dahdas' approach would require suppression of evidence of serious criminal behavior due to the most

minor of technical failures, including those that have little or no relation to any statutory objective.

The Tenth Circuit, agreeing with the Government, held that subparagraph (ii) applies only where the "insufficiency" constitutes an order's failure to satisfy a "'statutory requiremen[t] that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" 853 F. 3d, at 1114 (quoting *Giordano*, *supra*, at 527; second alteration in original). The court identified two such core concerns—"'(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized'"—and concluded that neither applies to the statute's territorial limitation. 853 F. 3d, at 1114 (quoting S. Rep. No. 90–1097, p. 66 (1968)).

Like the Dahdas, we believe that the Tenth Circuit's interpretation of this provision is too narrow. The Tenth Circuit took the test it applied from this Court's decision in *Giordano*, *supra*, at 527. But *Giordano* involved a different provision. Keep in mind that the statute sets forth three grounds for suppression:

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of . . . approval under which it was intercepted is insufficient on its face; or
>
> "(iii) the interception was not made in conformity with the order of authorization or approval." § 2518(10)(a).

Giordano focused not, as here, on the second subparagraph but on the first subparagraph, which calls for the suppression of "unlawfully intercepted" communications.

In *Giordano*, a criminal defendant sought suppression of wiretap-gathered information on the ground that the wiretap application was unlawfully authorized. 416 U. S., at 525. A provision of the wiretap statute that has since been

amended required an application to be approved by either the Attorney General or a designated Assistant Attorney General. See 18 U. S. C. § 2516(1) (1970 ed.). But, in Giordano's case, an executive assistant to the Assistant Attorney General—not the Assistant Attorney General himself—had approved the application. 416 U. S., at 510.

The Government argued that this statutory violation did not violate the first subparagraph, *i. e.*, it did not lead to an "unlawfu[l] intercept[ion]," 18 U. S. C. § 2518(10)(a)(i), because that subparagraph covers only violations of the Constitution, not statutes. *Giordano*, 416 U. S., at 525–526. Otherwise, the Government added, subparagraphs (ii) and (iii)—which clearly cover some statutory violations—would be superfluous. *Id.*, at 526. But this Court held that the first subparagraph *did* cover certain statutory violations, namely, violations of those statutory provisions that "implemented" the wiretap-related congressional concerns the Tenth Circuit mentioned in its opinion. *Id.*, at 527. So construed, the suppression provision left room for the second and third subparagraphs to have separate legal force. The Court went on to hold that a violation of the approval-by-the-Attorney-General provision implicated Congress' core concerns. Subparagraph (i) thus covered that particular statutory provision. And, finding the provision violated, it ordered the wiretap evidence suppressed. *Id.*, at 527–528.

Here, by contrast, we focus upon subparagraph (ii), which requires suppression when an order is facially insufficient. And in respect to this subparagraph, we can find no good reason for applying *Giordano*'s test. The underlying point of *Giordano*'s limitation was to help give independent meaning to each of § 2518(10)(a)'s subparagraphs. It thus makes little sense to extend the core concerns test to subparagraph (ii) as well. Doing so would "actually treat that paragraph as 'surplusage'—precisely what [this] Court tried to avoid in *Giordano*." *Glover*, 736 F. 3d, at 514. We consequently conclude that subparagraph (ii) does not contain a *Giordano*-

like "core concerns" requirement. The statute means what it says. That is to say, subparagraph (ii) applies where an order is "insufficient on its face." § 2518(10)(a)(ii).

B

Although we believe the Tenth Circuit erred in applying *Giordano*'s core concerns test to subparagraph (ii), we cannot fully endorse the Dahdas' reading of the statute either. In our view, subparagraph (ii) does not cover each and every error that appears in an otherwise sufficient order. It is clear that subparagraph (ii) covers at least an order's failure to include information that § 2518(4) specifically requires the order to contain. See §§ 2518(4)(a)–(e) (requiring an order to specify, *e. g.*, the "identity of the person, if known, whose communications are to be intercepted," "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates"); Brief for United States 17. An order lacking that information would deviate from the uniform authorizing requirements that Congress explicitly set forth, while also falling literally within the phrase "insufficient on its face."

But the Dahdas would have us go further and conclude that any defect that may appear on an order's face would render it insufficient. The lower courts in various contexts have debated just which kinds of defects subparagraph (ii) covers. See, *e. g.*, *United States* v. *Moore*, 41 F. 3d 370, 375–376 (CA8 1994) (order missing judge's signature); *United States* v. *Joseph*, 519 F. 2d 1068, 1070 (CA5 1975) (order identifying the wrong Government official as authorizing the application); *United States* v. *Vigi*, 515 F. 2d 290, 293 (CA6 1975) (same). We need not, however, resolve the questions that these many different cases raise. We need only determine whether the defects in the Orders before us render them "insufficient." We conclude that they do not.

We rest that conclusion upon an argument that the Government did not make below but which it did set forth in its

response to the petition for certiorari and at the beginning of its brief on the merits. That argument is closely related to the arguments the Government did make below. It has been fully briefed by both sides. And as we may "affir[m]" a lower court judgment "on any ground permitted by the law and record," *Murr* v. *Wisconsin*, 582 U. S. 383, 404 (2017), we see little to be gained by remanding this litigation for further consideration.

The argument is simply this: Subparagraph (ii) refers to an order that is "insufficient on its face." An order is "insufficient" insofar as it is "deficient" or "lacking in what is necessary or requisite." 5 Oxford English Dictionary 359 (1933); accord, Webster's New International Dictionary 1288 (2d ed. 1957). And, looking, as the Dahdas urge us to do, at "the four corners of the order itself," Reply Brief 4, we cannot find any respect in which the Orders are deficient or lacking in anything necessary or requisite.

The Orders do contain a defect, namely, the sentence authorizing interception outside Kansas, which we set forth above. See *supra*, at 444–445. But not every defect results in an insufficiency. In that sentence, the District Court "further" ordered that interception may take place "outside the territorial jurisdiction of the court." App. 97. The sentence is without legal effect because, as the parties agree, the Orders could not legally authorize a wiretap outside the District Court's "territorial jurisdiction." But, more importantly, the sentence itself is surplus. Its presence is not connected to any other relevant part of the Orders. Were we to remove the sentence from the Orders, they would then properly authorize wiretaps within the authorizing court's territorial jurisdiction. As we discussed above, a listening post within the court's territorial jurisdiction could lawfully intercept communications made to or from telephones located within Kansas or outside Kansas. See *supra*, at 444. Consequently, every wiretap that produced evidence intro-

duced at the Dahdas' trial was properly authorized under the statute.

The Dahdas argue that, without the offending sentence, the Orders are "insufficient" because they then do not specifically list the territorial area where they could lawfully take effect. Reply Brief 6. The Orders, however, clearly set forth the authorizing judge's territorial jurisdiction: the "District of Kansas." See App. 100. And the statute itself presumptively limits every Order's scope to the issuing court's territorial jurisdiction. See § 2518(3). We consequently fail to see how the additional language here at issue could render the Orders facially insufficient.

The Dahdas add that interpreting the term "insufficient" as we have just done will produce "bizarre results." Reply Brief 5. They claim that, under the Government's logic, an order authorizing interception for 180 days would not be facially insufficient even though the wiretap statute expressly limits the maximum duration of a wiretap order to 30 days. § 2518(5). To be sure, a 180-day order may raise problems that the language at issue here does not. On the one hand, it may be argued that such an order would be facially insufficient because without the 180-day provision the order would not contain any time limit at all. See § 2518(4)(e). On the other hand, one might argue that such an order merely would be overly broad—not facially insufficient—and that suppression would be warranted only for those communications unlawfully intercepted after 30 days. See § 2518(10)(a)(i).

Regardless, we need not now address the Dahdas' 180-day hypothetical. It is enough to say that the problems that may be associated with such an order are not present in this litigation. Here, the Orders would have been sufficient even if they lacked the language authorizing interception outside Kansas. And the Dahdas cannot seek suppression under subparagraph (i) given that the unlawfully intercepted com-

munications from the Missouri listening post were not introduced at trial.

Our interpretation of subparagraph (ii) makes sense of the suppression provision as a whole. Where the Government's use of a wiretap is unconstitutional or violates a statutory provision that reflects Congress' core concerns, an aggrieved person may suppress improperly acquired evidence under subparagraph (i) (as "unlawfully intercepted," see *Giordano*, 416 U. S., at 527). Where an order lacks information that the wiretap statute requires it to include, an aggrieved person may suppress the fruits of the order under subparagraph (ii) (as "insufficient on its face"). And where the Government fails to comply with conditions set forth in the authorizing order, an aggrieved person may suppress its fruits under subparagraph (iii) (as an "interception . . . not made in conformity with the order of authorization or approval").

For these reasons, the judgments of the Court of Appeals are affirmed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of these cases.

Syllabus

MURPHY, GOVERNOR OF NEW JERSEY, ET AL. *v.* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.

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

No. 16–476. Argued December 4, 2017—Decided May 14, 2018*

The Professional and Amateur Sports Protection Act (PASPA) makes it unlawful for a State or its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events, 28 U. S. C. § 3702(1), and for "a person to sponsor, operate, advertise, or promote" those same gambling schemes if done "pursuant to the law or compact of a governmental entity," § 3702(2). But PASPA does not make sports gambling itself a federal crime. Instead, it allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. § 3703. "Grandfather" provisions allow existing forms of sports gambling to continue in four States, §§ 3704(a)(1)–(2), and another provision would have permitted New Jersey to set up a sports gambling scheme in Atlantic City within a year of PASPA's enactment, § 3704(a)(3).

New Jersey did not take advantage of that option but has since had a change of heart. After voters approved an amendment to the State Constitution giving the legislature the authority to legalize sports gambling schemes in Atlantic City and at horseracing tracks, the legislature enacted a 2012 law doing just that. The National Collegiate Athletic Association and three major professional sports leagues brought an action in federal court against New Jersey's Governor and other state officials (hereinafter New Jersey), seeking to enjoin the law on the ground that it violates PASPA. New Jersey countered that PASPA violates the Constitution's "anticommandeering" principle by preventing the State from modifying or repealing its laws prohibiting sports gambling. The District Court found no anticommandeering violation, the Third Circuit affirmed, and this Court denied review.

In 2014, the New Jersey Legislature enacted the law at issue in these cases. Instead of affirmatively authorizing sports gambling schemes,

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*Together with No. 16–477, *New Jersey Thoroughbred Horsemen's Assn., Inc.* v. *National Collegiate Athletic Assn. et al.*, also on certiorari to the same court.

this law repeals state-law provisions that prohibited such schemes, insofar as they concerned wagering on sporting events by persons 21 years of age or older; at a horseracing track or a casino or gambling house in Atlantic City; and only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State. Plaintiffs in the earlier suit, respondents here, filed a new action in federal court. They won in the District Court, and the Third Circuit affirmed, holding that the 2014 law, no less than the 2012 one, violates PASPA. The court further held that the prohibition does not "commandeer" the States in violation of the Constitution.

Held:

1. When a State completely or partially repeals old laws banning sports gambling schemes, it "authorize[s]" those schemes under PASPA. Pp. 465–470.

(a) Pointing out that one accepted meaning of "authorize" is "permit," petitioners contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to authorization. Respondents maintain that "authorize" requires affirmative action and that the 2014 law affirmatively acts by empowering a defined group of entities and endowing them with the authority to conduct sports gambling operations. They do not take the position that PASPA bans all modifications of laws prohibiting sports gambling schemes, but just how far they think a modification could go is not clear. Similarly, the United States, as *amicus*, claims that the State's 2014 law qualifies as an authorization. PASPA, it contends, neither prohibits a State from enacting a complete repeal nor outlaws all partial repeals. But the United States also does not set out any clear rule for distinguishing between partial repeals that constitute the "authorization" of sports gambling and those that are permissible. Pp. 466–467.

(b) Taking into account the fact that all forms of sports gambling were illegal in the great majority of States at the time of PASPA's enactment, the repeal of a state law banning sports gambling not only "permits" sports gambling but also gives those now free to conduct a sports betting operation the "right or authority to act." The interpretation adopted by the Third Circuit and advocated by respondents and the United States not only ignores the situation that Congress faced when it enacted PASPA but also leads to results that Congress is most unlikely to have wanted. Pp. 467–469.

(c) Respondents and the United States cannot invoke the canon of interpretation that a statute should not be held to be unconstitutional if there is any reasonable interpretation that can save it. Even if the law

could be interpreted as respondents and the United States suggest, it would still violate the anticommandeering principle. Pp. 469–470.

2. PASPA's provision prohibiting state authorization of sports gambling schemes violates the anticommandeering rule. Pp. 470–480.

(a) As the Tenth Amendment confirms, all legislative power not conferred on Congress by the Constitution is reserved for the States. Absent from the list of conferred powers is the power to issue direct orders to the governments of the States. The anticommandeering doctrine that emerged in *New York* v. *United States*, 505 U. S. 144, and *Printz* v. *United States*, 521 U. S. 898, simply represents the recognition of this limitation. Thus, "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.' " *New York*, *supra*, at 161. Adherence to the anticommandeering principle is important for several reasons, including, as significant here, that the rule serves as "one of the Constitution's structural safeguards of liberty," *Printz*, *supra*, at 921, that the rule promotes political accountability, and that the rule prevents Congress from shifting the costs of regulation to the States. Pp. 470–474.

(b) PASPA's anti-authorization provision unequivocally dictates what a state legislature may and may not do. The distinction between compelling a State to enact legislation and prohibiting a State from enacting new laws is an empty one. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event. Pp. 474–475.

(c) Contrary to the claim of respondents and the United States, this Court's precedents do not show that PASPA's anti-authorization provision is constitutional. *South Carolina* v. *Baker*, 485 U. S. 505; *Reno* v. *Condon*, 528 U. S. 141; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264; *FERC* v. *Mississippi*, 456 U. S. 742, distinguished. Pp. 475–477.

(d) Nor does the anti-authorization provision constitute a valid preemption provision. To preempt state law, it must satisfy two requirements. It must represent the exercise of a power conferred on Congress by the Constitution. And, since the Constitution "confers upon Congress the power to regulate individuals, not States," *New York*, *supra*, at 177, it must be best read as one that regulates private actors. There is no way that the PASPA anti-authorization provision can be understood as a regulation of private actors. It does not confer any federal rights on private actors interested in conducting sports gambling operations or impose any federal restrictions on private actors. Pp. 477–480.

Syllabus

3. PASPA's provision prohibiting state "licens[ing]" of sports gambling schemes also violates the anticommandeering rule. It issues a direct order to the state legislature and suffers from the same defect as the prohibition of state authorization. Thus, this Court need not decide whether New Jersey's 2014 law violates PASPA's anti-licensing provision. Pp. 480–481.

4. No provision of PASPA is severable from the provisions directly at issue. Pp. 481–486.

(a) Section 3702(1)'s provisions prohibiting States from "operat[ing]," "sponsor[ing]," or "promot[ing]" sports gambling schemes cannot be severed. Striking the state authorization and licensing provisions while leaving the state operation provision standing would result in a scheme sharply different from what Congress contemplated when PASPA was enacted. For example, had Congress known that States would be free to authorize sports gambling in privately owned casinos, it is unlikely that it would have wanted to prevent States from operating sports lotteries. Nor is it likely that Congress would have wanted to prohibit such an ill-defined category of state conduct as sponsorship or promotion. Pp. 482–483.

(b) Congress would not want to sever the PASPA provisions that prohibit a private actor from "sponsor[ing]," "operat[ing]," or "promot[ing]" sports gambling schemes "pursuant to" state law. § 3702(2). PASPA's enforcement scheme makes clear that § 3702(1) and § 3702(2) were meant to operate together. That scheme—suited for challenging state authorization or licensing or a small number of private operations—would break down if a State broadly decriminalized sports gambling. Pp. 483–485.

(c) PASPA's provisions prohibiting the "advertis[ing]" of sports gambling are also not severable. See §§ 3702(1)–(2). If they were allowed to stand, federal law would forbid the advertising of an activity that is legal under both federal and state law—something that Congress has rarely done. Pp. 485–486.

832 F. 3d 389, reversed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, KAGAN, and GORSUCH, JJ., joined, and in which BREYER, J., joined as to all but Part VI–B. THOMAS, J., filed a concurring opinion, *post*, p. 486. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 491. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER, J., joined in part, *post*, p. 493.

Counsel

Theodore B. Olson argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 16–476 were *Christopher S. Porrino*, Attorney General of New Jersey, *Stuart M. Feinblatt*, Assistant Attorney General, *Peter Slocum*, Deputy Attorney General, *Matthew D. McGill*, *Nicole A. Saharsky*, *Ashley E. Johnson*, *Lauren M. Blas*, *Michael R. Griffinger*, *Thomas R. Valen*, and *Jennifer A. Hradil*. *Ronald J. Riccio*, *Eliott Berman*, and *Edward A. Hartnett* filed briefs for petitioner in No. 16–477.

Paul D. Clement argued the cause for respondents. With him on the brief were *Erin E. Murphy*, *Edmund G. LaCour, Jr.*, *Michael D. Lieberman*, *Jeffrey A. Mishkin*, and *Anthony J. Dreyer*.

Jeffrey B. Wall argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Mooppan*, *Brian H. Fletcher*, and *Peter J. Phipps*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Gaming Association by *Jonathan F. Cohn* and *Joshua J. Fougere*; for the European Sports Security Association et al. by *Jonathan Sherman*, *Joshua I. Schiller*, *A. Jeff Ifrah*, and *David S. Yellin*; for the Pacific Legal Foundation et al. by *Jonathan Wood*, *Sam Kazman*, *Ilya Shapiro*, *Joshua P. Thompson*, and *Richard M. Esenberg*; for John T. Holden by *Anita M. Moorman*; and for Frank J. Pallone, Jr., by *Timothy R. Robinson*.

Briefs of *amici curiae* urging reversal in No. 16–476 were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia, and *Thomas M. Johnson, Jr.*, Deputy Solicitor General, for Gov. Matthew G. Bevin of Kentucky by *Mark Stephen Pitt*, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Pamela Jo Bondi* of Florida, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Jim Hood* of Mississippi, *Joshua D. Hawley* of Missouri, *Douglas J. Peterson* of Nebraska, *Gordon J. MacDonald* of New Hampshire, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Peter*

JUSTICE ALITO delivered the opinion of the Court.

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act, generally makes it unlawful for a State to "authorize" sports gambling schemes. 28 U. S. C. § 3702(1). We must decide whether this provision is compatible with the system of "dual sovereignty" embodied in the Constitution.

I

A

Americans have never been of one mind about gambling, and attitudes have swung back and forth. By the end of the 19th century, gambling was largely banned throughout the country,[1] but beginning in the 1920s and 1930s, laws prohibiting gambling were gradually loosened.

New Jersey's experience is illustrative. In 1897, New Jersey adopted a constitutional amendment that barred all gambling in the State.[2] But during the Depression, the State permitted parimutuel betting on horse races as a way of in-

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F. Kilmartin of Rhode Island, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; for Constitutional Law Scholars by *William J. Trunk*; and for the National Governors Association et al. by *Richard A. Simpson*, *Tara L. Ward*, and *Lisa E. Soronen*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly*; and for Stop Predatory Gambling et al. by *Deepak Gupta*.

Briefs of *amici curiae* were filed in both cases for the New Sports Economy Institute by *Christopher Pey*; and for Ryan M. Rodenberg by *Mr. Rodenberg, pro se.*

[1] See Nat. Gambling Impact Study Comm'n, Final Report, p. 2–1 (1999) (Final Report); S. Durham & K. Hashimoto, The History of Gambling in America 34–35 (2010).

[2] See *Atlantic City Racing Assn.* v. *Attorney General*, 98 N. J. 535, 539–541, 489 A. 2d 165, 167–168 (1985).

creasing state revenue,[3] and in 1953, churches and other nonprofit organizations were allowed to host bingo games.[4] In 1970, New Jersey became the third State to run a state lottery,[5] and within five years, 10 other States followed suit.[6]

By the 1960s, Atlantic City, "once the most fashionable resort of the Atlantic Coast," had fallen on hard times,[7] and casino gambling came to be seen as a way to revitalize the city.[8] In 1974, a referendum on statewide legalization failed,[9] but two years later, voters approved a narrower measure allowing casino gambling in Atlantic City alone.[10] At that time, Nevada was the only other State with legal casinos,[11] and thus for a while the Atlantic City casinos had an east coast monopoly. "With 60 million people living within a one-tank car trip away," Atlantic City became "the most popular tourist destination in the United States."[12] But that favorable situation eventually came to an end.

With the enactment of the Indian Gaming Regulatory Act in 1988, 25 U. S. C. §2701 *et seq.*, casinos opened on Indian land throughout the country. Some were located within driving distance of Atlantic City,[13] and nearby States (and many others) legalized casino gambling.[14] But Nevada re-

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[3] See Note, The Casino Act: Gambling's Past and the Casino Act's Future, 10 Rutgers-Camden L. J. 279, 287 (1979) (The Casino Act).

[4] *Id.*, at 288; see also N. J. Const., Art. 4, §7, ¶2(A); Bingo Licensing Law, N. J. Stat. Ann. §5:8–24 *et seq.* (West 2012).

[5] See State Lottery Law, N. J. Stat. Ann. §5:9–1 *et seq.*; The Casino Act, at 288; N. J. Const., Art. 4, §7, ¶2(C); Final Report, at 2–1.

[6] *Id.*, at 2–1.

[7] T. White, The Making of the President 1964, p. 275 (1965).

[8] See D. Clary, Gangsters to Governors 152–153 (2017) (Clary).

[9] See The Casino Act, at 289.

[10] See *ibid.*; N. J. Const., Art. 4, §7, ¶2(D).

[11] Clary 146.

[12] *Id.*, at 146, 158.

[13] *Id.*, at 208–210.

[14] Casinos now operate in New York, Pennsylvania, Delaware, and Maryland. See American Gaming Assn., 2016 State of the States, p. 8, online

mained the only state venue for legal sports gambling in casinos, and sports gambling is immensely popular.[15]

Sports gambling, however, has long had strong opposition. Opponents argue that it is particularly addictive and especially attractive to young people with a strong interest in sports,[16] and in the past gamblers corrupted and seriously damaged the reputation of professional and amateur sports.[17] Apprehensive about the potential effects of sports gambling, professional sports leagues and the National Collegiate Athletic Association (NCAA) long opposed legalization.[18]

B

By the 1990s, there were signs that the trend that had brought about the legalization of many other forms of gambling might extend to sports gambling,[19] and this sparked federal efforts to stem the tide. Opponents of sports gam-

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at https://www.americangaming.org/sites/default/files/2016%20State%20of%20the%20States_FINAL.pdf (all Internet materials as last visited May 4, 2018).

[15] See, *e. g.*, Brief for American Gaming Assn. as *Amicus Curiae* 1–2.

[16] See, *e. g.*, Final Report, at 3–10; Bradley, The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474, 2 Seton Hall J. Sport L. 5, 7 (1992); Brief for Stop Predatory Gambling et al. as *Amici Curiae* 22–23.

[17] For example, in 1919, professional gamblers are said to have paid members of the Chicago White Sox to throw the World Series, an episode that was thought to have threatened baseball's status as the Nation's pastime. See E. Asinof, Eight Men Out: The Black Sox and the 1919 World Series 5, 198–199 (1963). And in the early 1950s, the Nation was shocked when several college basketball players were convicted for shaving points. S. Cohen, The Game They Played 183–238 (1977). This scandal is said to have nearly killed college basketball. See generally C. Rosen, Scandals of '51: How the Gamblers Almost Killed College Basketball (1978).

[18] See Professional and Amateur Sports Protection, S. Rep. No. 102–248, p. 8 (1991); Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 21, 39, 46–47, 59–60, 227 (1991) (S. Hrg. 102–499) (statements by representatives of major sports leagues opposing sports gambling).

[19] S. Rep. No. 102–248, at 5.

bling turned to the legislation now before us, the Professional and Amateur Sports Protection Act (PASPA). 28 U. S. C. §3701 *et seq.* PASPA's proponents argued that it would protect young people, and one of the bill's sponsors, Senator Bill Bradley of New Jersey, a former college and professional basketball star, stressed that the law was needed to safeguard the integrity of sports.[20] The Department of Justice opposed the bill,[21] but it was passed and signed into law.

PASPA's most important provision, part of which is directly at issue in these cases, makes it "unlawful" for a State or any of its subdivisions[22] "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. §3702(1). In parallel, §3702(2) makes it "unlawful" for "a person to sponsor, operate, advertise, or promote" those same gambling schemes[23]—but only if this is done "pursuant to the law or compact of a governmental entity." PASPA does not make sports gambling a federal crime (and thus was not anticipated to impose a significant law enforcement burden on the Federal Government).[24] Instead, PASPA allows the Attorney General, as well as professional and am-

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[20] S. Hrg. 102–499, at 10–14.

[21] App. to Pet. for Cert. in No. 16–476, p. 225a.

[22] The statute applies to any "governmental entity," which is defined as "a State, a political subdivision of a State, or an entity or organization . . . that has governmental authority within the territorial boundaries of the United States." 28 U. S. C. §3701(2).

[23] PASPA does not define the term "scheme." The United States has not offered a definition of the term but suggests that it encompasses only those forms of gambling having some unspecified degree of organization or structure. See Brief for United States as *Amicus Curiae* 28–29. For convenience, we will use the term "sports gambling" to refer to whatever forms of sports gambling fall within PASPA's reach.

[24] The Congressional Budget Office estimated that PASPA would not require the appropriation of any federal funds. S. Rep. No. 102–248, at 10.

ateur sports organizations, to bring civil actions to enjoin violations. § 3703.

At the time of PASPA's adoption, a few jurisdictions allowed some form of sports gambling. In Nevada, sports gambling was legal in casinos,[25] and three States hosted sports lotteries or allowed sports pools.[26] PASPA contains "grandfather" provisions allowing these activities to continue. §§ 3704(a)(1)–(2). Another provision gave New Jersey the option of legalizing sports gambling in Atlantic City—provided that it did so within one year of the law's effective date. § 3704(a)(3).[27]

New Jersey did not take advantage of this special option, but by 2011, with Atlantic City facing stiff competition, the State had a change of heart. New Jersey voters approved an amendment to the State Constitution making it lawful for the legislature to authorize sports gambling, Art. IV, § 7, ¶¶2(D), (F), and in 2012 the legislature enacted a law doing just that, 2011 N. J. Laws p. 1723 (2012 Act).

The 2012 Act quickly came under attack. The major professional sports leagues and the NCAA brought an action in federal court against the New Jersey Governor and other state officials (hereinafter New Jersey), seeking to enjoin the new law on the ground that it violated PASPA. In response, the State argued, among other things, that PASPA unconstitutionally infringed the State's sovereign authority to end its sports gambling ban. See *National Collegiate Athletic Assn.* v. *Christie*, 926 F. Supp. 2d 551, 561 (NJ 2013).

In making this argument, the State relied primarily on two cases, *New York* v. *United States*, 505 U. S. 144 (1992), and *Printz* v. *United States*, 521 U. S. 898 (1997), in which

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[25] *Ibid.*

[26] *Ibid.*; 138 Cong. Rec. 12973 (1992).

[27] Although this provision did not specifically mention New Jersey or Atlantic City, its requirements—permitting legalization only "in a municipality" with an uninterrupted 10-year history of legal casino gaming—did not fit anyplace else.

we struck down federal laws based on what has been dubbed the "anticommandeering" principle. In *New York*, we held that a federal law unconstitutionally ordered the State to regulate in accordance with federal standards, and in *Printz*, we found that another federal statute unconstitutionally compelled state officers to enforce federal law.

Relying on these cases, New Jersey argued that PASPA is similarly flawed because it regulates a State's exercise of its lawmaking power by prohibiting it from modifying or repealing its laws prohibiting sports gambling. See *National Collegiate Athletic Assn.* v. *Christie*, 926 F. Supp. 2d, at 561–562. The plaintiffs countered that PASPA is critically different from the commandeering cases because it does not command the States to take any affirmative act. *Id.*, at 562. Without an affirmative federal command to *do* something, the plaintiffs insisted, there can be no claim of commandeering. *Ibid.*

The District Court found no anticommandeering violation, *id.*, at 569–573, and a divided panel of the Third Circuit affirmed, *National Collegiate Athletic Assn.* v. *Christie*, 730 F. 3d 208 (2013) (*Christie I*). The panel thought it significant that PASPA does not impose any affirmative command. *Id.*, at 231. In the words of the panel, "PASPA does not require or coerce the states to lift a finger." *Ibid.* (emphasis deleted). The panel recognized that an affirmative command (for example, "Do not repeal") can often be phrased as a prohibition ("Repeal is prohibited"), but the panel did not interpret PASPA as prohibiting the repeal of laws outlawing sports gambling. *Id.*, at 232. A repeal, it thought, would not amount to "authoriz[ation]" and thus would fall outside the scope of § 3702(1). "[T]he lack of an affirmative prohibition of an activity," the panel wrote, "does not mean it is affirmatively authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.*, at 232 (emphasis deleted).

New Jersey filed a petition for a writ of certiorari, raising the anticommandeering issue. Opposing certiorari, the United States told this Court that PASPA does not require New Jersey "to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part." Brief for United States in Opposition in *Christie* v. *National Collegiate Athletic Assn.*, O. T. 2013, No. 13–967 etc., p. 11. See also Brief for Respondents in Opposition in No. 13–967 etc., p. 23 ("Nothing in that unambiguous language compels states to prohibit or maintain any existing prohibition on sports gambling"). We denied review. *Christie* v. *National Collegiate Athletic Assn.*, 573 U. S. 931 (2014).

Picking up on the suggestion that a partial repeal would be allowed, the New Jersey Legislature enacted the law now before us. 2014 N. J. Laws p. 602 (2014 Act). The 2014 Act declares that it is not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling. *Ibid.* Instead, it is framed as a repealer. Specifically, it repeals the provisions of state law prohibiting sports gambling insofar as they concerned the "placement and acceptance of wagers" on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in Atlantic City. *Ibid.* The new law also specified that the repeal was effective only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State. *Ibid.*

Predictably, the same plaintiffs promptly commenced a new action in federal court. They won in the District Court, *National Collegiate Athletic Assn.* v. *Christie*, 61 F. Supp. 3d 488 (NJ 2014), and the case was eventually heard by the Third Circuit sitting en banc. The en banc court affirmed, finding that the new law, no less than the old one, violated PASPA by "author[izing]" sports gambling. *National Collegiate Athletic Assn.* v. *Governor of N. J.*, 832

F. 3d 389 (2016) (case below). The court was unmoved by the New Jersey Legislature's "artfu[l]" attempt to frame the 2014 Act as a repealer. *Id.*, at 397. Looking at what the law "actually does," the court concluded that it constitutes an authorization because it "selectively remove[s] a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators." *Id.*, at 397, 401. The court disavowed some of the reasoning in the *Christie I* opinion, finding its discussion of "the relationship between a 'repeal' and an 'authorization' to have been too facile." 832 F. 3d, at 401. But the court declined to say whether a repeal that was more complete than the 2014 Act would still amount to an authorization. The court observed that a partial repeal that allowed only "*de minimis* wagers between friends and family would not have nearly the type of authorizing effect" that it found in the 2014 Act, and it added: "We need not . . . articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, *if indeed such a line could be drawn*." *Id.*, at 402 (emphasis added).

Having found that the 2014 Act violates PASPA's prohibition of state authorization of sports gambling schemes, the court went on to hold that this prohibition does not contravene the anticommandeering principle because it "does not command states to take affirmative actions." *Id.*, at 401.

We granted review to decide the important constitutional question presented by these cases, *sub nom. Christie* v. *National Collegiate Athletic Assn.*, 582 U. S. 951 (2017).

II

Before considering the constitutionality of the PASPA provision prohibiting States from "author[izing]" sports gambling, we first examine its meaning. The parties advance dueling interpretations, and this dispute has an important bearing on the constitutional issue that we must decide. Neither respondents nor the United States, appearing as an

amicus in support of respondents, contends that the provision at issue would be constitutional if petitioners' interpretation is correct. Indeed, the United States expressly concedes that the provision is unconstitutional if it means what petitioners claim. Brief for United States 8, 19.

A

Petitioners argue that the anti-authorization provision requires States to maintain their existing laws against sports gambling without alteration. One of the accepted meanings of the term "authorize," they point out, is "permit." Brief for Petitioners in No. 16–476, p. 42 (citing Black's Law Dictionary 133 (6th ed. 1990); Webster's Third New International Dictionary 146 (1992)). They therefore contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization. Brief for Petitioners in No. 16–476, at 42.

Respondents interpret the provision more narrowly. They claim that the *primary* definition of "authorize" requires affirmative action. Brief for Respondents 39. To authorize, they maintain, means "'[t]o empower; to give a right or authority to act; to endow with authority.'" *Ibid.* (quoting Black's Law Dictionary, at 133). And this, they say, is precisely what the 2014 Act does: It empowers a defined group of entities, and it endows them with the authority to conduct sports gambling operations.

Respondents do not take the position that PASPA bans all modifications of old laws against sports gambling, Brief for Respondents 20, but just how far they think a modification could go is not clear. They write that a State "can also repeal or enhance [laws prohibiting sports gambling] without running afoul of PASPA" but that it "cannot 'partially repeal' a general prohibition for only one or two preferred providers, or only as to sports-gambling schemes conducted by the

state." *Ibid.* Later in their brief, they elaborate on this point:

> "If, for example, a state had an existing felony prohibition on all lotteries, it could maintain the law, it could repeal the law, it could downgrade the crime to a misdemeanor or increase the penalty . . . . But if the state modified its law, whether through a new authorization or through an amendment partially repealing the existing prohibition, to authorize the state to conduct a sports lottery, that modified law would be preempted." *Id.*, at 31.

The United States makes a similar argument. PASPA, it contends, does not prohibit a State from enacting a complete repeal because "one would not ordinarily say that private conduct is 'authorized by law' simply because the government has not prohibited it." Brief for United States as *Amicus Curiae* 17. But the United States claims that "[t]he 2014 Act's selective and conditional permission to engage in conduct that is generally prohibited certainly qualifies" as an authorization. *Ibid.* The United States does not argue that PASPA outlaws *all* partial repeals, but it does not set out any clear rule for distinguishing between partial repeals that constitute the "authorization" of sports gambling and those that are permissible. The most that it is willing to say is that a State could "eliminat[e] prohibitions on sports gambling involving wagers by adults or wagers below a certain dollar threshold." *Id.*, at 29.

B

In our view, petitioners' interpretation is correct: When a State completely or partially repeals old laws banning sports gambling, it "authorize[s]" that activity. This is clear when the state-law landscape at the time of PASPA's enactment is taken into account. At that time, all forms of sports gam-

bling were illegal in the great majority of States, and in that context, the competing definitions offered by the parties lead to the same conclusion. The repeal of a state law banning sports gambling not only "permits" sports gambling (petitioners' favored definition); it also gives those now free to conduct a sports betting operation the "right or authority to act"; it "empowers" them (respondents' and the United States's definition).

The concept of state "authorization" makes sense only against a backdrop of prohibition or regulation. A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State "authorizes" its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.[28]

The United States counters that, even if the term "authorize," standing alone, is interpreted as petitioners claim, PASPA contains additional language that precludes that reading. The provision at issue refers to "authoriz[ation] *by law*," § 3702(1) (emphasis added), and the parallel provision governing private conduct, § 3702(2), applies to conduct done "pursuant to the law . . . of a governmental entity." The United States maintains that one "would not naturally describe a person conducting a sports-gambling operation that is merely left unregulated as acting 'pursuant to' state law." Brief for United States 18. But one might well say exactly that if the person previously was prohibited from engaging in the activity. ("Now that the State has legalized the sale

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[28] See, *e. g.*, A. McCullum, Vermont's Legal Recreational Marijuana Law: What You Should Know, USA Today Network (Jan. 23, 2018), online at https://www.usatoday.com/story/news/nation-now/2018/01/23/vermont-legal-marijuana-law-what-know/1056869001/ ("Vermont . . . bec[ame] the first [State] in the country to *authorize* the recreational use of [marijuana] by an act of a state legislature" (emphasis added)).

of marijuana, Joe is able to sell the drug pursuant to state law.")

The United States also claims to find support for its interpretation in the fact that the authorization ban applies to all "governmental entities." It is implausible, the United States submits, to think that Congress "commanded every county, district, and municipality in the Nation to prohibit sports betting." *Ibid.* But in making this argument, the United States again ignores the legal landscape at the time of PASPA's enactment. At that time, sports gambling was generally prohibited by state law, and therefore a State's political subdivisions were powerless to legalize the activity. But what if a State enacted a law enabling, but not requiring, one or more of its subdivisions to decide whether to authorize sports gambling? Such a state law would not itself authorize sports gambling. The ban on legalization at the local level addresses this problem.

The interpretation adopted by the Third Circuit and advocated by respondents and the United States not only ignores the situation that Congress faced when it enacted PASPA but also leads to results that Congress is most unlikely to have wanted. This is illustrated by the implausible conclusions that all of those favoring alternative interpretations have been forced to reach about the extent to which the provision permits the repeal of laws banning sports gambling.

The Third Circuit could not say which, if any, partial repeals are allowed. 832 F. 3d, at 402. Respondents and the United States tell us that the PASPA ban on state authorization allows complete repeals, but beyond that they identify no clear line. It is improbable that Congress meant to enact such a nebulous regime.

C

Respondents and the United States argue that even if there is some doubt about the correctness of their interpretation of the anti-authorization provision, that interpretation

should be adopted in order to avoid any anticommandeering problem that would arise if the provision were construed to require States to maintain their laws prohibiting sports gambling. Brief for Respondents 38; Brief for United States 19. They invoke the canon of interpretation that a statute should not be held to be unconstitutional if there is any reasonable interpretation that can save it. See *Jennings* v. *Rodriguez*, 583 U. S. 281, 296 (2018). The plausibility of the alternative interpretations is debatable, but even if the law could be interpreted as respondents and the United States suggest, it would still violate the anticommandeering principle, as we now explain.

III

A

The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i. e.*, the decision to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority "to do all . . . Acts and Things which Independent States may of right do." ¶32. The Constitution limited but did not abolish the sovereign powers of the States, which retained "a residuary and inviolable sovereignty." The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison). Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of "dual sovereignty." *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991).

The Constitution limits state sovereignty in several ways. It directly prohibits the States from exercising some attributes of sovereignty. See, *e. g.*, Art. I, § 10. Some grants of power to the Federal Government have been held to impose implicit restrictions on the States. See, *e. g.*, *Department of*

Revenue of Ky. v. *Davis*, 553 U. S. 328 (2008); *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396 (2003). And the Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, § 8, while providing in the Supremacy Clause that federal law is the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted.

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

Although the anticommandeering principle is simple and basic, it did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways. The pioneering case was *New York*, 505 U. S. 144, which concerned a federal law that required a State, under certain circumstances, either to "take title" to low-level radioactive waste or to "regulat[e] according to the instructions of Congress." *Id.*, at 175. In enacting this provision, Congress issued orders to either the legislative or executive branch of state government (depending on the branch authorized by state law to take the actions demanded). Either way, the Court held, the provision was unconstitutional because "the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.*, at 176.

Justice O'Connor's opinion for the Court traced this rule to the basic structure of government established under the

Constitution. The Constitution, she noted, "confers upon Congress the power to regulate individuals, not States." *Id.*, at 166. In this respect, the Constitution represented a sharp break from the Articles of Confederation. "Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly." *Id.*, at 163. Instead, Congress was limited to acting "'only upon the States.'" *Id.*, at 162 (quoting *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869)). Alexander Hamilton, among others, saw this as "'[t]he great and radical vice in . . . the existing Confederation.'" 505 U. S., at 163 (quoting The Federalist No. 15, at 108). The Constitutional Convention considered plans that would have preserved this basic structure, but it rejected them in favor of a plan under which "Congress would exercise its legislative authority directly over individuals rather than over States." 505 U. S., at 165.

As to what this structure means with regard to Congress's authority to control state legislatures, *New York* was clear and emphatic. The opinion recalled that "no Member of the Court ha[d] ever suggested" that even "a particularly strong federal interest" "would enable Congress to command a state government to enact *state* regulation." *Id.*, at 178 (emphasis in original). "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.*, at 166. "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.*, at 161 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288 (1981)). "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." 505 U. S., at 178.

Five years after *New York*, the Court applied the same principles to a federal statute requiring state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses. *Printz*, 521 U. S. 898. Holding this provision unconstitutional, the Court put the point succinctly: "The Federal Government" may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.*, at 935. This rule applies, *Printz* held, not only to state officers with policymaking responsibility but also to those assigned more mundane tasks. *Id.*, at 929–930.

B

Our opinions in *New York* and *Printz* explained why adherence to the anticommandeering principle is important. Without attempting a complete survey, we mention several reasons that are significant here.

First, the rule serves as "one of the Constitution's structural protections of liberty." *Printz*, *supra*, at 921. "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities." *New York*, 505 U. S., at 181. "To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *Ibid.* "'[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.'" *Id.*, at 181–182 (quoting *Gregory*, 501 U. S., at 458).

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do

so by Congress, responsibility is blurred. See *New York*, *supra*, at 168–169; *Printz*, *supra*, at 929–930.

Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis. See, *e. g.*, Young, Two Cheers for Process Federalism, 46 Vill. L. Rev. 1349, 1360–1361 (2001).

IV

A

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. See Brief for Respondents 19; Brief for United States 12. Noting that the laws challenged in *New York* and *Printz* "told states what they must do instead of what they must not do," respondents contend that commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it." Brief for Respondents 19 (emphasis deleted).

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded "affirmative" action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

Here is an illustration. PASPA includes an exemption for States that permitted sports betting at the time of enactment, § 3704, but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.

B

Respondents and the United States claim that prior decisions of this Court show that PASPA's anti-authorization provision is constitutional, but they misread those cases. In none of them did we uphold the constitutionality of a federal statute that commanded state legislatures to enact or refrain from enacting state law.

In *South Carolina* v. *Baker*, 485 U. S. 505 (1988), the federal law simply altered the federal tax treatment of private investments. Specifically, it removed the federal tax exemption for interest earned on state and local bonds unless they were issued in registered rather than bearer form. This law did not order the States to enact or maintain any existing laws. Rather, it simply had the indirect effect of pressuring States to increase the rate paid on their bearer bonds in order to make them competitive with other bonds paying taxable interest.

In any event, even if we assume that removal of the tax exemption was tantamount to an outright prohibition of the issuance of bearer bonds, see *id.*, at 511, the law would simply treat state bonds the same as private bonds. The anti-commandeering doctrine does not apply when Congress

evenhandedly regulates an activity in which both States and private actors engage.

That principle formed the basis for the Court's decision in *Reno* v. *Condon*, 528 U. S. 141 (2000), which concerned a federal law restricting the disclosure and dissemination of personal information provided in applications for driver's licenses. The law applied equally to state and private actors. It did not regulate the States' sovereign authority to "regulate their own citizens." *Id.*, at 151.

In *Hodel*, 452 U. S., at 289, the federal law, which involved what has been called "cooperative federalism," by no means commandeered the state legislative process. Congress enacted a statute that comprehensively regulated surface coal mining and offered States the choice of "either implement[ing]" the federal program "or else yield[ing] to a federally administered regulatory program." *Ibid.* Thus, the federal law *allowed* but did not *require* the States to implement a federal program. "States [were] not compelled to enforce the [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.*, at 288. If a State did not "wish" to bear the burden of regulation, the "full regulatory burden [would] be borne by the Federal Government." *Ibid.*

Finally, in *FERC* v. *Mississippi*, 456 U. S. 742 (1982), the federal law in question issued no command to a state legislature. Enacted to restrain the consumption of oil and natural gas, the federal law directed state utility regulatory commissions to consider, but not necessarily to adopt, federal " 'rate design' and regulatory standards." *Id.*, at 746. The Court held that this modest requirement did not infringe the States' sovereign powers, but the Court warned that it had "never . . . sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.*, at 761–762. *FERC* was decided well before our decisions in *New York* and *Printz*, and PASPA, unlike the law in *FERC*, does far more than require States to *consider* Con-

gress's preference that the legalization of sports gambling be halted. See *Printz*, 521 U. S., at 929 (distinguishing *FERC*).

In sum, none of the prior decisions on which respondents and the United States rely involved federal laws that commandeered the state legislative process. None concerned laws that directed the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders. Therefore, none of these precedents supports the constitutionality of the PASPA provision at issue here.

V

Respondents and the United States defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides "a rule of decision." *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U. S. 320, 324 (2015). It specifies that federal law is supreme in case of a conflict with state law. Therefore, in order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution "confers upon Congress the power to regulate individuals, not States," *New York*, 505 U. S., at 166, the PASPA provision at issue must be best read as one that regulates private actors.

Our cases have identified three different types of preemption—"conflict," "express," and "field," see *English* v. *General Elec. Co.*, 496 U. S. 72, 78–79 (1990)—but all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

This mechanism is shown most clearly in cases involving "conflict preemption." A recent example is *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U. S. 472 (2013). In that case, a federal law enacted under the Commerce Clause regulated manufacturers of generic drugs, prohibiting them from altering either the composition or labeling approved by the Food and Drug Administration. A State's tort law, however, effectively required a manufacturer to supplement the warnings included in the FDA-approved label. *Id.*, at 480–486. We held that the state law was preempted because it imposed a duty that was inconsistent—*i. e.*, in conflict—with federal law. *Id.*, at 493.

"Express preemption" operates in essentially the same way, but this is often obscured by the language used by Congress in framing preemption provisions. The provision at issue in *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992), is illustrative. The Airline Deregulation Act of 1978 lifted prior federal regulations of airlines, and "[t]o ensure that the States would not undo federal deregulation with regulation of their own," *id.*, at 378, the Act provided that "no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier." 49 U. S. C. App. § 1305(a)(1) (1988 ed.).

This language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased. As we recently explained, "we do not require Congress to employ a particular linguistic formulation when preempting state law." *Coventry Health Care of Mo., Inc.* v. *Nevils*, 581 U. S. 87, 99 (2017). And if we look beyond the phrasing employed in the Airline Deregulation Act's preemption provision, it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities

(*i. e.*, covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.

"Field preemption" operates in the same way. Field preemption occurs when federal law occupies a "field" of regulation "so comprehensively that it has left no room for supplementary state legislation." *R. J. Reynolds Tobacco Co.* v. *Durham County*, 479 U. S. 130, 140 (1986). In describing field preemption, we have sometimes used the same sort of shorthand employed by Congress in express preemption provisions. See, *e. g.*, *Oneok*, *Inc.* v. *Learjet*, *Inc.*, 575 U. S. 373, 377 (2015) ("Congress has forbidden the State to take action in the *field* that the federal statute pre-empts"). But in substance, field preemption does not involve congressional commands to the States. Instead, like all other forms of preemption, it concerns a clash between a constitutional exercise of Congress's legislative power and conflicting state law. See *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372, n. 6 (2000).

The Court's decision in *Arizona* v. *United States*, 567 U. S. 387 (2012), shows how this works. Noting that federal statutes "provide a full set of standards governing alien registration," we concluded that these laws "reflec[t] a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Id.*, at 401. What this means is that the federal registration provisions not only impose federal registration obligations on aliens but also confer a federal right to be free from any other registration requirements.

In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States.

Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this

provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) Nor does it impose any federal restrictions on private actors. If a private citizen or company started a sports gambling operation, either with or without state authorization, § 3702(1) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.

In so holding, we recognize that a closely related provision of PASPA, § 3702(2), *does* restrict private conduct, but that is not the provision challenged by petitioners. In Part VI–B–2, *infra*, we consider whether § 3702(2) is severable from the provision directly at issue in these cases.

VI

Having concluded that § 3702(1) violates the anticommandeering doctrine, we consider two additional questions: first, whether the decision below should be affirmed on an alternative ground and, second, whether our decision regarding the anti-authorization provision dooms the remainder of PASPA.

A

Respondents and the United States argue that, even if we disagree with the Third Circuit's decision regarding the constitutionality of the anti-authorization provision, we should nevertheless affirm based on PASPA's prohibition of state "licens[ing]" of sports gambling. Brief for Respondents 43, n. 10; Brief for United States 34–35. Although New Jersey's 2014 Act does not expressly provide for the licensing of sports gambling operations, respondents and the United

States contend that the law effectively achieves that result because the only entities that it authorizes to engage in that activity, *i. e.*, casinos and racetracks, are already required to be licensed. *Ibid.*

We need not decide whether the 2014 Act violates PASPA's prohibition of state "licens[ing]" because that provision suffers from the same defect as the prohibition of state authorization. It issues a direct order to the state legislature.[29] Just as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain from enacting a law licensing sports gambling.[30]

B

We therefore turn to the question whether, as petitioners maintain, our decision regarding PASPA's prohibition of the authorization and licensing of sports gambling operations dooms the remainder of the Act. In order for other PASPA provisions to fall, it must be "evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987) (internal quotation marks omitted). In conducting that inquiry, we ask whether the law remains "fully operative" without the invalid provisions, *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 509 (2010) (internal quotation marks omitted), but "we cannot rewrite a statute

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[29] Even if the prohibition of state licensing were not itself unconstitutional, we do not think it could be severed from the invalid provision forbidding state authorization. The provision of PASPA giving New Jersey the option of legalizing sports gambling within one year of enactment applied only to casinos operated "pursuant to a comprehensive system of State regulation." § 3704(a)(3)(B). This shows that Congress preferred tightly regulated sports gambling over total deregulation.

[30] The dissent apparently disagrees with our holding that the provisions forbidding state authorization and licensing violate the anticommandeering principle, but it provides no explanation for its position.

and give 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). We will consider each of the provisions at issue separately.

1

Under 28 U. S. C. § 3702(1), States are prohibited from "operat[ing]," "sponsor[ing]," or "promot[ing]" sports gambling schemes. If the provisions prohibiting state authorization and licensing are stricken but the prohibition on state "operat[ion]" is left standing, the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted. At that time, Congress knew that New Jersey was considering the legalization of sports gambling in the privately owned Atlantic City casinos and that other States were thinking about the institution of state-run sports lotteries. PASPA addressed both of these potential developments. It gave New Jersey one year to legalize sports gambling in Atlantic City but otherwise banned the authorization of sports gambling in casinos, and it likewise prohibited the spread of state-run lotteries. If Congress had known that States would be free to authorize sports gambling in privately owned casinos, would it have nevertheless wanted to prevent States from running sports lotteries?

That seems most unlikely. State-run lotteries, which sold tickets costing only a few dollars, were thought more benign than other forms of gambling, and that is why they had been adopted in many States. Casino gambling, on the other hand, was generally regarded as far more dangerous. A gambler at a casino can easily incur heavy losses, and the legalization of privately owned casinos was known to create the threat of infiltration by organized crime, as Nevada's early experience had notoriously shown.[31] To the Congress that adopted PASPA, legalizing sports gambling in privately

[31] See Clary 84–102.

owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards.

Prohibiting the States from engaging in commercial activities that are permitted for private parties would also have been unusual, and it is unclear what might justify such disparate treatment. Respondents suggest that Congress wanted to prevent States from taking steps that the public might interpret as the endorsement of sports gambling, Brief for Respondents 39, but we have never held that the Constitution permits the Federal Government to prevent a state legislature from expressing its views on subjects of public importance. For these reasons, we do not think that the provision barring state operation of sports gambling can be severed.

We reach the same conclusion with respect to the provisions prohibiting state "sponsor[ship]" and "promot[ion]." The line between authorization, licensing, and operation, on the one hand, and sponsorship or promotion, on the other, is too uncertain. It is unlikely that Congress would have wanted to prohibit such an ill-defined category of state conduct.

2

Nor do we think that Congress would have wanted to sever the PASPA provisions that prohibit a private actor from "sponsor[ing]," "operat[ing]," or "promot[ing]" sports gambling schemes "pursuant to" state law. § 3702(2). These provisions were obviously meant to work together with the provisions in § 3702(1) that impose similar restrictions on governmental entities. If Congress had known that the latter provisions would fall, we do not think it would have wanted the former to stand alone.

The present cases illustrate exactly how Congress must have intended § 3702(1) and § 3702(2) to work. If a State attempted to authorize particular private entities to engage in sports gambling, the State could be sued under § 3702(1), and the private entity could be sued at the same time under

§ 3702(2). The two sets of provisions were meant to be deployed in tandem to stop what PASPA aimed to prevent: state legalization of sports gambling. But if, as we now hold, Congress lacks the authority to prohibit a State from legalizing sports gambling, the prohibition of private conduct under § 3702(2) ceases to implement any coherent federal policy.

Under § 3702(2), private conduct violates federal law only if it is permitted by state law. That strange rule is exactly the opposite of the general federal approach to gambling. Under 18 U. S. C. § 1955, operating a gambling business violates federal law only if that conduct is illegal under state or local law. Similarly, § 1953, which criminalizes the interstate transmission of wagering paraphernalia, and § 1084, which outlaws the interstate transmission of information that assists in the placing of a bet on a sporting event, apply only if the underlying gambling is illegal under state law. See also § 1952 (making it illegal to travel in interstate commerce to further a gambling business that is illegal under applicable state law).

These provisions implement a coherent federal policy: They respect the policy choices of the people of each State on the controversial issue of gambling. By contrast, if § 3702(2) is severed from § 3702(1), it implements a perverse policy that undermines whatever policy is favored by the people of a State. If the people of a State support the legalization of sports gambling, federal law would make the activity illegal. But if a State outlaws sports gambling, that activity would be lawful under § 3702(2). We do not think that Congress ever contemplated that such a weird result would come to pass.

PASPA's enforcement scheme reinforces this conclusion. PASPA authorizes civil suits by the Attorney General and sports organizations but does not make sports gambling a federal crime or provide civil penalties for violations. This enforcement scheme is suited for challenging state authori-

zation or licensing or a small number of private operations, but the scheme would break down if a State broadly decriminalized sports gambling. It is revealing that the Congressional Budget Office estimated that PASPA would impose "no cost" on the Federal Government, see S. Rep. No. 102–248, p. 10 (1991), a conclusion that would certainly be incorrect if enforcement required a multiplicity of civil suits and applications to hold illegal bookies and other private parties in contempt.[32]

3

The remaining question that we must decide is whether the provisions of PASPA prohibiting the "advertis[ing]" of sports gambling are severable. See §§ 3702(1)–(2). If these provisions were allowed to stand, federal law would forbid the advertising of an activity that is legal under both federal and state law, and that is something that Congress has rarely done. For example, the advertising of cigarettes is heavily regulated but not totally banned. See Federal Cigarette Labeling and Advertising Act, 79 Stat. 282; Family Smoking Prevention and Tobacco Control Act, §§ 201–204, 123 Stat. 1842–1848.

It is true that at one time federal law prohibited the use of the mail or interstate commerce to distribute advertisements of lotteries that were permitted under state law, but that is no longer the case. See *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 421–423 (1993). In 1975, Congress passed a new statute, codified at 18 U. S. C. § 1307, that explicitly *exempts* print advertisements regarding a lottery lawfully conducted by States, and in *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 176 (1999), we held that the First Amendment protects the right

[32] Of course, one need not rely on the Senate Report for the commonsense proposition that leaving § 3702(2) in place could wildly change the fiscal calculus, "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).

of a radio or television station in a State with a lottery to run such advertisements. In light of these developments, we do not think that Congress would want the advertising provisions to stand if the remainder of PASPA must fall.

For these reasons, we hold that no provision of PASPA is severable from the provision directly at issue in these cases.

* * *

The legalization of sports gambling is a controversial subject. Supporters argue that legalization will produce revenue for the States and critically weaken illegal sports betting operations, which are often run by organized crime. Opponents contend that legalizing sports gambling will hook the young on gambling, encourage people of modest means to squander their savings and earnings, and corrupt professional and college sports.

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA "regulate[s] state governments' regulation" of their citizens, *New York*, 505 U. S., at 166. The Constitution gives Congress no such power.

The judgment of the Third Circuit is reversed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in its entirety. I write separately, however, to express my growing discomfort with our modern severability precedents.

I agree with the Court that the Professional and Amateur Sports Protection Act (PASPA) exceeds Congress' Article I authority to the extent it prohibits New Jersey from "author-

iz[ing]" or "licens[ing]" sports gambling, 28 U. S. C. § 3702(1). Unlike the dissent, I do "doubt" that Congress can prohibit sports gambling that does not cross state lines. *Post*, at 494 (opinion of GINSBURG, J.); see *License Tax Cases*, 5 Wall. 462, 470–471 (1867) (holding that Congress has "no power" to regulate "the internal commerce or domestic trade of the States," including the intrastate sale of lottery tickets); *United States* v. *Lopez*, 514 U. S. 549, 587–601 (1995) (THOMAS, J., concurring) (documenting why the Commerce Clause does not permit Congress to regulate purely local activities that have a substantial effect on interstate commerce). But even assuming the Commerce Clause allows Congress to prohibit intrastate sports gambling "directly," it "does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U. S. 144, 166 (1992). The Necessary and Proper Clause does not give Congress this power either, as a law is not "proper" if it "subvert[s] basic principles of federalism and dual sovereignty." *Gonzales* v. *Raich*, 545 U. S. 1, 65 (2005) (THOMAS, J., dissenting). Commandeering the States, as PASPA does, subverts those principles. See *Printz* v. *United States*, 521 U. S. 898, 923–924 (1997).

Because PASPA is at least partially unconstitutional, our precedents instruct us to determine "which portions of the . . . statute we must sever and excise." *United States* v. *Booker*, 543 U. S. 220, 258 (2005) (emphasis deleted). The Court must make this severability determination by asking a counterfactual question: "'Would Congress still have passed' the valid sections 'had it known' about the constitutional invalidity of the other portions of the statute?" *Id.*, at 246 (quoting *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 767 (1996) (plurality opinion)). I join the Court's opinion because it gives the best answer it can to this question, and no party has asked us to apply a different test. But in a future case, we should take another look at our severability precedents.

Those precedents appear to be in tension with traditional limits on judicial authority. Early American courts did not have a severability doctrine. See Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 769 (2010) (Walsh). They recognized that the judicial power is, fundamentally, the power to render judgments in individual cases. See *id.*, at 755; Baude, The Judgment Power, 96 Geo. L. J. 1807, 1815 (2008). Judicial review was a byproduct of that process. See generally P. Hamburger, Law and Judicial Duty (2008); Prakash & Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887 (2003). As Chief Justice Marshall famously explained, "[i]t is emphatically the province and duty of the judicial department to say what the law is" because "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). If a plaintiff relies on a statute but a defendant argues that the statute conflicts with the Constitution, then courts must resolve that dispute and, if they agree with the defendant, follow the higher law of the Constitution. See *id.*, at 177–178; The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton). Thus, when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them. See Walsh 755–766. "[T]here was no 'next step' in which courts inquired into whether the legislature would have preferred no law at all to the constitutional remainder." *Id.*, at 777.

Despite this historical practice, the Court's modern cases treat the severability doctrine as a "remedy" for constitutional violations and ask which provisions of the statute must be "excised." See, *e. g.*, *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006); *Booker*, *supra*, at 245; *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 686 (1987). This language cannot be taken literally. Invalidating a statute is not a "remedy," like an injunction, a declara-

tion, or damages. See Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56, 82–88 (2014) (Harrison). Remedies "operate with respect to specific parties," not "on legal rules in the abstract." *Id.*, at 85; see also *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923) (explaining that the power "to review and annul acts of Congress" is "little more than the negative power to disregard an unconstitutional enactment" and that "the court enjoins . . . not the execution of the statute, but the acts of the official"). And courts do not have the power to "excise" or "strike down" statutes. See 39 Op. Atty. Gen. 22, 22–23 (1937) ("The decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute"); Harrison 82 ("[C]ourts do not make [nonseverable] provisions inoperative . . . . Invalidation by courts is a figure of speech"); Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018) "The federal courts have no authority to erase a duly enacted law from the statute books").

Because courts cannot take a blue pencil to statutes, the severability doctrine must be an exercise in statutory interpretation. In other words, the severability doctrine has courts decide how a statute operates once they conclude that part of it cannot be constitutionally enforced. See Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1333–1334 (2000); Harrison 88. But even under this view, the severability doctrine is still dubious for at least two reasons.

First, the severability doctrine does not follow basic principles of statutory interpretation. Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make "a nebulous inquiry into hypothetical congressional intent." *Booker*, *supra*, at 320, n. 7 (THOMAS, J., dissenting in part). It requires judges to determine what Congress would have intended had it known

that part of its statute was unconstitutional.* But it seems unlikely that the enacting Congress had any intent on this question; Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional. See Walsh 740–741; Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 98 (1937) (Stern). Without any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be. See Walsh 752–753; Stern 112–113. More fundamentally, even if courts could discern Congress' hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment. See *Wyeth* v. *Levine*, 555 U. S. 555, 586–588 (2009) (THOMAS, J., concurring in judgment). Because we have " 'a Government of laws, not of men,' " we are governed by "legislated text," not "legislators' intentions"—and especially not legislators' *hypothetical* intentions. *Zuni Public School Dist. No. 89* v. *Department of Education*, 550 U. S. 81, 119 (2007) (Scalia, J., dissenting). Yet hypothetical intent is exactly what the severability doctrine turns on, at least when Congress has not expressed its fallback position in the text.

Second, the severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions. See Stern 77; Lea, Situational Severability, 103 Va. L. Rev. 735, 788–803 (2017) (Lea). If one provision

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*The first court to engage in this counterfactual exploration of legislative intent was the Massachusetts Supreme Judicial Court in *Warren* v. *Mayor and Aldermen of Charlestown*, 68 Mass. 84, 99 (1854). This Court adopted the *Warren* formulation in the late 19th century, see *Allen* v. *Louisiana*, 103 U. S. 80, 84 (1881), an era when statutory interpretation privileged Congress' unexpressed "intent" over the enacted text, see, *e. g.*, *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 472 (1892); *United States* v. *Moore*, 95 U. S. 760, 763 (1878).

of a statute is deemed unconstitutional, the severability doctrine places every other provision at risk of being declared nonseverable and thus inoperative; our precedents do not ask whether the plaintiff has standing to challenge those other provisions. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 696–697 (2012) (joint dissent) (citing, as an example, *Williams* v. *Standard Oil Co. of La.*, 278 U. S. 235, 242–244 (1929)). True, the plaintiff had standing to challenge the unconstitutional part of the statute. But the severability doctrine comes into play only *after* the court has resolved that issue—typically the only live controversy between the parties. In every other context, a plaintiff must demonstrate standing for each part of the statute that he wants to challenge. See Lea 789, 751, and nn. 79–80 (citing, as examples, *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 733–734 (2008); *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 346, 350–353 (2006)). The severability doctrine is thus an unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 101 (1998).

In sum, our modern severability precedents are in tension with longstanding limits on the judicial power. And, though no party in these cases has asked us to reconsider these precedents, at some point, it behooves us to do so.

JUSTICE BREYER, concurring in part and dissenting in part.

I agree with JUSTICE GINSBURG that 28 U. S. C. § 3702(2) is severable from the challenged portion of § 3702(1). The challenged part of subsection (1) prohibits a State from "author[izing]" or "licens[ing]" sports gambling schemes; subsection (2) prohibits individuals from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports gambling schemes "pursuant to the law . . . of a governmental entity." The first says that a State cannot authorize sports gambling

schemes under state law; the second says that (just in case a State finds a way to do so) sports gambling schemes that a State authorizes are unlawful under federal law regardless. As JUSTICE GINSBURG makes clear, the latter section can live comfortably on its own without the first.

Why would Congress enact both these provisions? The obvious answer is that Congress wanted to "keep sports gambling from spreading." S. Rep. No. 102–248, pp. 4–6 (1991). It feared that widespread sports gambling would "threate[n] to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling." *Id.*, at 4. And it may have preferred that state authorities enforce state law forbidding sports gambling than require federal authorities to bring civil suits to enforce federal law forbidding about the same thing. Alternatively, Congress might have seen subsection (2) as a backup, called into play if subsection (1)'s requirements, directed to the States, turned out to be unconstitutional—which, of course, is just what has happened. Neither of these objectives is unreasonable.

So read, the two subsections both forbid sports gambling but § 3702(2) applies federal policy directly to individuals while the challenged part of § 3702(1) forces the States to prohibit sports gambling schemes (thereby shifting the burden of enforcing federal regulatory policy from the Federal Government to state governments). Section 3702(2), addressed to individuals, standing alone seeks to achieve Congress' objective of halting the spread of sports gambling schemes by "regulat[ing] interstate commerce directly." *New York* v. *United States*, 505 U. S. 144, 166 (1992). But the challenged part of subsection (1) seeks the same end indirectly by "regulat[ing] state governments' regulation of interstate commerce." *Ibid.* And it does so by addressing the States (not individuals) directly and telling state legislatures what laws they must (or cannot) enact. Under our precedent, the first provision (directly and unconditionally

telling States what laws they must enact) is unconstitutional, but the second (directly telling individuals what they cannot do) is not. See *ibid.*

As so interpreted, the statutes would make New Jersey's victory here mostly Pyrrhic. But that is because the only problem with the challenged part of § 3702(1) lies in its means, not its end. Congress has the constitutional power to prohibit sports gambling schemes, and no party here argues that there is any constitutional defect in § 3702(2)'s alternative means of doing so.

I consequently join JUSTICE GINSBURG's dissenting opinion in part, and all but Part VI–B of the Court's opinion.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER joins in part, dissenting.

The petition for certiorari filed by the Governor of New Jersey invited the Court to consider a sole question: "Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U. S. 144 (1992)?" Pet. for Cert. in No. 16–476, p. i.

Assuming, *arguendo*, a "yes" answer to that question, there would be no cause to deploy a wrecking ball destroying the Professional and Amateur Sports Protection Act (PASPA) in its entirety, as the Court does today. Leaving out the alleged infirmity, *i. e.*, "commandeering" state regulatory action by prohibiting the States from "authoriz[ing]" and "licens[ing]" sports-gambling schemes, 28 U. S. C. § 3702(1), two federal edicts should remain intact. First, PASPA bans States themselves (or their agencies) from "sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]" sports-gambling schemes. *Ibid.* Second, PASPA stops private parties from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports-gambling schemes if state law author-

izes them to do so. § 3702(2).[1] Nothing in these § 3702(1) and § 3702(2) prohibitions commands States to do anything other than desist from conduct federal law proscribes.[2] Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis, authority Congress exercised in PASPA. See *Gonzales* v. *Raich*, 545 U. S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

Surely, the accountability concern that gave birth to the anticommandeering doctrine is not implicated in any federal proscription other than the bans on States' authorizing and licensing sports-gambling schemes. The concern triggering the doctrine arises only "where the Federal Government compels States to regulate" or to enforce federal law, thereby creating the appearance that state officials are responsible for policies Congress forced them to enact. *New York* v. *United States*, 505 U. S. 144, 168 (1992). If States themselves and private parties may not operate sports-gambling schemes, responsibility for the proscriptions is hardly blurred. It cannot be maintained credibly that state officials have anything to do with the restraints. Unmistakably, the foreclosure of sports-gambling schemes, whether state run or privately operated, is chargeable to congressional, not state, legislative action.

When a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a demolition operation: It "limit[s] the solution [to] severing any problematic

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[1] PASPA was not designed to eliminate any and all sports gambling. The statute targets sports-gambling *schemes*, *i. e.*, organized markets for sports gambling, whether operated by a State or by a third party under state authorization.

[2] In lieu of a flat ban, PASPA prohibits third parties from operating sports-gambling schemes only if state law permits them to do so. If a state ban is in place, of course, there is no need for a federal proscription.

portions while leaving the remainder intact." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 508 (2010) (internal quotation marks omitted). The relevant question is whether the Legislature would have wanted unproblematic aspects of the legislation to survive or would want them to fall along with the infirmity.[3] As the Court stated in *New York*, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, . . . the invalid part may be dropped if what is left is fully operative as a law." 505 U. S., at 186 (internal quotation marks omitted). Here, it is scarcely arguable that Congress "would have preferred no statute at all," *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. 25, 37 (2014), over one that simply stops States and private parties alike from operating sports-gambling schemes.

The Court wields an ax to cut down § 3702 instead of using a scalpel to trim the statute. It does so apparently in the mistaken assumption that private sports-gambling schemes would become lawful in the wake of its decision. In particular, the Court holds that the prohibition on state "operat[ion]" of sports-gambling schemes cannot survive, because it does not believe Congress would have "wanted to prevent States from running sports lotteries" "had [it] known that States would be free to authorize sports gambling in privately owned casinos." *Ante*, at 482. In so reasoning, the Court shutters § 3702(2), under which private parties are prohibited from operating sports-gambling schemes *precisely when state law authorizes them to do so*.[4]

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[3] Notably, in the two decisions marking out and applying the anticommandeering doctrine to invalidate federal law, the Court invalidated only the offending provision, not the entire statute. *New York* v. *United States*, 505 U. S. 144, 186–187 (1992); *Printz* v. *United States*, 521 U. S. 898, 935 (1997).

[4] As earlier indicated, see *supra*, at 494, direct federal regulation of sports-gambling schemes nationwide, including private-party schemes, falls within Congress' power to regulate activities having a substantial

This plain error pervasively infects the Court's severability analysis. The Court strikes Congress' ban on state "sponsor[ship]" and "promot[ion]" of sports-gambling schemes because it has (mistakenly) struck Congress' prohibition on state "operat[ion]" of such schemes. See *ante*, at 483. It strikes Congress' prohibitions on private "sponsor[ship]," "operat[ion]," and "promot[ion]" of sports-gambling schemes because it has (mistakenly) struck those same prohibitions on the States. See *ibid.* And it strikes Congress' prohibition on "advertis[ing]" sports-gambling schemes because it has struck everything else. See *ante*, at 485–486.

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In PASPA, shorn of the prohibition on modifying or repealing state law, Congress permissibly exercised its authority to regulate commerce by instructing States and private parties to refrain from operating sports-gambling schemes. On no rational ground can it be concluded that Congress would have preferred no statute at all if it could not prohibit States from authorizing or licensing such schemes. Deleting the alleged "commandeering" directions would free the statute to accomplish just what Congress legitimately sought to achieve: stopping sports-gambling regimes while making it clear that the stoppage is attributable to federal, not state, action. I therefore dissent from the Court's determination to destroy PASPA rather than salvage the statute.

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effect on interstate commerce. See *Gonzales* v. *Raich*, 545 U. S. 1, 17 (2005). Indeed, according to the Court, direct regulation is precisely what the anticommandeering doctrine requires. *Ante*, at 470–474.

Syllabus

EPIC SYSTEMS CORP. *v.* LEWIS

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

No. 16–285. Argued October 2, 2017—Decided May 21, 2018*

In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held: Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise. Pp. 505–525.

(a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9 U. S. C. §§2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act's saving clause—which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," §2—recognizes only "'generally applicable contract defenses, such as fraud, duress, or uncon-

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*Together with No. 16–300, *Ernst & Young LLP et al.* v. *Morris et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 16–307, *National Labor Relations Board* v. *Murphy Oil USA, Inc., et al.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

scionability,'" *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 339, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," *id.*, at 344. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. Pp. 505–510.

(b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive "to give effect to both." *Morton* v. *Mancari*, 417 U. S. 535, 551. To prevail, the employees must show a "'clear and manifest'" congressional intention to displace one Act with another. *Ibid.* There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" preexisting law before suspending the law's normal operations in a later statute. *United States* v. *Fausto*, 484 U. S. 439, 452, 453.

The employees ask the Court to infer that class and collective actions are "concerted activities" protected by § 7 of the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. § 157. But § 7 focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in § 7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term "other concerted activities for the purpose of . . . other mutual aid or protection" appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i. e.*, things employees do for themselves in the course of exercising their right to free association in the workplace.

The NLRA's structure points to the same conclusion. After speaking of various "concerted activities" in § 7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., *e. g.*, 29 U. S. C. §§ 216(b), 626,

or to override the Arbitration Act, see, *e. g.*, 15 U. S. C. § 1226(a)(2), but Congress has done nothing like that in the NLRA.

The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32. The employees' theory also runs afoul of the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468, as it would allow a catchall term in the NLRA to dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings—matters that are usually left to, *e. g.*, the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. Nor does the employees' invocation of the Norris-LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. § 102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, *e. g.*, *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228; and its § 7 cases have generally involved efforts related to organizing and collective bargaining in the workplace, not the treatment of class or collective action procedures in court or arbitration, see, *e. g.*, *NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9.

Finally, the employees cannot expect deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, because *Chevron*'s essential premises are missing. The Board sought not to interpret just the NLRA, "which it administers," *id.*, at 842, but to interpret that statute in a way that limits the work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the NLRA's meaning, articulating no single posi-

tion on which the Executive Branch might be held "accountable to the people." *Id.*, at 865. And after "employing traditional tools of statutory construction," *id.*, at 843, n. 9, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. Pp. 510–521.

No. 16–285, 823 F. 3d 1147, and No. 16–300, 834 F. 3d 975, reversed and remanded; No. 16–307, 808 F. 3d 1013, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 525. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 526.

Paul D. Clement argued the cause for petitioners in Nos. 16–285 and 16–300 and for respondent Murphy Oil USA, Inc., in No. 16–307. With him on the brief for petitioner in No. 16–285 and for respondent Murphy Oil USA, Inc., in No. 16–307 were *Neal Kumar Katyal*, *Frederick Liu*, *Colleen E. Roh Sinzdak*, *Daniel J. T. Schuker*, *Thomas P. Schmidt*, *Noah A. Finkel*, *Andrew Scroggins*, *Jeffrey A. Schwartz*, and *Daniel D. Schudroff*. With him on the briefs for petitioners in No. 16–300 were *Kannon K. Shanmugam*, *Allison Jones Rushing*, *Rex S. Heinke*, *Pratik A. Shah*, and *Daniel L. Nash*.

Acting Solicitor General Wall argued the cause for the United States as *amicus curiae* urging reversal in Nos. 16–285 and 16–300 and affirmance in No. 16–307. With him on the brief were *Deputy Solicitor General Stewart* and *Allon Kedem*.

Richard F. Griffin, Jr., argued the cause for petitioner acting as respondent in No. 16–307. With him on the brief were *Jennifer Abruzzo*, *John H. Ferguson*, *Linda Dreeben*, *Meredith Jason*, *Kira Dellinger Vol*, and *Jeffrey W. Burritt*. *Harold Craig Becker*, *Richard P. Rouco*, and *Glen M. Connor* filed a brief for respondent Sheila Hobson in support of petitioner in No. 16–307.

Daniel R. Ortiz argued the cause for respondents in Nos. 16–285 and 16–300. With him on the brief in No. 16–

285 were *Toby J. Heytens*, *David C. Zoeller*, *William E. Parsons*, *Caitlin M. Madden*, and *Adam Hansen*. *Max Folkenflik*, *Margaret McGerity*, *Ross Libenson*, and *H. Tim Hoffman* filed a brief for respondents in No. 16–300.†

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†Briefs of *amici curiae* urging reversal in Nos. 16–285 and 16–300 and affirmance in No. 16–307 were filed for the American Staffing Association et al. by *John B. Lewis*, *Dustin M. Dow*, *Garrett R. Ferencz*, *Melissa A. Siebert*, *Bonnie K. Del Gobbo*, *Angelo I. Amador*, *Kevin W. Shaughnessy*, and *Joyce Ackerbaum Cox*; for the Atlantic Legal Foundation by *Martin S. Kaufman*; for Bristol Farms by *Steven B. Katz*; for the Business Roundtable by *William M. Jay* and *Andrew Kim*; for the Chamber of Commerce of the United States of America by *Andrew J. Pincus*, *Evan M. Tager*, *Archis A. Parasharami*, *Matthew A. Waring*, *Kate Comerford Todd*, and *Warren Postman*; for the Council on Labor Law Equality et al. by *Christopher C. Murray*, *Ron Chapman, Jr.*, and *Brian E. Hayes*; for DRI–The Voice of the Defense Bar by *David M. Axelrad*, *Felix Shafir*, *John F. Querio*, and *John E. Cuttino*; for the Employers Group by *Beth Heifetz* and *Anthony J. Dick*; for the HR Policy Association by *Sam S. Shaulson*, *Allyson N. Ho*, and *John C. Sullivan*; for the International Association of Defense Counsel by *Mary-Christine Sungaila*; for Law Professors by *Thomas R. McCarthy* and *J. Michael Connolly*; for the Mortgage Bankers Association et al. by *Stephen A. Fogdall* and *Germán A. Salazar*; for the National Association of Manufacturers et al. by *Edward F. Berbarie*, *Robert F. Friedman*, *Sean M. McCrory*, *Henry D. Lederman*, *Michael J. Lotito*, and *Linda E. Kelly*; for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*; for the Retail Litigation Center, Inc., by *Adam G. Unikowsky* and *Deborah R. White*; and for the Washington Legal Foundation by *Richard A. Samp*.

Briefs of *amici curiae* urging reversal in No. 16–285 were filed for the Equal Employment Advisory Council by *Rae T. Vann*; and for the Pacific Legal Foundation by *Deborah J. La Fetra*.

Briefs of *amici curiae* urging affirmance in Nos. 16–285 and 16–300 and reversal in No. 16–307 were filed for the State of Maryland et al. by *Brian E. Frosh*, Attorney General of Maryland, *Steven M. Sullivan*, Solicitor General, and *Patrick B. Hughes*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsyl-

JUSTICE GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral

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vania, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the American Association for Justice by *Deepak Gupta*, *Matthew Wessler*, and *Jeffrey R. White*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianna J. Gorod*, and *Brian R. Frazelle*; for Labor Law Professors by *David C. Frederick*, *Jeremy S. B. Newman*, and *Matthew W. Finkin*, *pro se*; for the Main Street Alliance et al. by *Samuel R. Bagenstos* and *Kate Andrias*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *Sherrilyn Ifill*, *Janai Nelson*, *Samuel Spital*, *Raymond Audain*, *Jocelyn D. Larkin*, *Lindsay Nako*, *Coty Montag*, *Joseph M. Sellers*, and *Christine Webber*; for the National Academy of Arbitrators by *Mr. Finkin, pro se*; for the New York Taxi Workers Alliance by *Jeanne Mirer*; for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve*; for Ten International Labor Unions et al. by *Michael Rubin*, *Nicole B. Berner*, *Claire Prestel*, *Judith Rivlin*, *David J. Strom*, *Mark Schneider*, *Bradley T. Raymond*, *Alice O'Brien*, *Catherine K. Ruckelshaus*, *Nicholas W. Clark*, *Richard J. Brean*, and *Cliff Palefsky*; and for Susan Fowler by *Chris Baker*.

forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP* v. *Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by . . . a court" in the relevant jurisdiction. App. in No. 16–300, p. 43. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id.*, at 44.

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U. S. C. §216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. 834 F. 3d 975 (2016). The Ninth Circuit recognized that the Arbitration Act generally

requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause," see 9 U. S. C. § 2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the "concerted activit[y]," 29 U. S. C. § 157, of pursuing claims as a class or collective action.

Judge Ikuta dissented. In her view, the Arbitration Act protected the arbitration agreement from judicial interference and nothing in the Act's saving clause suggested otherwise. Neither, she concluded, did the NLRA demand a different result. Rather, that statute focuses on protecting unionization and collective bargaining in the workplace, not on guaranteeing class or collective action procedures in disputes before judges or arbitrators.

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms. See, *e. g.*, *Owen* v. *Bristol Care, Inc.*, 702 F. 3d 1050 (CA8 2013); *Sutherland* v. *Ernst & Young LLP*, 726 F. 3d 290 (CA2 2013); *D. R. Horton, Inc.* v. *NLRB*, 737 F. 3d 344 (CA5 2013); *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 327 P. 3d 129 (2014); *Tallman* v. *Eighth Jud. Dist. Court*, 131 Nev. 71, 359 P. 3d 113 (2015); 808 F. 3d 1013 (CA5 2015) (case below in No. 16–307).

The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers "can benefit from the relative simplicity and informality of resolving claims before arbitrators," the general counsel opined that the validity of such agreements "does not involve consideration of the policies of the National Labor Relations Act." Memorandum GC 10–06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D. R. Horton, Inc.*, 357 N. L. R. B. 2277. Initially, this agency decision received a cool reception in court. See *D. R. Horton*, 737 F. 3d, at 355–362. In the last two years, though, some circuits have either agreed with the Board's conclusion or thought themselves obliged to defer to it under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See 823 F. 3d 1147 (CA7 2016) (case below in No. 16–285); 834 F. 3d 975 (case below in No. 16–300); *NLRB* v. *Alternative Entertainment, Inc.*, 858 F. 3d 393 (CA6 2017). More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law's meaning. We granted certiorari to clear the confusion. 580 U. S. 1089 (2017).

II

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 510, n. 4 (1974). But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved. *Id.*, at 511. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U. S. C. § 2. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memo-*

rial Hospital v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983) (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967)); see *id.*, at 404 (discussing "the plain meaning of the statute" and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See §3 (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); §4 (providing for "an order directing that . . . arbitration proceed in the manner provided for in such agreement"). Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 233 (2013) (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011); *Italian Colors*, *supra*; *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. 47 (2015). You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all

the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." § 2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law . . . for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. See 834 F. 3d, at 991–992, 997 (Ikuta, J., dissenting). Put to the side the question of what it takes to qualify as a ground for "revocation" of a contract. See *Concepcion*, *supra*, at 352–355 (THOMAS, J., concurring); *post*, at 525–526 (THOMAS, J., concurring). Put to the side for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. 246, 251 (2017). The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion*, 563 U. S., at 339. At the same time, the clause offers no refuge for "defenses that apply only to arbitration

or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." *Id.*, at 344; see *Kindred Nursing*, *supra*, at 252.

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. 563 U. S., at 338, 341. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This "'fundamental'" change to the traditional arbitration process, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*, at 347, 348. Not least, *Concepcion* noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class mem-

bers should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. *Ibid.* All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid.* In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. *Id.*, at 351. But *Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. *Id.*, at 344–351; see also *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 684–687 (2010). Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U. S., at 342 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

The employees' efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepion*'s rationale and rule. Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a

different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

III

But that's not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow. *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 533 (1995). The intention must be "'clear and manifest.'" *Morton*, *supra*, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" pre-existing law when it wishes to suspend its normal operations in a later statute. *United States* v. *Fausto*, 484 U. S. 439, 452, 453 (1988).

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

> "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. § 157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 256–260 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like

that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. See Rule 23, 28 U. S. C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069; *Concepcion*, 563 U. S., at 349; see also *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701 (1979) (noting that the "usual rule" then was litigation "conducted by and on behalf of individual named parties only"). And while some forms of group litigation existed even in 1935, see 823 F. 3d, at 1154, Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term "other concerted activities for the purpose of . . . other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively." 29 U. S. C. § 157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 115 (2001) (discussing *ejusdem generis* canon); *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. 109, 121 (2018). All of which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." *Alternative Entertainment*, 858 F. 3d, at 414–415 (Sutton, J., concurring in part and dissenting in part) (empha-

sis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. After speaking of various "concerted activities" in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for the recognition of exclusive bargaining representatives, 29 U. S. C. § 159, explains employees' and employers' obligation to bargain collectively, § 158(d), and conscribes certain labor organization practices, §§ 158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, § 158(b)(7), and strikes, § 163. It even sets rules for adjudicatory proceedings under the NLRA itself. §§ 160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute. *E. g.*, 29 U. S. C. §§216(b), 626; 42 U. S. C. §§2000e–5(b), (f)(3)–(5). Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, "[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if" certain conditions are met, 15 U. S. C. §1226(a)(2); or that "[n]o predispute arbitration agreement shall be valid or enforceable" in other circumstances, 7 U. S. C. §26(n)(2); 12 U. S. C. §5567(d)(2); or that requiring a party to arbitrate is "unlawful" in other circumstances yet, 10 U. S. C. §987(e)(3). The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn't discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, "on the same terms as [they are] made available to everyone else." Brief for Respondent in No. 16–285, p. 53, n. 10. But of course the NLRA doesn't say even that much. And, besides, if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees' underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of "themselves and other

employees similarly situated," 29 U. S. C. §216(b), and it's precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32 (1991) (discussing Age Discrimination in Employment Act). In fact, it turns out that "[e]very circuit to consider the question" has held that the FLSA allows agreements for individualized arbitration. *Alternative Entertainment*, 858 F. 3d, at 413 (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act). It's a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

Perhaps worse still, the employees' theory runs afoul of the usual rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. It's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws,

flattens the parties' contracted-for dispute resolution procedures, and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.

Nor does it help to fold yet another statute into the mix. At points, the employees suggest that the Norris-LaGuardia Act, a precursor of the NLRA, also renders their arbitration agreements unenforceable. But the Norris-LaGuardia Act adds nothing here. It declares "[un]enforceable" contracts that conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §§ 102, 103. That is the same policy the NLRA advances and, as we've seen, it does not conflict with Congress's statutory directions favoring arbitration. See also *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970) (holding that the Norris-LaGuardia Act's anti-injunction provisions do not bar enforcement of arbitration agreements).

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. *Italian Colors*, 570 U. S. 228; *Gilmer*, 500 U. S. 20; *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95 (2012); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989) (overruling *Wilko* v. *Swan*, 346 U. S. 427 (1953)); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987). Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes " 'individual attempts at conciliation' " through arbitration. *Gilmer*, *supra*,

at 32. And we've stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. *CompuCredit*, *supra*, at 103–104; *McMahon*, *supra*, at 227; *Italian Colors*, *supra*, at 234. Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors*, this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act (just like the NLRA) made "no mention of class actions" and was adopted before Rule 23 introduced its exception to the "usual rule" of "individual" dispute resolution. 570 U. S., at 234 (internal quotation marks omitted). In *Gilmer*, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though" the Age Discrimination in Employment Act "expressly permitted collective legal actions." *Italian Colors*, *supra*, at 237 (citing *Gilmer*, *supra*, at 32). And in *CompuCredit*, this Court refused to find a conflict even though the Credit Repair Organizations Act expressly provided a "right to sue," "repeated[ly]" used the words "action" and "court" and "class action," and even declared "[a]ny waiver" of the rights it provided to be "void." 565 U. S., at 99–100 (internal quotation marks omitted). If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court's cases interpreting Section 7 itself. But, as it turns out, this Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, *e. g.*, *NLRB* v. *Washington Aluminum Co.*,

370 U. S. 9 (1962) (walkout to protest workplace conditions); *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972) (resignation from union and refusal to strike); *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251 (1975) (request for union representation at disciplinary interview). Neither do the two cases the employees cite prove otherwise. In *Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 558 (1978), we simply addressed the question whether a union's distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was "undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations," all part of the union's "'continuing organizational efforts.'" *Id.*, at 575, and n. 24. In *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 831–832 (1984), we held only that an employee's assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining "process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that "it has been held" by other courts and the Board "that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." 437 U. S., at 565–566; see also Brief for National Labor Relations Board in No. 16–307, p. 15 (citing similar Board decisions). But even on its own terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in

litigation or arbitration. Instead this passage at most suggests only that "resort to administrative and judicial forums" isn't "entirely unprotected." *Eastex*, 437 U. S., at 566. Indeed, the Court proceeded to explain that it did not intend to "address . . . the question of what may constitute 'concerted' activities in this [litigation] context." *Ibid.*, n. 15. So even the employees' dicta, when viewed fairly and fully, doesn't suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that Section 7 guarantees a right to class or collective action procedures. As we've seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See *D. R. Horton*, 357 N. L. R. B. 2277; 823 F. 3d 1147 (case below in No. 16–285).

With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn't see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency's interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS Institute Inc.* v. *Iancu*, *ante*, at 369. But even under *Chevron*'s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation to an agency to interpret a "statute which it administers." 467 U. S., at 841, 842. Here, though, the Board hasn't just

sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659, 685–686 (1975). An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'bootstrap[ping] itself into an area in which it has no jurisdiction.'" *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 650 (1990). All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. See *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 144 (2002) (noting that this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." 467 U. S., at 865. But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.

See Hemel & Nielson, *Chevron* Step One-and-a-Half, 84 U. Chi. L. Rev. 757, 808 (2017) ("If the theory undergirding *Chevron* is that voters should be the judges of the executive branch's policy choices, then presumably the executive branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit)"). In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that deference is not due unless a "court, employing traditional tools of statutory construction," is left with an unresolved ambiguity. 467 U. S., at 843, n. 9. And that too is missing: The canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, "*Chevron* leaves the stage." *Alternative Entertainment*, 858 F. 3d, at 417 (opinion of Sutton, J.).

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. See *Lochner* v. *New York*, 198 U. S. 45 (1905). The dissent even suggests we have resurrected the long-dead "yellow dog" contract. *Post*, at 527–541, 553 (opinion of GINSBURG, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, American Constitutional Law 435 (1978) ("'*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding").

Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." *Post*, at 532. Those rights stand every bit as strong today as they did yesterday. And rather than revive "yellow dog" contracts against union organizing

that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of *Lochner*, it turns around and criticizes the Court for trying *too hard* to abide the Arbitration Act's "'liberal federal policy favoring arbitration agreements,'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002), saying we "'ski'" too far down the "'slippery slope'" of this Court's arbitration precedent, *post,* at 547. But the dissent's real complaint lies with the mountain of precedent itself. The dissent spends page after page relitigating our Arbitration Act precedents, rehashing arguments this Court has heard and rejected many times in many cases that no party has asked us to revisit. Compare *post,* at 542–547, 549 (criticizing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985), *Gilmer*, 500 U. S. 20, *Circuit City*, 532 U. S. 105, *Concepcion*, 563 U. S. 333, *Italian Colors*, 570 U. S. 228, and *CompuCredit*, 565 U. S. 95), with *Mitsubishi*, *supra,* at 645–650 (Stevens, J., dissenting), *Gilmer*, *supra,* at 36, 39–43 (Stevens, J., dissenting), *Circuit City*, *supra*, at 124–129 (Stevens, J., dissenting), *Concepcion*, *supra*, at 357–367 (BREYER, J., dissenting), *Italian Colors*, *supra,* at 240–253 (KAGAN, J., dissenting), and *CompuCredit*, *supra*, at 116–117 (GINSBURG, J., dissenting).

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. Our precedent clearly teaches that a contract defense "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the Arbitration Act and its saving clause. *Concepcion*, *supra*, at 336 (opinion of the Court). And that, of

course, is exactly what the employees' proffered defense seeks to do.

Nor is the dissent's reading of the NLRA any more available to us than its reading of the Arbitration Act. The dissent imposes a vast construction on Section 7's language. *Post*, at 533. But a statute's meaning does not always "turn solely" on the broadest imaginable "definitions of its component words." *Yates* v. *United States*, 574 U. S. 528, 537 (2015) (plurality opinion). Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. *Post*, at 528–530; see also *post*, at 542–544. But legislative history is not the law. "It is the business of Congress to sum up its own debates in its legislation," and once it enacts a statute "'[w]e do not inquire what the legislature meant; we ask only what the statute means.'" *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384, 396, 397 (1951) (Jackson, J., concurring) (quoting Justice Holmes). Besides, when it comes to the legislative history here, it seems Congress "did not discuss the right to file class or consolidated claims against employers." *D. R. Horton*, 737 F. 3d, at 361. So the dissent seeks instead to divine messages from congressional commentary directed to different questions altogether—a project that threatens to "substitute [the Court] for the Congress." *Schwegmann*, *supra*, at 396.

Nor do the problems end there. The dissent proceeds to argue that its expansive reading of the NLRA conflicts with and should prevail over the Arbitration Act. The NLRA leaves the Arbitration Act without force, the dissent says, because it provides the more "pinpointed" direction. *Post*, at 549. Even taken on its own terms, though, this argument quickly faces trouble. The dissent says the NLRA is the more specific provision because it supposedly "speaks directly to group action by employees," while the Arbitration

Act doesn't speak to such actions. *Ibid.* But the question before us is whether courts must enforce particular arbitration agreements according to their terms. And it's the Arbitration Act that speaks directly to the enforceability of arbitration agreements, while the NLRA doesn't mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction. Of course, there is no need to make that call because, as our precedents demand, we have sought and found a persuasive interpretation that gives effect to all of Congress's work, not just the parts we might prefer.

Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. *Post*, at 550–553. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. 29 U. S. C. § 216(b); *Gilmer*, *supra*, at 32. While the dissent is no doubt right that class actions can enhance enforcement by "spread[ing] the costs of litigation," *post*, at 533, it's also well known that they can unfairly "plac[e] pressure on the defendant to settle even unmeritorious claims," *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 445, n. 3 (2010) (GINSBURG, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agreements it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017) (cited *post*, at 551,

n. 15); Pub. L. 115–74, 131 Stat. 1243. This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments in *Epic*, No. 16–285, and *Ernst & Young*, No. 16–300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16–307, is affirmed.

So ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to add that the employees also cannot prevail under the plain meaning of the Federal Arbitration Act. The Act declares arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. As I have previously explained, grounds for revocation of a contract are those that concern "'the formation of the arbitration agreement.'" *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 239 (2013) (concurring opinion) (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 353 (2011) (THOMAS, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal. But illegality is

a public-policy defense. See Restatement (Second) of Contracts §§178–179 (1979); *McMullen* v. *Hoffman*, 174 U. S. 639, 669–670 (1899). Because "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made," the saving clause does not apply here. *Concepcion*, *supra*, at 357. For this reason, and the reasons in the Court's opinion, the employees' arbitration agreements must be enforced according to their terms.

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

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 *et seq.*, and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers, 2012 Mich. St. L. Rev. 1103, 1118–1119 (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id.*, at 1108–1111. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), 9 U. S. C. §1 *et seq.*, permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA), 29 U. S. C. §151 *et seq.*, "to engage in . . . concerted activities" for their "mutual aid or protection"? §157. The answer should be a resounding "No."

In the NLRA and its forerunner, the Norris-LaGuardia Act (NLGA), 29 U. S. C. §101 *et seq.*, Congress acted on an

acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33–34 (1937). The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 835 (1984). Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the NLGA and the NLRA to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA's protective sphere.

I

It was once the dominant view of this Court that "[t]he right of a person to sell his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions." *Adair* v. *United States*, 208 U. S. 161, 174 (1908) (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage* v. *Kansas*, 236 U. S. 1, 26 (1915) (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the NLRA operate on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and

conditions of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel*, 301 U. S. 1 (upholding the NLRA against employer assault); cf. *United States* v. *Darby*, 312 U. S. 100 (1941) (upholding the FLSA).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 (1932). Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E. Brown, From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations 7–8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, The Yellow Dog Contract 11 (1932). Notable among such devices was the "yellow-dog contract." Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See *id.*, at 11, 56. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6, 16 (2014); see Seidman, *supra*, at 59–60, 65–66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' rights to band together were unavailing. See, *e. g.*, *Coppage*, 236 U. S., at 26; Frankfurter & Greene, Legislation Affecting Labor

Injunctions, 38 Yale L. J. 879, 889–890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to "liberty of contract." See *Coppage*, 236 U. S., at 26; Frankfurter & Greene, *supra*, at 890–891. While stating that legislatures could curtail contractual "liberty" in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See *Coppage*, 236 U. S., at 16–19.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

> "Whereas . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. § 102.

Section 3 provides that federal courts shall not enforce "any . . . undertaking or promise in conflict with the public policy declared in [§ 2]." § 103.[1] In adopting these provisions,

[1] Other provisions of the NLGA further rein in federal-court authority to disturb employees' concerted activities. See, *e. g.*, 29 U. S. C. § 104(d) (federal courts lack jurisdiction to enjoin a person from "aiding any person participating or interested in any labor dispute who is being proceeded

Congress sought to render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind. See 75 Cong. Rec. 4504–4505 (remarks of Sen. Norris) ("[o]ne of the objects" of the NLGA was to "outlaw" yellow-dog contracts); Finkin, *supra*, at 16 (contracts prohibiting "all manner of concerted activities apart from union membership or support . . . were understood to be 'yellow dog' contracts"). While banning court enforcement of contracts proscribing concerted action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, § 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." 29 U. S. C. § 157 (emphasis added). Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." § 158(a)(1). To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer "labor policy for the Nation." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 242 (1959); see 29 U. S. C. § 160.

Unlike earlier legislative efforts, the NLGA and the NLRA had staying power. When a case challenging the NLRA's constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-"liberty" decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel*, 301 U. S., at 33–34. The Court recognized that employees have a "fundamental right" to join together to advance their common interests and that

against in, or [who] is prosecuting, any action or suit in any court of the United States or of any State").

Congress, in lieu of "ignor[ing]" that right, had elected to "safeguard" it. *Ibid.*

B

Despite the NLRA's prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one.[2] When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure,[3] the employers moved to compel individual arbi-

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[2] The Court's opinion opens with the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" *Ante*, at 502. Were the "agreements" genuinely bilateral? Petitioner Epic Systems Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees "continue[d] to work at Epic," they would "be deemed to have accepted th[e] Agreement." App. to Pet. for Cert. in No. 16–285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees' continued employment would indicate their assent to the agreement's terms. See App. in No. 16–300, p. 37. Epic's and Ernst & Young's employees thus faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.

[3] The FLSA establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See 29 U. S. C. § 216(b). In particular, it authorizes "one or more employees" to maintain an action "in behalf of himself or themselves and other employees similarly situated." *Ibid.* "Similarly situated" employees may become parties to an FLSA collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid.* The Federal Rules of Civil Procedure provide two collective-litigation procedures relevant here. First, Rule 20(a) permits individuals to join as plaintiffs in a single action if they assert claims arising out of the same transaction or occurrence and their claims involve common questions of law or fact. Second, Rule 23 establishes an opt-out class-action procedure, pursuant to which "[o]ne or more members of a class" may bring an action on behalf of the entire class if specified prerequisites are met.

tration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum.[4] They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. § 157 (emphasis added); see, *e. g.*, *NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9, 14–15 (1962) (§ 7 protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, The Developing Labor Law 209 (6th ed. 2012) ("Section 7 protects not only union-related activity but also 'other concerted activities . . . for mutual aid or protection.' "); 1 N. Lareau, Labor and Employment Law § 1.01[1], p. 1–2 (2017) ("Section 7 extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negoti-

[4] Notably, one employer specified that if the provisions confining employees to individual proceedings are "unenforceable," "any claim brought on a class, collective, or representative action basis must be filed in . . . court." App. to Pet. for Cert. in No. 16–285, at 35a.

ate) with employers about terms and conditions of employment; *and* (3) the right to work in concert with another employee or employees to achieve employment-related goals." (emphasis added)).

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. § 157. "Concerted" means "[p]lanned or accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). "Mutual" means "reciprocal." *Id.*, at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra*, at 550–551.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. Congress expressed its intent, when it enacted the NLRA, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power" workers faced. 29 U. S. C. § 151; see, *e. g.*, *Eastex*, *Inc.* v. *NLRB*, 437 U. S. 556, 567 (1978) (the Act's policy is "to protect the right of workers to act together to better their working conditions" (internal quotation marks omitted)); *City Disposal*, 465 U. S., at 835 ("[I]n enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). See also *supra*, at 529–530. There can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood § 7's "concerted activities" clause to protect

myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, *e. g.*, *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505–506 (CA2 1942), legislative bodies, *e. g.*, *Bethlehem Shipbuilding Corp.* v. *NLRB*, 114 F. 2d 930, 937 (CA1 1940), and government agencies, *e. g.*, *Moss Planing Mill Co.*, 103 N. L. R. B. 414, 418–419, enf'd, 206 F. 2d 557 (CA4 1953). "The 74th Congress," this Court has noted, "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex*, 437 U. S., at 565.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, *e. g.*, *Spandsco Oil and Royalty Co.*, 42 N. L. R. B. 942, 948–949 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); *Poultrymen's Service Corp.*, 41 N. L. R. B. 444, 460–463, and n. 28 (1942) (same with respect to employee's filing of FLSA suit on behalf of himself and others similarly situated), enf'd, 138 F. 2d 204 (CA3 1943); *Sarkes Tarzian, Inc.*, 149 N. L. R. B. 147, 149, 153 (1964) (same with respect to employees' filing class libel suit); *United Parcel Service, Inc.*, 252 N. L. R. B. 1015, 1018 (1980) (same with respect to employee's filing class action regarding break times), enf'd, 677 F. 2d 421 (CA6 1982); *Harco Trucking, LLC*, 344 N. L. R. B. 478, 478–479 (2005) (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7." *Leviton Mfg. Co.* v. *NLRB*, 486 F. 2d 686, 689 (CA1 1973); see,

e. g., *Brady* v. *National Football League*, 644 F. 3d 661, 673 (CA8 2011) (similar).[5] The Court pays scant heed to this longstanding line of decisions.[6]

D

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court's reasons for diminishing § 7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. See *ante*, at 512. Observing that § 7's "other concerted activities" clause "appears at the end of a detailed list of activi-

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[5] The Court cites, as purported evidence of contrary agency precedent, a 2010 "Guideline Memorandum" that the NLRB's then-General Counsel issued to his staff. See *ante*, at 519, 522, 529. The General Counsel appeared to conclude that employees have a § 7 right to file collective suits, but that employers can nonetheless require employees to sign arbitration agreements waiving the right to maintain such suits. See Memorandum GC 10–06, p. 7 (June 16, 2010). The memorandum sought to address what the General Counsel viewed as tension between longstanding precedent recognizing a § 7 right to pursue collective employment litigation and more recent court decisions broadly construing the FAA. The memorandum did not bind the Board, and the Board never adopted the memorandum's position as its own. See *D. R. Horton*, 357 N. L. R. B. 2277, 2282 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013); Tr. of Oral Arg. 41. Indeed, shortly after the General Counsel issued the memorandum, the Board rejected its analysis, finding that it conflicted with Board precedent, rested on erroneous factual premises, "defie[d] logic," and was internally incoherent. *D. R. Horton*, 357 N. L. R. B., at 2282–2283.

[6] In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful. *D. R. Horton*, 357 N. L. R. B. 2277. In so ruling, the Board simply applied its precedents recognizing that (1) employees have a § 7 right to engage in collective employment litigation and (2) employers cannot lawfully require employees to sign away their § 7 rights. See *id.*, at 2278, 2280. It broke no new ground. But cf. *ante*, at 503, 519.

ties," the Court says the clause should be read to "embrace" only activities "similar in nature" to those set forth first in the list, *ibid.* (internal quotation marks omitted), *i. e.*, "'self-organization,' 'form[ing], join[ing], or assist[ing] labor organizations,' and 'bargain[ing] collectively,'" *ibid.* The Court concludes that § 7 should, therefore, be read to protect "things employees 'just do' for themselves." *Ibid.* (quoting *NLRB* v. *Alternative Entertainment, Inc.*, 858 F. 3d 393, 415 (CA6 2017) (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as "things employees just do for themselves." In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow § 7's protections in the manner the Court suggests.

The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. See *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519 (1923). Courts must take care, however, not to deploy the canon to undermine Congress' efforts to draft encompassing legislation. See *United States* v. *Powell*, 423 U. S. 87, 90 (1975) ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute."). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, *i. e.*, to "protec[t] the exercise by workers of full freedom of association." 29 U. S. C. § 151; see *supra*, at 533.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA's "structure." *Ante*, at 513. Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA "estab-

lish[es] a regulatory regime" governing each of the activities protected by § 7. *Ibid.* That regime, the Court says, offers "specific guidance" and "rules" regulating each protected activity. *Ibid.* Observing that none of the NLRA's provisions explicitly regulates employees' resort to collective litigation, the Court insists that "it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§ 7] yet remain mute about this matter alone—unless, of course, [§ 7] doesn't speak to class and collective action procedures in the first place." *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only § 7 activity Congress addressed with any specificity was employees' selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer "specific guidance" about employees' rights to "form, join, or assist labor organizations." Nor did it set forth "specific guidance" for any activity falling within § 7's "other concerted activities" clause. The only provision that touched upon an activity falling within that clause stated: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." *Id.*, at 457. That provision hardly offered "specific guidance" regarding employees' right to strike.

Without much in the original Act to support its "structure" argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare 49 Stat. 449–457 with 61 Stat. 142–143 (1947) (adding § 8(d) to provide guidance regarding employees' and employers' collective-bargaining obligations); 61 Stat. 141–142 (amending § 8(a) and adding § 8(b) to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding § 8(b)(7) to place restrictions on labor organizations' right to picket employers). It is difficult to comprehend why Congress' later inclusion of specific guidance regarding some of the activities protected by § 7 sheds any light on Congress' initial conception of § 7's scope.

But even if each of the provisions the Court cites had been included in the original Act, they still would provide little support for the Court's conclusion. For going on 80 years now, the Board and federal courts—including this one—have understood § 7 to protect numerous activities for which the Act provides no "specific" regulatory guidance. See *supra*, at 533–534.

3

In a related argument, the Court maintains that the NLRA does not "even whispe[r]" about the "rules [that] should govern the adjudication of class or collective actions in court or arbitration." *Ante*, at 513. The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act establishes their right to act in concert using existing, generally available procedures, see *supra*, at 531, n. 3, and to do so free from employer interference. The FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, *e. g.*, American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

To the employees' argument, the Court replies: If the employees "really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures." *Ante*, at 514. The freedom to depart asserted by the Court, as already underscored, is entirely one sided. See *supra*, at 527–529. Once again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enter-

prise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection." 29 U. S. C. §§ 151, 157, 158.

4

Further attempting to sow doubt about § 7's scope, the Court asserts that class and collective procedures were "hardly known when the NLRA was adopted in 1935." *Ante*, at 512. In particular, the Court notes, the FLSA's collective-litigation procedure postdated § 7 "by years" and Rule 23 "didn't create the modern class action until 1966." *Ibid.*

First, one may ask, is there any reason to suppose that Congress intended to protect employees' right to act in concert using only those procedures and forums available in 1935? Congress framed § 7 in broad terms, "entrust[ing]" the Board with "responsibility to adapt the Act to changing patterns of industrial life." *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 266 (1975); see *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)). With fidelity to Congress' aim, the Board and federal courts have recognized that the NLRA shields employees from employer interference when they, *e. g.*, join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, *e. g.*, *Wray Electric Contracting, Inc.*, 210 N. L. R. B. 757, 762 (1974) (the NLRA protects concerted filing of complaint with the Occupational Safety and Health Administration).

Moreover, the Court paints an ahistorical picture. As Judge Wood, writing for the Seventh Circuit, cogently explained, the FLSA's collective-litigation procedure and the

modern class action were "not written on a clean slate." 823 F. 3d 1147, 1154 (2016). By 1935, permissive joinder was scarcely uncommon in courts of equity. See 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1651 (3d ed. 2001). Nor were representative and class suits novelties. Indeed, their origins trace back to medieval times. See S. Yeazell, From Medieval Group Litigation to the Modern Class Action 38 (1987). And beyond question, "[c]lass suits long have been a part of American jurisprudence." 7A Wright, *supra*, § 1751, at 12 (3d ed. 2005); see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363 (1921). See also Brief for Constitutional Accountability Center as *Amicus Curiae* 5–16 (describing group litigation's "rich history"). Early instances of joint proceedings include cases in which employees allied to sue an employer. *E. g.*, *Gorley* v. *Louisville*, 23 Ky. 1782, 65 S. W. 844 (1901) (suit to recover wages brought by ten members of city police force on behalf of themselves and other officers); *Guiliano* v. *Daniel O'Connell's Sons*, 105 Conn. 695, 136 A. 677 (1927) (suit by two employees to recover for injuries sustained while residing in housing provided by their employer). It takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees' joining together to engage in collective litigation.[7]

E

Because I would hold that employees' § 7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-

[7] The Court additionally suggests that something must be amiss because the employees turn to the NLRA, rather than the FLSA, to resist enforcement of the collective-litigation waivers. See *ante*, at 514–515. But the employees' reliance on the NLRA is hardly a reason to "raise a judicial eyebrow." *Ante*, at 515. The NLRA's guiding purpose is to protect employees' rights to work together when addressing shared workplace grievances of whatever kind.

dictated collective-litigation stoppers, *i. e.*, "waivers," are unlawful. As earlier recounted, see *supra*, at 530, § 8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their § 7 rights. 29 U. S. C. § 158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their § 7 rights by mandating that they prospectively renounce those rights in individual employment agreements.[8] The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 364 (1940). Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. See *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 77 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.").[9]

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[8] See, *e. g.*, *Bethany Medical Center*, 328 N. L. R. B. 1094, 1105–1106 (1999) (holding employer violated § 8(a)(1) by conditioning employees' rehiring on the surrender of their right to engage in future walkouts); *Mandel Security Bureau Inc.*, 202 N. L. R. B. 117, 119, 122 (1973) (holding employer violated § 8(a)(1) by conditioning employee's reinstatement to former position on agreement that employee would refrain from filing charges with the Board and from circulating work-related petitions, and, instead, would "mind his own business").

[9] I would similarly hold that the NLGA renders the collective-litigation waivers unenforceable. That Act declares it the public policy of the United States that workers "shall be free from the interference, restraint, or coercion of employers" when they engage in "concerted activities" for their "mutual aid or protection." 29 U. S. C. § 102; see *supra*, at 529. Section 3 provides that federal courts shall not enforce any "promise in conflict with the [Act's] policy." § 103. Because employer-extracted collective-litigation waivers interfere with employees' ability to engage in "concerted activities" for their "mutual aid or protection," see *supra*, at 532–535, the arm-twisted waivers collide with the NLGA's stated policy; thus, no federal court should enforce them. See Finkin, The Meaning and

II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante*, at 506. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections. Before addressing the interaction between the two laws, I briefly recall the FAA's history and the domain for which that Act was designed.

A

1

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements. See

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Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6 (2014).

Boys Markets, Inc. v. *Retail Clerks*, 398 U. S. 235 (1970), provides no support for the Court's contrary conclusion. See *ante*, at 516. In *Boys Markets*, an employer and a union had entered into a collective-bargaining agreement, which provided that labor disputes would be resolved through arbitration and that the union would not engage in strikes, pickets, or boycotts during the life of the agreement. 398 U. S., at 238–239. When a dispute later arose, the union bypassed arbitration and called a strike. *Id.*, at 239. The question presented: Whether a federal district court could enjoin the strike and order the parties to arbitrate their dispute. The case required the Court to reconcile the NLGA's limitations on federal courts' authority to enjoin employees' concerted activities, see 29 U. S. C. § 104, with § 301(a) of the Labor Management Relations Act, 1947, which grants federal courts the power to enforce collective-bargaining agreements, see 29 U. S. C. § 185(a). The Court concluded that permitting district courts to enforce no-strike and arbitration provisions in collective-bargaining agreements would encourage employers to enter into such agreements, thereby furthering federal labor policy. 398 U. S., at 252–253. That case has little relevance here. It did not consider the enforceability of arbitration provisions that require employees to arbitrate disputes only one-by-one. Nor did it consider the enforceability of arbitration provisions that an employer has unilaterally imposed on employees, as opposed to provisions negotiated through collective-bargaining processes in which employees can leverage their collective strength.

Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 270 (1926). Growing backlogs in the courts, which delayed the resolution of commercial disputes, prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. See *id.*, at 265. The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes. See *ibid.* The American Bar Association's Committee on Commerce, Trade and Commercial Law took up the reins in 1921, drafting the legislation Congress enacted, with relatively few changes, four years later. See Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153 (1925).

The legislative hearings and debate leading up to the FAA's passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. See, *e. g.*, 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) (Joint Hearings) (consistently focusing on the need for binding arbitration of commercial disputes).[10]

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[10] American Bar Association member Julius H. Cohen, credited with drafting the legislation, wrote shortly after the FAA's passage that the law was designed to provide a means of dispute resolution "particularly adapted to the settlement of commercial disputes." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 279 (1926). Arbitration, he and a colleague explained, is "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like." *Id.*, at 281. "It has a place also," they noted, "in the determination of the simpler questions of law" that "arise

The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. In brief, when the legislation was introduced, organized labor voiced concern. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Hearing). Herbert Hoover, then Secretary of Commerce, suggested that if there were "objection[s]" to including "workers' contracts in the law's scheme," Congress could amend the legislation to say: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id.*, at 14. Congress adopted Secretary Hoover's suggestion virtually verbatim in § 1 of the Act, see Joint Hearings 2; 9 U. S. C. § 1, and labor expressed no further opposition, see H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).[11]

Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements. See, *e. g.*, 65 Cong. Rec. 1931 (remarks of Rep. Graham) (the FAA provides an "opportunity to enforce . . . an agreement to arbitrate, when voluntarily placed in the document by the parties to it"). Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to "take it or leave it." Hearing 9 (remarks of Sen. Walsh) (internal quotation marks omitted); see *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403, n. 9 (1967) ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1.").

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out of th[e] daily relations between merchants, [for example,] the passage of title, [and] the existence of warranties." *Ibid.*

[11] For fuller discussion of Congress' intent to exclude employment contracts from the FAA's scope, see *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 124–129 (2001) (Stevens, J., dissenting).

In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes. See Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637, 644–674 (1996) (tracing the Court's evolving interpretation of the FAA's scope). In 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a "liberal federal policy favoring arbitration." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983) (involving an arbitration agreement between a hospital and a construction contractor). Soon thereafter, the Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well. *E. g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987). Further, in 1991, the Court concluded in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 23 (1991), that the FAA requires enforcement of agreements to arbitrate claims arising under the Age Discrimination in Employment Act of 1967, a workplace antidiscrimination statute. Then, in 2001, the Court ruled in *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 109 (2001), that the Arbitration Act's exemption for employment contracts should be construed narrowly, to exclude from the Act's scope only transportation workers' contracts.

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction of arbitration clauses in employment contracts grew steadily. See, *e. g.*, Economic Policy Institute (EPI), A. Colvin, The Growing Use of Mandatory Arbitration 1–2, 4 (Sept. 27, 2017), avail-

able at https://www.epi.org/files/pdf/135056.pdf (All Internet materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration,[12] employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129; Colvin, *supra*, at 6 (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See *D. R. Horton*, 357 N. L. R. B. 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013). Compare *ante*, at 504–505 (suggesting the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration), with *supra*, at 534–535

[12] In *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444 (2003), a plurality suggested arbitration might proceed on a class basis where not expressly precluded by an agreement. After *Bazzle*, companies increasingly placed explicit collective-litigation waivers in consumer and employee arbitration agreements. See Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 409–410 (2005). In *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011), and *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228 (2013), the Court held enforceable class-action waivers in the arbitration agreements at issue in those cases. No surprise, the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked. See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 29 (2017), available at https://www.classactionsurvey.com/pdf/2017-class-action-survey.pdf (reporting that 16.1% of surveyed companies' arbitration agreements expressly precluded class actions in 2012, but 30.2% did so in 2016).

(NLRB decisions recognizing a § 7 right to engage in collective employment litigation), and *supra*, at 541, n. 8 (NLRB decisions finding employer-dictated waivers of § 7 rights unlawful).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

B

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U. S., at 404, n. 12. Congress thus provided in § 2 of the FAA that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U. S. C. § 2 (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invalidated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996); see *ante*, at 507.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, Williston on Contracts § 12.1 (4th ed. 2009). "[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *Kaiser Steel*, 455 U. S., at 77 (quoting *McMullen* v. *Hoffman*, 174 U. S. 639, 654 (1899)). For the reasons stated *supra*, at 532–541, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's

saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

The Court urges that our case law—most forcibly, *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011)—rules out reconciliation of the NLRA and the FAA through the latter's saving clause. See *ante*, at 507–510. I disagree. True, the Court's Arbitration Act decisions establish that the saving clause "offers no refuge" for defenses that discriminate against arbitration, "either by name or by more subtle methods." *Ante*, at 507–508. The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate "covertly" against arbitration. *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. 246, 252 (2017). In *Concepcion*, the Court held that the saving clause did not spare the California Supreme Court's invocation of unconscionability doctrine to establish a rule blocking enforcement of class-action waivers in adhesive consumer contracts. 563 U. S., at 341–344, 346–352. Class proceedings, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*, at 348. Accordingly, the Court concluded, the California Supreme Court's rule, though derived from unconscionability doctrine, impermissibly disfavored arbitration, and therefore could not stand. *Id.*, at 346–352.

Here, however, the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that "illegal promises will not be enforced," *Kaiser Steel*, 455 U. S., at 77, to invalidate arbitration provisions at odds with the NLRA, a pathmarking federal statute. That statute neither discriminates against arbitration on its face, nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees' § 7 rights. See *supra*, at 541, and n. 8; cf.

Kindred Nursing Centers, 581 U. S., at 254, n. 2 (States may enforce generally applicable rules so long as they do not "single out arbitration" for disfavored treatment).

C

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as "an implied repeal" of the FAA, to the extent of any genuine conflict. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment. See *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153 (1976) ("a specific statute" generally "will not be controlled or nullified by a general one" (internal quotation marks omitted)).[13]

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. See *ante*, at 514. The statutes the Court cites, however, are of recent vintage.[14] Each was enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. See *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95, 116 (2012) (GINSBURG, J., dissenting). The Congress that drafted the NLRA in 1935 was scarcely on similar alert.

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[13] Enacted, as was the NLRA, after passage of the FAA, the NLGA also qualifies as a statute more specific than the FAA. Indeed, the NLGA expressly addresses the enforceability of contract provisions that interfere with employees' ability to engage in concerted activities. See *supra*, at 541, n. 9. Moreover, the NLGA contains an express repeal provision, which provides that "[a]ll acts and parts of acts in conflict with [the Act's] provisions . . . are repealed." 29 U. S. C. § 115.

[14] See 116 Stat. 1836 (2002); 120 Stat. 2267 (2006); 124 Stat. 1746 (2010); 124 Stat. 2035 (2010).

III

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections, 80 Brooklyn L. Rev. 1309 (2015).

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109–1111; A. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 11–16, 21–22 (2009). One study estimated that in Chicago, Los Angeles, and New York City alone, low-wage workers lose nearly $3 billion in legally owed wages each year. *Id.*, at 6. The U. S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014), available at https://www.epi.org/files/2014/wage-theft.pdf. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws. See Brief for State of Maryland et al. as *Amici Curiae* 29–33; Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1150–1151 (2012) (Department of Labor investigates fewer than 1% of FLSA-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See *id.*, at 1184–1185 (because "the FLSA systematically tends to generate low-value claims," "mechanisms that facilitate the economics of claim-

ing are required"); *Sutherland* v. *Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (SDNY 2011) (finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L. J. 2804, 2904 (2015) (analyzing available data from the consumer context to conclude that "private enforcement of small-value claims depends on collective, rather than individual, action"); *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 617 (1997) (class actions help "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (internal quotation marks omitted)).[15]

Fear of retaliation may also deter potential claimants from seeking redress alone. See, *e. g.*, Ruan 1119–1121; Bernhardt, *supra*, at 3, 24–25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.

In stark contrast to today's decision,[16] the Court has repeatedly recognized the centrality of group action to the ef-

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[15] Based on a 2015 study, the Bureau of Consumer Financial Protection found that "pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief." 82 Fed. Reg. 33210 (2017).

[16] The Court observes that class actions can be abused, see *ante*, at 524, but under its interpretation, even two employees would be stopped from proceeding together.

fective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace discrimination based on race, sex, and other protected characteristics. See, *e. g.*, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187 (1991). In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. See *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401 (1968) (*per curiam*) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."). That reality, as just noted, holds true for enforcement of wage and hours laws. See *supra*, at 550–551.

I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a groupwide basis, see Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as *Amici Curiae* 19–25, which some courts have concluded cannot be maintained by solo complainants, see, *e. g.*, *Chin* v. *Port Auth. of N. Y. & N. J.*, 685 F. 3d 135, 147 (CA2 2012) (pattern-or-practice method of proving race discrimination is unavailable in non-class actions). It would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and other laws enacted to eliminate, root and branch, class-based employment discrimination, see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417, 421 (1975). With fidelity to the Legislature's will, the Court could hardly hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes

be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, *e. g.*, App. to Pet. for Cert. in No. 16–285, p. 34a (Epic's agreement); App. in No. 16–300, p. 46 (Ernst & Young's agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. *Encino Motorcars, LLC* v. *Navarro*, *ante*, p. 79 (Court divides on whether "service advisors" are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

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If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16–307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16–285 and 16–300.

Syllabus

UPPER SKAGIT INDIAN TRIBE *v.* LUNDGREN ET VIR

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 17–387. Argued March 21, 2018—Decided May 21, 2018

The Upper Skagit Indian Tribe purchased a roughly 40-acre plot of land and then commissioned a boundary survey. The survey convinced the Tribe that about an acre of its land lay on the other side of a boundary fence between its land and land owned by Sharline and Ray Lundgren. The Lundgrens filed a quiet title action in Washington state court, invoking the doctrines of adverse possession and mutual acquiescence, but the Tribe asserted sovereign immunity from the suit. Ultimately, the State Supreme Court rejected the Tribe's immunity claim and ruled for the Lundgrens, reasoning that, under *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, tribal sovereign immunity does not apply to *in rem* suits.

Held: *Yakima* addressed not the scope of tribal sovereign immunity, but a question of statutory interpretation of the Indian General Allotment Act of 1887. That Act authorized the President to allot parcels of reservation land to individual tribal members and directed the United States eventually to issue fee patents to the allottees as private individuals. In 1934, Congress reversed course but made no attempt to withdraw the lands already conveyed. As a result, Indian reservations sometimes contain both trust land held by the United States and fee-patented land held by private parties. *Yakima* concerned the tax consequences of this intermixture. This Court had previously held that § 6 of the General Allotment Act could no longer be read as allowing States to impose *in personam* taxes on transactions between Indians on fee-patented land within a reservation. *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 479–481. The Court reached a different conclusion in *Yakima* with respect to *in rem* state taxes, holding that the state collection of property taxes on fee-patented land within reservations was still allowed under § 6. 502 U. S., at 265. In short, *Yakima* sought only to interpret a relic of a statute in light of a distinguishable precedent; it resolved nothing about the law of sovereign immunity.

Acknowledging this, the Lundgrens now ask the Court to affirm on an alternative, common-law ground: that the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in Washington State, purchased by the Tribe in the same manner as a

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private individual. Because this alternative argument did not emerge until late in this case, the Washington Supreme Court should address it in the first instance. Pp. 558–561.

187 Wash. 2d 857, 389 P. 3d 569, vacated and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 562. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 564.

David S. Hawkins argued the cause for petitioner. With him on the briefs were *Arthur W. Harrigan, Jr.*, *Tyler L. Farmer*, *Kristin E. Ballinger*, and *John C. Burzynski*.

Ann O'Connell argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Wood*, *Deputy Solicitor General Kneedler*, *William B. Lazarus*, and *Mary Gabrielle Sprague*.

Eric D. Miller argued the cause for respondents. With him on the brief were *Scott M. Ellerby*, *Luke M. Rona*, *Jennifer A. MacLean*, and *Charles G. Curtis, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the Cayuga Nation et al. by *Ian Heath Gershengorn*, *David W. DeBruin*, *Sam Hirsch*, *Martin E. Seneca, Jr.*, *Todd Hembree*, *Chrissi Ross Nimmo*, *Marsha K. Schmidt*, and *Daniel I. S. J. Rey-Bear*; for the Fond du Lac Band of Lake Superior Chippewa Indians et al. by *Douglas B. L. Endreson* and *Frank S. Holleman*; and for the National Congress of American Indians et al. by *Colette Routel*, *Joel West Williams*, and *Dan Lewerenz*.

Briefs of *amici curiae* urging affirmance were filed for Seneca County, New York, by *Brian Laudadio*, *Louis P. DiLorenzo*, and *Mary P. Moore*; for the Village of Union Springs et al. by *David H. Tennant* and *Chad R. Hayden*; and for Public Service Company of New Mexico by *William H. Hurd* and *Siran S. Faulders*.

A brief of *amici curiae* was filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *David L. Franklin*, Solicitor General, and *Brett E. Legner*, Deputy Solicitor General, and by the Attorney Generals of their respective States as follows: *Curtis T. Hill, Jr.*, of Indiana, *Hector Balderas* of New Mexico, and *Ken Paxton* of Texas.

JUSTICE GORSUCH delivered the opinion of the Court.

Lower courts disagree about the significance of our decision in *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251 (1992). Some think it means Indian tribes lack sovereign immunity in *in rem* lawsuits like this one; others don't read it that way at all.* We granted certiorari to set things straight. 583 U. S. 1036 (2017).

Ancestors of the Upper Skagit Tribe lived for centuries along the Skagit River in northwestern Washington State. But as settlers moved across the Cascades and into the region, the federal government sought to make room for them by displacing native tribes. In the treaty that followed with representatives of the Skagit people and others, the tribes agreed to "cede, relinquish, and convey" their lands to the United States in return for $150,000 and other promises. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; see *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676 (1979); *United States* v. *Washington*, 384 F. Supp. 312, 333 (WD Wash. 1974).

Today's dispute stems from the Upper Skagit Tribe's efforts to recover a portion of the land it lost. In 1981, the federal government set aside a small reservation for the Tribe. 46 Fed. Reg. 46681. More recently, the Tribe has sought to purchase additional tracts in market transactions. In 2013, the Tribe bought roughly 40 acres where, it says, tribal members who died of smallpox are buried. The Tribe bought the property with an eye to asking the federal government to take the land into trust and add it to the existing

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*Compare 187 Wash. 2d 857, 865–869, 389 P. 3d 569, 573–574 (2017) (case below); *Cass County Joint Water Resource Dist.* v. *1.43 Acres of Land in Highland Twp.*, 2002 ND 83, 643 N. W. 2d 685, 691–693 (conforming to the Washington Supreme Court's interpretation of *Yakima*), with *Hamaatsa, Inc.* v. *Pueblo of San Felipe*, 2017–NMSC–007, 388 P. 3d 977, 986 (2016) (disagreeing); *Cayuga Indian Nation of N. Y.* v. *Seneca County*, 761 F. 3d 218, 221 (CA2 2014) (same).

reservation next door. See 25 U. S. C. § 5108; 25 CFR § 151.4 (2013). Toward that end, the Tribe commissioned a survey of the plot so it could confirm the property's boundaries. But then a question arose.

The problem was a barbed wire fence. The fence runs some 1,300 feet along the boundary separating the Tribe's land from land owned by its neighbors, Sharline and Ray Lundgren. The survey convinced the Tribe that the fence is in the wrong place, leaving about an acre of its land on the Lundgrens' side. So the Tribe informed its new neighbors that it intended to tear down the fence; clearcut the intervening acre; and build a new fence in the right spot.

In response, the Lundgrens filed this quiet title action in Washington state court. Invoking the doctrines of adverse possession and mutual acquiescence, the Lundgrens offered evidence showing that the fence has stood in the same place for years, that they have treated the disputed acre as their own, and that the previous owner of the Tribe's tract long ago accepted the Lundgrens' claim to the land lying on their side of the fence. For its part, the Tribe asserted sovereign immunity from the suit. It relied upon the many decisions of this Court recognizing the sovereign authority of Native American tribes and their right to "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 788 (2014) (internal quotation marks omitted).

Ultimately, the Supreme Court of Washington rejected the Tribe's claim of immunity and ruled for the Lundgrens. The court reasoned that sovereign immunity does not apply to cases where a judge "exercis[es] in rem jurisdiction" to quiet title in a parcel of land owned by a Tribe, but only to cases where a judge seeks to exercise *in personam* jurisdiction over the Tribe itself. 187 Wash. 2d 857, 867, 389 P. 3d 569, 573 (2017). In coming to this conclusion, the court relied in part on our decision in *Yakima*. Like some courts before it, the Washington Supreme Court read *Yakima* as distinguish-

ing *in rem* from *in personam* lawsuits and "establish[ing] the principle that . . . courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted." 187 Wash. 2d, at 868, 389 P. 3d, at 574.

That was error. *Yakima* did not address the scope of tribal sovereign immunity. Instead, it involved only a much more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887. See 24 Stat. 388.

Some background helps dispel the misunderstanding. The General Allotment Act represented part of Congress's late 19th-century Indian policy: "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Yakima*, *supra*, at 254; *In re Heff*, 197 U. S. 488, 499 (1905). It authorized the President to allot parcels of reservation land to individual tribal members. The law then directed the United States to hold the allotted parcel in trust for some years, and afterwards issue a fee patent to the allottee. 24 Stat. 389. Section 6 of the Act, as amended, provided that once a fee patent issued, "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside" and "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 25 U. S. C. § 349.

In 1934, Congress reversed course. It enacted the Indian Reorganization Act, 48 Stat. 984, to restore "the principles of tribal self-determination and self-governance" that prevailed before the General Allotment Act. *Yakima*, 502 U. S., at 255. "Congress halted further allotments and extended indefinitely the existing periods of trust applicable to" parcels that were not yet fee patented. *Ibid.*; see 25 U. S. C. §§ 461–462. But the Legislature made no attempt to withdraw lands already conveyed to private persons through fee patents (and by now sometimes conveyed to non-Indians). As a result, Indian reservations today sometimes contain two

kinds of land intermixed in a kind of checkerboard pattern: trust land held by the United States and fee-patented land held by private parties. See *Yakima*, *supra*, at 256.

Yakima concerned the tax consequences of this checkerboard. Recall that the amended version of § 6 of the General Allotment Act rendered allottees and their fee-patented land subject to state regulations and taxes. 25 U. S. C. § 349. Despite that, in *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463 (1976), this Court held that § 6 could no longer be read as allowing States to impose *in personam* taxes (like those on cigarette sales) on transactions between Indians on fee-patented land within a reservation. *Id.*, at 479–481. Among other things, the Court pointed to the impracticality of using the ownership of a particular parcel within a reservation to determine the law governing transactions taking place upon it. See *id.*, at 478–479. Despite *Moe* and some years later, this Court in *Yakima* reached a different conclusion with respect to *in rem* state taxes. The Court held that allowing States to collect property taxes on fee-patented land within reservations was still allowed by § 6. *Yakima*, *supra*, at 265. Unlike the *in personam* taxes condemned in *Moe*, the Court held that imposing *in rem* taxes only on the fee-patented squares of the checkerboard was "not impracticable" because property tax assessors make "parcel-by-parcel determinations" about property tax liability all the time. *Yakima*, *supra*, at 265. In short, *Yakima* sought only to interpret a relic of a statute in light of a distinguishable precedent; it resolved nothing about the law of sovereign immunity.

Commendably, the Lundgrens acknowledged all this at oral argument. Tr. of Oral Arg. 36–37. Instead of seeking to defend the Washington Supreme Court's reliance on *Yakima*, they now ask us to affirm their judgment on an entirely distinct alternative ground. At common law, they say, sovereigns enjoyed no immunity from actions involving immov-

able property located in the territory of another sovereign. As our cases have put it, "[a] prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 145 (1812). Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in "the character of a private individual."

The Tribe and the federal government disagree. They note that immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes. See *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, 756 (1998) ("[T]he immunity possessed by Indian tribes is not coextensive with that of the States"). And since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); *Ex parte Peru*, 318 U. S. 578, 588 (1943).

We leave it to the Washington Supreme Court to address these arguments in the first instance. Although we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below, *Thigpen* v. *Roberts*, 468 U. S. 27, 30 (1984), in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us; and the alternative argument for affirmance did not emerge until late in this case. In fact, it appeared only when the United States filed an *amicus* brief in this case—after briefing on certiorari, after the Tribe filed its opening brief, and after the Tribe's other *amici* had their say. This Court has often declined to take a "first view" of questions that make their appearance in this posture, and we

think that course the wise one today. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

The dissent is displeased with our decision on this score, but a contradiction lies at the heart of its critique. First, the dissent assures us that the immovable property exception applies with irresistible force—nothing more than a matter of "hornbook law." *Post*, at 566–572 (opinion of THOMAS, J.). But then, the dissent claims that allowing the Washington Supreme Court to address that exception is a "grave" decision that "casts uncertainty" over the law and leaves lower courts with insufficient "guidance." *Post*, at 565–566, 575. Both cannot be true. If the immovable property exception presents such an easy question, then it's hard to see what terrible things could happen if we allow the Washington Supreme Court to answer it. Surely our state court colleagues are no less versed than we in "hornbook law," and we are confident they can and will faithfully apply it. And what if, instead, the question turns out to be more complicated than the dissent promises? In that case the virtues of inviting full adversarial testing will have proved themselves once again. Either way, we remain sanguine about the consequences.

The dissent's other objection to a remand rests on a belief that the immovable property exception was the source of "the disagreement that led us to take this case." *Post*, at 564. But this too is mistaken. As we've explained, the courts below and the certiorari-stage briefs before us said precisely nothing on the subject. Nor do we understand how the dissent might think otherwise—for its essential premise is that *no* disagreement exists, or is even possible, about the exception's scope. The source of confusion in the lower courts that led to our review was the one about *Yakima*, see *supra*, at 556, n., and we have dispelled it. That is work enough for the day. We vacate the judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court in full.

But that opinion poses an unanswered question: What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.

The Tribe suggests that the proper mode of redress is for the Lundgrens—who purchased their property long before the Tribe came into the picture—to negotiate with the Tribe. Although the parties got off on the wrong foot here, the Tribe insists that negotiations would run more smoothly if the Lundgrens "understood [its] immunity from suit." Tr. of Oral Arg. 61. In other words, once the Court makes clear that the Lundgrens ultimately have no recourse, the parties can begin working toward a sensible settlement. That, in my mind at least, is not a meaningful remedy.

The Solicitor General proposes a different out-of-court solution. Taking up this Court's passing comment that a disappointed litigant may continue to assert his title, see *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 291–292 (1983), the Solicitor General more pointedly suggests that the Lundgrens should steer into the conflict: Go onto the disputed property and chop down some trees, build a shed, or otherwise attempt to "induce [the Tribe] to file a quiet-title action." Brief for United States as *Amicus Curiae* 23–24. Such brazen tactics may well have the desired effect of causing the Tribe to waive its sovereign immunity. But I am skeptical that the law requires private individuals—who, again, had no prior dealings with the Tribe—to pick a fight in order to vindicate their interests.

The consequences of the Court's decision today thus seem intolerable, unless there is another means of resolving property disputes of this sort. Such a possibility was discussed in the Solicitor General's brief, the Lundgrens' brief, and the Tribe's reply brief, and extensively explored at oral argument—the exception to sovereign immunity for actions to determine rights in immovable property. After all, "property ownership is not an inherently sovereign function." *Permanent Mission of India to United Nations* v. *City of New York*, 551 U. S. 193, 199 (2007). Since the 18th century, it has been a settled principle of international law that a foreign state holding real property outside its territory is treated just like a private individual. *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 145 (1812). The same rule applies as a limitation on the sovereign immunity of States claiming an interest in land located within other States. See *Georgia* v. *Chattanooga*, 264 U. S. 472, 480–482 (1924). The only question, as the Solicitor General concedes, Brief for United States as *Amicus Curiae* 25, is whether different principles afford Indian tribes a broader immunity from actions involving off-reservation land.

I do not object to the Court's determination to forgo consideration of the immovable-property rule at this time. But if it turns out that the rule does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future case. See *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 799, n. 8 (2014) (reserving the question whether sovereign immunity would apply if a "plaintiff who has not chosen to deal with a tribe[ ] has no alternative way to obtain relief for off-reservation commercial conduct"). At the very least, I hope the Lundgrens would carefully examine the full range of legal options for resolving this title dispute with their neighbors, before crossing onto the disputed land and firing up their chainsaws.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

We granted certiorari to decide whether "a court's exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity." Pet. for Cert. i; 583 U. S. 1036 (2017). State and federal courts are divided on that question, but the Court does not give them an answer. Instead, it holds only that *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251 (1992), "resolved nothing about the law of [tribal] sovereign immunity." *Ante*, at 559. Unfortunately, neither does the decision today—except to say that courts cannot rely on *County of Yakima*. As a result, the disagreement that led us to take this case will persist.

The Court easily could have resolved that disagreement by addressing respondents' alternative ground for affirmance. Sharline and Ray Lundgren—whose family has maintained the land in question for more than 70 years—ask us to affirm based on the "immovable property" exception to sovereign immunity. That exception is settled, longstanding, and obviously applies to tribal immunity—as it does to every other type of sovereign immunity that has ever been recognized. Although the Lundgrens did not raise this argument below, we have the discretion to reach it. I would have done so. The immovable-property exception was extensively briefed and argued, and its application here is straightforward. Addressing the exception now would have ensured that property owners like the Lundgrens can protect their rights and that States like Washington can protect their sovereignty. Because the Court unnecessarily chooses to leave them in limbo, I respectfully dissent.

I

As the Court points out, the parties did not raise the immovable-property exception below or in their certiorari-stage briefs. See *ante*, at 560. But this Court will resolve

arguments raised for the first time in the merits briefs when they are a "'"predicate to an intelligent resolution" of the question presented'" and thus "'fairly included' within the question presented." *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13 (1996) (quoting *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996); this Court's Rule 14.1). The Court agrees that the immovable-property exception is necessary to an intelligent resolution of the question presented, which is why it remands that issue to the Washington Supreme Court. See *ante*, at 560. But our normal practice is to address the issue ourselves, unless there are "good reasons to decline to exercise our discretion." *Jones* v. *United States*, 527 U. S. 373, 397, n. 12 (1999) (plurality opinion).

There are no good reasons here. The Court's only proffered reason is that the applicability of the immovable-property exception is a "grave question" that "will affect all tribes, not just the one before us." *Ante*, at 560.[1] The exception's applicability might be "grave," but it is also clear. And most questions decided by this Court will affect more than the parties "before us"; that is one of the primary reasons why we grant certiorari. See this Court's Rule 10(c) (explaining that certiorari review is usually reserved for cases involving "an important question of federal law" that has divided the state or federal courts). Moreover, the Court's decision to forgo answering the question presented is no less "grave." It forces the Lundgrens to squander additional years and resources litigating their right to litigate.

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[1] The Court does not question the adequacy of the briefing or identify factual questions that need further development. Nor could it. The immovable-property exception received extensive attention in the parties' briefs, see Brief for Respondents 9–26; Reply Brief 13–24, and the Government's *amicus* brief, see Brief for United States 25–33. Most of the oral argument likewise focused on the immovable-property exception. See Tr. of Oral Arg. 14–16, 19–29, 34–51, 54–59. And when asked at oral argument what else it could say about the exception if it had more time, the Tribe had no response. See *id.*, at 19–21.

And it casts uncertainty over the sovereign rights of States to maintain jurisdiction over their respective territories.

Contrary to the Court's suggestion, *ante*, at 560–561, I have no doubt that our state-court colleagues will faithfully interpret and apply the law on remand. But I also have no doubt that this Court "ha[s] an 'obligation . . . to decide the merits of the question presented'" in the cases that come before us. *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 227 (2016) (THOMAS, J., dissenting). The Court should have discharged that obligation here.

II

I would have resolved this case based on the immovable-property exception to sovereign immunity. That exception is well established. And it plainly extends to tribal immunity, as it does to every other form of sovereign immunity.

A

The immovable-property exception has been hornbook law almost as long as there have been hornbooks. For centuries, there has been "uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property." Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y. B. Int'l Law 220, 244 (1951).[2] This immovable-property exception predates both the founding and the

[2] There is some disagreement about the outer bounds of this exception—for example, whether it applies to tort claims related to the property or to diplomatic embassies. See, *e. g.*, Letter from J. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General P. Perlman (May 19, 1952), 26 Dept. State Bull. 984, 984–985 (Tate Letter); see also C. Bynkershoek, De Foro Legatorum Liber Singularis 22–23 (G. Laing transl. 2d ed. 1946) (explaining there is "no unanimity" regarding attaching a foreign prince's debts to immovable property). But there is no dispute that it covers suits concerning ownership of a piece of real property used for nondiplomatic reasons. See Tate Letter 984; Brief for United States as *Amicus Curiae* 27–28. In other words, there is no dispute that it applies to *in rem* suits like this one.

Tribe's treaty with the United States. Cornelius van Bynkershoek, a renowned 18th-century jurist,[3] stated that it was "established" that "property which a prince has purchased for himself in the dominions of another . . . shall be treated just like the property of private individuals." De Foro Legatorum Liber Singularis 22 (G. Laing transl. 2d ed. 1946). His conclusion echoed the 16th-century legal scholar Oswald Hilliger. See *ibid.* About a decade after Bynkershoek, Emer de Vattel explained that, when "sovereigns have fiefs and other possessions in the territory of another prince; in such cases they hold them after the manner of private individuals." 3 The Law of Nations § 83, p. 139 (C. Fenwick transl. 1916); see also E. de Vattel, The Law of Nations § 115, p. 493 (J. Chitty ed. 1872) ("All landed estates, all immovable property, by whomsoever possessed, are subject to the jurisdiction of the country").[4]

The immovable-property exception is a corollary of the ancient principle of *lex rei sitae.* Sometimes called *lex situs* or *lex loci rei sitae*, the principle provides that "land is governed by the law of the place where it is situated." F. Wharton, 1 Conflict of Laws § 273, p. 607 (G. Parmele ed., 3d ed. 1905). It reflects the fact that a sovereign "cannot suffer its own laws . . . to be changed" by another sovereign. H.

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[3] Considered "a jurist of great reputation" by Chief Justice Marshall, *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 144 (1812), "Bynkershoek's influence in the eighteenth century [w]as enormous," Adler, The President's Recognition Power, in The Constitution and the Conduct of American Foreign Policy 133, 153, n. 19 (G. Adler & L. George eds. 1996) (internal quotation marks omitted). Madison, for example, consulted Bynkershoek's works (on the recommendation of Jefferson) while preparing to draft the Constitution. See Letter from T. Jefferson to J. Madison (Feb. 20, 1784), in 4 The Works of Thomas Jefferson 239, 248 (P. Ford ed. 1904); Letter from J. Madison to T. Jefferson (Mar. 16, 1784), in 2 The Writings of James Madison 34, 43 (G. Hunt ed. 1901).

[4] De Vattel's work was "a leading treatise" of its era. *Jesner* v. *Arab Bank, PLC*, *ante*, at 288, n. 3 (GORSUCH, J., concurring in part and concurring in judgment).

Wheaton, Elements of International Law § 81, p. 114 (G. Wilson ed. 1936). As then-Judge Scalia explained, it is "self-evident" that "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F. 2d 1517, 1521 (CADC 1984). And because "land is so indissolubly connected with the territory of a State," a State "cannot permit" a foreign sovereign to displace its jurisdiction by purchasing land and then claiming "immunity." Competence of Courts in Regard to Foreign States, 26 Am. J. Int'l L. Supp. 451, 578 (1932) (Competence of Courts). An assertion of immunity by a foreign sovereign over real property is an attack on the sovereignty of "the State of the situs." *Ibid.*

The principle of *lex rei sitae* was so well established by the 19th century that Chancellor James Kent deemed it "too clear for discussion." 2 Commentaries on American Law 429, n. a (4th ed. 1840). The medieval jurist Bartolus of Sassoferatto had recognized the principle 500 years earlier in his commentary on conflicts of law under the Justinian Code. See Bartolus, Conflict of Laws 29 (J. Beale transl. 1914).[5] Bartolus explained that, "when there is a question of any right growing out of a thing itself, the custom or statute of the place where the thing is should be observed." *Ibid.* Later authorities writing on conflicts of law consistently agreed that *lex rei sitae* determined the governing law in real-property disputes.[6] And this Court likewise held,

[5] In the foreword to his translation of Bartolus, Joseph Henry Beale described him as "the most imposing figure among the lawyers of the middle ages," whose work was "the first and standard statement of the doctrines of the Conflict of Laws." Bartolus, Conflict of Laws, at 9.

[6] See, *e. g.*, F. von Savigny, Conflict of Laws 130 (W. Guthrie transl. 1869) ("This principle [of *lex rei sitae*] has been generally accepted from a very early time"); G. Bowyer, Commentaries on Universal Public Law 160 (1854) ("[W]here the matter in controversy is the right and title to land or other immovable property, the judgment pronounced in the *forum rei sitae* is held conclusive in other countries"); H. Wheaton, Elements of

nearly 200 years ago, that "the nature of sovereignty" requires that "[e]very government" have "the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries." *Green* v. *Biddle*, 8 Wheat. 1, 12 (1823) (Story, J.).

The acceptance of the immovable-property exception has not wavered over time. In the 20th century, as nations increasingly owned foreign property, it remained "well settled in international law that foreign state immunity need not be extended in cases dealing with rights to interests in real property." Weber, The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect, 3 Yale Stud. in World Pub. Order 1, 33 (1976). Countries around the world continued to recognize the exception in their statutory and decisional law. See Competence of Courts 572–590 (noting support for the exception in statutes from Austria, Germany, Hungary, and Italy, as well as decisions from the United States, Austria, Chile, Czechoslovakia, Egypt, France, Germany, and Romania). "All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals." C. Hyde, 2 International Law 848, n. 33 (rev. 2d ed. 1945) (internal quotation marks omitted).

International Law § 81, p. 114 (G. Wilson ed. 1936) ("[T]he law of a place where real property is situated governs exclusively as to the tenure, the title, and the descent of such property"); J. Story, Commentaries on the Conflict of Laws § 424, p. 708 (rev. 3d ed. 1846) ("The title . . . to real property can be acquired, passed, and lost only according to the *Lex rei sitae*"); J. Westlake, Private International Law *56 ("The right to the possession of land can only be tried in the courts of the *situs*"); L. Bar, International Law: Private and Criminal 241–242 (G. Gillespie transl. 1883) (noting that, in "the simpler case of immoveables," "[t]he *lex rei sitae* is the rule"); F. Wharton, 1 Conflict of Laws § 273, p. 607 (G. Parmele ed., 3d ed. 1905) ("Jurists of all schools, and courts of all nations, are agreed in holding that land is governed by the law of the place where it is situated").

The Restatement of Foreign Relations Law reflects this unbroken consensus. Every iteration of the Restatement has deemed a suit concerning the ownership of real property to be "outside the scope of the principle of [sovereign] immunity of a foreign state." Restatement of Foreign Relations Law of the United States (Proposed Official Draft) § 71, Comment *c*, p. 228 (1962); see also Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965) (similar); Restatement (Third) of Foreign Relations Law of the United States § 455(1)(c) (1986) (denying that immunity exists for "claims . . . to immovable property in the state of the forum"); Restatement (Fourth) of Foreign Relations Law of the United States § 456(2) (Tent. Draft No. 2, Mar. 22, 2016) (recognizing "jurisdiction over a foreign state in any case in which rights in immovable property situated in the United States are in issue"). Sovereign immunity, the First Restatement explains, does not bar "an action to obtain possession of or establish an ownership interest in immovable property located in the territory of the state exercising jurisdiction." § 71(b), at 226.

Given the centuries of uniform agreement on the immovable-property exception, it is no surprise that all three branches of the United States Government have recognized it. Writing for a unanimous Court and drawing on Bynkershoek and De Vattel, Chief Justice Marshall noted that "the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 144–145 (1812). Thus, "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction . . . and assuming the character of a private individual." *Id.*, at 145.[7]

[7] The Skagit Tribe entered into its treaty with the United States four decades later. See Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. The treaty does not mention sovereignty or otherwise alter the rule laid out in *Schooner Exchange*.

The Court echoed this reasoning over a century later, holding that state sovereign immunity does not extend to "[l]and acquired by one State in another State." *Georgia* v. *Chattanooga*, 264 U. S. 472, 480 (1924). In 1952, the State Department acknowledged that "[t]here is agreement[,] supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property." Tate Letter 984.[8] Two decades later, Congress endorsed the immovable-property exception by including it in the Foreign Sovereign Immunities Act of 1976. See 28 U. S. C. §1605(a)(4) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue"). This statutory exception was "meant to codify . . . the *pre-existing* real property exception to sovereign immunity recognized by international practice." *Permanent Mission of India to United Nations* v. *City of New York*, 551 U. S. 193, 200 (2007) (emphasis added; internal quotation marks omitted).

The Court does not question any of the foregoing authorities. Nor did the parties provide any reason to do so. The Government, when asked to identify its "best authority for the proposition that the baseline rule of common law was total immunity, including *in rem* actions," pointed to just two sources. See Tr. of Oral Arg. 29; Brief for United States as *Amicus Curiae* 10, 26. The first was Hamilton's statement that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

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[8] This declaration has long been "the official policy of our Government." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 698 (1976). The State Department has reaffirmed it on several occasions. See, *e. g.*, Dept. of State, J. Sweeney, Policy Research Study: The International Law of Sovereign Immunity 24 (1963) ("The immunity from jurisdiction of a foreign state does not extend to actions for the determination of an interest in immovable—or real—property in the territory. This limitation on the immunity of the state is of long standing").

The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (emphasis deleted). Yet "property ownership is not an inherently sovereign function," *Permanent Mission*, *supra*, at 199, and Hamilton's general statement does not suggest that immunity is automatically available or is not subject to longstanding exceptions. The Government also cited *Schooner Exchange*. But as explained above, that decision expressly acknowledges the immovable-property exception. The Government's unconvincing arguments cannot overcome more than six centuries of consensus on the validity of the immovable-property exception.

B

Because the immovable-property exception clearly applies to both state and foreign sovereign immunity, the only question is whether it also applies to tribal immunity. It does.

Just last Term, this Court refused to "exten[d]" tribal immunity "beyond what common-law sovereign immunity principles would recognize." *Lewis* v. *Clarke*, 581 U. S. 155, 163–164 (2017). Tribes are "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831), that "no longer posses[s] the full attributes of sovereignty," *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978) (internal quotation marks omitted). Given the "limited character" of their sovereignty, *ibid.*, Indian tribes possess only "the common-law immunity from suit traditionally enjoyed by sovereign powers," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58 (1978). That is why this Court recently declined an invitation to make tribal immunity "broader than the protection offered by state or federal sovereign immunity." *Lewis*, 581 U. S., at 164. Accordingly, because States and foreign countries are subject to the immovable-property exception, Indian tribes are too. "There is no reason to depart from these general rules in the context of tribal sovereign immunity." *Id.*, at 163.

In declining to reach the immovable-property exception, the Court highlights two counterarguments that the Tribe

and the United States have raised for why the exception should not extend to tribal immunity. Neither argument has any merit.

First, the Court notes that "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." *Ante*, at 560 (citing *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, 756 (1998)). But the Court's authority for that proposition merely states that tribal immunity "is not coextensive with that of *the States*." *Id.*, at 756 (emphasis added). Even assuming that is so, it does not mean that the Tribe's immunity can be more expansive than any recognized form of sovereign immunity, including the immunity of the United States and foreign countries. See *Lewis*, *supra*, at 163–164. And the Tribe admits that this Court has previously limited tribal immunity to conform with analogous "limitations . . . in suits against the United States." Reply Brief 22. No one argues that the United States could claim sovereign immunity if it wrongfully asserted ownership of private property in a foreign country—the equivalent of what the Tribe did here. The United States plainly would be subject to suit in that country's courts. See Competence of Courts 572–590.

Second, the Court cites two decisions for the proposition that "since the founding . . . the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country." *Ante*, at 560 (citing *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); *Ex parte Peru*, 318 U. S. 578, 588 (1943)). But those cases did not involve tribal immunity. They were admiralty suits in which foreign sovereigns sought to recover ships they allegedly owned. See *Verlinden*, *supra*, at 486 (citing cases involving ships allegedly owned by Italy, Peru, and Mexico); *Ex parte Peru*, *supra*, at 579 (mandamus action by Peru regarding its steamship). Those decisions were an extension of the common-law principle, recognized in *Schooner Exchange*, that sovereign immunity applies to vessels owned by a

foreign sovereign. See *Berizzi Brothers Co.* v. *S. S. Pesaro*, 271 U. S. 562, 571–576 (1926). These cases encourage deference to the political branches on sensitive questions of foreign affairs. But they do not suggest that courts can ignore longstanding limits on sovereign immunity, such as the immovable-property exception. And they do not suggest that courts can abdicate their judicial duty to decide the scope of tribal immunity—a duty this Court exercised just last Term. See *Lewis*, *supra*, at 161–164.[9]

In fact, those present at "the founding," *ante*, at 560, would be shocked to learn that an Indian tribe could acquire property in a State and then claim immunity from that State's jurisdiction.[10] Tribal immunity is "a judicial doctrine" that is not mandated by the Constitution. *Kiowa*, 523 U. S., at 759. It "developed almost by accident," was reiterated "with little analysis," and does not reflect the realities of modern-day Indian tribes. See *id.*, at 756–758. The doctrine has become quite "exorbitant," *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 831 (2014) (GINSBURG, J., dissenting), and it has been implausibly "extended . . . to bar suits arising out of an Indian tribe's commercial activities

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[9] These decisions about ships, even on their own terms, undercut the Tribe's claim to immunity here. The decisions acknowledge a "distinction between possession and title" that is "supported by the overwhelming weight of authority" and denies immunity to a foreign sovereign that has "title . . . without possession." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 37–38 (1945); see, *e. g.*, *Long* v. *The Tampico*, 16 F. 491, 493–501 (SDNY 1883). That distinction would defeat the Tribe's claim to immunity because the Lundgrens have possession of the land. See 187 Wash. 2d 857, 861–864, 389 P. 3d 569, 571–572 (2017).

[10] Their shock would not be assuaged by the Government's proposed remedy. The Government suggests that the Lundgrens should force a showdown with the Tribe by chopping down trees or building some structure on the land. See Brief for United States as *Amicus Curiae* 23–24. If the judge-made doctrine of tribal immunity has come to a place where it forces individuals to take the law into their own hands to keep their own land, then it will have crossed the threshold from mistaken to absurd.

conducted outside its territory," *id.*, at 814 (THOMAS, J., dissenting).

Extending it even further here would contradict the bedrock principle that each State is "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Lessee of Pollard* v. *Hagan*, 3 How. 212, 228 (1845); accord, *Texas* v. *White*, 7 Wall. 700, 725 (1869); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 9 (1888) (collecting cases). Since 1812, this Court has "entertain[ed] no doubt" that "the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate[d]." *United States* v. *Crosby*, 7 Cranch 115, 116 (1812) (Story, J.). Justice Bushrod Washington declared it "an unquestionable principle of general law, that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated." *Kerr* v. *Devisees of Moon*, 9 Wheat. 565, 570 (1824). This Court has been similarly emphatic ever since. See, *e. g.*, *Munday* v. *Wisconsin Trust Co.*, 252 U. S. 499, 503 (1920) ("long ago declared"); *Arndt* v. *Griggs*, 134 U. S. 316, 321 (1890) ("held repeatedly"); *United States* v. *Fox*, 94 U. S. 315, 320 (1877) ("undoubted"); *McCormick* v. *Sullivant*, 10 Wheat. 192, 202 (1825) ("an acknowledged principle of law"). Allowing the judge-made doctrine of tribal immunity to intrude on such a fundamental aspect of state sovereignty contradicts the Constitution's design, which "'leaves to the several States a residuary and inviolable sovereignty.'" *New York* v. *United States*, 505 U. S. 144, 188 (1992) (quoting The Federalist No. 39, at 245).

* * *

The Court's failure to address the immovable-property exception in this case is difficult to justify. It leaves our colleagues in the state and federal courts with little more guidance than they had before. It needlessly delays relief for the Lundgrens, who must continue to litigate the threshold question whether they can litigate their indisputable right

to their land. And it does not address a clearly erroneous tribal-immunity claim: one that asserts a sweeping and absolute immunity that no other sovereign has ever enjoyed—not a State, not a foreign nation, and not even the United States.

I respectfully dissent.

Syllabus

LAGOS *v.* UNITED STATES

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

No. 16–1519. Argued April 18, 2018—Decided May 29, 2018

Petitioner Sergio Fernando Lagos was convicted of using a company he controlled to defraud a lender of tens of millions of dollars. After the fraudulent scheme came to light and Lagos' company went bankrupt, the lender conducted a private investigation of Lagos' fraud and participated as a party in the company's bankruptcy proceedings. Between the private investigation and the bankruptcy proceedings, the lender spent nearly $5 million in legal, accounting, and consulting fees related to the fraud. After Lagos pleaded guilty to federal wire fraud charges, the District Court ordered him to pay restitution to the lender for those fees. The Fifth Circuit affirmed, holding that such restitution was required by the Mandatory Victims Restitution Act of 1996, which requires defendants convicted of certain federal offenses, including wire fraud, to, among other things, "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense," 18 U. S. C. § 3663A(b)(4).

Held:

1. The words "investigation" and "proceedings" in subsection (b)(4) of the Mandatory Victims Restitution Act are limited to government investigations and criminal proceedings and do not include private investigations and civil or bankruptcy proceedings. The word "investigation" appears in the phrase "the investigation or prosecution." Because the word "prosecution" must refer to a government's criminal prosecution, this suggests that the word "investigation" refers to a government's criminal investigation. Similar reasoning suggests that the immediately following reference to "proceedings" refers to criminal proceedings. Furthermore, the statute refers to the victim's "participation" in the "investigation," and "attendance" at "proceedings," which would be odd ways to describe a victim's role in its own private investigation and as a party in noncriminal court proceedings, but which are natural ways to describe a victim's role in a government's investigation and in the criminal proceedings that a government conducts.

Moreover, the statute lists three specific items that must be reimbursed: lost income, child care expenses, and transportation expenses. These are precisely the kind of expenses that a victim is likely to incur

when missing work and traveling to participate in a government investigation or to attend criminal proceedings. In contrast, the statute says nothing about the kinds of expenses a victim would often incur during private investigations or noncriminal proceedings, namely, the costs of hiring private investigators, attorneys, or accountants. This supports the Court's more limited reading of the statute.

A broad reading would also require district courts to resolve difficult, fact-intensive disputes about whether particular expenses "incurred during" participation in a private investigation were in fact "necessary," and about whether proceedings such as a licensing proceeding or a Consumer Products Safety Commission hearing were sufficiently "related to the offense." The Court's narrower interpretation avoids such controversies, which are often irrelevant to the victim because over 90% of criminal restitution is never collected.

The Court's interpretation means that some victims will not receive restitution for all of their losses from a crime, but that is consistent with the Mandatory Victims Restitution Act's enumeration of limited categories of covered expenses, in contrast with the broader language that other federal restitution statutes use, see, *e. g.,* 18 U. S. C. §§ 2248(b), 2259(b), 2264(b), 2327(b). Pp. 580–584.

2. That the victim shared the results of its private investigation with the Government does not make the costs of conducting the private investigation "necessary . . . other expenses incurred during participation in the investigation . . . of the offense." § 3663A(b)(4). That language does not cover the costs of a private investigation that the victim chooses on its own to conduct, which are not "incurred during" participation in a government's investigation. Pp. 584–585.

864 F. 3d 320, reversed and remanded.

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

Daniel L. Geyser argued the cause for petitioner. With him on the briefs were *Peter K. Stris*, *Douglas D. Geyser*, and *Randolph L. Schaffer, Jr.*

Michael R. Huston argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Eric J. Feigin*, and *William A. Glaser.**

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers by *Stuart Banner* and *Barbara E. Bergman*; and for Shon Hopwood by *Gregory M. Lipper.*

JUSTICE BREYER delivered the opinion of the Court.

The Mandatory Victims Restitution Act of 1996 requires defendants convicted of a listed range of offenses to

> "reimburse the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*." 18 U. S. C. §3663A(b)(4) (emphasis added).

We must decide whether the words "investigation" and "proceedings" are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings. In our view, they are limited to government investigations and criminal proceedings.

I

The petitioner, Sergio Fernando Lagos, was convicted of using a company that he controlled (Dry Van Logistics) to defraud a lender (General Electric Capital Corporation, or GE) of tens of millions of dollars. The fraud involved generating false invoices for services that Dry Van Logistics had not actually performed and then borrowing money from GE using the false invoices as collateral. Eventually, the scheme came to light. Dry Van Logistics went bankrupt. GE investigated. The Government indicted Lagos. Lagos pleaded guilty to wire fraud. And the judge, among other things, ordered him to pay GE restitution.

The issue here concerns the part of the restitution order that requires Lagos to reimburse GE for expenses GE incurred during its own investigation of the fraud and during its participation in Dry Van Logistics' bankruptcy proceedings. The amounts are substantial (about $5 million), and primarily consist of professional fees for attorneys, accountants, and consultants. The Government argued that the District Court must order restitution of these amounts under

the Mandatory Victims Restitution Act because these sums were "necessary . . . other expenses incurred during participation in the investigation . . . of the offense or attendance at proceedings related to the offense." § 3663A(b)(4). The District Court agreed, as did the U. S. Court of Appeals for the Fifth Circuit. 864 F. 3d 320, 323 (2017).

Lagos filed a petition for certiorari. And in light of a division of opinion on the matter, we granted the petition. Compare *United States* v. *Papagno*, 639 F. 3d 1093, 1100 (CADC 2011) (subsection (b)(4) of the Mandatory Victims Restitution Act does not cover private investigation costs), with *United States* v. *Elson*, 577 F. 3d 713, 726–729 (CA6 2009) (statute not so limited); *United States* v. *Hosking*, 567 F. 3d 329, 331–332 (CA7 2009) (same); *United States* v. *Stennis-Williams*, 557 F. 3d 927, 930 (CA8 2009) (same); *United States* v. *Amato*, 540 F. 3d 153, 159–163 (CA2 2008) (same); *United States* v. *Gordon*, 393 F. 3d 1044, 1056–1057 (CA9 2004) (same).

II

The Mandatory Victims Restitution Act is one of several federal statutes that govern federal court orders requiring defendants convicted of certain crimes to pay their victims restitution. It concerns "crime[s] of violence," "offense[s] against property . . . , including any offense committed by fraud or deceit," and two specific offenses, one concerning tampering with a consumer product and the other concerning theft of medical products. 18 U. S. C. § 3663A(c)(1)(A). It requires, in the case of property offenses, return of the property taken or its value, § 3663A(b)(1); in the case of bodily injury, the payment of medical expenses and lost income, § 3663A(b)(2); in the case of death, the payment of funeral expenses, § 3663A(b)(3); and, as we have said, *supra*, at 579, in all cases, "reimburse[ment]" to

> "the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the*

> *offense or attendance at proceedings related to the offense*." § 3663A(b)(4) (emphasis added).

We here consider the meaning of that italicized phrase. Specifically, we ask whether the scope of the words "investigation" and "proceedings" is limited to government investigations and criminal proceedings, or whether it includes private investigations and civil or bankruptcy litigation. We conclude that those words are limited to government investigations and criminal proceedings.

Our conclusion rests in large part upon the statute's wording, both its individual words and the text taken as a whole. The individual words suggest (though they do not demand) our limited interpretation. The word "investigation" is directly linked by the word "or" to the word "prosecution," with which it shares the article "the." This suggests that the "investigation[s]" and "prosecution[s]" that the statute refers to are of the same general type. And the word "prosecution" must refer to a government's criminal prosecution, which suggests that the word "investigation" may refer to a government's criminal investigation. A similar line of reasoning suggests that the immediately following reference to "proceedings" also refers to criminal proceedings in particular, rather than to "proceedings" of any sort.

Furthermore, there would be an awkwardness about the statute's use of the word "participation" to refer to a victim's role in its own private investigation, and the word "attendance" to refer to a victim's role as a party in noncriminal court proceedings. A victim opting to pursue a private investigation of an offense would be more naturally said to "provide for" or "conduct" the private investigation (in which he may, or may not, actively "participate"). And a victim who pursues civil or bankruptcy litigation does not merely "atten[d]" such other "proceedings related to the offense" but instead "participates" in them as a party. In contrast, there is no awkwardness, indeed it seems perfectly natural, to say that a victim "participat[es] in the investiga-

tion" or "attend[s] . . . proceedings related to the offense" if the investigation at issue is a government's criminal investigation, and if the proceedings at issue are criminal proceedings conducted by a government.

Moreover, to consider the statutory phrase as a whole strengthens these linguistic points considerably. The phrase lists three specific items that must be reimbursed, namely, lost income, child care, and transportation; and it then adds the words, "and other expenses." §3663A(b)(4). Lost income, child care expenses, and transportation expenses are precisely the kind of expenses that a victim would be likely to incur when he or she (or, for a corporate victim like GE, its employees) misses work and travels to talk to government investigators, to participate in a government criminal investigation, or to testify before a grand jury or attend a criminal trial. At the same time, the statute says nothing about the kinds of expenses a victim would often incur when private investigations or, say, bankruptcy proceedings are at issue, namely, the costs of hiring private investigators, attorneys, or accountants. Thus, if we look to *noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep, we find here both the presence of company that suggests limitation and the absence of company that suggests breadth. See, *e. g.*, *Yates* v. *United States*, 574 U. S. 528, 543 (2015).

We add a practical fact: A broad reading would create significant administrative burdens. The statute provides for mandatory restitution, and the portion we construe is limited to "*necessary* . . . other expenses." §3663A(b)(4) (emphasis added). The word "necessary" would, if the statute is broadly interpreted, invite disputes as to whether particular expenses "incurred during" participation in a private investigation or attendance at, say, a bankruptcy proceeding were in fact "necessary." Such disputes may become burdensome in cases involving multimillion dollar investigation expenses for teams of lawyers and accountants. A district court

might, for example, need to decide whether each witness interview and each set of documents reviewed was really "necessary" to the investigation. Similarly, the statute also limits restitution to expenses incurred only during "attendance at *proceedings related* to the offense," *ibid.* (emphasis added), inviting disputes as to whether, say, a licensing proceeding, a human resources review, an in-house disciplinary proceeding, a job interview, a Consumer Product Safety Commission hearing, or a neighborhood watch meeting qualified as "proceedings" sufficiently "related to the offense" so as to be eligible for restitution.

To interpret the statute broadly is to invite controversy on those and other matters; our narrower construction avoids it. And one begins to doubt whether Congress intended, in making this restitution mandatory, to require courts to resolve these potentially time-consuming controversies as part of criminal sentencing—particularly once one realizes that few victims are likely to benefit because more than 90% of criminal restitution is never collected. See GAO, Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved 25 (GAO–18–203, 2018) (explaining that the Justice Department considers 91% of outstanding criminal restitution to be "uncollectible").

There are, of course, contrary arguments—arguments favoring a broad interpretation. The Government points out, in particular, that our narrow interpretation will sometimes leave a victim without a restitution remedy sufficient to cover some expenses (say, those related to his private investigation) which he undoubtedly incurred as a result of the offense. Leaving the victim without that restitution remedy, the Government adds, runs contrary to the broad purpose of the Mandatory Victims Restitution Act, namely, "to ensure that victims of a crime receive full restitution." *Dolan* v. *United States*, 560 U. S. 605, 612 (2010).

But a broad general purpose of this kind does not always require us to interpret a restitution statute in a way that favors an award. After all, Congress has enacted many dif-

ferent restitution statutes with differing language, governing different circumstances. Some of those statutes specifically require restitution for the "full amount of the victim's losses," defined to include "any . . . losses suffered by the victim as a proximate result of the offense." See 18 U. S. C. §§ 2248(b), 2259(b), 2264(b), 2327(b). The Mandatory Victims Restitution Act, however, contains no such language; it specifically lists the kinds of losses and expenses that it covers. Moreover, in at least one other statute Congress has expressly provided for restitution of "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense." § 3663(b)(6). Again the Mandatory Victims Restitution Act has no similar provision. And given those differences between the Mandatory Victims Restitution Act and other restitution statutes, we conclude that the considerations we have mentioned, particularly those based on a reading of the statute as a whole, tip the balance in favor of our more limited interpretation.

We add that this interpretation does not leave a victim such as GE totally without a remedy for additional losses not covered by the Mandatory Victims Restitution Act. GE also brought a civil lawsuit against Lagos for the full extent of its losses, and obtained an over-$30 million judgment against him. The Government says that GE has largely been unable to collect on that judgment, but there is no reason to think that collection efforts related to a criminal restitution award would prove any more successful.

The Government makes one additional argument. It points out that GE shared with the Government the information that its private investigation uncovered. And that fact, the Government says, should bring the expenses of that investigation within the terms of the statute even if the "investigation" referred to by the statute is a government's criminal investigation. The short, conclusive answer to that claim, however, lies in the fact that the statute refers to "nec-

essary child care, transportation, and other expenses incurred *during* participation in the investigation or prosecution of the offense." § 3663A(b)(4) (emphasis added). It does not refer to expenses incurred *before* the victim's participation in a government's investigation began. And the Government does not deny that it is those preparticipation expenses—the expenses of conducting GE's investigation, not those of sharing the results from it—that are at issue here. We therefore need not address in this case whether this part of the Mandatory Victims Restitution Act would cover similar expenses incurred during a private investigation that was pursued at a government's invitation or request. It is enough to hold that it does not cover the costs of a private investigation that the victim chooses on its own to conduct.

* * *

For the reasons stated, we conclude that the words "investigation" and "proceedings" in the Mandatory Victims Restitution Act refer to government investigations and criminal proceedings. Consequently Lagos is not obliged to pay the portion of the restitution award that he here challenges. We reverse the Court of Appeals' judgment to the contrary, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

COLLINS *v.* VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 16–1027. Argued January 9, 2018—Decided May 29, 2018

During the investigation of two traffic incidents involving an orange and black motorcycle with an extended frame, Officer David Rhodes learned that the motorcycle likely was stolen and in the possession of petitioner Ryan Collins. Officer Rhodes discovered photographs on Collins' Facebook profile of an orange and black motorcycle parked in the driveway of a house, drove to the house, and parked on the street. From there, he could see what appeared to be the motorcycle under a white tarp parked in the same location as the motorcycle in the photograph. Without a search warrant, Office Rhodes walked to the top of the driveway, removed the tarp, confirmed that the motorcycle was stolen by running the license plate and vehicle identification numbers, took a photograph of the uncovered motorcycle, replaced the tarp, and returned to his car to wait for Collins. When Collins returned, Officer Rhodes arrested him. The trial court denied Collins' motion to suppress the evidence on the ground that Officer Rhodes violated the Fourth Amendment when he trespassed on the house's curtilage to conduct a search, and Collins was convicted of receiving stolen property. The Virginia Court of Appeals affirmed. The State Supreme Court also affirmed, holding that the warrantless search was justified under the Fourth Amendment's automobile exception.

Held: The automobile exception does not permit the warrantless entry of a home or its curtilage in order to search a vehicle therein. Pp. 591–601.

(a) This case arises at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home. In announcing each of the automobile exception's justifications—*i. e.*, the "ready mobility of the automobile" and "the pervasive regulation of vehicles capable of traveling on the public highways," *California* v. *Carney*, 471 U. S. 386, 390, 392—the Court emphasized that the rationales applied only to automobiles and not to houses, and therefore supported their different treatment as a constitutional matter. When these justifications are present, officers may search an automobile without a warrant so long as they have probable cause. Curtilage—"the area 'immediately surrounding and associated with the home' "—is considered " 'part of the home itself for Fourth Amendment purposes.' " *Florida* v. *Jardines*, 569 U. S. 1, 6. Thus, when an officer physically intrudes on the curtilage to gather evidence, a Fourth Amendment

search has occurred and is presumptively unreasonable absent a warrant. Pp. 591–593.

(b) As an initial matter, the part of the driveway where Collins' motorcycle was parked and subsequently searched is curtilage. When Officer Rhodes searched the motorcycle, it was parked inside a partially enclosed top portion of the driveway that abuts the house. Just like the front porch, side garden, or area "outside the front window," that enclosure constitutes "an area adjacent to the home and 'to which the activity of home life extends.'" *Jardines*, 569 U. S., at 6, 7.

Because the scope of the automobile exception extends no further than the automobile itself, it did not justify Officer Rhodes' invasion of the curtilage. Nothing in this Court's case law suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Such an expansion would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and "'untether'" the exception "'from the justifications underlying'" it. *Riley* v. *California*, 573 U. S. 373, 386. This Court has similarly declined to expand the scope of other exceptions to the warrant requirement. Thus, just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant—see *Horton* v. *California*, 496 U. S. 128, 136–137—and just as an officer must have a lawful right of access in order to arrest a person in his home—see *Payton* v. *New York*, 445 U. S. 573, 587–590—so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. To allow otherwise would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application. Pp. 593–598.

(c) Contrary to Virginia's claim, the automobile exception is not a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. *Scher* v. *United States*, 305 U. S. 251; *Pennsylvania* v. *Labron*, 518 U. S. 938, distinguished. Also unpersuasive is Virginia's proposed bright-line rule for an automobile exception that would not permit warrantless entry only of the house itself or another fixed structure, *e. g.*, a garage, inside the curtilage. This Court has long been clear that curtilage is afforded constitutional protection, and creating a carveout for certain types of curtilage seems more likely to create confusion than does uniform application of the Court's doctrine. Virginia's rule also rests on a mistaken premise, for the ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant to search for information not otherwise accessible. Finally, Virginia's rule automatically would grant constitutional rights to those persons with the

financial means to afford residences with garages but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage. Pp. 598–601.

292 Va. 486, 790 S. E. 2d 611, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 601. ALITO, J., filed a dissenting opinion, *post*, p. 609.

Matthew A. Fitzgerald argued the cause for petitioner. With him on the briefs were *Brian D. Schmalzbach*, *Travis C. Gunn*, and *Charles L. Weber, Jr.*

Trevor S. Cox, Acting Solicitor General of Virginia, argued the cause for respondent. With him on the brief were *Mark R. Herring*, Attorney General of Virginia, *Matthew R. McGuire*, Acting Deputy Solicitor General, and *Christopher P. Schandevel*, Assistant Attorney General.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. It does not.

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*Briefs of *amici curiae* urging reversal were filed for the American Motorcyclist Association by *William R. Peterson*; for the Cato Institute by *Andrew J. Pincus*, *Charles A. Rothfeld*, *Paul W. Hughes*, *Michael B. Kimberly*, *Eugene R. Fidell*, *Ilya Shapiro*, and *Jay R. Schweikert*; for the Conservative Legal Defense and Education Fund et al. by *Herbert W. Titus*, *Robert J. Olson*, *William J. Olson*, *Jeremiah L. Morgan*, *Joseph W. Miller*, and *Michael Boos*; for Fourth Amendment Scholars by *Leslie A. Shoebotham*; for the Institute for Justice by *Anthony Sanders* and *Robert P. Frommer*; for the National Association of Criminal Defense Lawyers by *Douglas Hallward-Driemeier* and *Jonathan Hacker*; for the National Rifle Association Freedom Action Foundation by *David H. Thompson* and *Peter A. Patterson*; for Restore the Fourth, Inc., by *Mahesha P. Subbaraman*; and for The Rutherford Institute by *Anand Agneshwar*, *Paige Hester Sharpe*, and *John W. Whitehead*.

I

Officer Matthew McCall of the Albemarle County Police Department in Virginia saw the driver of an orange and black motorcycle with an extended frame commit a traffic infraction. The driver eluded Officer McCall's attempt to stop the motorcycle. A few weeks later, Officer David Rhodes of the same department saw an orange and black motorcycle traveling well over the speed limit, but the driver got away from him, too. The officers compared notes and concluded that the two incidents involved the same motorcyclist.

Upon further investigation, the officers learned that the motorcycle likely was stolen and in the possession of petitioner Ryan Collins. After discovering photographs on Collins' Facebook profile that featured an orange and black motorcycle parked at the top of the driveway of a house, Officer Rhodes tracked down the address of the house, drove there, and parked on the street. It was later established that Collins' girlfriend lived in the house and that Collins stayed there a few nights per week.[1]

From his parked position on the street, Officer Rhodes saw what appeared to be a motorcycle with an extended frame covered with a white tarp, parked at the same angle and in the same location on the driveway as in the Facebook photograph. Officer Rhodes, who did not have a warrant, exited his car and walked toward the house. He stopped to take a photograph of the covered motorcycle from the sidewalk, and then walked onto the residential property and up to the top of the driveway to where the motorcycle was parked. In order "to investigate further," App. 80, Officer Rhodes pulled off the tarp, revealing a motorcycle that looked like the one from the speeding incident. He then ran a search of the license plate and vehicle identification numbers, which con-

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[1] Virginia does not dispute that Collins has Fourth Amendment standing. See *Minnesota* v. *Olson*, 495 U. S. 91, 96–100 (1990).

firmed that the motorcycle was stolen. After gathering this information, Officer Rhodes took a photograph of the uncovered motorcycle, put the tarp back on, left the property, and returned to his car to wait for Collins.

Shortly thereafter, Collins returned home. Officer Rhodes walked up to the front door of the house and knocked. Collins answered, agreed to speak with Officer Rhodes, and admitted that the motorcycle was his and that he had bought it without title. Officer Rhodes then arrested Collins.

Collins was indicted by a Virginia grand jury for receiving stolen property. He filed a pretrial motion to suppress the evidence that Officer Rhodes had obtained as a result of the warrantless search of the motorcycle. Collins argued that Officer Rhodes had trespassed on the curtilage of the house to conduct an investigation in violation of the Fourth Amendment. The trial court denied the motion and Collins was convicted.

The Court of Appeals of Virginia affirmed. It assumed that the motorcycle was parked in the curtilage of the home and held that Officer Rhodes had probable cause to believe that the motorcycle under the tarp was the same motorcycle that had evaded him in the past. It further concluded that Officer Rhodes' actions were lawful under the Fourth Amendment even absent a warrant because "numerous exigencies justified both his entry onto the property and his moving the tarp to view the motorcycle and record its identification number." 65 Va. App. 37, 46, 773 S. E. 2d 618, 623 (2015).

The Supreme Court of Virginia affirmed on different reasoning. It explained that the case was most properly resolved with reference to the Fourth Amendment's automobile exception. 292 Va. 486, 496–501, 790 S. E. 2d 611, 616–618 (2016). Under that framework, it held that Officer Rhodes had probable cause to believe that the motorcycle was contraband, and that the warrantless search therefore was justified. *Id.*, at 498–499, 790 S. E. 2d, at 617.

We granted certiorari, 582 U. S. 966 (2017), and now reverse.

II

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." This case arises at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home.

A

1

The Court has held that the search of an automobile can be reasonable without a warrant. The Court first articulated the so-called automobile exception in *Carroll* v. *United States*, 267 U. S. 132 (1925). In that case, law enforcement officers had probable cause to believe that a car they observed traveling on the road contained illegal liquor. They stopped and searched the car, discovered and seized the illegal liquor, and arrested the occupants. *Id.*, at 134–136. The Court upheld the warrantless search and seizure, explaining that a "necessary difference" exists between searching "a store, dwelling house or other structure" and searching "a ship, motor boat, wagon or automobile" because a "vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153.

The "ready mobility" of vehicles served as the core justification for the automobile exception for many years. *California* v. *Carney*, 471 U. S. 386, 390 (1985) (citing, *e. g.*, *Cooper* v. *California*, 386 U. S. 58, 59 (1967); *Chambers* v. *Maroney*, 399 U. S. 42, 51–52 (1970)). Later cases then introduced an additional rationale based on "the pervasive regulation of vehicles capable of traveling on the public highways." *Carney*, 471 U. S., at 392. As the Court explained in *South Dakota* v. *Opperman*, 428 U. S. 364 (1976):

> "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." *Id.*, at 368.

In announcing each of these two justifications, the Court took care to emphasize that the rationales applied only to automobiles and not to houses, and therefore supported "treating automobiles differently from houses" as a constitutional matter. *Cady* v. *Dombrowski*, 413 U. S. 433, 441 (1973).

When these justifications for the automobile exception "come into play," officers may search an automobile without having obtained a warrant so long as they have probable cause to do so. *Carney*, 471 U. S., at 392–393.

2

Like the automobile exception, the Fourth Amendment's protection of curtilage has long been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U. S. 1, 6 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Ibid.* (quoting *Silverman* v. *United States*, 365 U. S. 505, 511 (1961)). To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home'"—to be "'part of the home itself for Fourth Amendment purposes.'" *Jardines*, 569 U. S., at 6 (quoting *Oliver* v. *United States*, 466 U. S. 170, 180 (1984)). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to

the home, both physically and psychologically, where privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U. S. 207, 212–213 (1986).

When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *Jardines*, 569 U. S., at 11. Such conduct thus is presumptively unreasonable absent a warrant.

B

1

With this background in mind, we turn to the application of these doctrines in the instant case. As an initial matter, we decide whether the part of the driveway where Collins' motorcycle was parked and subsequently searched is curtilage.

According to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Officer Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house.

The "'conception defining the curtilage' is . . . familiar enough that it is 'easily understood from our daily experience.'" *Jardines*, 569 U. S., at 7 (quoting *Oliver*, 466 U. S., at 182, n. 12). Just like the front porch, side garden, or area "outside the front window," *Jardines*, 569 U. S., at 6, the driveway enclosure where Officer Rhodes searched the mo-

torcycle constitutes "an area adjacent to the home and 'to which the activity of home life extends,' " and so is properly considered curtilage, *id.*, at 7 (quoting *Oliver*, 466 U. S., at 182, n. 12).

2

In physically intruding on the curtilage of Collins' home to search the motorcycle, Officer Rhodes not only invaded Collins' Fourth Amendment interest in the item searched, *i. e.*, the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home. The question before the Court is whether the automobile exception justifies the invasion of the curtilage.[2] The answer is no.

Applying the relevant legal principles to a slightly different factual scenario confirms that this is an easy case. Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not.

The reason is that the scope of the automobile exception extends no further than the automobile itself. See, *e. g.*, *Pennsylvania* v. *Labron*, 518 U. S. 938, 940 (1996) (*per curiam*) (explaining that the automobile exception "permits police to search the vehicle"); *Wyoming* v. *Houghton*, 526 U. S. 295, 300 (1999) ("[T]he Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers *within* an automobile"). Virginia asks the Court to expand the scope of the automobile exception to

[2] Helpfully, the parties have simplified matters somewhat by each making a concession. Petitioner concedes "for purposes of this appeal" that Officer Rhodes had probable cause to believe that the motorcycle was the one that had eluded him, Brief for Petitioner 5, n. 3, and Virginia concedes that "Officer Rhodes searched the motorcycle," Brief for Respondent 12.

permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. Nothing in our case law, however, suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Expanding the scope of the automobile exception in this way would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and "'untether'" the automobile exception "'from the justifications underlying'" it. *Riley* v. *California*, 573 U. S. 373, 386 (2014) (quoting *Arizona* v. *Gant*, 556 U. S. 332, 343 (2009)).

The Court already has declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home. The reasoning behind those decisions applies equally well in this context. For instance, under the plain-view doctrine, "any valid warrantless seizure of incriminating evidence" requires that the officer "have a lawful right of access to the object itself." *Horton* v. *California*, 496 U. S. 128, 136–137 (1990); see also *id.*, at 137, n. 7 ("'[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure'"); *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 354 (1977) ("It is one thing to seize without a warrant property resting in an open area . . . , and it is quite another thing to effect a warrantless seizure of property . . . situated on private premises to which access is not otherwise available for the seizing officer"). A plain-view seizure thus cannot be justified if it is effectuated "by unlawful trespass." *Soldal* v. *Cook County*, 506 U. S. 56, 66 (1992). Had Officer Rhodes seen illegal drugs through the window of Collins' house, for example, assuming no other warrant exception applied, he could not have entered the house to seize them without first obtaining a warrant.

Similarly, it is a "settled rule that warrantless arrests in public places are valid," but, absent another exception such

as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause. *Payton* v. *New York*, 445 U. S. 573, 587–590 (1980). That is because being "'arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.'" *Id.*, at 588–589 (quoting *United States* v. *Reed*, 572 F. 2d 412, 423 (CA2 1978)). Likewise, searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.

Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, and just as an officer must have a lawful right of access in order to arrest a person in his home, so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage.

As noted, the rationales underlying the automobile exception are specific to the nature of a vehicle and the ways in which it is distinct from a house. See Part II–A–1, *supra*. The rationales thus take account only of the balance between the intrusion on an individual's Fourth Amendment interest in his vehicle and the governmental interests in an expedient search of that vehicle; they do not account for the distinct privacy interest in one's home or curtilage. To allow an officer to rely on the automobile exception to gain entry into a house or its curtilage for the purpose of conducting a vehicle search would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and

transform what was meant to be an exception into a tool with far broader application. Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles.[3]

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[3] The dissent concedes that "the degree of the intrusion on privacy" is relevant in determining whether a warrant is required to search a motor vehicle "located on private property." *Post*, at 614 (opinion of ALITO, J.). Yet it puzzlingly asserts that the "privacy interests at stake" here are no greater than when a motor vehicle is searched "on public streets." *Post*, at 612. "An ordinary person of common sense," *post*, at 611, however, clearly would understand that the privacy interests at stake in one's private residential property are far greater than on a public street. Contrary to the dissent's suggestion, it is of no significance that the motorcycle was parked just a "short walk up the driveway." *Post*, at 610–611. The driveway was private, not public, property, and the motorcycle was parked in the portion of the driveway beyond where a neighbor would venture, in an area "intimately linked to the home, . . . where privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986). Nor does it matter that Officer Rhodes "did not damage any property," *post*, at 611, for an officer's care in conducting a search does not change the character of the place being searched. And, as we explain, see *infra*, at 600–601, it is not dispositive that Officer Rhodes did not "observe anything along the way" to the motorcycle "that he could not have seen from the street," *post*, at 611. Law enforcement officers need not "shield their eyes when passing by a home on public thoroughfares," *Ciraolo*, 476 U. S., at 213, but the ability visually to observe an area protected by the Fourth Amendment does not give officers the green light physically to intrude on it. See *Florida* v. *Jardines*, 569 U. S. 1, 7–8 (2013). It certainly does not permit an officer physically to intrude on curtilage, remove a tarp to reveal license plate and vehicle identification numbers, and use those numbers to confirm that the defendant committed a crime.

The dissent also mistakenly relies on a law enacted by the First Congress and mentioned in *Carroll* v. *United States*, 267 U. S. 132, 150–151 (1925), that authorized the warrantless search of vessels. *Post*, at 613, n. 3. The dissent thinks it implicit in that statute that "officers could cross private property such as wharves in order to reach and board those vessels." *Ibid.* Even if it were so that a police officer could have entered a private wharf to search a vessel, that would not prove he could enter the curtilage of a home to do so. To the contrary, whereas the statute relied upon in *Carroll* authorized warrantless searches of vessels, it ex-

Given the centrality of the Fourth Amendment interest in the home and its curtilage and the disconnect between that interest and the justifications behind the automobile exception, we decline Virginia's invitation to extend the automobile exception to permit a warrantless intrusion on a home or its curtilage.

III

A

Virginia argues that this Court's precedent indicates that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. Specifically, Virginia points to two decisions that it contends resolve this case in its favor. Neither is dispositive or persuasive.

First, Virginia invokes *Scher* v. *United States*, 305 U. S. 251 (1938). In that case, federal officers received a confidential tip that a particular car would be transporting bootleg liquor at a specified time and place. The officers identified and followed the car until the driver "turned into a garage a few feet back of his residence and within the curtilage." *Id.*, at 253. As the driver exited his car, an officer approached and stated that he had been informed that the car was carrying contraband. The driver acknowledged that there was liquor in the trunk, and the officer proceeded to open the trunk, find the liquor, arrest the driver, and seize both the car and the liquor. *Id.*, at 253–254. Although the officer did not have a search warrant, the Court upheld the officer's actions as reasonable. *Id.*, at 255.

Scher is inapposite. Whereas Collins' motorcycle was parked and unattended when Officer Rhodes intruded on the curtilage to search it, the officers in *Scher* first encountered the vehicle when it was being driven on public streets, approached the curtilage of the home only when the driver

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pressly required warrants to search houses. See 267 U. S., at 150–157; Act of July 31, 1789, § 24, 1 Stat. 43. Here, Officer Rhodes did not invade a private wharf to undertake a search; he invaded the curtilage of a home.

turned into the garage, and searched the vehicle only after the driver admitted that it contained contraband. *Scher* by no means established a general rule that the automobile exception permits officers to enter a home or its curtilage absent a warrant. The Court's brief analysis referenced *Carroll*, but only in the context of observing that, consistent with that case, the "officers properly could have stopped" and searched the car "just before [petitioner] entered the garage," a proposition the petitioner did "not seriously controver[t]." *Scher*, 305 U. S., at 254–255. The Court then explained that the officers did not lose their ability to stop and search the car when it entered "the open garage closely followed by the observing officer" because "[n]o search was made of the garage." *Id.*, at 255. It emphasized that "[e]xamination of the automobile accompanied an arrest, without objection and upon admission of probable guilt," and cited two search-incident-to-arrest cases. *Ibid.* (citing *Agnello* v. *United States*, 269 U. S. 20, 30 (1925); *Wisniewski* v. *United States*, 47 F. 2d 825, 826 (CA6 1931)). *Scher*'s reasoning thus was both case specific and imprecise, sounding in multiple doctrines, particularly, and perhaps most appropriately, hot pursuit. The decision is best regarded as a factbound one, and it certainly does not control this case.

Second, Virginia points to *Labron*, 518 U. S. 938, where the Court upheld under the automobile exception the warrantless search of an individual's pickup truck that was parked in the driveway of his father-in-law's farmhouse. *Id.*, at 939–940; *Commonwealth* v. *Kilgore*, 544 Pa. 439, 444, 677 A. 2d 311, 313 (1995). But *Labron* provides scant support for Virginia's position. Unlike in this case, there was no indication that the individual who owned the truck in *Labron* had any Fourth Amendment interest in the farmhouse or its driveway, nor was there a determination that the driveway was curtilage.

B

Alternatively, Virginia urges the Court to adopt a more limited rule regarding the intersection of the automobile ex-

ception and the protection afforded to curtilage. Virginia would prefer that the Court draw a bright line and hold that the automobile exception does not permit warrantless entry into "the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage like a garage." Brief for Respondent 46. Requiring officers to make "case-by-case curtilage determinations," Virginia reasons, unnecessarily complicates matters and "raises the potential for confusion and . . . error." *Id.*, at 46–47 (internal quotation marks omitted).

The Court, though, has long been clear that curtilage is afforded constitutional protection. See *Oliver*, 466 U. S., at 180. As a result, officers regularly assess whether an area is curtilage before executing a search. Virginia provides no reason to conclude that this practice has proved to be unadministrable, either generally or in this context. Moreover, creating a carveout to the general rule that curtilage receives Fourth Amendment protection, such that certain types of curtilage would receive Fourth Amendment protection only for some purposes but not for others, seems far more likely to create confusion than does uniform application of the Court's doctrine.

In addition, Virginia's proposed rule rests on a mistaken premise about the constitutional significance of visibility. The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible. Cf. *Ciraolo*, 476 U. S., at 213–214 (holding that "physically nonintrusive" warrantless aerial observation of the curtilage of a home did not violate the Fourth Amendment, and could form the basis for probable cause to support a warrant to search the curtilage). So long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage.

Finally, Virginia's proposed bright-line rule automatically would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage. See *United States* v. *Ross*, 456 U. S. 798, 822 (1982) ("[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion").

IV

For the foregoing reasons, we conclude that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein. We leave for resolution on remand whether Officer Rhodes' warrantless intrusion on the curtilage of Collins' house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement. The judgment of the Supreme Court of Virginia is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion because it correctly resolves the Fourth Amendment question in this case. Notably, the only reason that Collins asked us to review this question is because, if he can prove a violation of the Fourth Amendment, our precedents require the Virginia courts to apply the exclusionary rule and potentially suppress the incriminating evidence against him. I write separately because I have serious doubts about this Court's authority to impose that rule on the States. The assumption that state courts must apply the federal exclusionary rule is legally dubious, and many jurists have complained that it encourages "distort[ions]" in

substantive Fourth Amendment law, *Rakas* v. *Illinois*, 439 U. S. 128, 157 (1978) (White, J., dissenting); see also *Coolidge* v. *New Hampshire*, 403 U. S. 443, 490 (1971) (Harlan, J., concurring); Calabresi, The Exclusionary Rule, 26 Harv. J. L. & Pub. Pol'y 111, 112 (2003).

The Fourth Amendment, as relevant here, protects the people from "unreasonable searches" of "their . . . houses." As a general rule, warrantless searches of the curtilage violate this command. At the founding, curtilage was considered part of the "hous[e]" itself. See 4 W. Blackstone, Commentaries on the Laws of England 225 (1769) ("[T]he capital house protects and privileges all its branches and appurtenants, if within the curtilage"). And except in circumstances not present here, house searches required a specific warrant. See W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791, p. 743 (2009) (Cuddihy); Donahue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1237–1240 (2016); Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 643–646 (1999). A warrant was required even if the house was being searched for stolen goods or contraband—objects that, unlike cars, are not protected by the Fourth Amendment at all. *Id.*, at 647–650; see also *Carroll* v. *United States*, 267 U. S. 132, 150–152 (1925) (Taft, C. J.) (discussing founding-era evidence that a search warrant was required when stolen goods and contraband were "concealed in a dwelling house" but not when they were "in course of transportation and concealed in a movable vessel"). Accordingly, the police acted "unreasonabl[y]" when they searched the curtilage of Collins' house without a warrant.[1]

While those who ratified the Fourth and Fourteenth Amendments would agree that a constitutional violation oc-

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[1] Collins did not live at the house; he merely stayed there with his girlfriend several times a week. But Virginia does not contest Collins' assertion that the house is his, so I agree with the Court that Virginia has forfeited any argument to the contrary. See *ante*, at 589, n. 1; *United States* v. *Jones*, 565 U. S. 400, 404, n. 2 (2012).

curred here, they would be deeply confused about the posture of this case and the remedy that Collins is seeking. Historically, the only remedies for unconstitutional searches and seizures were "tort suits" and "self-help." *Utah* v. *Strieff*, 579 U. S. 232, 237 (2016). The exclusionary rule—the practice of deterring illegal searches and seizures by suppressing evidence at criminal trials—did not exist. No such rule existed in "Roman Law, Napoleonic Law or even the Common Law of England." Burger, Who Will Watch the Watchman? 14 Am. U. L. Rev. 1 (1964). And this Court did not adopt the federal exclusionary rule until the 20th century. See *Weeks* v. *United States*, 232 U. S. 383 (1914). As late as 1949, nearly two-thirds of the States did not have an exclusionary rule. See *Wolf* v. *Colorado*, 338 U. S. 25, 29 (1949). Those States, as then-Judge Cardozo famously explained, did not understand the logic of a rule that allowed "[t]he criminal . . . to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926).

The Founders would not have understood the logic of the exclusionary rule either. Historically, if evidence was relevant and reliable, its admissibility did not "depend upon the lawfulness or unlawfulness of the mode, by which it [was] obtained." *United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832, 843 (No. 15,551) (CC Mass. 1822) (Story, J.); accord, 1 S. Greenleaf, Evidence § 254a, pp. 825–826 (14th ed. 1883) ("[T]hat . . . subjects of evidence may have been . . . unlawfully obtained . . . is no valid objection to their admissibility if they are pertinent to the issue"); 4 J. Wigmore, Evidence § 2183, p. 626 (2d ed. 1923) ("[I]t has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence" (emphasis deleted)). And the common law sometimes reflected the inverse of the exclusionary rule: The fact that someone turned out to be guilty could *justify* an illegal seizure. See *Gelston* v. *Hoyt*, 3 Wheat. 246, 310 (1818) (Story, J.) ("At common law, any per-

son may at his peril, seize for a forfeiture to the government; and if the government adopt his seizure, and the property is condemned, he will be completely justified"); 2 W. Hawkins, Pleas of the Crown, ch. 12, § 18, p. 77 (1721) ("And where a Man arrests another, who is actually guilty of the Crime for which he is arrested, . . . he needs not in justifying it, set forth any special Cause of his Suspicion").

Despite this history, the Court concluded in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), that the States must apply the federal exclusionary rule in their own courts. *Id.*, at 655.[2] *Mapp* suggested that the exclusionary rule was required by the Constitution itself. See, *e. g.*, *id.*, at 657 ("[T]he exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments"); *id.*, at 655 ("[E]vidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"); *id.*, at 655–656 ("[I]t was . . . constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon").[3] But that suggestion could not withstand

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[2] Twelve years before *Mapp*, the Court declined to apply the federal exclusionary rule to the States. See *Wolf* v. *Colorado*, 338 U. S. 25 (1949). *Wolf* denied that the Constitution requires the exclusionary rule, since "most of the English-speaking world" does not apply that rule and alternatives such as civil suits and internal police discipline do not "fal[l] below the minimal standards assured by the Due Process Clause." *Id.*, at 29, 31. In *Mapp*, the Court overruled *Wolf* and applied the exclusionary rule to the States, even though no party had briefed or argued that question. See 367 U. S., at 672–674, and nn. 4–6 (Harlan, J., dissenting); Stewart, The Road to *Mapp* v. *Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule, 83 Colum. L. Rev. 1365, 1368 (1983).

[3] Justice Black, the essential fifth vote in *Mapp*, did not agree that the Fourth Amendment contains an exclusionary rule. See 367 U. S., at 661–662 (concurring opinion) ("[T]he Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred"). But he concluded that, when the police seize private papers, suppression is required by a combination of the Fourth and Fifth Amendments. See *id.*, at 662–666.

even the slightest scrutiny. The exclusionary rule appears nowhere in the Constitution, postdates the founding by more than a century, and contradicts several longstanding principles of the common law. See *supra*, at 602–604; Cuddihy 759–760; Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 786 (1994); Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1030–1031 (1974).

Recognizing this, the Court has since rejected *Mapp*'s "'[e]xpansive dicta'" and clarified that the exclusionary rule is not required by the Constitution. *Davis* v. *United States*, 564 U. S. 229, 237 (2011) (quoting *Hudson* v. *Michigan*, 547 U. S. 586, 591 (2006)). Suppression, this Court has explained, is not "a personal constitutional right." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974); accord, *Stone* v. *Powell*, 428 U. S. 465, 486 (1976). The Fourth Amendment "says nothing about suppressing evidence," *Davis*, *supra*, at 236, and a prosecutor's "use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong,'" *United States* v. *Leon*, 468 U. S. 897, 906 (1984) (quoting *Calandra*, *supra*, at 354).[4] Instead, the exclusionary rule is a "judicially created" doctrine that is "prudential rather than constitutionally mandated." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 363 (1998); accord, *Herring* v. *United States*, 555 U. S. 135, 139 (2009);

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[4] The exclusionary rule is not required by the Due Process Clause either. Given its nonexistent historical foundation, the exclusionary rule cannot be a "settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). And the rule "has 'no bearing on . . . the fairness of the trial.'" *Desist* v. *United States*, 394 U. S. 244, 254, n. 24 (1969). If anything, the exclusionary rule itself "'offends basic concepts of the criminal justice system'" and exacts a "'costly toll upon truth-seeking.'" *Herring* v. *United States*, 555 U. S. 135, 141 (2009). "The [excluded] evidence is likely to be the most reliable that could possibly be obtained [and thus] exclusion rather than admission creates the danger of a verdict erroneous on the true facts." H. Friendly, Benchmarks 260 (1967).

Arizona v. *Evans*, 514 U. S. 1, 10 (1995); *United States* v. *Janis*, 428 U. S. 433, 459–460 (1976).[5]

Although the exclusionary rule is not part of the Constitution, this Court has continued to describe it as "federal law" and assume that it applies to the States. *Evans*, *supra*; *Massachusetts* v. *Sheppard*, 468 U. S. 981, 991 (1984). Yet the Court has never attempted to justify this assumption. If the exclusionary rule is federal law, but is not grounded in the Constitution or a federal statute, then it must be federal common law. See Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 10 (1975). As federal common law, however, the exclusionary rule cannot bind the States.

Federal law trumps state law only by virtue of the Supremacy Clause, which makes the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . . the supreme Law of the Land," Art. VI, cl. 2. When the Supremacy Clause refers to "[t]he Laws of the United States . . . made in Pursuance [of the Constitution]," it means federal statutes, not federal common law. Ramsey, The Supremacy Clause, Original Meaning, and Modern Law, 74 Ohio St. L. J. 559, 572–599 (2013) (Ramsey); Clark, Separation of Powers as a Safeguard of Federalism, 79 Texas L. Rev. 1321, 1334–1336, 1338–1367 (2001) (Clark); see also *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C. J.) ("The appropriate application of that part of

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[5] These statements cannot be dismissed as mere dicta. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 438–441, and n. 2 (2000) (constitutionalizing the rule announced in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), despite earlier precedents to the contrary). The nonconstitutional status of the exclusionary rule is why this Court held in *Stone* v. *Powell*, 428 U. S. 465, 482–495 (1976), that violations are not cognizable on federal habeas review. Cf. *Dickerson*, *supra*, at 439, n. 3. And the nonconstitutional status of the rule is why this Court has created more than a dozen exceptions to it, which apply even when the Fourth Amendment is concededly violated. See *United States* v. *Weaver*, 808 F. 3d 26, 49 (CADC 2015) (Henderson, J., dissenting) (collecting cases); cf. *Dickerson*, *supra*, at 441.

the clause which confers . . . supremacy on laws . . . is to . . . the laws of Congress, made in pursuance of the constitution"); Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 500 (1954) ("[T]he supremacy clause is limited to those 'Laws' of the United States which are passed by Congress pursuant to the Constitution"). By referencing laws "made in Pursuance" of the Constitution, the Supremacy Clause incorporates the requirements of Article I, which force Congress to stay within its enumerated powers, § 8, and follow the cumbersome procedures for enacting federal legislation, § 7. See *Wyeth* v. *Levine*, 555 U. S. 555, 585–587 (2009) (THOMAS, J., concurring in judgment); 3 J. Story, Commentaries on the Constitution of the United States § 1831, pp. 693–694 (1833); Clark 1334. Those procedures—especially the requirement that bills pass the Senate, where the States are represented equally and Senators were originally elected by state legislatures—safeguard federalism by making federal legislation more difficult to pass and more responsive to state interests. See Ramsey 565; Clark 1342–1343. Federal common law bypasses these procedures and would not have been considered the kind of "la[w]" that can bind the States under the Supremacy Clause. See Ramsey 564–565, 568, 574, 581; Jay, Origins of Federal Common Law: Part Two, 133 U. Pa. L. Rev. 1231, 1275 (1985).

True, this Court, without citing the Supremacy Clause, has recognized several "enclaves of federal judge-made law which bind the States." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 426 (1964); see, *e. g.*, *id.*, at 427–428 (foreign affairs); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110 (1938) (disputes between States); *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245 (1942) (admiralty); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366 (1943) (certain rights and obligations of the United States); *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 456–457 (1957) (aspects of federal labor law). To the extent these enclaves are delegations of lawmaking au-

thority from the Constitution or a federal statute, they do not conflict with the original meaning of the Supremacy Clause (though they might be illegitimate for other reasons). See Ramsey 568–569; Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U. L. Rev. 100, 131–132 (1985). To the extent these enclaves are not rooted in the Constitution or a statute, their preemptive force is questionable. But that is why this Court has "limited" them to a "'few'" "narrow areas" where "the authority and duties of the United States as sovereign are intimately involved" or where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 640–641 (1981) (quoting *Wheeldin* v. *Wheeler*, 373 U. S. 647, 651 (1963)). Outside these narrow enclaves, the general rule is that "[t]here is no federal general common law" and "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938).

These precedents do not support requiring the States to apply the exclusionary rule. As explained, the exclusionary rule is not rooted in the Constitution or a federal statute. This Court has repeatedly rejected the idea that the rule is in the Fourth and Fourteenth Amendments, expressly or implicitly. See *Davis*, 564 U. S., at 236; *Leon*, 468 U. S., at 905–906; cf. *Ziglar* v. *Abbasi*, 582 U. S. 120, 135 (2017) (explaining that reading implied remedies into the Constitution is "a 'disfavored' judicial activity"). And the exclusionary rule does not implicate any of the special enclaves of federal common law. It does not govern the sovereign duties of the United States or disputes of an interstate or international character. Instead, the rule governs the methods that state police officers use to solve crime and the procedures that state courts use at criminal trials—subjects that the Federal Government generally has no power to regulate. See

United States v. *Morrison*, 529 U. S. 598, 618 (2000) (explaining that "[t]he regulation" and "vindication" of intrastate crime "has always been the province of the States"); *Smith* v. *Phillips*, 455 U. S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings"). These are not areas where federal common law can bind the States.[6]

* * *

In sum, I am skeptical of this Court's authority to impose the exclusionary rule on the States. We have not yet revisited that question in light of our modern precedents, which reject *Mapp*'s essential premise that the exclusionary rule is required by the Constitution. We should do so.

JUSTICE ALITO, dissenting.

The Fourth Amendment prohibits "unreasonable" searches. What the police did in this case was entirely reasonable. The Court's decision is not.

On the day in question, Officer David Rhodes was standing at the curb of a house where petitioner, Ryan Austin Collins, stayed a couple of nights a week with his girlfriend. From his vantage point on the street, Rhodes saw an object covered with a tarp in the driveway, just a car's length or two from the curb. It is undisputed that Rhodes had probable cause to believe that the object under the tarp was a motor-

[6] Of course, the States are free to adopt their own exclusionary rules as a matter of state law. But nothing in the Federal Constitution requires them to do so. Even assuming the Constitution requires particular state-law remedies for federal constitutional violations, it does not require the exclusionary rule. The "sole purpose" of the exclusionary rule is "to deter future Fourth Amendment violations"; it does not "'redress'" or "'repair'" past ones. *Davis* v. *United States*, 564 U. S. 229, 236–237 (2011). This Court has noted the lack of evidence supporting its deterrent effect, see *United States* v. *Janis*, 428 U. S. 433, 450, n. 22 (1976), and this Court has recognized the effectiveness of alternative deterrents such as state tort law, state criminal law, internal police discipline, and suits under 42 U. S. C. § 1983, see *Hudson* v. *Michigan*, 547 U. S. 586, 597–599 (2006).

cycle that had been involved a few months earlier in a dangerous highway chase, eluding the police at speeds in excess of 140 mph. See Tr. of Oral Arg. 22; App. to Pet. for Cert. 67. Rhodes also had probable cause to believe that petitioner had been operating the motorcycle[1] and that a search of the motorcycle would provide evidence that the motorcycle had been stolen.[2]

If the motorcycle had been parked at the curb, instead of in the driveway, it is undisputed that Rhodes could have searched it without obtaining a warrant. See Tr. of Oral Arg. 9; Reply Brief 1. Nearly a century ago, this Court held that officers with probable cause may search a motor vehicle without obtaining a warrant. *Carroll* v. *United States*, 267 U. S. 132, 153, 155–156 (1925). The principal rationale for this so-called automobile or motor-vehicle exception to the warrant requirement is the risk that the vehicle will be moved during the time it takes to obtain a warrant. *Id.*, at 153; *California* v. *Carney*, 471 U. S. 386, 390–391 (1985). We have also observed that the owner of an automobile has a diminished expectation of privacy in its contents. *Id.*, at 391–393.

So why does the Court come to the conclusion that Officer Rhodes needed a warrant in this case? Because, in order to reach the motorcycle, he had to walk 30 feet or so up the driveway of the house rented by petitioner's girlfriend, and by doing that, Rhodes invaded the home's "curtilage." *Ante*, at 594–595. The Court does not dispute that the motorcycle, when parked in the driveway, was just as mobile as it would have been had it been parked at the curb. Nor does the Court claim that Officer Rhodes's short walk up the

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[1] Petitioner had a photo on his Facebook profile of a motorcycle that resembled the unusual motorcycle involved in the prior highway chase. See *ante*, at 589 (majority opinion).

[2] Rhodes suspected the motorcycle was stolen based on a conversation he had with the man who had sold the motorcycle to petitioner. See App. 57–58.

driveway did petitioner or his girlfriend any harm. Rhodes did not damage any property or observe anything along the way that he could not have seen from the street. But, the Court insists, Rhodes could not enter the driveway without a warrant, and therefore his search of the motorcycle was unreasonable and the evidence obtained in that search must be suppressed.

An ordinary person of common sense would react to the Court's decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, "the law is a ass—a idiot." C. Dickens, Oliver Twist 277 (1867).

The Fourth Amendment is neither an "ass" nor an "idiot." Its hallmark is reasonableness, and the Court's strikingly unreasonable decision is based on a misunderstanding of Fourth Amendment basics.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects." A "house," for Fourth Amendment purposes, is not limited to the structure in which a person lives, but by the same token, it also does not include all the real property surrounding a dwelling. See, *e. g.*, *Florida* v. *Jardines*, 569 U. S. 1, 6 (2013); *United States* v. *Dunn*, 480 U. S. 294, 300–301 (1987). Instead, a person's "house" encompasses the dwelling and a circumscribed area of surrounding land that is given the name "curtilage." *Oliver* v. *United States*, 466 U. S. 170, 180 (1984). Land outside the curtilage is called an "open field," and a search conducted in that area is not considered a search of a "house" and is therefore not governed by the Fourth Amendment. *Ibid.* Ascertaining the boundaries of the curtilage thus determines only whether a search is governed by the Fourth Amendment. The concept plays no other role in Fourth Amendment analysis.

In this case, there is no dispute that the search of the motorcycle was governed by the Fourth Amendment, and

therefore whether or not it occurred within the curtilage is not of any direct importance. The question before us is not whether there was a Fourth Amendment search but whether the search was reasonable. And the only possible argument as to why it might not be reasonable concerns the need for a warrant. For nearly a century, however, it has been well established that officers do not need a warrant to search a motor vehicle on public streets so long as they have probable cause. *Carroll*, *supra*, at 153, 156; see also, *e. g.*, *Pennsylvania* v. *Labron*, 518 U. S. 938, 940 (1996) (*per curiam*); *Carney*, *supra*, at 394; *South Dakota* v. *Opperman*, 428 U. S. 364, 367–368 (1976); *Chambers* v. *Maroney*, 399 U. S. 42, 50–51 (1970). Thus, the issue here is whether there is any good reason why this same rule should not apply when the vehicle is parked in plain view in a driveway just a few feet from the street.

In considering that question, we should ask whether the reasons for the "automobile exception" are any less valid in this new situation. Is the vehicle parked in the driveway any less mobile? Are any greater privacy interests at stake? If the answer to those questions is "no," then the automobile exception should apply. And here, the answer to each question is emphatically "no." The tarp-covered motorcycle parked in the driveway could have been uncovered and ridden away in a matter of seconds. And Officer Rhodes's brief walk up the driveway impaired no real privacy interests.

In this case, the Court uses the curtilage concept in a way that is contrary to our decisions regarding other, exigency-based exceptions to the warrant requirement. Take, for example, the "emergency aid" exception. See *Brigham City* v. *Stuart*, 547 U. S. 398 (2006). When officers reasonably believe that a person inside a dwelling has urgent need of assistance, they may cross the curtilage and enter the building without first obtaining a warrant. *Id.*, at 403–404. The same is true when officers reasonably believe that a person in a dwelling is destroying evidence. See *Kentucky* v. *King*,

563 U. S. 452, 460 (2011). In both of those situations, we ask whether "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." *Brigham City*, *supra*, at 403 (quoting *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978)). We have not held that the need to cross the curtilage independently necessitates a warrant, and there is no good reason to apply a different rule here.[3]

It is no answer to this argument that the emergency-aid and destruction-of-evidence exceptions require an inquiry into the practicality of obtaining a warrant in the particular circumstances of the case. Our precedents firmly establish that the motor-vehicle exception, unlike these other exceptions, "has no separate exigency requirement." *Maryland* v. *Dyson*, 527 U. S. 465, 466–467 (1999) (*per curiam*). It is settled that the mobility of a motor vehicle categorically obviates any need to engage in such a case-specific inquiry. Requiring such an inquiry here would mark a substantial alteration of settled Fourth Amendment law.

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[3] Indeed, I believe that the First Congress implicitly made the same judgment in enacting the statute on which *Carroll* v. *United States*, 267 U. S. 132 (1925), relied when the motor-vehicle exception was first recognized. Since the First Congress sent the Bill of Rights to the States for ratification, we have often looked to laws enacted by that Congress as evidence of the original understanding of the meaning of those Amendments. See, *e. g.*, *id.*, at 150–151; *Town of Greece* v. *Galloway*, 572 U. S. 565, 575–576 (2014); *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 585–586 (1983); *United States* v. *Ramsey*, 431 U. S. 606, 616–617 (1977). *Carroll* itself noted that the First Congress enacted a law authorizing officers to search vessels without a warrant. 267 U. S., at 150–151. Although this statute did not expressly state that these officers could cross private property such as wharves in order to reach and board those vessels, I think that was implicit. Otherwise, the statute would very often have been ineffective. And when Congress later enacted similar laws, it made this authorization express. See, *e. g.*, An Act Further to Prevent Smuggling and for Other Purposes, § 5, 14 Stat. 179. For this reason, Officer Rhodes's conduct in this case is consistent with the original understanding of the Fourth Amendment, as explicated in *Carroll*.

This does not mean, however, that a warrant is never needed when officers have probable cause to search a motor vehicle, no matter where the vehicle is located. While a case-specific inquiry regarding *exigency* would be inconsistent with the rationale of the motor-vehicle exception, a case-specific inquiry regarding *the degree of intrusion on privacy* is entirely appropriate when the motor vehicle to be searched is located on private property. After all, the ultimate inquiry under the Fourth Amendment is whether a search is reasonable, and that inquiry often turns on the degree of the intrusion on privacy. Thus, contrary to the opinion of the Court, an affirmance in this case would not mean that officers could perform a warrantless search if a motorcycle were located inside a house. See *ante*, at 594. In that situation, the intrusion on privacy would be far greater than in the present case, where the real effect, if any, is negligible.

I would affirm the decision below and therefore respectfully dissent.

Per Curiam

CITY OF HAYS, KANSAS *v.* VOGT

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

No. 16–1495. Argued February 20, 2018—Decided May 29, 2018
Certiorari dismissed. Reported below: 844 F. 3d 1235.

Toby J. Heytens argued the cause for petitioner. With him on the briefs were *Daniel R. Ortiz*, *David R. Cooper*, and *John T. Bird.*

Elizabeth B. Prelogar argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Blanco*, *Deputy Solicitor General Dreeben*, and *James I. Pearce.*

Kelsi Brown Corkran argued the cause for respondent. With her on the brief were *E. Joshua Rosenkranz*, *Daniel A. Rubens*, *Alison M. Kilmartin*, *Haley Jankowski*, *Morgan L. Roach*, and *Thomas M. Bondy.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Kansas et al. by *Derek Schmidt*, Attorney General of Kansas, *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Stephen R. McAllister*, Solicitor General, *Kristafer Ailslieger*, Deputy Solicitor General, and *Natalie Chalmers*, *Dwight R. Carswell*, and *Bryan C. Clark*, Assistant Solicitors General, and by the Attorneys General for their respective jurisdictions as follows: *Leslie Rutledge* of Arkansas, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill*, *Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Doug Peterson* of Nebraska, *Gordon J. MacDonald* of New Hampshire, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Brad Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton*; and for State and Local Government Employers by *Stuart A. Raphael* and *Lisa E. Soronen.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Government Employees et al. by *Andres M. Grajales*, *David A. Borer*, and *David J. Strom*; for Criminal Procedure Scholars by *Elizabeth B. Wydra* and *Brianne J. Gorod*; for the National Association of Criminal Defense Lawyers et al. by *Jeffrey A. Mandell*, *Erika L. Bierma*,

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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

Barbara E. Bergman, *David D. Cole*, *Rachel Wainer Apter*, and *Ezekiel Edwards*; and for the National Fraternal Order of Police by *Larry H. James* and *Robert C. Buchbinder*.

Syllabus

MASTERPIECE CAKESHOP, LTD., ET AL. *v.* COLORADO CIVIL RIGHTS COMMISSION ET AL.

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 16–111. Argued December 5, 2017—Decided June 4, 2018

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, *e. g.*, birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services . . . to the public." Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a State Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held: The Commission's actions in this case violated the Free Exercise Clause. Pp. 631–640.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. See *Obergefell* v. *Hodges*, 576 U. S. 644, 679–680. While it is unexceptional that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component

and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued *United States* v. *Windsor*, 570 U. S. 744, or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division (Division) concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 631–634.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 634–638.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exer-

cise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520. Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540. In view of these factors, the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of his religious beliefs. The Commission gave "every appearance," *id.*, at 545, of adjudicating his religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it, *id.*, at 537, but government has no role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips' religious objection was not considered with the neutrality required by the Free Exercise Clause. The State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners' comments were inconsistent with that requirement, and the Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. Pp. 638–639.

370 P. 3d 272, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 640. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined, *post*, p. 643. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined, *post*, p. 654. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, *post*, p. 667.

Kristen K. Waggoner argued the cause for petitioners. With her on the briefs were *Jeremy D. Tedesco*, *James A. Campbell*, *Jonathan A. Scruggs*, *David A. Cortman*, *Rory T. Gray*, and *Nicolle H. Martin*.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. On the

brief were *Acting Solicitor General Wall*, *Acting Assistant Attorneys General Readler* and *Gore*, *Deputy Assistant Attorney General Mooppan*, *Morgan L. Goodspeed*, *Eric Treene*, and *Lowell V. Sturgill, Jr.*

Frederick R. Yarger, Solicitor General of Colorado, argued the cause for respondent Colorado Civil Rights Commission. With him on the brief were *Cynthia H. Coffman*, Attorney General of Colorado, *Vincent E. Morscher*, Deputy Attorney General, *Glenn E. Roper*, Deputy Solicitor General, *Stacy L. Worthington*, Senior Assistant Attorney General, and *Grant T. Sullivan*, Assistant Solicitor General. *David D. Cole* argued the cause for respondent Craig et al. With him on the brief were *Ria Tabacco Mar*, *James D. Esseks*, *Leslie Cooper*, *Rachel Wainer Apter*, *Louise Melling*, *Rose A. Saxe*, *Lee Rowland*, *Amanda W. Shanor*, *Daniel Mach*, *Mark Silverstein*, *Sara R. Neel*, and *Paula Greisen*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Scott A. Keller*, Solicitor General, *Jeffrey C. Mateer*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, and *Michael P. Murphy* and *John C. Sullivan*, Assistant Solicitors General, by *M. Stephen Pitt*, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Lawrence G. Wasden* of Idaho, *Jeff Landry* of Louisiana, *Joshua D. Hawley* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Wayne Stenehjem* of North Dakota, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, *Patrick Morrisey* of West Virginia, and *Brad Schimel* of Wisconsin; for Agudath Israel of America by *Jeffrey I. Zuckerman* and *Andrew Weinstock*; for the American College of Pediatricians et al. by *Roger G. Brooks*, *Nikolas T. Nikas*, *Dorinda C. Bordlee*, and *Catherine W. Short*; for the Becket Fund for Religious Liberty by *Eric C. Rassbach*, *Mark L. Rienzi*, *Eric S. Baxter*, *Hannah C. Smith*, *Diana M. Verm*, and *Stephanie Hall Barclay*; for the Billy Graham Evangelistic Association et al. by *Stuart J. Lark*; for the C12 Group et al. by *Richard C. Baker*; for CatholicVote.org by *Scott W. Gaylord*; for the Cato Institute et al. by *Ilya Shapiro* and *Manuel S. Klausner*; for the Center for Constitutional Jurisprudence et al. by *John C. Eastman* and *Anthony T. Caso*; for Christian Business Owners by *Erin Elizabeth Mersino* and *William Wagner*; for the Christian Law Association by *David C. Gibbs*,

JUSTICE KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado

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Jr.; for the Christian Legal Society et al. by *Douglas Laycock* and *Thomas C. Berg*; for Concerned Women for America by *Steven W. Fitschen*; for the Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. by *Michael K. Whitehead*; for the First Amendment Lawyers Association by *Robert Corn-Revere*, *Ronald G. London*, and *D. Gill Sperlein*; for the Foundation for Moral Law by *John Eidsmoe*; for Freedom X et al. by *William J. Becker, Jr.*; for the Independence Law Center by *Randall L. Wenger* and *Jeremy L. Samek*; for the Indiana Family Institute et al. by *James Bopp, Jr.*, and *Richard E. Coleson*; for International Christian Photographers et al. by *Michael J. Norton*; for Law and Economics Scholars et al. by *David A. Shaneyfelt* and *Richard A. Epstein*; for Liberty Counsel by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Mary E. McAlister*; for National Black Religious Broadcasters et al. by *David H. Thompson*; for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin*, *Alyza D. Lewin*, and *Dennis Rapps*; for the National Legal Foundation et al. by *Frederick W. Claybrook, Jr.*; for the North Carolina Values Coalition et al. by *Deborah J. Dewart* and *Travis Weber*; for Public Advocate of the United States et al. by *William J. Olson*, *Herbert W. Titus*, *Jeremiah L. Morgan*, *Robert J. Olson*, *Joseph W. Miller*, and *Michael Boos*; for the Restoring Religious Freedom Project by *David I. Schoen*; for the Southeastern Legal Foundation et al. by *John J. Park, Jr.*, and *Kimberly S. Hermann*; for the Thomas More Society by *Thomas Brejcha* and *Joan M. Mannix*; for the United States Conference of Catholic Bishops et al. by *John J. Bursch*, *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, *Michael F. Moses*, and *Hillary E. Byrnes*; for United States Senators et al. by *Jonathan R. Whitehead*; for Utah Republican State Senators by *Michael K. Erickson* and *William C. Duncan*; for 33 Family Policy Organizations by *David French*; for 34 Legal Scholars by *David R. Langdon*; for 479 Creative Professionals by *Nathan W. Kellum*; for Ryan T. Anderson et al. by *Charles S. LiMandri*, *Paul M. Jonna*, and *Jeffrey M. Trissell*; for Sherif Girgis by *Robert P. George*; for Christopher R. Green et al. by *David R. Upham*; for William Jack et al. by *Michael Lee Francisco*; for Aaron Klein et al. by *Kelly J. Shackelford*, *Hiram*

Civil Rights Commission (or Commission) alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado

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S. Sasser III, *Kenneth A. Klukowski*, and *Herbert G. Grey*; for Richard Lawrence by *Mr. Lawrence*, *pro se*; for Adam J. MacLeod by *Robert Tyler* and *Jennifer Bursch*; for Patrick Mahoney et al. by *Thomas P. Monaghan* and *Walter M. Weber*; and for Mark Regnerus et al. by *Edward H. Trent*.

Briefs of *amici curiae* urging affirmance were filed for the State of Massachusetts et al. by *Maura Healey*, Attorney General of Massachusetts, *Elizabeth N. Dewar*, State Solicitor, and *David C. Kravitz*, *Genevieve C. Nadeau*, and *Jon Burke*, Assistant Attorneys General, by *Douglas S. Chin*, Attorney General of Hawaii, *Clyde J. Wadsworth*, Solicitor General, and *Kaliko'onalani D. Fernandes*, Deputy Solicitor General, and by the Attorneys General of their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Lori Swanson* of Minnesota, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the County of Santa Clara et al. by *James R. Williams*, *Greta S. Hansen*, *Julie Wilensky*, *Zachary W. Carter*, *Richard Dearing*, *Michael N. Feuer*, *James P. Clark*, *Blithe Smith Bock*, and *Shaun Dabby Jacobs*; for the American Bar Association by *Hilarie Bass*, *Donald B. Verrilli, Jr.*, *Ginger D. Anders*, and *Chad Golder*; for the American Psychological Association et al. by *Jessica Ring Amunson*, *Emily L. Chapuis*, *Nathalie F. P. Gilfoyle*, and *Deanne M. Ottaviano*; for the American Unity Fund et al. by *Eugene Volokh* and *Dale Carpenter*, both *pro se*; for Americans United for Separation of Church and State et al. by *Richard B. Katskee*, *Steven M. Freeman*, *Elliot M. Mincberg*, and *Diane Laviolette*; for the Canadian Civil Liberties Association et al. by *Maureen P. Alger*; for the Center for Inquiry et al. by *Edward Tabash*; for the Central Conference of American Rabbis et al. by *Jeffrey S. Trachtman*, *Norman C. Simon*, *Jason M. Moff*, and *Kurt M. Denk*; for Chefs et al. by *Pratik A. Shah*; for Church-State Scholars by *Roberta A. Kaplan*; for the Civil Rights Forum by *Lawrence A. Organ*; for Colorado Organizations et al. by *Melissa Hart*, *Craig J. Konnoth*, *Evan Wolfson*, and *Lino S. Lipinsky de Orlov*; for Corporate

state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the author-

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Law Professors by *Andrew D. Silverman* and *Daniel A. Rubens*; for the Denver Metro Chamber of Commerce et al. by *John F. Walsh*, *Paul R. Q. Wolfson*, and *Alan E. Schoenfeld*; for First Amendment Scholars by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for Former Rep. Tony Coelho et al. by *Sanford Jay Rosen*; for the Freedom From Religion Foundation by *Rebecca S. Markert*; for Freedom of Speech Scholars by *Steven H. Shiffrin*, *pro se*; for the General Synod of the United Church of Christ et al. by *Douglas Hallward-Driemeier*, *K. Hollyn Hollman*, *Jennifer L. Hawks*, *Mary E. Kostel*, and *Donald C. Clark*, *Jr.*; for GLBTQ Legal Advocates & Defenders et al. by *Mary L. Bonauto*, *Gary D. Buseck*, *Shannon P. Minter*, *Christopher F. Stoll*, *Catherine R. Connors*, and *Nolan L. Reichl*; for the Lambda Legal Defense and Education Fund, Inc., et al. by *Jennifer C. Pizer*; for the Lawyers' Committee for Civil Rights Under Law et al. by *Ilana H. Eisenstein*, *Courtney Gilligan Saleski*, *Ethan H. Townsend*, *Paul Schmitt*, *Kristen Clarke*, *Jon Greenbaum*, and *Dariely Rodriguez*; for Legal Scholars by *Kyle C. Velte* and *Barbara J. Cox*, both *pro se*; for the Main Street Alliance et al. by *Charles C. Sipos*, *Nicola A. Menaldo*, and *Luke Rona*; for the NAACP Legal Defense & Educational Fund, Inc., by *John Paul Schnapper-Casteras*, *Coty Montag*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, and *Samuel Spital*; for the National League of Cities et al. by *Lisa E. Soronen*, *D. Bruce La Pierre*, and *Brian C. Walsh*; for the National LGBTQ Task Force et al. by *Marc A. Hearron* and *Ruth N. Borenstein*; for the National Women's Law Center et al. by *Anna P. Engh*, *Fatima Goss Graves*, *Emily J. Martin*, *Gretchen Borchelt*, *Sunu Chandy*, and *Melissa Murray*; for OutServe-SLDN, Inc., et al. by *Michael E. Bern*, *Matthew Peters*, *Peter Perkowski*, and *Nima H. Mohebbi*; for Public Accommodation Law Scholars by *Catherine Weiss*, *Natalie J. Kraner*, and *Rey Lambert*; for Scholars of Behavioral Science et al. by *Adam W. Hofmann*; for Scholars of the Constitutional Rights and Interests of Children by *Catherine E. Smith*, *Lauren Fontana*, and *Barbara Bennett Woodhouse*, all *pro se*; for the Service Employees International Union by *Stacey Leyton*, *Rebecca Lee*, *Nicole G. Berner*, and *Claire Prestel*; for Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders et al. by *Jonathan Jacob Nadler*; for the Tanenbaum Center for Interreligious Understanding by *Daniel Lawrence Greenberg*, *Robert J. Ward*, *Holly H. Weiss*, and *Jennifer M. Opheim*; for Thirty-seven Busi-

ity of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

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nesses and Organizations by *Jonathan B. Sallet*; for the Transgender Law Center et al. by *Clifford M. Sloan*, *Caroline S. Van Zile*, *Flor Bermudez*, and *Lynly S. Egyes*; for the Transgender Legal Defense and Education Fund by *John D. Winter*, *Jeffrey S. Ginsberg*, and *Sean P. Madden*; for the Washington Lawyers' Committee for Civil Rights and Urban Affairs et al. by *Matthew J. MacLean*, *Michael S. McNamara*, *Jennifer R. Clarke*, and *Aneel Chablani*; for 15 Faith and Civil Rights Organizations by *Jessica L. Ellsworth*, *Johnathan J. Smith*, and *Sirine Shebaya*; for 211 Members of Congress by *Peter T. Barbur*; for Floyd Abrams et al. by *Walter Dellinger*, *pro se*, and *Meaghan VerGow*; for Ilan H. Meyer et al. by *Stephen B. Kinnaird*; and for Tobias B. Wolff by *Mr. Wolff*, *pro se*.

Briefs of *amici curiae* were filed for Cake Artists by *Evan A. Young*, *Aaron M. Streett*, and *Benjamin A. Geslison*; for the Council for Christian Colleges and Universities et al. by *Gene C. Schaerr*; for the Institute for Justice by *Robert J. McNamara* and *Paul M. Sherman*; and for David Boyle by *Mr. Boyle*, *pro se*.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies

to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." App. 148. And he seeks to "honor God through his work at Masterpiece Cakeshop." *Ibid.* One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." *Id.*, at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." *Id.*, at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. *Ibid.* He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." *Ibid.* The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex mar-

riages. *Id.*, at 153. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." *Ibid.* (emphasis deleted).

B

For most of its history, Colorado has prohibited discrimination in places of public accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed "An Act to Protect All Citizens in Their Civil Rights," which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." 1885 Colo. Sess. Laws pp. 132–133. A decade later, the General Assembly expanded the requirement to apply to "all other places of public accommodation." 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the State's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

> "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. §24–34–601(2)(a) (2017).

CADA defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes

"a church, synagogue, mosque, or other place that is principally used for religious purposes." § 24–34–601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division (or Division). The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a State Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§ 24–34–306, 24–4–105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See § 24–34–306(9). Available remedies include, among other things, orders to cease and desist a discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." § 24–34–605. Colorado law does not permit the Commission to assess money damages or fines. §§ 24–34–306(9), 24–34–605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in September 2012, shortly after the couple's visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation, *id.*, at 35, 48, and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings, *id.*, at 43.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips

"turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. *Id.*, at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. *Id.*, at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." *Id.*, at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. *Id.*, at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a–72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins' cake would force Phillips to adhere to "'an ideological point of view.'" *Id.*, at 75a. Applying CADA to the facts at hand,

in the ALJ's view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court's precedent in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the ALJ determined that CADA is a "'valid and neutral law of general applicability'" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. *Id.*, at 879; App. to Pet. for Cert. 82a–83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. *Id.*, at 57a. The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." *Ibid.* It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with . . . this Order." *Id.*, at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." *Ibid.*

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 283 (2015). The court also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying on this Court's precedent in *Smith*, *supra*, at 879, the court stated that the Free Exercise Clause "'does not relieve an

individual of the obligation to comply with a valid and neutral law of general applicability' " on the ground that following the law would interfere with religious practice or belief. 370 P. 3d, at 289. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U. S. 929 (2017). He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell* v. *Hodges*, 576 U. S. 644 (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Id.*, at 679–680. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*); see also *Hurley* v. *Irish-American Gay, Lesbian and Bisex-*

ual Group of Boston, Inc., 515 U. S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to

make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, § 31 (2012); 370 P. 3d, at 277. At the time of the events in question, this Court had not issued its decisions either in *United States* v. *Windsor*, 570 U. S. 744 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. See *Jack* v. *Gateaux, Ltd.*, Charge

No. P20140071X (Mar. 24, 2015); *Jack* v. *Le Bakery Sensual, Inc.*, Charge No. P20140070X (Mar. 24, 2015); *Jack* v. *Azucar Bakery*, Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." Tr. 23. A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and

he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." *Id.*, at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

> "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Tr. 11–12.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair

and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 540–542 (1993); *id.*, at 558 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included "wording and images [the baker] deemed derogatory," *Jack* v. *Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured "language and images [the baker] deemed hateful," *Jack* v. *Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker "deemed as discriminatory, *Jack* v. *Azucar Bakery*, Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the requested cakes. 370 P. 3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries . . . refuse[d] the patron's request . . . be-

cause of the offensive nature of the requested message." *Ibid.*

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal* v. *Tam*, 582 U. S. 218, 243–244 (2017) (opinion of ALITO, J.). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye*, *supra*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "'subtle departures from neutrality'" on matters of religion. *Id.*, at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention

stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*, at 547.

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540. In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "'every appearance,'" *id.*, at 545, of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. *Id.*, at 537. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring.

"[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante*, at 631. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." *Ante*, at 634. I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write

separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the "disparate consideration of Phillips' case compared to the cases of [three] other bakers" who "objected to a requested cake on the basis of conscience." *Ante*, at 636, 639. In the latter cases, a customer named William Jack sought "cakes with images that conveyed disapproval of same-sex marriage, along with religious text"; the bakers whom he approached refused to make them. *Ante*, at 636; see *post*, at 669 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See *ante*, at 637. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested "offensive [in] nature." *Ante*, at 637–638 (internal quotation marks omitted). As the Court states, a "principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness." *Ante*, at 638.

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. §24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single

out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. *Ibid.* The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.*

*JUSTICE GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases "would not sell the requested cakes to anyone." *Post*, at 646. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. JUSTICE GORSUCH can make the claim only because he does not think a "wedding cake" is the relevant product. As JUSTICE GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a "cake celebrating same-sex marriage." *Ibid.*; see *post*, at 645, 648, 650. But that is wrong. The cake requested was not a special "cake celebrating same-sex marriage." It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante*, at 626 (majority opinion) (recounting that Phillips did not so much as discuss the cake's design before he refused to make it). And contrary to JUSTICE GORSUCH's view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with "religious significance." *Post*, at 653. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante*, at 631–632. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully dis-

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—"quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished." *Ante*, at 637. And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court says, "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante*, at 632. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. *Id.*, at 878–879. *Smith* remains controversial in many quarters. Compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: When the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it sat-

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criminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips' religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

isfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 546 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. *Ante*, at 636–638. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." *Ante*, at 638. That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. See *post*, at 670–671, and n. 3 (GINSBURG, J., dissenting); *ante*, at 642–643, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers and asked them to prepare cakes with messages disapprov-

ing same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. *Id.*, at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. *Id.*, at 230, 240, 249. He pointed to Colorado's Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See *ibid.*; Colo. Rev. Stat. §24–34–601(2)(a) (2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. *Id.*, at 237, 247, 255–256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. *Id.*, at 230–231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. *Id.*, at 237, 247, 257. Mr. Jack appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief. App. to Pet. for Cert. 326a–331a.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. *Id.*, at 168–169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. *Ibid.* Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regard-

less of his or her sexual orientation. *Id.*, at 166 ("I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer"). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig's mother. *Id.*, at 38–40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer, then, would simply mistake the undisputed factual record. See *post,* at 671, n. 3 (GINSBURG, J., dissenting); *ante,* at 642–643, and n. (KAGAN, J., concurring).) Nonetheless, the Commission held that Mr. Phillips's conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a–58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: Bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, *e. g.*, ALI, Model Penal Code §§ 1.13, 2.02(2)(a)(i) (1985); 1 W. LaFave, Substantive Criminal Law § 5.2(b), pp. 460–463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, *e. g.*, Restatement (Second) of Torts § 8A (1964); *Radio Officers* v. *NLRB*, 347 U. S. 17, 45 (1954).

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from "the offensive nature of the requested message." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 282, n. 8 (Colo. App. 2015); App. 237, 247, 256; App. to Pet. for Cert. 326a–331a; see also Brief for Respondent Colorado Civil Rights Commission 52 ("Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be 'offensive' "). Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a difference." App. to Pet. for Cert. 69a. It concluded instead that an "intent to disfavor" a protected class of persons should be "readily . . . presumed" from the knowing failure to serve someone who belongs to that class. *Id.*, at 70a. In its judgment, Mr. Phillips's intentions were "inextricably tied to the

sexual orientation of the parties involved" and essentially "'irrational.'" *Ibid.*

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is "inextricably tied" to a protected class, then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: It *presumed* that Mr. Phillips harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that "no such showing" of actual "'animus'"—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips's case. 370 P. 3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. See *Church of Lukumi Babalu Aye*, 508 U. S., at 543–544. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive" message that the bakers in the first case refused to endorse. *Ante*, at 638. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the "proudest boast of our free speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. *Matal* v. *Tam*, 582 U. S. 218, 246 (2017) (plurality opinion) (citing *United States* v. *Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom. See *Church of Lukumi Babalu Aye*, *supra*, at 547; *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 715–716 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205, 223–224 (1972); *Cantwell* v. *Connecticut*, 310 U. S. 296, 308–310 (1940).

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer, for exam-

ple, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See *post*, at 672, and n. 5 (GINSBURG, J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See *ante*, at 642–643, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. See 370 P. 3d, at 276 (stating that Mr. Craig and Mr. Mullins "requested that Phillips design and create a *cake to celebrate their same-sex wedding*" (emphasis added)). Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, [or] institution." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message

they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs, *id.*, at 642, or whether an adherent has "correctly perceived" the commands of his religion, *Thomas*, *supra*, at 716. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression," which are "not a condition of constitutional protection").

The second suggestion fares no better. Suggesting that this case is only about "wedding cakes"—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: Describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding same-sex marriage). Of course, under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and *Smith*, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: It risks denying constitutional protection to religious beliefs that draw distinctions more specific than the govern-

ment's preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "[r]epeatedly and in many different contexts" over many years. *Smith*, 494 U. S., at 887. For example, in *Thomas* a faithful Jehovah's Witness and steelmill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. 450 U. S., at 711. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. *Id.*, at 714–716; see also *United States* v. *Lee*, 455 U. S. 252, 254–255 (1982); *Smith*, *supra*, at 887 (collecting authorities). It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." *Ante*, at 639. Maybe in

some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "[h]owever later cases raising these or similar concerns are resolved in the future, . . . the rulings of the Commission and of the state court that enforced the Commission's order" in *this* case "must be invalidated." *Ante*, at 640. Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

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

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips' right to freely exercise his religion. As JUSTICE GORSUCH explains, the Commission treated Phillips' case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips' religion. See *ante*, at 644–650 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. See *ante*, at 634–638. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See *ante*, at 624. Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one). But the Colorado Court of Appeals resolved this factual dispute in Phillips' favor. The court described his conduct as a refusal to "design and create a cake to celebrate

[a] same-sex wedding." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 276 (2015); see also *id.*, at 286 ("designing and selling a wedding cake"); *id.*, at 283 ("refusing to create a wedding cake"). And it noted that the Commission's order required Phillips to sell "'*any* product [he] would sell to heterosexual couples,'" including custom wedding cakes. *Id.*, at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips' conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the "freedom of speech." When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose "incidental burdens" on expression. *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 567 (2011). As the Court explains today, public-accommodations laws usually regulate conduct. *Ante*, at 631–632 (citing *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572 (1995)). "[A]s a general matter," public-accommodations laws do not "target speech" but instead prohibit "the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Id.*, at 572 (emphasis added).

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law "ha[s]

the effect of declaring . . . speech itself to be the public accommodation," the First Amendment applies with full force. *Id.*, at 573; accord, *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 657–659 (2000). In *Hurley*, for example, a Massachusetts public-accommodations law prohibited "'any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation.'" 515 U. S., at 561 (quoting Mass. Gen. Laws § 272:98 (1992); alterations in original). When this law required the sponsor of a St. Patrick's Day parade to include a parade unit of gay, lesbian, and bisexual Irish-Americans, the Court unanimously held that the law violated the sponsor's right to free speech. Parades are "a form of expression," this Court explained, and the application of the public-accommodations law "alter[ed] the expressive content" of the parade by forcing the sponsor to add a new unit. 515 U. S., at 568, 572–573. The addition of that unit compelled the organizer to "bear witness to the fact that some Irish are gay, lesbian, or bisexual"; "suggest . . . that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals"; and imply that their participation "merits celebration." *Id.*, at 574. While this Court acknowledged that the unit's exclusion might have been "misguided, or even hurtful," *ibid.*, it rejected the notion that governments can mandate "thoughts and statements acceptable to some groups or, indeed, all people" as the "antithesis" of free speech, *id.*, at 579; accord, *Dale*, *supra*, at 660–661.

The parade in *Hurley* was an example of what this Court has termed "expressive conduct." See 515 U. S., at 568–569. This Court has long held that "the Constitution looks beyond written or spoken words as mediums of expression," *id.*, at 569, and that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943). Thus, a person's "conduct

may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas* v. *Johnson*, 491 U. S. 397, 404 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.[1]

Of course, conduct does not qualify as protected speech simply because "the person engaging in [it] intends thereby to express an idea." *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 294 (1984). But a "'particularized message'" is not required, or else the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U. S., at 569.

Once a court concludes that conduct is expressive, the Constitution limits the government's authority to restrict or compel it. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'" and "tailor" the content of his mes-

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[1] *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565–566 (1991); *Johnson*, 491 U. S., at 405–406; *Spence* v. *Washington*, 418 U. S. 405, 406, 409–411 (1974) (*per curiam*); *Schacht* v. *United States*, 398 U. S. 58, 62–63 (1970); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506 (1969); *Brown* v. *Louisiana*, 383 U. S. 131, 141–142 (1966) (opinion of Fortas, J.); *Barnette*, 319 U. S., at 633–634; *Stromberg* v. *California*, 283 U. S. 359, 361, 369 (1931).

sage as he sees fit. *Id.*, at 573 (quoting *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 16 (1986) (plurality opinion)). This rule "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, *supra*, at 573. And it "makes no difference" whether the government is regulating the "creati[on], distributi[on], or consum[ption]" of the speech. *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792, n. 1 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palette with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece's website. See http://masterpiececakes.com/wedding-cakes (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding

cakes. To him, a wedding cake inherently communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, "[w]edding cakes are so packed with symbolism that it is hard to know where to begin." M. Krondl, Sweet Invention: A History of Dessert 321 (2011) (Krondl); see also *ibid.* (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multitiered cake, he would immediately know that he had stumbled upon a wedding. The cake is "so standardised and inevitable a part of getting married that few ever think to question it." Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See *id.*, at 98. "A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards." *Ibid.* Although the cake is eventually eaten, that is not its primary purpose. See *id.*, at 95 ("It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings"); *id.*, at 97 ("Nothing is made of the eating itself"); Krondl 320–321 (explaining that wedding cakes have long been described as "inedible"). The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple.[2]

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[2] The Colorado Court of Appeals acknowledged that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage," depending on its "design" and whether it has "written inscriptions." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 288 (2015). But a wedding cake needs no particular design or written words

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565–566 (1991), or flying a plain red flag, *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).[3] By forcing Phillips to create custom wedding cakes for same-sex weddings, Colorado's public-accommodations law "alter[s] the expressive content" of his message. *Hurley*, 515 U. S., at 572. The meaning of expressive conduct, this Court has explained, depends on "the context in which it occur[s]." *Johnson*, 491 U. S., at 405. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, ac-

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to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 96 (1987). And regardless, the Commission's order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

[3] The dissent faults Phillips for not "submitting . . . evidence" that wedding cakes communicate a message. *Post*, at 668, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568–570 (1995); *Spence*, 418 U. S., at 410–411; *Barnes*, 501 U. S., at 565–566. And we do not need extensive evidence here to conclude that Phillips' artistry is expressive, see *Hurley*, 515 U. S., at 569, or that wedding cakes at least communicate the basic fact that "this is a wedding," see *id.*, at 573–575. Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See *id.*, at 569–570. And by forcing him to provide the cake, Colorado is requiring Phillips to be "intimately connected" with the couple's speech, which is enough to implicate his First Amendment rights. See *id.*, at 576.

knowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to "bear witness to [these] fact[s]," *Hurley*, 515 U. S., at 574, or to "affir[m] . . . a belief with which [he] disagrees," *id.*, at 573.

B

The Colorado Court of Appeals nevertheless concluded that Phillips' conduct was "not sufficiently expressive" to be protected from state compulsion. 370 P. 3d, at 283. It noted that a reasonable observer would not view Phillips' conduct as "an endorsement of same-sex marriage," but rather as mere "compliance" with Colorado's public-accommodations law. *Id.*, at 286–287 (citing *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 64–65 (2006) (*FAIR*); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 841–842 (1995); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 76–78 (1980)). It also emphasized that Masterpiece could "disassociat[e]" itself from same-sex marriage by posting a "disclaimer" stating that Colorado law "requires it not to discriminate" or that "the provision of its services does not constitute an endorsement." 370 P. 3d, at 288. This reasoning is badly misguided.

1

The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a reasonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And this Court has never accepted it. From the beginning, this Court's compelled-speech precedents have rejected arguments that "would resolve every issue of power in favor of those in authority." *Barnette*, 319 U. S., at 636. *Hurley*, for example, held that the application of Massachusetts' public-

accommodations law "requir[ed the organizers] to alter the expressive content of their parade." 515 U. S., at 572–573. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party's speech. See *FAIR*, *supra*, at 51 (law school refused to allow military recruiters on campus); *Rosenberger*, *supra*, at 822–823 (public university refused to provide funds to a religious student paper); *PruneYard*, *supra*, at 77 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. See *FAIR*, *supra*, at 63–65; *Rosenberger*, *supra*, at 841–842; *PruneYard*, *supra*, at 85–88. But these decisions do not suggest that the government can force speakers to alter their *own* message. See *Pacific Gas & Elec.*, 475 U. S., at 12 ("Notably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner's exercise of his own right to speak"); *Hurley*, *supra*, at 580 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a "for-profit bakery" that "charges its customers." 370 P. 3d, at 287. But this Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech. See *Pacific Gas & Elec.*, *supra*, at 8, 16 (collecting cases); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 761 (1976) (deeming it "beyond serious dispute" that "[s]peech . . . is protected even though it is carried in a form that is 'sold' for profit"). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece

Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–258 (1974); *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200, 217 (2015).

2

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as "beg[ging] the core question." *Tornillo*, *supra*, at 256. Because the government cannot compel speech, it also cannot "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec.*, 475 U. S., at 16; see also *id.*, at 15, n. 11 (citing *PruneYard*, 447 U. S., at 99 (Powell, J., concurring in part and concurring in judgment)). States cannot put individuals to the choice of "be[ing] compelled to affirm someone else's belief" or "be[ing] forced to speak when [they] would prefer to remain silent." *Id.*, at 99.

III

Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes

reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien*,[4] that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, *e. g.*, *Barnes*, 501 U. S., at 566–572 (applying *O'Brien* to evaluate the application of a general nudity ban to nude dancing); *Clark*, 468 U. S., at 293 (applying *O'Brien* to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand "'the most exacting scrutiny.'" *Johnson*, 491 U. S., at 412; accord, *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 28 (2010).

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from "'denigrat[ing] the dignity'" of same-sex couples, "'assert[ing their] inferiority,'" and subjecting them to "'humiliation, frustration, and embarrassment.'" Brief for Respondents Craig et al. 39 (quoting *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 142 (1994); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 292 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undig-

[4] "[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).

nified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, *supra*, at 414. A contrary rule would allow the government to stamp out virtually any speech at will. See *Morse* v. *Frederick*, 551 U. S. 393, 409 (2007) ("After all, much political and religious speech might be perceived as offensive to some"). As the Court reiterates today, "it is not . . . the role of the State or its officials to prescribe what shall be offensive." *Ante*, at 638. "'Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55 (1988); accord, *Johnson*, *supra*, at 408–409. If the only reason a public-accommodations law regulates speech is "to produce a society free of . . . biases" against the protected groups, that purpose is "decidedly fatal" to the law's constitutionality, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U. S., at 578–579; see also *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000) ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"). "[A] speech burden based on audience reactions is simply government hostility . . . in a different guise." *Matal* v. *Tam*, 582 U. S. 218, 250 (2017) (KENNEDY, J., concurring in part and concurring in judgment).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, "'I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.'" App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this

Court has deemed protected by the First Amendment. See *Hurley*, *supra*, at 574–575; *Dale*, 530 U. S., at 644; *Snyder* v. *Phelps*, 562 U. S. 443, 448 (2011). Moreover, it is also hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, *Virginia* v. *Black*, 538 U. S. 343 (2003); conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to "'Bury the niggers,'" *Brandenburg* v. *Ohio*, 395 U. S. 444, 446, n. 1 (1969) (*per curiam*).

Nor does the fact that this Court has now decided *Obergefell* v. *Hodges*, 576 U. S. 644 (2015), somehow diminish Phillips' right to free speech. "It is one thing . . . to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted" and unentitled to express a different view. *Id.*, at 712 (ROBERTS, C. J., dissenting). This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.*, at 657 (majority opinion). If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected. See *Dale*, *supra*, at 660 ("[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view").

* * *

In *Obergefell*, I warned that the Court's decision would "inevitabl[y] . . . come into conflict" with religious liberty, "as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples." 576 U. S., at 734 (dissenting opinion). This case proves that the conflict has already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy." *Id.*, at 741 (ALITO, J., dissenting). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante*, at 631. "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante*, at 632. "[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " *Ante*, at 634. Gay persons may be spared from "indignities when they seek goods and services in an open market." *Ante*, at 640.[1] I strongly dis-

[1] As JUSTICE THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See *ante*, at 654 (opinion concurring in part and concurring in judg-

agree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Ante*, at 639. This conclusion rests on evidence said to show the Colorado Civil Rights Commission's (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an *amicus* here. *Ibid.* The Court also finds

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ment). Nor could it, consistent with our First Amendment precedents. JUSTICE THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. *Ante*, at 657 (citing *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 294 (1984)). The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. See *ante*, at 658–659 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips "considers" and "sees" his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 100–101 (1987) (no explanation of wedding cakes' symbolism was forthcoming "even amongst those who might be expected to be the experts"); *id.*, at 104–105 (the cake cutting tradition might signify "the bride and groom . . . as appropriating the cake" from the bride's parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. *ante*, at 659–660, n. 2 (THOMAS, J., concurring in part and concurring in judgment); *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568–579 (1995) (citing previous cases recognizing parades to be expressive); *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565 (1991) (noting precedents suggesting nude dancing is expressive conduct); *Spence* v. *Washington*, 418 U. S. 405, 410 (1974) (*per curiam*) (observing the Court's decades-long recognition of the symbolism of flags).

hostility in statements made at two public hearings on Phillips' appeal to the Commission. *Ante*, at 634–636. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

> "made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested [on] one side[,] . . . 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.' " App. to Pet. for Cert. 319a; see *id.*, at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discrimi-

nate" and "accept[s] all humans." *Id.*, at 301a (internal quotation marks omitted). The second bakery owner told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." *Id.*, at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. *Id.*, at 319a.[2]

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. *Id.*, at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Anti-Discrimination Act (CADA) protects. See *id.*, at 305a, 314a, 324a. The Commission summarily affirmed the Division's no-probable-cause finding. See *id.*, at 326a–331a.

The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." *Ante*, at 637. See also *ante*, at 647–649 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mul-

[2] The record provides no ideological explanation for the bakeries' refusals. Cf. *ante*, at 644, 645, 651, 653 (GORSUCH, J., concurring) (describing Jack's requests as offensive to the bakers' "secular" convictions).

lins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Cf. *ante*, at 645–646, 651 (GORSUCH, J., concurring). Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See *supra*, at 667. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.[3]

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers[4] was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex

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[3] JUSTICE GORSUCH argues that the situations "share all legally salient features." *Ante*, at 646 (concurring opinion). But what critically differentiates them is the role the customer's "statutorily protected trait," *ibid.*, played in the denial of service. Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request. The bakers' objections to Jack's cakes had nothing to do with "religious opposition to same-sex weddings." *Ante*, at 648 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack's second cake, in particular, where he requested an image of two groomsmen covered by a red "X" and the lines "God loves sinners" and "While we were yet sinners Christ died for us," the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See *supra*, at 669. Phillips did, therefore, discriminate *because of* sexual orientation; the other bakers did not discriminate *because of* religious belief; and the Commission properly found discrimination in one case but not the other. Cf. *ante*, at 646–648 (GORSUCH, J., concurring).

[4] But see *ante*, at 629 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. *ante*, at 637.

Nor was the Colorado Court of Appeals' "difference in treatment of these two instances . . . based on the government's own assessment of offensiveness." *Ante*, at 638. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal "to design a special cake with words or images . . . might be different from a refusal to sell any cake at all." *Ante*, at 624.[5] The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distin-

[5] The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, "could reasonably be interpreted as being inconsistent as to the question whether speech is involved." *Ante*, at 637. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, http://www.masterpiececakes.com/wedding-cakes (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see *ante*, at 650–651 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

guished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 282, n. 8 (2015) ("The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather because of the offensive nature of the requested message. . . . [T]here was no evidence that the bakeries based their decisions on [Jack's] religion . . . [whereas Phillips] discriminat[ed] on the basis of sexual orientation."). I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. *ante*, at 631–632. To repeat, the Court affirms that "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante*, at 632.

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. See 370 P. 3d, at 277. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is

thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see *id.*, at 526–528.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.

Syllabus

HUGHES *v.* UNITED STATES

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

No. 17–155. Argued March 27, 2018—Decided June 4, 2018

In *Freeman* v. *United States*, 564 U. S. 522, this Court considered whether a prisoner who had been sentenced under a plea agreement authorized by the Federal Rules of Criminal Procedure could have his sentence reduced under 18 U. S. C. § 3582(c)(2) when his Federal Guidelines sentencing range was lowered retroactively. No single interpretation or rationale commanded a majority, however. Some Courts of Appeals, turning to *Marks* v. *United States*, 430 U. S. 188, for guidance, adopted the reasoning of JUSTICE SOTOMAYOR's opinion concurring in the judgment. Others interpreted *Marks* differently and adopted the plurality's reasoning. Because this Court can now resolve the substantive, sentencing issue discussed in *Freeman*, it is unnecessary to reach questions regarding the proper application of *Marks*.

The Sentencing Reform Act of 1984 authorizes the United States Sentencing Commission to establish, and retroactively amend, Sentencing Guidelines. Though the Guidelines are only advisory, see *United States* v. *Booker*, 543 U. S. 220, a district court must consult them during sentencing, *id.*, at 264, along with other factors specified in 18 U. S. C. § 3553(a), including "the need to avoid unwarranted sentence disparities," § 3553(a)(6). When an amendment applies retroactively, district courts may reduce the sentences of prisoners whose sentences were "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." § 3582(c)(2).

This case concerns the issue whether a defendant may seek relief under § 3582(c)(2) if he entered a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) (Type-C agreement), which permits the defendant and the Government to "agree that a specific sentence or sentencing range is the appropriate disposition of the case," and "binds the court [to the agreed-upon sentence] once [it] accepts the plea agreement." In making its decision, the district court must consider the Sentencing Guidelines. And it may not accept the agreement unless the sentence is within the applicable Guidelines range, or it is outside that range for justifiable reasons specifically set out.

After petitioner Erik Hughes was indicted on drug and gun charges, he and the Government negotiated a Type-C plea agreement, which stipulated that Hughes would receive a sentence of 180 months but did not refer to a particular Guidelines range. Hughes pleaded guilty. At his

sentencing hearing, the District Court accepted the agreement and sentenced him to 180 months. In so doing, it calculated Hughes' Guidelines range as 188 to 235 months and determined that the sentence was in accordance with the Guidelines and other factors the court was required to consider. Less than two months later, the Sentencing Commission adopted, and made retroactive, an amendment that had the effect of reducing Hughes' sentencing range to 151 to 188 months. The District Court denied Hughes' motion for a reduced sentence under § 3582(c)(2), and the Eleventh Circuit affirmed. Both courts concluded that, under the *Freeman* concurrence, Hughes was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range.

Held:

1. A sentence imposed pursuant to a Type-C agreement is "based on" the defendant's Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement. Pp. 684–690.

(a) A principal purpose of the Sentencing Guidelines is to promote sentencing uniformity. But in the aftermath of *Freeman*, a defendant's eligibility for a reduced sentence under § 3582(c)(2) turns on the Circuit in which the case arises. Even within Circuits that follow the *Freeman* concurrence, unwarranted disparities have resulted depending on whether a defendant's Type-C agreement has a specific-enough reference to a Guidelines range. This Court's precedents since *Freeman* have confirmed that the Guidelines remain the foundation of federal sentencing decisions. See, *e. g.*, *Peugh* v. *United States*, 569 U. S. 530; *Molina-Martinez* v. *United States*, 578 U. S. 189. Pp. 684–685.

(b) A district court imposes a sentence that is "based on" a Guidelines range for purposes of § 3582(c)(2) if the range was a basis for the court's exercise of discretion in imposing a sentence. Given the standard legal definition of "base," there will be no question in the typical case that the defendant's Guidelines range was a basis for his sentence. A district court is required to calculate and consider a defendant's Guidelines range in every case. § 3553(a). Indeed, the Guidelines are "the starting point for every sentencing calculation in the federal system." *Peugh*, *supra*, at 542. Thus, in general, § 3582(c)(2) allows district courts to reconsider a prisoner's sentence based on a new starting point—that is, a lower Guidelines range—and determine whether a reduction is appropriate.

A sentence imposed pursuant to a Type-C agreement is no exception to the general rule that a defendant's Guidelines range is the starting point and a basis for his ultimate sentence. The Government and the defendant may agree to a specific sentence, but the Sentencing Guidelines prohibit district courts from accepting Type-C agreements without first evaluating the recommended sentence in light of the defendant's

Guidelines range. So in the usual case the court's acceptance of a Type-C agreement and the sentence to be imposed pursuant to that agreement are "based on" the defendant's Guidelines range. Since the Guidelines are a district court's starting point, when the Commission lowers the range, the defendant will be eligible for relief under § 3582(c)(2) absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines.

This interpretation furthers § 3582(c)(2)'s purpose, as well as the broader purposes of the Sentencing Reform Act. It is also reinforced by *Molina-Martinez* and *Peugh*, which both confirm that the Guidelines remain a basis for almost all federal sentences. Experience has shown that, although the interpretation proffered by JUSTICE SOTOMAYOR's concurring opinion in *Freeman* could be one permissible reading of § 3582(c)(2), as a systemic, structural matter the system Congress put in place is best implemented by the interpretation confirmed in this case. Pp. 685–689.

(c) The Government's counterarguments—that allowing defendants with Type-C agreements to seek reduced sentences under § 3582(c)(2) would deprive the Government of a benefit of its bargain, namely, the defendant's agreement to a particular sentence; and that allowing courts to reduce the sentences of defendants like Hughes would be inconsistent with one of the Commission's policy statements—are unpersuasive. Pp. 689–690.

2. Hughes is eligible for relief under § 3582(c)(2). The District Court accepted his Type-C agreement after concluding that a 180-month sentence was consistent with the Guidelines, and then calculated Hughes' sentencing range and imposed a sentence it deemed "compatible" with the Guidelines. The sentencing range was thus a basis for the sentence imposed. And that range has since been lowered by the Commission. The District Court has discretion to decide whether to reduce Hughes' sentence after considering the § 3553(a) factors and the Commission's relevant policy statements. Pp. 690–691.

849 F. 3d 1008, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 691. ROBERTS, C. J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 694.

Eric A. Shumsky argued the cause for petitioner. With him on the briefs were *E. Joshua Rosenkranz*, *Daniel A. Rubens*, *Alison M. Kilmartin*, *Thomas M. Bondy*, *Melanie*

L. Bostwick, *Katherine M. Kopp*, *Benjamin F. Aiken*, *Stephanie A. Kearns*, and *Brian Mendelsohn*.

Rachel P. Kovner argued the cause for the United States. With her on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Eric J. Feigin*, and *Ross B. Goldman*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The proper construction of federal sentencing statutes and the Federal Rules of Criminal Procedure can present close questions of statutory and textual interpretation when implementing the Federal Sentencing Guidelines. Seven Terms ago the Court considered one of these issues in a case involving a prisoner's motion to reduce his sentence, where the prisoner had been sentenced under a plea agreement authorized by a specific Rule of criminal procedure. *Freeman* v. *United States*, 564 U. S. 522 (2011). The prisoner maintained that his sentence should be reduced under 18 U. S. C. § 3582(c)(2) when his Guidelines sentencing range was lowered retroactively. 564 U. S., at 527–528 (plurality opinion).

No single interpretation or rationale in *Freeman* commanded a majority of the Court. The courts of appeals then confronted the question of what principle or principles considered in *Freeman* controlled when an opinion by four Justices and a concurring opinion by a single Justice had allowed

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*Briefs of *amici curiae* urging reversal were filed for Agricultural Interests et al. by *Timothy S. Bishop*, *Michael B. Kimberly*, *Ellen Steen*, *Stacy Linden*, *William R. Murray*, *Peter Tolsdorf*, *Kenneth T. Gear*, *Thomas J. Ward*, *Scott Yager*, and *Michael C. Formica*; for the National Association of Criminal Defense Lawyers et al. by *Nathaniel P. Garrett*, *Kenton J. Skarin*, *David M. Porter*, *Daniel L. Kaplan*, *Donna F. Coltharp*, and *Sarah S. Gannett*; for Douglas A. Berman by *Jean-Claude André*; and for Chantelle Sackett et al. by *Brian T. Hodges*, *Anthony L. Francois*, and *Damien M. Schiff*.

Briefs of *amici curiae* were filed for Law Professors by *Maxwell L. Stearns*, *David A. Skeel*, and *Michael J. Gerhardt*, all *pro se*; and for Richard M. Re, by *Mr. Re*, *pro se*.

a majority of this Court to agree on the judgment in *Freeman* but not on one interpretation or rule that courts could follow in later cases when similar questions arose under the same statute and Rule.

For guidance courts turned to this Court's opinion in *Marks* v. *United States*, 430 U. S. 188 (1977). Some courts interpreted *Marks* as directing them to follow the "narrowest" opinion in *Freeman* that was necessary for the judgment in that case; and, accordingly, they adopted the reasoning of the opinion concurring in the judgment by JUSTICE SOTOMAYOR. See *United States* v. *Rivera-Martinez*, 665 F. 3d 344, 348 (CA1 2011); *United States* v. *Thompson*, 682 F. 3d 285, 290 (CA3 2012); *United States* v. *Brown*, 653 F. 3d 337, 340, n. 1 (CA4 2011); *United States* v. *Benitez*, 822 F. 3d 807, 811 (CA5 2016); *United States* v. *Smith*, 658 F. 3d 608, 611 (CA6 2011); *United States* v. *Dixon*, 687 F. 3d 356, 359 (CA7 2012); *United States* v. *Browne*, 698 F. 3d 1042, 1045 (CA8 2012); *United States* v. *Graham*, 704 F. 3d 1275, 1277–1278 (CA10 2013).

In contrast, the Courts of Appeals for the District of Columbia and Ninth Circuits held that no opinion in *Freeman* provided a controlling rule because the reasoning in the concurrence was not a "logical subset" of the reasoning in the plurality. *United States* v. *Davis*, 825 F. 3d 1014, 1021–1022 (CA9 2016) (en banc); *United States* v. *Epps*, 707 F. 3d 337, 350 (CADC 2013). Those courts have adopted the plurality's opinion as the most persuasive interpretation of § 3582(c)(2). *Davis*, *supra*, at 1026; *Epps*, *supra*, at 351.

To resolve these differences over the proper application of *Marks* and the proper interpretation of § 3582(c)(2), the Court granted certiorari in the present case. 583 U. S. 1036 (2017). The first two questions, relating to *Marks*, are as follows: (1) "Whether this Court's decision in *Marks* means that the concurring opinion in a 4–1–4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the

other"; and (2) "Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by JUSTICE SOTOMAYOR's separate concurring opinion with which all eight other Justices disagreed." Pet. for Cert. i.

The third question is directed to the underlying statutory issue in this case, the substantive, sentencing issue the Court discussed in the three opinions issued in *Freeman*. That question is: "Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range." Pet. for Cert. ii.

Taking instruction from the cases decided in the wake of *Freeman* and the systemic concerns that have arisen in some Circuits, and considering as well the arguments of the parties as to question three, a majority of the Court in the instant case now can resolve the sentencing issue on its merits. So it will be unnecessary to consider questions one and two despite the extensive briefing and careful argument the parties presented to the Court concerning the proper application of *Marks*. The opinion that follows resolves the sentencing issue in this case; and, as well, it should give the necessary guidance to federal district courts and to the courts of appeals with respect to plea agreements of the kind presented here and in *Freeman*.

With that explanation, the Court now turns to the circumstances of this case and the sentencing issue it presents.

I

A

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission establishes Sentencing Guidelines based on the seriousness of a defendant's offense and his criminal history. *Dillon* v. *United States*, 560 U. S. 817, 820 (2010). In combination, these two factors yield a

range of potential sentences for a district court to choose from in sentencing a particular defendant. "The Sentencing Guidelines provide the framework for the tens of thousands of federal sentencing proceedings that occur each year." *Molina-Martinez* v. *United States*, 578 U. S. 189, 192 (2016).

After this Court's decision in *United States* v. *Booker*, 543 U. S. 220 (2005), the Guidelines are advisory only. But a district court still "must consult those Guidelines and take them into account when sentencing." *Id.*, at 264; see also 18 U. S. C. § 3553(a)(4). Courts must also consider various other sentencing factors listed in § 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6).

The Act requires the Commission to review and revise the Guidelines from time to time. 28 U. S. C. § 994(*o*). When the Commission amends the Guidelines in a way that reduces the Guidelines range for "a particular offense or category of offenses," the Commission must "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." § 994(u). In this way the Act requires the Commission to decide whether amendments to the Guidelines should have retroactive effect.

If an amendment applies retroactively, the Act authorizes district courts to reduce the sentences of prisoners who were sentenced based on a Guidelines range that would have been lower had the amendment been in place when they were sentenced. 18 U. S. C. § 3582(c)(2). Specifically, § 3582(c)(2) provides:

> "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U. S. C. § 994(*o*), . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that

> they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

B

The controlling issue here is whether a defendant may seek relief under § 3582(c)(2) if he entered a plea agreement specifying a particular sentence under Federal Rule of Criminal Procedure 11(c)(1)(C). This kind of plea agreement is sometimes referred to as a "Type-C agreement."

In a Type-C agreement the Government and a defendant "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply," and "such a recommendation or request binds the court once the court accepts the plea agreement." Rule 11(c)(1)(C). When the Government and a defendant enter a Type-C agreement, the district court has three choices: It "may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." Rule 11(c)(3)(A). If the court rejects the agreement, the defendant may withdraw his guilty plea. Rule 11(c)(5)(B).

In deciding whether to accept an agreement that includes a specific sentence, the district court must consider the Sentencing Guidelines. The court may not accept the agreement unless the court is satisfied that "(1) the agreed sentence is within the applicable guideline range; or (2)(A) the agreed sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with specificity." United States Sentencing Commission, Guidelines Manual § 6B1.2(c) (Nov. 2016) (USSG). "[T]he decision whether to accept the agreement will often be deferred until the sentencing hearing," which means that "the decision whether to accept the plea agreement will often be made at the same time that the defendant is sentenced." *United States* v. *Hyde*, 520 U. S. 670, 678 (1997).

C

1

In 2013 petitioner Erik Hughes was indicted on drug and gun charges for his participation in a conspiracy to distribute methamphetamine. About four months later, the Government and Hughes negotiated a Type-C plea agreement. Hughes agreed to plead guilty to two of the four charges (conspiracy to distribute methamphetamine and being a felon in possession of a gun); and in exchange the Government agreed to dismiss the other two charges and to refrain from filing an information giving formal notification to the District Court of his prior drug felonies. If the Government had filed the information, Hughes would have been subject to a mandatory sentence of life in prison. See 21 U. S. C. §§ 841(b)(1)(A), 851(a). The agreement stipulated that Hughes would receive a sentence of 180 months, but it did not refer to any particular Guidelines range.

Hughes entered his guilty plea in December 2013. The District Court accepted the plea at that time, but it deferred consideration of the plea agreement (and hence the stipulated 180-month sentence) until sentencing.

Three months later, at the sentencing hearing, the District Court accepted the agreement and sentenced Hughes to 180 months in prison. The court stated that it had "considered the plea agreement [and] the sentencing guidelines, particularly the provisions of [§ 3553(a)]," and that it would "accept and approve the binding plea agreement." App. to Pet. for Cert. 32a–33a. The court calculated Hughes' Guidelines range as 188 to 235 months in prison and heard statements from Hughes' daughter, mother, and Hughes himself. *Id.*, at 37a–43a. When it imposed the agreed 180-month sentence the court reiterated that it was "a reasonable sentence in this case compatible with the advisory United States Sentencing Guidelines but in accordance with the mandatory matters the Court is required to consider in ultimately determining a sentence." *Id.*, at 44a, 47a.

Less than two months after the District Court sentenced Hughes, the Sentencing Commission adopted amendment 782 to the Guidelines. USSG App. C, Amdt. 782 (Supp. Nov. 2012–Nov. 2016). The amendment reduced the base offense level by two levels for most drug offenses. The Commission later made amendment 782 retroactive for defendants who, like Hughes, already had been sentenced under the higher offense levels. Amdt. 788. Under the revised Guidelines, Hughes' sentencing range is 151 to 188 months—about three to four years lower than the range in effect when he was sentenced.

Hughes filed a motion for a reduced sentence under § 3582(c)(2). The District Court denied the motion, concluding that Hughes is ineligible for relief; and the Court of Appeals for the Eleventh Circuit affirmed. 849 F. 3d 1008, 1016 (2017); App. to Pet. for Cert. 28a. Both courts concluded that the *Freeman* concurrence stated the holding of this Court under *Marks*, and that under the concurrence's interpretation Hughes was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range. 849 F. 3d, at 1015; App. to Pet. for Cert. 25a. This Court granted certiorari. 583 U. S. 1036.

II

A principal purpose of the Sentencing Guidelines is to promote "uniformity in sentencing imposed by different federal courts for similar criminal conduct." *Molina-Martinez*, 578 U. S., at 192 (internal quotation marks and alteration omitted; emphasis deleted). Yet in the aftermath of *Freeman*, a defendant's eligibility for a reduced sentence under § 3582(c)(2) turns on the Circuit in which the case arises. Further, even within Circuits that follow the *Freeman* concurrence, unwarranted disparities have resulted depending on the fortuity of whether a defendant's Type-C agreement

includes a specific-enough reference to a Guidelines range. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 13–20. In some cases defendants have been held ineligible for relief even where the sentencing hearing makes it crystal clear that the Government and the defendant agreed to a Guidelines sentence and the district court imposed one. See, *e. g.*, *United States* v. *McNeese*, 819 F. 3d 922, 929 (CA6 2016).

In addition this Court's precedents since *Freeman* have further confirmed that the Guidelines remain the foundation of federal sentencing decisions. In *Peugh* v. *United States*, 569 U. S. 530 (2013), for example, the Court held that the *Ex Post Facto* Clause prohibits retroactive application of amended Guidelines that increase a defendant's sentencing range. *Id.*, at 544. The Court reasoned that, *Booker* notwithstanding, the Guidelines remain "the lodestone of sentencing." 569 U. S., at 544. And in *Molina-Martinez*, the Court held that in the ordinary case a defendant suffers prejudice from a Guidelines error because of "the systemic function of the selected Guidelines range." 578 U. S., at 200.

"The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines." *Peugh*, *supra*, at 541. In this context clarity and consistency are essential. To resolve the uncertainty that resulted from this Court's divided decision in *Freeman*, the Court now holds that a sentence imposed pursuant to a Type-C agreement is "based on" the defendant's Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement.

A

As already mentioned, § 3582(c)(2) authorizes a district court to reduce a defendant's sentence if the defendant "has been sentenced to a term of imprisonment based on a sen-

tencing range that has subsequently been lowered by the Sentencing Commission." A district court imposes a sentence that is "based on" a Guidelines range if the range was a basis for the court's exercise of discretion in imposing a sentence. To "base" means "[t]o make, form, or serve as a foundation for," or "[t]o use (something) as the thing from which something else is developed." Black's Law Dictionary 180 (10th ed. 2014). Likewise, a "base" is "[t]he starting point or foundational part of something," or "[a] point, part, line, or quantity from which a reckoning or conclusion proceeds." *Ibid.*; see also *ibid.* (similarly defining "basis").

In the typical sentencing case there will be no question that the defendant's Guidelines range was a basis for his sentence. The Sentencing Reform Act requires a district court to calculate and consider a defendant's Guidelines range in every case. 18 U. S. C. § 3553(a). Indeed, the Guidelines are "the starting point for every sentencing calculation in the federal system." *Peugh*, *supra*, at 542; see also *Molina-Martinez*, 578 U. S., at 198 ("The Court has made clear that the Guidelines are to be the sentencing court's starting point and initial benchmark" (internal quotation marks and alteration omitted)). "Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence." *Id.*, at 199 (internal quotation marks omitted; emphasis deleted). In general, § 3582(c)(2) allows district courts to reconsider a prisoner's sentence based on a new starting point—that is, a lower Guidelines range—and determine whether a reduction in the prisoner's sentence is appropriate.

A sentence imposed pursuant to a Type-C agreement is no exception to the general rule that a defendant's Guidelines range is both the starting point and a basis for his ultimate sentence. Although in a Type-C agreement the Govern-

ment and the defendant may agree to a specific sentence, that bargain is contingent on the district court accepting theagreement and its stipulated sentence. *Freeman*, 564 U. S., at 529–530. The Sentencing Guidelines prohibit district courts from accepting Type-C agreements without first evaluating the recommended sentence in light of the defendant's Guidelines range. USSG § 6B1.2(c). So in the usual case the court's acceptance of a Type-C agreement and the sentence to be imposed pursuant to that agreement are "based on" the defendant's Guidelines range.

To be sure, the Guidelines are advisory only, and so not every sentence will be consistent with the relevant Guidelines range. See *Koons* v. *United States*, *post*, at 706 (defendants' Guidelines ranges "clearly did not" form a basis of the ultimate sentences). For example, in *Koons* the Court today holds that five defendants' sentences were not " 'based on' " subsequently lowered Guidelines ranges because in that case the Guidelines and the record make clear that the sentencing judge "discarded" their sentencing ranges "in favor of mandatory minimums and substantial-assistance factors." *Ibid.*; see also *Molina-Martinez*, *supra*, at 200 ("The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range").

If the Guidelines range was not "a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement," *Freeman*, *supra*, at 530, then the defendant's sentence was not based on that sentencing range, and relief under § 3582(c)(2) is unavailable. And that is so regardless of whether a defendant pleaded guilty pursuant to a Type-C agreement or whether the agreement itself referred to a Guidelines range. The statutory language points to the reasons for the sentence that the district court imposed, not the reasons for the parties' plea agreement. Still, cases like *Koons* are a narrow exception to the

general rule that, in most cases, a defendant's sentence will be "based on" his Guidelines range. In federal sentencing the Guidelines are a district court's starting point, so when the Commission lowers a defendant's Guidelines range the defendant will be eligible for relief under § 3582(c)(2) absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines. See *Koons*, *post*, at 705–707.

This interpretation furthers § 3582(c)(2)'s purpose, as well as the broader purposes of the Sentencing Reform Act. "The Act aims to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences." *Freeman*, 564 U. S., at 533. "Section 3582(c)(2) contributes to that goal by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes [is] too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes." *Ibid.* And there is no reason a defendant's eligibility for relief should turn on the form of his plea agreement.

Two cases decided after *Freeman* now reinforce this proposition. See *Molina-Martinez*, *supra*, at 198–201; *Peugh*, 569 U. S., at 541–544. These cases confirm that the Guidelines remain a basis for almost all federal sentences. In *Peugh*, the Court recognized that "[e]ven after *Booker* rendered the Sentencing Guidelines advisory, district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion." *Id.*, at 543. And in *Molina-Martinez*, the Court explained that "[t]he Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing." 578 U. S., at 199. In short, experience has shown that, although the interpretation proffered by JUSTICE SOTOMAYOR's concurring opinion in *Freeman* could be one permissible reading of

§ 3582(c)(2), the system Congress put in place is best implemented, as a systemic, structural matter, by the interpretation confirmed in the instant case.

B

In response, the Government largely recycles arguments that a majority of this Court rejected in *Freeman*. For example, the Government contends that allowing defendants who enter Type-C agreements to seek reduced sentences under § 3582(c)(2) would deprive the Government of one of the benefits of its bargain—namely, the defendant's agreement to a particular sentence. But that has nothing to do with whether a defendant's sentence was based on the Sentencing Guidelines under § 3582(c)(2). *Freeman*, 564 U. S., at 531; see also *id.*, at 540 (opinion of SOTOMAYOR, J.). And in any event, "[w]hat is at stake in this case is a defendant's eligibility for relief, not the extent of that relief." *Id.*, at 532 (plurality opinion). Even if a defendant is eligible for relief, before a district court grants a reduction it must consider "the factors set forth in section 3553(a) to the extent that they are applicable" and the Commission's "applicable policy statements." § 3582(c)(2). The district court can consider the benefits the defendant gained by entering a Type-C agreement when it decides whether a reduction is appropriate (or when it determines the extent of any reduction), "for the statute permits but does not require the court to reduce a sentence." *Id.*, at 532.

The Government also contends that allowing courts to reduce the sentences of defendants like Hughes would be inconsistent with the Commission's policy statement in USSG § 1B1.10, which provides that when a district court modifies a sentence under § 3582(c)(2) it "shall substitute only the [retroactive] amendments listed in subsection (d) for the corresponding guidelines provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." USSG § 1B1.10(b)(1).

According to the Government, no "guidelines provisions" are "applied" when a defendant enters a Type-C agreement because at the moment of sentencing—that is, after the court has already accepted the agreement—Rule 11 prohibits the court from imposing any sentence other than the one the parties bargained for.

This argument fails for at least two reasons. First, the Government's interpretation of § 1B1.10 depends on an artificial distinction between a court's decision to accept a Type-C agreement and its decision to impose the agreed-upon sentence. As explained above, a district court must consider the defendant's "applicable Guidelines range" when it decides whether to accept or reject the agreement, USSG § 6B1.2(c)—often, as here, at the sentencing hearing, after the court has reviewed the presentence report. And as the Government itself points out, once the district court accepts the agreement, the agreed-upon sentence is the only sentence the court may impose. Thus, there is no meaningful difference between a court's decision to accept a Type-C agreement that includes a particular sentence and the court's decision (sometimes, as here, just minutes later) to impose that sentence.

Second, the Commission's policy statement "seeks to isolate whatever marginal effect the since-rejected Guideline had on the defendant's sentence." *Freeman*, 564 U. S., at 530. Accordingly, relief under § 3582(c)(2) should be available to permit the district court to reconsider a prior sentence to the extent the prisoner's Guidelines range was a relevant part of the framework the judge used to accept the agreement or determine the sentence. *Ibid.* If the district court concludes that it would have imposed the same sentence even if the defendant had been subject to the lower range, then the court retains discretion to deny relief.

C

In this case the District Court accepted Hughes' Type-C agreement after concluding that a 180-month sentence was

consistent with the Sentencing Guidelines. App. to Pet. for Cert. 33a. The court then calculated Hughes' sentencing range and imposed a sentence that the court deemed "compatible" with the Guidelines. *Id.*, at 36a, 47a. Thus, the sentencing range was a basis for the sentence that the District Court imposed. That range has "subsequently been lowered by the Sentencing Commission," so Hughes is eligible for relief under § 3582(c)(2). The Court expresses no view as to whether the District Court should exercise its discretion to reduce Hughes' sentence after considering the § 3553(a) factors and the Commission's relevant policy statements. See 18 U. S. C. § 3582(c)(2).

* * *

For these reasons, 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 SOTOMAYOR, concurring.

In *Freeman* v. *United States*, 564 U. S. 522 (2011), this Court confronted the same question it definitively resolves today: whether criminal defendants who enter into plea agreements under Federal Rule of Criminal Procedure 11(c)(1)(C) are eligible for sentencing reductions under 18 U. S. C. § 3582(c)(2). *Freeman* ended in a 4–1–4 decision that left lower courts confused as to whether the plurality or the concurring opinion controlled.

The plurality of four Justices in *Freeman* concluded that defendants who plead guilty pursuant to a so-called Type-C agreement may be eligible for a sentence reduction under § 3582(c)(2) because Type-C sentences are "based on the Guidelines" "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." 564 U. S., at 530. Four Justices dissented. *Id.*, at 544–551 (opinion of ROBERTS, C. J.). They would

have held that a defendant who pleads guilty pursuant to a Type-C agreement is categorically ineligible for a sentence reduction under § 3582(c)(2) because such a sentence is always "based on" the plea agreement, and not on the Guidelines. *Id.*, at 544–548.

Parting ways with all eight of my colleagues, I concurred only in the judgment. *Id.*, at 534–544. I held the view that sentences imposed under Type-C agreements are typically "based on" the agreements themselves, not on the Guidelines. *Id.*, at 535–536. "In the (C) agreement context," I explained, "it is the binding plea agreement that is the foundation for the term of imprisonment to which the defendant is sentenced." *Id.*, at 535. But, in my view, that general rule was not absolute. Rejecting the categorical rule adopted by the dissent, I instead concluded that some Type-C sentences were "based on" the Guidelines and thus eligible for sentencing reductions under § 3582(c)(2). *Id.*, at 538–539. Specifically, I clarified that § 3582(c)(2) relief was available in cases where the Type-C agreement "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range," or in cases where the "plea agreement . . . provide[s] for a specific term of imprisonment . . . but also make[s] clear that the basis for the specified term is a Guidelines sentencing range." *Id.*, at 538–539. Because Freeman's agreement presented one such case, I agreed with the plurality that he was eligible for a sentence reduction under § 3582(c)(2). See *id.*, at 542–544.

I continue to believe that my *Freeman* concurrence sets forth the most convincing interpretation of § 3582(c)(2)'s statutory text. But I also acknowledge that my concurrence precipitated a 4–1–4 decision that left significant confusion in its wake. Because *Freeman*'s fractured disposition provided insufficient guidance, courts of appeals have struggled over whether they should follow the *Freeman* plurality or my separate concurrence. See *ante*, at 679. As a result, "in the aftermath of *Freeman*, a defendant's eligibility for a reduced sentence under § 3582(c)(2) turns on the Circuit in

which the case arises." *Ante*, at 684. And, "even within Circuits that follow the *Freeman* concurrence, unwarranted disparities have resulted depending on the fortuity of whether a defendant's Type-C agreement includes a specific-enough reference to a Guidelines range." *Ante*, at 684–685.

The integrity and legitimacy of our criminal justice system depend upon consistency, predictability, and evenhandedness. Regrettably, the divided decisions in *Freeman*, and my concurrence in particular, have done little to foster those foundational principles. Quite the opposite, my individual views, which "[n]o other Justice . . . shares," have contributed to ongoing discord among the lower courts, sown confusion among litigants, and left "the governing rule uncertain." *Arizona* v. *Gant*, 556 U. S. 332, 354 (2009) (Scalia, J., concurring); see Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3–27 (arguing that the *Freeman* concurrence leads to unpredictable and inconsistent results).

I therefore join the majority in full because doing so helps to ensure clarity and stability in the law and promotes "uniformity in sentencing imposed by different federal courts for similar criminal conduct." *Molina-Martinez* v. *United States*, 578 U. S. 189, 192 (2016) (internal quotation marks and alteration omitted; emphasis deleted). Today's majority opinion charts a clear path forward: It mitigates the inconsistencies and disparities occasioned (at least in part) by my concurrence. It ensures that similarly situated defendants are subject to a uniform legal rule. It studiously adheres to "this Court's precedents since *Freeman*," which firmly establish "that the Guidelines remain the foundation of federal sentencing decisions." *Ante*, at 685; see *ante*, at 688–689 (discussing *Molina-Martinez*, 578 U. S. 189; *Peugh* v. *United States*, 569 U. S. 530 (2013)). And it aligns more closely than the dissent does with the view I articulated in *Freeman*.[1]

[1] Unlike the majority, the dissent's position is incompatible with my view in *Freeman* (and in this case) that criminal defendants who plead guilty under Type-C agreements are not categorically ineligible for relief under

For all these reasons, I now lend my vote to the majority and accede in its holding "that a sentence imposed pursuant to a Type-C agreement is 'based on' the defendant's Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement." *Ante*, at 685.[2]

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Seven years ago, four Justices took the position that a defendant sentenced to a term of imprisonment specified in a binding plea agreement may have been sentenced "based on" a Sentencing Guidelines range, simply because the district court must consider the Guidelines in deciding whether to accept the agreement. *Freeman* v. *United States*, 564 U. S. 522, 529–530 (2011) (plurality opinion). That view has

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§ 3582(c)(2). See 564 U. S., at 538–540 (SOTOMAYOR, J., concurring in judgment). Accordingly, I continue to "reject the categorical rule advanced by the Government and endorsed by the dissent." *Id.*, at 539.

[2] I am sensitive to the Government's contention that allowing criminal defendants to obtain reductions of Type-C sentences under § 3582(c)(2) might deprive the Government of the benefit of its bargain. Brief for United States 52. But, as the majority persuasively explains, that argument "has nothing to do with whether a defendant's sentence was based on the Sentencing Guidelines under § 3582(c)(2)" and therefore has no bearing on whether a defendant who has entered into a Type-C agreement is eligible for a sentence reduction. *Ante*, at 689; see *Freeman*, 564 U. S., at 532 (plurality opinion) ("What is at stake . . . is a defendant's eligibility for relief, not the extent of that relief"). All that said, there may be circumstances in which the Government makes substantial concessions in entering into a Type-C agreement with a defendant—*e. g.*, by declining to pursue easily proved and weighty sentencing enhancements—such that there is a compelling case that the agreed-upon sentence in the Type-C agreement would not have been affected if the subsequently lowered Guidelines range had been in place at the relevant time. If such circumstances exist, I expect that district courts will take that into account when deciding whether, and to what extent, a Type-C sentence should be reduced under § 3582(c)(2). See *ante*, at 689.

since garnered more votes, but has not gotten any more persuasive.

A defendant is eligible for a sentence reduction following a retroactive Guidelines amendment if he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U. S. C. § 3582(c)(2). When a defendant enters into a binding "Type-C" plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), however, the resulting sentence is "dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation." *Freeman*, 564 U. S., at 536 (SOTOMAYOR, J., concurring in judgment). Five Justices recognized as much in *Freeman*. See *ibid.*; *id.*, at 544 (ROBERTS, C. J., dissenting).

If a defendant pleads guilty pursuant to a Type-C agreement specifying a particular term of imprisonment, the district court may sentence him only to that term. See Fed. Rule Crim. Proc. 11(c)(1)(C) (the parties' choice of an "appropriate" sentence "binds the court once the court accepts the plea agreement"). If the judge considers the parties' chosen sentence to be inappropriate, he does not have discretion to impose a different one. Instead, the court's only option is to reject the agreement and afford the defendant the opportunity to be released from his guilty plea. See Fed. Rules Crim. Proc. 11(c)(3)(A), (4), (5).

As the Court points out, a district court considering whether to accept a Type-C agreement must consult the Guidelines, as the District Court did here. *Ante*, at 682; see App. to Pet. for Cert. 32a–36a. But "when determining the sentence to impose," the district court may base its decision on "one thing and one thing only—the plea agreement." *Freeman*, 564 U. S., at 545 (ROBERTS, C. J., dissenting). The Court characterizes this distinction as "artificial," arguing that the district court's ultimate imposition of a sentence often has as much to do with its Guidelines calculation as anything else. *Ante*, at 690; see *ante*, at 686–688. But that is

not so: With a Type-C agreement, the sentence is set by the parties, not by a judge applying the Guidelines. Far from being "artificial," that distinction is central to what makes a Type-C plea a Type-C plea. "In the (C) agreement context" it is "the binding plea agreement that is the foundation for the term of imprisonment." *Freeman*, 564 U. S., at 535 (opinion of SOTOMAYOR, J.). "To hold otherwise would be to contravene the very purpose of (C) agreements—to bind the district court and allow the Government and the defendant to determine what sentence he will receive." *Id.*, at 536.

That commonsense understanding accords with our reading of the phrase "based upon" in the context of deciding when a cause of action is based upon particular conduct. In *Saudi Arabia* v. *Nelson*, 507 U. S. 349 (1993), we considered a provision in the Foreign Sovereign Immunities Act of 1976 providing an exception to a foreign state's immunity when "the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U. S. C. § 1605(a)(2). We said that the phrase did not encompass a foreign state's activity that "led to" the tortious conduct. 507 U. S., at 358. Instead, we interpreted the phrase to refer only to the conduct that forms "the 'basis,'" or "foundation," of the cause of action—that is, "the 'gravamen of the complaint.'" *Id.*, at 357. And as we explained, the "torts, and not the arguably commercial activities that preceded their commission, form the basis for the [plaintiffs'] suit." *Id.*, at 358. So too here: The Type-C agreement, and not the Guidelines calculation that preceded its acceptance, forms the basis for the sentence.

More recently, in *OBB Personenverkehr AG* v. *Sachs*, 577 U. S. 27 (2015), we found that a cause of action was not "based upon" commercial activity when the activity established just one element of the action. The phrase "based upon," we explained, instead looks to "the core of [the] suit" and what the claims "turn on." *Id.*, at 35. Here the sentence that petitioner Hughes received "turned on" the agreement, not the Guidelines or anything else.

The Court finds new justification for its interpretation in *Peugh* v. *United States*, 569 U. S. 530 (2013), and *Molina-Martinez* v. *United States*, 578 U. S. 189 (2016). But those cases—which do not concern the language of § 3582(c)(2) or sentencing pursuant to Type-C agreements—do not inform the distinct question at hand. I agree that when a district court has discretion to select an appropriate sentence, the resulting sentence can often be said to be based on the advisory Guidelines range. See *Peugh*, 569 U. S., at 541 (describing sentences under the post-*Booker* scheme as "anchored by the Guidelines," see *United States* v. *Booker*, 543 U. S. 220 (2005)); *Molina-Martinez*, 578 U. S., at 204 ("[i]n the ordinary case" the Guidelines "anchor the court's discretion in selecting an appropriate sentence"). But there are circumstances where the district court's discretion is confined such that the Guidelines range does not play a meaningful part in the ultimate determination of the defendant's sentence. One such scenario is when an applicable mandatory minimum supersedes the Guidelines range. See *Koons* v. *United States*, *post*, at 702 (a Guidelines range can be "overridden" by "a congressionally mandated minimum sentence"). Another is the situation before us, where Rule 11(c)(1)(C) compels the district court to sentence the defendant to a term chosen by the parties, or none at all.

Finally, as five Members of this Court recognized in *Freeman*, "[a]llowing district courts later to reduce a term of imprisonment simply because the court itself considered the Guidelines in deciding whether to accept the agreement would transform § 3582(c)(2) into a mechanism by which courts could rewrite the terms of (C) agreements in ways not contemplated by the parties." 564 U. S., at 536–537 (opinion of SOTOMAYOR, J.); see *id.*, at 545 (ROBERTS, C. J., dissenting). The Court dismisses this point as having "nothing to do with whether a defendant's sentence was based on the Sentencing Guidelines." *Ante*, at 689. But of course it does. The very purpose of a Type-C agreement is to present the defendant's sentence to the district court on a

take-it-or-leave-it basis, preventing the district judge from altering the sentence as he sees fit. The Court's interpretation of § 3582(c)(2) allows for just such revision, possibly many years down the line, when the Government has already fulfilled its side of the bargain.

The Court justifies this result by arguing that its rule ensures that "those who commit crimes of similar severity under similar conditions receive similar sentences." *Ante*, at 688. But that ignores the crucial way in which Type-C defendants are *not* similarly situated to other defendants. They entered into binding agreements—based on the unique facts of their cases and their negotiations with prosecutors—and received benefits (often quite significant ones) that other defendants do not. The facts of this case provide a striking illustration. In exchange for the certainty of a binding 180-month sentence, the Government not only dropped additional charges against Hughes, but also promised not to pursue a recidivist enhancement that would have imprisoned him for life.

The Court stresses that the question presented concerns only a Type-C defendant's *eligibility* under § 3582(c)(2), and that the district court might exercise its discretion to deny a reduction if it "concludes that it would have imposed the same sentence even if the defendant had been subject to the lower range." *Ante*, at 690; see *ante*, at 689 (suggesting that the district court "can consider the benefits the defendant gained by entering a Type-C agreement" in deciding "whether a reduction is appropriate"). But even if the district court ultimately decides against a reduction, the Government will be forced to litigate the issue in the meantime—nullifying another of its benefits from the Type-C agreement. To secure the sentence to which the parties already agreed, the Government likely will have to recreate the state of play from the original plea negotiations and sentencing to make counterfactual "what if" arguments—which, naturally, the defendant will then try to rebut. Settling this

debate is unlikely to be as straightforward as the Court anticipates.

The point is a very practical one: Hughes pleaded guilty and entered into a binding agreement because he otherwise was looking at life in prison. Although the District Court dutifully performed the required Guidelines calculations, Hughes's sentence was based on the agreement, not the Guidelines range. Hughes should not receive a windfall benefit because that range has been changed.

The Government may well be able to limit the frustrating effects of today's decision in the long run. Going forward, it presumably can add a provision to every Type-C agreement in which the defendant agrees to waive any right to seek a sentence reduction following future Guidelines amendments. See Brief for Petitioner 34–35 (referring to the possibility of such an "explicit waiver"). But that is no comfort when it comes to cases like this one, where the parties understood their choice of sentence to be binding.

I respectfully dissent.

Syllabus

KOONS ET AL. *v.* UNITED STATES

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

No. 17–5716. Argued March 27, 2018—Decided June 4, 2018

The five petitioners pleaded guilty to drug conspiracy charges that subjected them to mandatory minimum sentences under 21 U. S. C. § 841(b)(1). Before imposing their sentences, the District Court calculated their advisory Guidelines ranges. But because the top end of the Guidelines ranges fell below the mandatory minimums, the court concluded that the mandatory minimums superseded the Guidelines ranges. After discarding these ranges, the court departed downward from the mandatory minimums under 18 U. S. C. § 3553(e) to reflect petitioners' substantial assistance to the Government in prosecuting other drug offenders. In settling on the final sentences, the court considered the relevant "substantial assistance factors" set out in the Guidelines, but it did not consider the original Guidelines ranges that it had earlier discarded.

After petitioners were sentenced, the Sentencing Commission amended the Guidelines and reduced the base offense levels for certain drug offenses, including those for which petitioners were convicted. Petitioners sought sentence reductions under § 3582(c)(2), which makes defendants eligible if they were sentenced "based on a sentencing range" that was later lowered by the Sentencing Commission. The courts below held that petitioners were not eligible because they could not show that their sentences were "based on" the now-lowered Guidelines ranges.

Held: Petitioners do not qualify for sentence reductions under § 3582(c)(2) because their sentences were not "based on" their lowered Guidelines ranges but, instead, were "based on" their mandatory minimums and on their substantial assistance to the Government. Pp. 704–708.

(a) For a sentence to be "based on" a lowered Guidelines range, the range must have at least played "a relevant part [in] the framework the [sentencing] judge used" in imposing the sentence. *Hughes* v. *United States*, *ante*, at 690. Petitioners' sentences do not fall into this category because the District Court did not consider the Guidelines ranges in imposing its ultimate sentences. On the contrary, the court scrapped the ranges in favor of the mandatory minimums and never considered the ranges again. Thus, petitioners may not receive § 3582(c)(2) sentence reductions. P. 705.

Syllabus

(b) Petitioners' four counterarguments are unavailing. First, they insist that because this Court has said that the Guidelines ranges serve as "the starting point for every sentencing calculation in the federal system," *Peugh* v. *United States*, 569 U. S. 530, 542, *all* sentences are "based on" Guidelines ranges. But that does not follow. Just because district courts routinely calculate defendants' Guidelines ranges does not mean that any sentence subsequently imposed must be regarded as "based on" a Guidelines range. What matters instead is the role that the Guidelines range played in the selection of the sentence eventually imposed. And here the ranges played no relevant role. Second, petitioners argue that even if their sentences were not actually based on the Guidelines ranges, they are eligible under § 3582(c)(2) because their sentences *should have been* based on those ranges. But even assuming that this is the correct interpretation of "based on," petitioners are not eligible because the District Court made no mistake in sentencing them. The court properly discarded their Guidelines ranges and permissibly considered only factors related to substantial assistance when departing downward. Third, petitioners stress that the Sentencing Commission's policy statement shows that defendants in their shoes should be eligible for sentence reductions. Policy statements, however, cannot make defendants eligible when § 3582(c)(2) makes them ineligible. Fourth, petitioners contend that the Court's rule creates unjustifiable sentencing disparities, but, in fact, the rule avoids such disparities. Identically situated defendants sentenced today may receive the same sentences petitioners received, and those defendants, like petitioners, are not eligible for sentence reductions under § 3582(c)(2). Pp. 705–708.

850 F. 3d 973, affirmed.

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

Jeffrey L. Fisher, by appointment of the Court, 583 U. S. 1090, argued the cause for petitioners. With him on the briefs were *David T. Goldberg*, *Pamela S. Karlan*, *James Whalen*, and *Joseph Herrold*.

Eric J. Feigin argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Deputy Solicitor General Kneedler*, and *Demetra Lambros*.*

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*Briefs of *amici curiae* urging reversal were filed for Families Against Mandatory Minimums by *David DeBold*, *Mary Price*, and *Peter Goldberger*; for the National Association of Criminal Defense Lawyers by *Dan-*

JUSTICE ALITO delivered the opinion of the Court.

Under 18 U. S. C. § 3582(c)(2), a defendant is eligible for a sentence reduction if he was initially sentenced "based on a sentencing range" that was later lowered by the United States Sentencing Commission. The five petitioners in today's case claim to be eligible under this provision. They were convicted of drug offenses that carried statutory mandatory minimum sentences, but they received sentences below these mandatory minimums, as another statute allows, because they substantially assisted the Government in prosecuting other drug offenders. We hold that petitioners' sentences were "based on" their mandatory minimums and on their substantial assistance to the Government, not on sentencing ranges that the Commission later lowered. Petitioners are therefore ineligible for § 3582(c)(2) sentence reductions.

I

All five petitioners pleaded guilty before the same sentencing judge to methamphetamine conspiracy offenses that subjected them to mandatory minimum sentences under 21 U. S. C. § 841(b)(1). Before the District Court imposed those sentences, however, it first calculated petitioners' advisory Guidelines ranges, as district courts do in sentencing proceedings all around the country. These ranges take into account the seriousness of a defendant's offense and his criminal history in order to produce a set of months as a recommended sentence (*e. g.*, 151 to 188 months for petitioner Koons). But not only are these ranges advisory, they are also tentative: They can be overridden by other considerations, such as a congressionally mandated minimum sentence. Indeed, the Guidelines themselves instruct that "[w]here a statutorily required minimum sentence is greater

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iel T. Hansmeier and *Jeffrey T. Green*; and for the National Association of Federal Defenders by *Amy Baron-Evans*, *Ada A. Phleger*, *Donna F. Coltharp*, *Sarah S. Gannett*, and *Daniel L. Kaplan*.

than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the [final] guideline sentence." United States Sentencing Commission, Guidelines Manual §5G1.1(b) (Nov. 2016) (USSG); see also §1B1.1(a)(8).

That is what happened here. In each of petitioners' cases, the top end of the Guidelines range fell below the applicable mandatory minimum sentence, and so the court concluded that the mandatory minimum superseded the Guidelines range. *E. g.*, App. 197; see also *id.*, at 70. Thus, in all five cases, the court discarded the advisory ranges in favor of the mandatory minimum sentences. See *id.*, at 114–115, 148, 174, 197, 216.

When a statute sets out a mandatory minimum sentence, a defendant convicted under that statute will generally receive a sentence at or above the mandatory minimum—but not always. If the defendant has substantially assisted the Government "in the investigation or prosecution of another person," the Government may move under 18 U. S. C. §3553(e) to allow the district court to "impose a sentence below" the mandatory minimum "so as to reflect [the] defendant's substantial assistance."

The Government filed such motions in each of petitioners' cases, and in each case, the District Court departed downward from the mandatory minimum because of petitioners' substantial assistance. In settling on the final sentences, the court considered the so-called "substantial-assistance factors" found in §5K1.1(a) of the Guidelines, all of which relate to the assistance defendants supply the Government. App. 80, 197; see, *e. g.*, USSG §§5K1.1(a)(1)–(3), (5) (the "extent," "timeliness," "significance[,] and usefulness" of the defendant's assistance and the "truthfulness, completeness, and reliability of [the] information" provided). In no case did the court consider the original drug Guidelines ranges that it had earlier discarded. See App. 115–116, 148–154, 174–177, 197–198, 216–218. The sentences ultimately imposed in

these cases represented downward departures from the mandatory minimums of between 25 and 45 percent. See Brief for United States 3.

Years after petitioners' sentences became final, the Sentencing Commission issued amendment 782, which reduced the Guidelines' base offense levels for certain drug offenses, including those for which petitioners were convicted. See USSG App. C, Amdt. 782 (Supp. Nov. 2012–Nov. 2016); see also *Hughes* v. *United States*, *ante*, at 684. And because the amendment applied retroactively, *ibid.*, it made defendants previously convicted of those offenses potentially eligible for a sentence reduction under § 3582(c)(2).

Petitioners sought such reductions, but in order to qualify, they had to show that their sentences were "based on" the now-lowered drug Guidelines ranges. § 3582(c)(2). The courts below held that petitioners could not make that showing, App. 93–97; 850 F. 3d 973, 977 (CA8 2017), and we granted certiorari to review the question, 583 U. S. 1037 (2017).

II

We hold that petitioners do not qualify for sentence reductions under § 3582(c)(2) because their sentences were not "based on" their lowered Guidelines ranges. Instead, their sentences were "based on" their mandatory minimums and on their substantial assistance to the Government.[1]

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[1] The Government argues that defendants subject to mandatory minimum sentences can never be sentenced "based on a sentencing range" that the Commission has lowered, 18 U. S. C. § 3582(c)(2), because such defendants' "sentencing range[s]" are the mandatory minimums, which the Commission has no power to lower. See Brief for United States 19–28. We need not resolve the meaning of "sentencing range" today. Even if it referred to the discarded Guidelines range rather than the mandatory minimum—as petitioners contend, see Brief for Petitioners 20–21—petitioners still would not be eligible for sentence reductions: As explained in the text that follows, their sentences were not "based on" even *that* range.

A

For a sentence to be "based on" a lowered Guidelines range, the range must have at least played "a relevant part [in] the framework the [sentencing] judge used" in imposing the sentence. *Hughes*, *ante*, at 690; see *ante*, at 687–688. The Guidelines range will often play that part, for district judges must calculate the defendant's advisory range and then will frequently tie the sentence they impose to that range. See *ante*, at 686–687; see also § 3553(a)(4). But that is not always the case. After all, the Guidelines are advisory, and in some instances they even explicitly call for the ranges to be tossed aside. When that happens—when the ranges play no relevant part in the judge's determination of the defendant's ultimate sentence—the resulting sentence is not "based on" a Guidelines range.

Petitioners' sentences fall into this latter category of cases. Their sentences were not "based on" the lowered Guidelines ranges because the District Court did not consider those ranges in imposing its ultimate sentences. On the contrary, the court scrapped the ranges in favor of the mandatory minimums and never considered the ranges again; as the court explained, the ranges dropped out of the case. App. 114–115, 148, 174, 197, 216. And once out of the case, the ranges could not come close to forming the "basis for the sentence that the District Court imposed," *Hughes*, *ante*, at 691, and petitioners thus could not receive § 3582(c)(2) sentence reductions.

B

Petitioners' four counterarguments do not change our conclusion.

First, petitioners insist that because the Guidelines ranges serve as "the starting point for every sentencing calculation in the federal system," *Peugh* v. *United States*, 569 U. S. 530, 542 (2013), *all* sentences are "based on" Guidelines ranges. See Brief for Petitioners 21–22; Reply Brief 16–17. It is

true that our cases require sentencing judges to calculate the now-advisory Guidelines range in every sentencing proceeding. And it is true that many judges use those ranges as "the foundation of [their] sentencing decisions." *Hughes*, *ante*, at 685.

But it does not follow that any sentence subsequently imposed must be regarded as "based on" a Guidelines range. What matters, instead, is the role that the Guidelines range played in the selection of the sentence eventually imposed—not the role that the range played in the initial calculation. And here, while consideration of the ranges may have served as the "starting point" in the sense that the court began by calculating those ranges, the ranges clearly did not form the "foundation" of the sentences ultimately selected. See *Hughes*, *ante*, at 686–688. In constructing a house, a builder may begin by considering one design but may ultimately decide to use entirely different plans. While the first design would represent the starting point in the builder's decision-making process, the house finally built would not be "based on" that design. The same is true here. Petitioners' sentences were not "based on" Guidelines ranges that the sentencing judge discarded in favor of mandatory minimums and substantial-assistance factors.

Second, petitioners argue that even if their sentences were not actually based on their Guidelines ranges, they are eligible under § 3582(c)(2) because their sentences *should have been* based on those ranges. See Brief for Petitioners 25–34.[2] But even under that reading of "based on," petitioners are not eligible because the District Court made no mistake at sentencing. Petitioners emphasize that when a court departs downward because of a defendant's substantial assistance, § 3553(e) requires it to impose a sentence " 'in accord-

[2] We assume for argument's sake that what should have happened at the initial sentencing proceedings, rather than what actually happened, matters for purposes of § 3582(c)(2). But cf. *Dillon* v. *United States*, 560 U. S. 817, 825–826, 831 (2010).

ance with the guidelines.'" *Id.*, at 28 (emphasis deleted). But that does not mean "in accordance with the guidelines *range*." Instead, a court imposes a sentence "in accordance with the guidelines" when it follows the Guidelines—including the parts of the Guidelines that instruct it to disregard the advisory ranges, see USSG §§1B1.1(a)(8), 5G1.1(b)—in settling on a sentence. And that is precisely what the court did here. It properly discarded the advisory ranges, *ibid.*, and permissibly considered only factors related to petitioners' substantial assistance, rather than factors related to the advisory ranges, as a guide in determining how far to depart downward, USSG §5K1.1. See §3553(e).[3]

Third, petitioners stress that the Sentencing Commission's policy statement makes clear that the Commission wanted defendants in their shoes to be eligible for sentence reductions. Brief for Petitioners 35–38; see USSG §1B1.10(c) (policy statement). But the Commission's policy statement cannot alter §3582(c)(2), which applies only when a sentence was "based on" a subsequently lowered range. The Sentencing Commission may limit the application of its retroactive Guidelines amendments through its "'applicable policy statements.'" *Dillon* v. *United States*, 560 U. S. 817, 824–826 (2010). But policy statements cannot make a defendant eligible when §3582(c)(2) makes him ineligible. See *id.*, at 824–825. In short, because petitioners do not satisfy §3582(c)(2)'s threshold "based on" requirement, the Commission had no power to enable their sentence reductions.

Fourth and finally, far from creating "unjustifiable sentencing disparities," Brief for Petitioners 38–42, our rule *avoids*

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[3] Many courts have held that §3553(e) *prohibits* consideration of the advisory Guidelines ranges in determining how far to depart downward. See, *e. g.*, *United States* v. *Spinks*, 770 F. 3d 285, 287–288, and n. 1 (CA4 2014) (collecting cases). We take no view on that issue. All we must decide today is that, at the least, neither §3553(e) nor the Guidelines *required* the District Court to use the advisory ranges in determining how far to depart downward.

such disparities. Identically situated defendants sentenced today may receive the same sentences as petitioners received. See App. 89–90. Now, as then, district courts calculate the advisory Guidelines ranges, see USSG §1B1.1(a)(7); discard them in favor of the mandatory minimum sentences, §§1B1.1(a)(8), 5G1.1(b); and then may use the substantial-assistance factors to determine how far to depart downward, §§1B1.1(b), 5K1.1(a). See §3553(e). Those resulting sentences, like the sentences here, are not "based on" a lowered Guidelines range—they are "based on" the defendants' mandatory minimums and substantial assistance to the Government. And those defendants, like petitioners, are not eligible for sentence reductions under §3582(c)(2).

* * *

For these reasons, we affirm.

It is so ordered.

Syllabus

LAMAR, ARCHER & COFRIN, LLP *v.* APPLING

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

No. 16–1215. Argued April 17, 2018—Decided June 4, 2018

Respondent R. Scott Appling fell behind on his bills owed to petitioner law firm Lamar, Archer & Cofrin, LLP, which threatened to withdraw representation and place a lien on its work product if Appling did not pay. Appling told Lamar that he could cover owed and future legal expenses with an expected tax refund, so Lamar agreed to continue representation. However, Appling used the refund, which was for much less than he had stated, for business expenses. When he met with Lamar again, he told the firm he was still waiting on the refund, so Lamar agreed to complete pending litigation. Appling never paid the final invoice, so Lamar sued him and obtained a judgment. Shortly thereafter, Appling and his wife filed for Chapter 7 bankruptcy. Lamar initiated an adversary proceeding against Appling in Bankruptcy Court, arguing that his debt to Lamar was nondischargeable pursuant to 11 U. S. C. § 523(a)(2)(A), which bars discharge of specified debts arising from "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." Appling moved to dismiss on the ground that his alleged misrepresentations were "statement[s] respecting the debtor's . . . financial condition," which § 523(a)(2)(B) requires to be "in writing." The Bankruptcy Court disagreed and denied Appling's motion. Finding that Appling knowingly made two false representations on which Lamar justifiably relied and that Lamar incurred damages as a result, the court concluded that Appling's debt to Lamar was nondischargeable under § 523(a)(2)(A). The District Court affirmed, but the Eleventh Circuit reversed, holding that a "statement respecting the debtor's financial condition" may include a statement about a single asset. Because Appling's statements were not in writing, the court held, § 523(a)(2)(B) did not bar him from discharging his debt to Lamar.

Held: A statement about a single asset can be a "statement respecting the debtor's financial condition" under § 523(a)(2). Pp. 715–725.

(a) The key word in the relevant statutory phrase here is the preposition "respecting." In ordinary usage, "respecting" means "concerning; about; regarding; in regard to; relating to." Lamar contends that the definitions "about," "concerning," "with reference to," and "as regards"

denote a more limited scope than "related to." And under that more limited meaning, Lamar asserts, a formal financial statement providing a detailed accounting of one's assets and liabilities would qualify as "a statement respecting the debtor's financial condition," but a statement about a single asset would not. But the overlapping and circular definitions of these words belie the clear distinction Lamar attempts to impose. And the firm gives no example of a phrase in a legal context similar to the one at issue here in which toggling between "related to" and "about" has any pertinent significance.

Use of the word "respecting" in a legal context generally has a broadening effect, ensuring that a provision's scope covers not only its subject but also matters relating to that subject. Cf. *Kleppe* v. *New Mexico*, 426 U. S. 529, 539. Indeed, this Court has typically read the phrase "relating to"—one of respecting's meanings—expansively. See, *e. g.*, *Coventry Health Care of Mo., Inc.* v. *Nevils*, 581 U. S. 87, 95–96. Appling and the United States, as *amicus curiae*, accordingly advance an expansive interpretation here. This Court agrees with them that, given the ordinary meaning of "respecting," Lamar's statutory construction must be rejected, for it reads "respecting" out of the statute. See *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31. Had Congress intended § 523(a)(2)(B) to encompass only statements expressing the balance of a debtor's assets and liabilities, it could have so specified—*e. g.*, "statement of the debtor's financial condition." The Court also agrees that a statement is "respecting" a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about that asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent. A statement about a single asset, thus, can be a "statement respecting the debtor's financial condition." Pp. 715–720.

(b) Lamar's interpretation would yield incoherent results. For instance, on Lamar's view, a misrepresentation about a single asset made in the context of a formal financial statement or balance sheet would constitute a "statement respecting the debtor's financial condition" and trigger § 523(a)(2)(B)'s heightened nondischargeability requirements, but the same misrepresentation made on its own, or in the context of a list of some but not all of the debtor's assets and liabilities, would not. Lamar does not explain why Congress would draw such seemingly arbitrary distinctions. P. 720.

(c) The statutory history of the phrase "statement respecting the debtor's financial condition" corroborates this Court's reading. Between 1926, when the phrase was introduced, and 1978, when Congress

enacted the Bankruptcy Code, Courts of Appeals consistently construed the phrase to encompass statements addressing just one or some of a debtor's assets or liabilities. When Congress used the materially same language in § 523(a)(2), it presumptively was aware of this longstanding judicial interpretation and intended for the phrase to retain its established meaning. Pp. 720–722.

(d) Lamar's additional arguments are unpersuasive. First, Lamar contends that Appling's construction gives § 523(a)(2)(B) an implausibly broad reach, such that little would be covered by § 523(a)(2)(A)'s general rule rendering nondischargeable debts arising from "false pretenses, a false representation, or actual fraud." But § 523(a)(2)(A) still retains significant function when the phrase "statement respecting the debtor's financial condition" is interpreted to encompass a statement about a single asset. See, *e. g.*, *Husky Int'l Electronics, Inc.* v. *Ritz*, 578 U. S. 355, 359. Second, Lamar asserts that Appling's interpretation is inconsistent with the overall principle that the Bankruptcy Code exists to afford relief only to the "'honest but unfortunate debtor.'" *Cohen* v. *de la Cruz*, 523 U. S. 213, 217. The text of § 523(a)(2), however, plainly heightens the bar to discharge when the fraud at issue was effectuated via a "statement respecting the debtor's financial condition." The heightened requirements, moreover, are not a shield for dishonest debtors. Rather, they reflect Congress' effort to balance the potential misuse of such statements by both debtors and creditors. See *Field* v. *Mans*, 516 U. S. 59, 76–77. Pp. 722–725.

848 F. 3d 953, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which THOMAS, ALITO, and GORSUCH, JJ., joined as to all but Part III–B.

Gregory G. Garre argued the cause for petitioner. With him on the briefs were *Benjamin W. Snyder*, *Robert C. Lamar*, and *David W. Davenport.*

Paul W. Hughes argued the cause for respondent. With him on the brief were *Micheal B. Kimberly*, *Andrew J. Pincus*, *Charles A. Rothfeld*, *Jonathan Weinberg*, and *Eugene R. Fidell.*

Jeffrey E. Sandberg argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Acting Assist-*

ant Attorney General Readler, *Deputy Solicitor General Stewart*, *Mark B. Stern*, and *Karen Schoen.**

JUSTICE SOTOMAYOR delivered the opinion of the Court.†

The Bankruptcy Code prohibits debtors from discharging debts for money, property, services, or credit obtained by "false pretenses, a false representation, or actual fraud," 11 U. S. C. § 523(a)(2)(A), or, if made in writing, by a materially false "statement . . . respecting the debtor's . . . financial condition," § 523(a)(2)(B).

This case is about what constitutes a "statement respecting the debtor's financial condition." Does a statement about a single asset qualify, or must the statement be about the debtor's overall financial status? The answer matters to the parties because the false statements at issue concerned a single asset and were made orally. So, if the single-asset statements here qualify as "respecting the debtor's financial condition," § 523(a)(2)(B) poses no bar to discharge because they were not made in writing. If, however, the statements fall into the more general category of "false pretenses, . . . false representation, or actual fraud," § 523(a)(2)(A), for which there is no writing requirement, the associated debt will be deemed nondischargeable.

The statutory language makes plain that a statement about a single asset can be a "statement respecting the debtor's financial condition." If that statement is not in writing, then, the associated debt may be discharged, even if the statement was false.

**Brian D. Schmalzbach*, *Karen R. Harned*, *Elizabeth Milito*, and *Luke A. Wake* filed a brief for the National Federation of Independent Business Small Business Legal Center as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Law Professors et al. by *John Collen* and *Richard Lieb*; and for Eugene Wedoff et al. by *David R. Kuney*.

†JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH join all but Part III–B of this opinion.

I

Respondent R. Scott Appling hired petitioner Lamar, Archer & Cofrin, LLP (Lamar), a law firm, to represent him in a business litigation. Appling fell behind on his legal bills, and by March 2005, he owed Lamar more than $60,000. Lamar informed Appling that if he did not pay the outstanding amount, the firm would withdraw from representation and place a lien on its work product until the bill was paid. The parties met in person that month, and Appling told his attorneys that he was expecting a tax refund of "'approximately $100,000,'" enough to cover his owed and future legal fees. *In re Appling*, 848 F. 3d 953, 955 (CA11 2017). Lamar relied on this statement and continued to represent Appling without initiating collection of the overdue amount.

When Appling and his wife filed their tax return, however, the refund they requested was of just $60,718, and they ultimately received $59,851 in October 2005. Rather than paying Lamar, they spent the money on their business.

Appling and his attorneys met again in November 2005, and Appling told them that he had not yet received the refund. Lamar relied on that statement and agreed to complete the pending litigation and delay collection of the outstanding fees.

In March 2006, Lamar sent Appling its final invoice. Five years later, Appling still had not paid, so Lamar filed suit in Georgia state court and obtained a judgment for $104,179.60. Shortly thereafter, Appling and his wife filed for Chapter 7 bankruptcy.

Lamar initiated an adversary proceeding against Appling in Bankruptcy Court for the Middle District of Georgia. The firm argued that because Appling made fraudulent statements about his tax refund at the March and November 2005 meetings, his debt to Lamar was nondischargeable pursuant to 11 U. S. C. § 523(a)(2)(A), which governs debts arising from "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . .

financial condition." Appling, in turn, moved to dismiss, contending that his alleged misrepresentations were "statement[s] . . . respecting [his] financial condition" and were therefore governed by § 523(a)(2)(B), such that Lamar could not block discharge of the debt because the statements were not "in writing" as required for nondischargeability under that provision.

The Bankruptcy Court held that a statement regarding a single asset is not a "statement respecting the debtor's financial condition" and denied Appling's motion to dismiss. 500 B. R. 246, 252 (MD Ga. 2013). After a trial, the Bankruptcy Court found that Appling knowingly made two false representations on which Lamar justifiably relied and that Lamar incurred damages as a result. It thus concluded that Appling's debt to Lamar was nondischargeable under § 523(a)(2)(A). 527 B. R. 545, 550–556 (MD Ga. 2015). The District Court affirmed. 2016 WL 1183128 (MD Ga., Mar. 28, 2016).

The Court of Appeals for the Eleventh Circuit reversed. It held that "'statement[s] respecting the debtor's . . . financial condition' may include a statement about a single asset." 848 F. 3d, at 960. Because Appling's statements about his expected tax refund were not in writing, the Court of Appeals held that § 523(a)(2)(B) did not bar Appling from discharging his debt to Lamar. *Id.*, at 961.

The Court granted certiorari, 583 U. S. 1088 (2018), to resolve a conflict among the Courts of Appeals as to whether a statement about a single asset can be a "statement respecting the debtor's financial condition."[1] We agree with the Eleventh Circuit's conclusion and affirm.

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[1] Compare *In re Bandi*, 683 F. 3d 671, 676 (CA5 2012) (a statement about a single asset is not a statement respecting the debtor's financial condition); *In re Joelson*, 427 F. 3d 700, 714 (CA10 2005) (same), with *In re Appling*, 848 F. 3d 953, 960 (CA11 2017) (a statement about a single asset can be a statement respecting the debtor's financial condition); *Engler* v. *Van Steinburg*, 744 F. 2d 1060, 1061 (CA4 1984) (same).

II

A

One of the "main purpose[s]" of the federal bankruptcy system is "to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character." *Stellwagen* v. *Clum*, 245 U. S. 605, 617 (1918). To that end, the Bankruptcy Code contains broad provisions for the discharge of debts, subject to exceptions. One such exception is found in 11 U. S. C. § 523(a)(2), which provides that a discharge under Chapter 7, 11, 12, or 13 of the Bankruptcy Code "does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" fraud. This exception is in keeping with the "basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor.'" *Cohen* v. *de la Cruz*, 523 U. S. 213, 217 (1998).

More specifically, § 523(a)(2) excepts from discharge debts arising from various forms of fraud. Subparagraph (A) bars discharge of debts arising from "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." Subparagraph (B), in turn, bars discharge of debts arising from a materially false "statement . . . respecting the debtor's . . . financial condition" if that statement is "in writing."

B

1

"Our interpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom* v. *FIA Card Services, N. A.*, 562 U. S. 61, 69 (2011). As noted, the relevant statutory text is the phrase "statement respecting the debtor's financial condition." Because the Bankruptcy Code does not define the words "statement," "financial condition," or "respecting," we look to their ordinary meanings. See *ibid.*

There is no dispute as to the meaning of the first two terms. A "statement" is "the act or process of stating, reciting, or presenting orally or on paper; something stated as a report or narrative; a single declaration or remark." Webster's Third New International Dictionary 2229 (1976) (Webster's). As to "financial condition," the parties agree, as does the United States, that the term means one's overall financial status. See Brief for Petitioner 23; Brief for Respondent 25; Brief for United States as *Amicus Curiae* 12.

For our purposes, then, the key word in the statutory phrase is the preposition "respecting," which joins together "statement" and "financial condition." As a matter of ordinary usage, "respecting" means "in view of: considering; with regard or relation to: regarding; concerning." Webster's 1934; see also American Heritage Dictionary 1107 (1969) ("[i]n relation to; concerning"); Random House Dictionary of the English Language 1221 (1966) ("regarding; concerning"); Webster's New Twentieth Century Dictionary 1542 (2d ed. 1979) ("concerning; about; regarding; in regard to; relating to").

According to Lamar, these definitions reveal that "'respecting' *can* be 'defined broadly,'" but that the word "isn't always used that way." Brief for Petitioner 27. The firm contends that "'about,'" "'concerning,'" "'with reference to,'" and "'as regards'" denote a more limited scope than "'related to.'" Brief for Petitioner 3, 18, 27. When "respecting" is understood to have one of these more limited meanings, Lamar asserts, a "statement respecting the debtor's financial condition" is "a statement that is 'about,' or that makes 'reference to,' the debtor's overall financial state or well-being." *Id.*, at 27–28. Under that formulation, a formal financial statement providing a detailed accounting of one's assets and liabilities would qualify, as would statements like "'Don't worry, I am above water,'" and "'I am in good financial shape.'" *Id.*, at 19, 28. A statement about a single asset would not.

The Court finds no basis to conclude, however, at least in this context, that "related to" has a materially different meaning than "about," "concerning," "with reference to," and "as regards." The definitions of these words are overlapping and circular, with each one pointing to another in the group. "Relate" means "to be in relationship: have reference," and, in the context of the phrase "in relation to," "reference, respect." Webster's 1916; see also *id.*, at 18a (Explanatory Note 16.2). "About" means "with regard to," and is the equivalent of "concerning." *Id.*, at 5. "Concerning" means "relating to," and is the equivalent of "regarding, respecting, about." *Id.*, at 470. "Reference" means "the capability or character of alluding to or bearing on or directing attention to something," and is the equivalent of "relation" and "respect." *Id.*, at 1907. And "regard" means "to have relation to or bearing upon: relate to," and is the equivalent of "relation" and "respect." *Id.*, at 1911. The interconnected web formed by these words belies the clear distinction Lamar attempts to impose. Lamar also fails to put forth an example of a phrase in a legal context similar to the one at issue here in which toggling between "related to" and "about" has any pertinent significance.

Use of the word "respecting" in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject. Cf. *Kleppe* v. *New Mexico*, 426 U. S. 529, 539 (1976) (explaining that the Property Clause, "in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands," and should receive an "expansive reading").

Indeed, when asked to interpret statutory language including the phrase "relating to," which is one of the meanings of "respecting," this Court has typically read the relevant text expansively. See, *e. g.*, *Coventry Health Care of Mo., Inc.* v. *Nevils*, 581 U. S. 87, 95–96 (2017) (describing " 'relate to' " as "expansive" and noting that "Congress characteristi-

cally employs the phrase to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates"); *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 378–390 (1992) (explaining that "'relating to'" has a "broad" ordinary meaning and accordingly holding that the Airline Deregulation Act of 1978 provision prohibiting the States from enforcing any law "'relating to rates, routes, or services'" of any air carrier pre-empted any fare advertising guidelines that "would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge"); *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 139 (1990) ("'A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.' Under this 'broad common-sense meaning,' a state law may 'relate to' a benefit plan . . . even if the law is not specifically designed to affect such plans, or the effect is only indirect" (citation omitted)).

Advancing that same expansive approach here, Appling contends that a "statement respecting the debtor's financial condition" is "a statement that has a direct relation to, or impact on the balance of all of the debtor's assets and liabilities or the debtor's overall financial status." Brief for Respondent 17 (internal quotation marks and citations omitted). "A debtor's statement describing an individual asset or liability necessarily qualifies," Appling explains, because it "has a direct impact on the *sum* of his assets and liabilities." *Ibid.* "Put differently, a debtor's statement that describes the existence or value of a constituent element of the debtor's balance sheet or income statement qualifies as a 'statement respecting financial condition.'" *Ibid.*

The United States as *amicus curiae* supporting Appling offers a slightly different formulation. In its view, a "statement respecting the debtor's financial condition" includes "a representation about a debtor's asset that is offered as evidence of ability to pay." Brief for United States 11. Al-

though Appling does not include "ability to pay" in his proffered definition, he and the United States agree that their respective formulations are functionally the same and lead to the same results. See Tr. of Oral Arg. 50–52, 58. That is so because to establish the requisite materiality and reliance, a creditor opposing discharge must explain why it viewed the debtor's false representation as relevant to the decision to extend money, property, services, or credit. If a given statement did not actually serve as evidence of ability to pay, the creditor's explanation will not suffice to bar discharge. But if the creditor proves materiality and reliance, it will be clear the statement was one "respecting the debtor's financial condition." Whether a statement about a single asset served as evidence of ability to pay thus ultimately always factors into the § 523(a)(2) inquiry at some point.

We agree with both Appling and the United States that, given the ordinary meaning of "respecting," Lamar's preferred statutory construction—that a "statement respecting the debtor's financial condition" means only a statement that captures the debtor's overall financial status—must be rejected, for it reads "respecting" out of the statute. See *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001) ("[A] statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks omitted)). Had Congress intended § 523(a)(2)(B) to encompass only statements expressing the balance of a debtor's assets and liabilities, there are several ways in which it could have so specified, *e. g.*, "statement disclosing the debtor's financial condition" or "statement of the debtor's financial condition."[2] But Congress did not use such narrow language.

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[2] Congress in fact used just such "statement of" language elsewhere in the Bankruptcy Code. See, *e. g.*, 11 U. S. C. § 329(a) ("statement of the compensation paid"); § 521(a)(1)(B)(iii) ("statement of the debtor's financial affairs"); § 707(b)(2)(C) ("statement of the debtor's current monthly income").

We also agree that a statement is "respecting" a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a "statement respecting the debtor's financial condition."

2

Further supporting the Court's conclusion is that Lamar's interpretation would yield incoherent results. On Lamar's view, the following would obtain: A misrepresentation about a single asset made in the context of a formal financial statement or balance sheet would constitute a "statement respecting the debtor's financial condition" and trigger § 523(a)(2)(B)'s heightened nondischargeability requirements, but the exact same misrepresentation made on its own, or in the context of a list of some but not all of the debtor's assets and liabilities, would not. Lamar does not explain why Congress would draw such seemingly arbitrary distinctions, where the ability to discharge a debt turns on the superficial packaging of a statement rather than its substantive content.

In addition, a highly general statement like, "I am above water," would need to be in writing to foreclose discharge, whereas a highly specific statement like, "I have $200,000 of equity in my house," would not. This, too, is inexplicably bizarre.

3

Lastly, the statutory history of the phrase "statement respecting the debtor's financial condition" corroborates our reading of the text. That language can be traced back to a 1926 amendment to the Bankruptcy Act of 1898 that prohibited discharge entirely to a debtor who had "obtained money or property on credit, or obtained an extension or renewal

of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition." Act of May 27, 1926, § 6, 44 Stat. 663–664.

When Congress again amended this provision in 1960, it retained the "statement in writing respecting . . . financial condition" language. See Act of July 12, 1960, Pub. L. 86–621, § 2, 74 Stat. 409. Congress then once more preserved that language when it rewrote and recodified the provision in the modern Bankruptcy Code as § 523(a)(2)(B).

Given the historical presence of the phrase "statement respecting the debtor's financial condition," lower courts had ample opportunity to weigh in on its meaning. Between 1926, when the phrase was introduced, and 1978, when Congress enacted the Bankruptcy Code, Courts of Appeals consistently construed the phrase to encompass statements addressing just one or some of a debtor's assets or liabilities.[3] When Congress used the materially same language in

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[3] See, *e. g.*, *Tenn* v. *First Hawaiian Bank*, 549 F. 2d 1356, 1358 (CA9 1977) (*per curiam*) ("[A]ppellants' recordation of the deed which they knew was false for the purpose of obtaining an extension of credit on the basis of an asset that they did not own was a false statement of financial condition" (citing *Scott* v. *Smith*, 232 F. 2d 188, 190 (CA9 1956))); *In re Butler*, 425 F. 2d 47, 49, 52 (CA3 1970) (affirming holding that a corporation's false statements as to select accounts receivable qualified as statements respecting financial condition); *Shainman* v. *Shear's of Affton, Inc.*, 387 F. 2d 33, 38 (CA8 1967) ("A written statement purporting to set forth the true value of a major asset of a corporation, its inventory, is a statement respecting the financial condition of that corporation. . . . There is nothing in the language or legislative history of this section of the [Bankruptcy] Act to indicate that it was intended to apply only to complete financial statements in the accounting sense"); *Albinak* v. *Kuhn*, 149 F. 2d 108, 110 (CA6 1945) ("No cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as limited to a detailed statement of assets and liabilities"); *In re Weiner*, 103 F. 2d 421, 423 (CA2 1939) (holding that a debtor's false statement about "an asset" that was pledged as collateral was a statement respecting financial condition).

§ 523(a)(2), it presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning. See *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); *Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well").

III

In addition to its plain-text arguments discussed and rejected above, see *supra*, at 715–720, Lamar contends that Appling's rule undermines the purpose of § 523(a)(2) in two ways. Neither argument is persuasive.

A

First, Lamar contends that Appling's construction gives § 523(a)(2)(B) an implausibly broad reach, such that little would be covered by § 523(a)(2)(A)'s general rule rendering nondischargeable debts arising from "false pretenses, a false representation, or actual fraud." That is not so. Decisions from this Court and several lower courts considering the application of § 523(a)(2)(A) demonstrate that the provision still retains significant function when the phrase "statement respecting the debtor's financial condition" is interpreted to encompass a statement about a single asset.

Section 523(a)(2)(A) has been applied when a debt arises from "forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Electronics, Inc.* v. *Ritz*, 578 U. S. 355, 359 (2016).[4] It

[4] See also, *e. g.*, *In re Tucker*, 539 B. R. 861, 868 (Bkrtcy. Ct. Idaho 2015) (holding nondischargeable under § 523(a)(2)(A) a debt arising from the overpayment of Social Security disability benefits to an individual who

also has been used to bar the discharge of debts resulting from misrepresentations about the value of goods, property, and services.[5]

B

Second, Lamar asserts that Appling's interpretation is inconsistent with the overall principle that the Bankruptcy Code exists to afford relief only to the "'honest but unfortunate debtor,'" *Cohen*, 523 U. S., at 217, because it leaves "fraudsters" free to "swindle innocent victims for money, property, or services by lying about their finances, then discharge the resulting debt in bankruptcy, just so long as they do so orally." Brief for Petitioner 35.

This general maxim, however, provides little support for Lamar's interpretation. The text of § 523(a)(2) plainly heightens the bar to discharge when the fraud at issue was effectuated via a "statement respecting the debtor's financial condition."[6] The heightened requirements, moreover, are not a shield for dishonest debtors. Rather, they reflect Congress' effort to balance the potential misuse of such

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failed to report changes to his employment despite a legal duty to do so); *In re Drummond*, 530 B. R. 707, 710, and n. 3 (Bkrtcy. Ct. ED Ark. 2015) (same, and concluding that "the requirement of the debtor to notify [the Social Security Administration] if she returns to work is not a statement that respects the debtor's financial condition").

[5] See, *e. g.*, *In re Bocchino*, 794 F. 3d 376, 380–383 (CA3 2015) (holding nondischargeable under § 523(a)(2)(A) civil judgment debts against a debtor-stockbroker who made misrepresentations about investments); *In re Cohen*, 106 F. 3d 52, 54–55 (CA3 1997) (holding that a landlord's misrepresentations about the rent that legally could be charged for an apartment constituted fraud under § 523(a)(2)(A)); *United States* v. *Spicer*, 57 F. 3d 1152, 1154, 1161 (CADC 1995) (holding nondischargeable under § 523(a)(2)(A) a settlement agreement owed to the Government based on an investor's misrepresentations of downpayment amounts in mortgage applications).

[6] In addition to the writing requirement, § 523(a)(2)(B) requires a creditor to show reasonable reliance. 11 U. S. C. § 523(a)(2)(B)(iii). Section 523(a)(2)(A), by contrast, requires only the lesser showing of "justifiable reliance." *Field* v. *Mans*, 516 U. S. 59, 61, 70–75 (1995).

statements by both debtors and creditors. As the Court has explained previously:

> "The House Report on the [Bankruptcy Reform Act of 1978] suggests that Congress wanted to moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies, which sometimes have encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge." *Field* v. *Mans*, 516 U. S. 59, 76–77 (1995).

Specifically, as detailed in *Field*, the House Report noted that consumer finance companies frequently collected information from loan applicants in ways designed to permit the companies to later use those statements as the basis for an exception to discharge. Commonly, a loan officer would instruct a loan applicant "'to list only a few or only the most important of his debts'" on a form with too little space to supply a complete list of debts, even though the phrase, "'"I have no other debts,"'" would be printed at the bottom of the form or the applicant would be "'instructed to write the phrase in his own handwriting.'" *Id.*, at 77, n. 13. If the debtor later filed for bankruptcy, the creditor would contend that the debtor had made misrepresentations in his loan application and the creditor would threaten litigation over excepting the debt from discharge. That threat was "often enough to induce the debtor to settle for a reduced sum," even where the merits of the nondischargeability claim were weak. H. R. Rep. No. 95–595, p. 131 (1977).

Notably, Lamar's interpretation of "statement respecting the debtor's financial condition" would not bring within § 523(a)(2)(B)'s reach the very types of statements the House Report described, because those debts-only statements said nothing about assets and thus did not communicate fully the

debtor's overall financial status. Yet in *Field*, the Court explained that the heightened requirements for nondischargeability under § 523(a)(2)(B) were intended to address creditor abuse involving such statements. 516 U. S., at 76–77. Lamar's construction also would render § 523(a)(2)(B) subject to manipulation by creditors, frustrating the very end Congress sought to avoid when it set forth heightened requirements for rendering nondischargeable "statements respecting the debtor's financial condition." *Ibid.*

Finally, although Lamar tries to paint a picture of defenseless creditors swindled by lying debtors careful to make their financial representations orally, creditors are not powerless. They can still benefit from the protection of § 523(a)(2)(B) so long as they insist that the representations respecting the debtor's financial condition on which they rely in extending money, property, services, or credit are made in writing. Doing so will likely redound to their benefit, as such writings can foster accuracy at the outset of a transaction, reduce the incidence of fraud, and facilitate the more predictable, fair, and efficient resolution of any subsequent dispute.

IV

For the foregoing reasons, the Court holds that a statement about a single asset can be a "statement respecting the debtor's financial condition" under § 523(a)(2) of the Bankruptcy Code. The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

Syllabus

AZAR, II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J. D.

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

No. 17–654. Decided June 4, 2018

Jane Doe, a minor, was eight weeks pregnant when she unlawfully crossed the border into the United States. She was detained and placed into the custody of the Office of Refugee Resettlement (ORR). Doe requested an abortion, but ORR policy generally prohibits shelter personnel from taking any steps to facilitate an abortion without the ORR director's approval. Doe's guardian ad litem, respondent Rochelle Garza, filed a putative class action on behalf of Doe and other similarly situated minors challenging the constitutionality of ORR's policy. The District Court issued a temporary restraining order allowing Doe to obtain an abortion. After a panel of the D. C. Circuit vacated the order, the D. C. Circuit sitting en banc vacated the panel order and remanded. The District Court then ordered the Government to make Doe available to begin the process for obtaining an abortion. Doe's representatives scheduled an appointment at the abortion clinic. The Government planned to seek emergency review in this Court in advance of Doe's appointment, but Doe's appointment was moved up and she had the abortion before the Government was made aware. The Government then filed this petition for certiorari.

Held: This case is moot, and the judgment below is vacated. When a federal civil case becomes moot on its way to this Court, "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39. One clear example where "[v]acatur is in order" is "when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'" *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 71–72. Here, it is undisputed that Doe's representative prevailed below, took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected, and thus retained the benefit of that favorable judgment. The fact that the relevant claim here became moot before certiorari does not limit this Court's discretion. See, *e. g.*, *LG Electronics, Inc.* v. *InterDigital Communications, LLC*, 572 U. S.

1056. In answering the *Munsingwear* question here, the Court does not address allegations of material misrepresentations and omissions designed to impede this Court's review.

Certiorari granted; 874 F. 3d 735, vacated and remanded.

PER CURIAM.

Jane Doe, a minor, was eight weeks pregnant when she unlawfully crossed the border into the United States. She was detained and placed into the custody of the Office of Refugee Resettlement (ORR), part of the Department of Health and Human Services. ORR placed her in a federally funded shelter in Texas. After an initial medical examination, Doe requested an abortion. But ORR did not allow Doe to go to an abortion clinic. Absent "emergency medical situations," ORR policy prohibits shelter personnel from "taking any action that facilitates an abortion without direction and approval from the Director of ORR." Plaintiff's Application for Temporary Restraining Order and Motion for Preliminary Injunction in *Garza* v. *Hargan*, No. 17–cv–2122 (D DC), Doc. 3–5, p. 2 (decl. of Brigitte Amiri, Exh. A). According to the Government, a minor may "le[ave] government custody by seeking voluntary departure, or by working with the government to identify a suitable sponsor who could take custody of her in the United States." Pet. for Cert. 18; see also 8 U. S. C. § 1229c; 8 CFR §§ 236.3, 1240.26 (2018).

Respondent Rochelle Garza, Doe's guardian ad litem, filed a putative class action on behalf of Doe and "all other pregnant unaccompanied . . . minors in ORR custody" challenging the constitutionality of ORR's policy. Complaint in *Garza* v. *Hargan*, No. 17–cv–2122 (D DC), Doc. 1, p. 11. On October 18, 2017, the District Court issued a temporary restraining order allowing Doe to obtain an abortion immediately. On October 19, Doe attended preabortion counseling, required by Texas law to occur at least 24 hours in advance with the same doctor who performs the abortion. The clinic she visited typically rotated physicians on a weekly basis.

The next day, a panel of the Court of Appeals for the District of Columbia Circuit vacated the relevant portions of the temporary restraining order. Noting that the Government had assumed for purposes of this case that Doe had a constitutional right to an abortion, the panel concluded that ORR's policy was not an "undue burden," *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 876 (1992) (plurality opinion).

Four days later, on October 24, the Court of Appeals, sitting en banc, vacated the panel order and remanded the case to the District Court. *Garza* v. *Hargan*, 874 F. 3d 735, 735–736 (CADC 2017). The same day, Garza sought an amended restraining order. Garza's lawyers asked the District Court to order the Government to make Doe available "in order to obtain the counseling required by state law and to obtain the abortion procedure." Pet. for Cert. 12 (emphasis deleted). The District Court agreed and ordered the Government to act accordingly. Doe's representatives scheduled an appointment for the next morning and arranged for Doe to be transported to the clinic on October 25 at 7:30 a.m.

The Government planned to ask this Court for emergency review of the en banc order. Believing the abortion would not take place until October 26 after Doe had repeated the state-required counseling with a new doctor, the Government informed opposing counsel and this Court that it would file a stay application early on the morning of October 25. The details are disputed, but sometime over the course of the night both the time and nature of the appointment were changed. The doctor who had performed Doe's earlier counseling was available to perform the abortion after all and the 7:30 a.m. appointment was moved to 4:15 a.m. At 10 a.m., Garza's lawyers informed the Government that Doe "had the abortion this morning." *Id.*, at 15 (internal quotation marks omitted). The abortion rendered the relevant claim moot, so the Government did not file its emergency stay ap-

plication. Instead, the Government filed this petition for certiorari.

When "a civil case from a court in the federal system . . . has become moot while on its way here," this Court's "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). Because this practice is rooted in equity, the decision whether to vacate turns on "the conditions and circumstances of the particular case." *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 478 (1916). One clear example where "[v]acatur is in order" is "when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'" *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 71–72 (1997) (quoting *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 23 (1994)). "'It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.'" 520 U. S., at 75 (alterations omitted).

The litigation over Doe's temporary restraining order falls squarely within the Court's established practice. Doe's individual claim for injunctive relief—the only claim addressed by the D. C. Circuit—became moot after the abortion. It is undisputed that Garza and her lawyers prevailed in the D. C. Circuit, took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected, and thus retained the benefit of that favorable judgment. And although not every moot case will warrant vacatur, the fact that the relevant claim here became moot before certiorari does not limit this Court's discretion. See, *e. g.*, *LG Electronics, Inc.* v. *InterDigital Communications, LLC*, 572 U. S. 1056 (2014) (after the certiorari petition was filed, respondents withdrew the complaint they filed with the Inter-

national Trade Commission); *United States* v. *Samish Indian Nation*, 568 U. S. 936 (2012) (after the certiorari petition was filed, respondent voluntarily dismissed its claim in the Court of Federal Claims); *Eisai Co.* v. *Teva Pharmaceuticals USA, Inc.*, 564 U. S. 1001 (2011) (before the certiorari petition was filed, respondent's competitor began selling the drug at issue, which was the relief that respondent had sought); *Indiana State Police Pension Trust* v. *Chrysler LLC*, 558 U. S. 1087 (2009) (before the certiorari petition was filed, respondent completed a court-approved sale of assets, which mooted the appeal). The unique circumstances of this case and the balance of equities weigh in favor of vacatur.

The Government also suggests that opposing counsel made "what appear to be material misrepresentations and omissions" that were "designed to thwart this Court's review." Pet. for Cert. 26. Respondent says this suggestion is "baseless." Brief in Opposition 23. The Court takes allegations like those the Government makes here seriously, for ethical rules are necessary to the maintenance of a culture of civility and mutual trust within the legal profession. On the one hand, all attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court. Especially in fast-paced, emergency proceedings like those at issue here, it is critical that lawyers and courts alike be able to rely on one another's representations. On the other hand, lawyers also have ethical obligations to their clients and not all communication breakdowns constitute misconduct. The Court need not delve into the factual disputes raised by the parties in order to answer the *Munsingwear* question here.

The petition for a writ of certiorari is granted. The Court vacates the en banc order and remands the case to the United States Court of Appeals for the District of Columbia Circuit with instructions to direct the District Court to dis-

miss the relevant individual claim for injunctive relief as moot. See *Munsingwear*, *supra*.

It is so ordered.

Syllabus

CHINA AGRITECH, INC. *v.* RESH ET AL.

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

No. 17–432. Argued March 26, 2018—Decided June 11, 2018

American Pipe & Constr. Co. v. *Utah*, 414 U. S. 538, established that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint and that members of a class that fails to gain certification can timely intervene as individual plaintiffs in the still-pending action, shorn of its class character. *American Pipe*'s tolling rule also applies to putative class members who, after denial of class certification, "prefer to bring an individual suit rather than intervene." *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 350. The question presented in this case is whether *American Pipe* tolling applies not only to individual claims, but to successive class actions as well.

This suit is the third class action brought on behalf of purchasers of petitioner China Agritech's common stock, alleging materially identical violations of the Securities Exchange Act of 1934. The Act has both a two-year statute of limitations and a five-year statute of repose, 28 U. S. C. § 1658(b). Here, the accrual date for purposes of the Act's limitation period is February 3, 2011, and for the repose period, November 12, 2009. Theodore Dean, a China Agritech shareholder, filed the first class-action complaint on February 11, 2011. As required by the Private Securities Litigation Reform Act of 1995 (PSLRA), his counsel posted notice of the action and invited any member of the purported class to move to serve as lead plaintiff. Six shareholders sought lead-plaintiff status. On May 3, 2012, the District Court denied class certification; the action settled in September 2012, and the suit was dismissed. On October 4, Dean's counsel filed a new complaint (*Smyth*), still timely, with a new set of plaintiffs. Eight shareholders sought lead-plaintiff appointment in response to the PSLRA notice, but the District Court again denied class certification. Thereafter, the *Smyth* plaintiffs settled their individual claims and dismissed their suit.

Respondent Michael Resh, who did not seek lead-plaintiff status in the earlier actions, filed the present class action in 2014, a year and a half after the statute of limitations expired. The other respondents moved to intervene in the suit commenced by Resh, seeking lead-plaintiff status. The District Court dismissed the class complaint as untimely, holding that the *Dean* and *Smyth* actions did not toll the time

to initiate class claims. The Ninth Circuit reversed, holding that the reasoning of *American Pipe* extends to successive class claims.

Held: Upon denial of class certification, a putative class member may not, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations. Pp. 739–748.

(a) *American Pipe* and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial. The "efficiency and economy of litigation" that support tolling of individual claims, *American Pipe*, 414 U. S., at 553, do not support maintenance of untimely successive class actions such as the one brought by Resh. Economy of litigation favors delaying individual claims until after a class-certification denial. With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.

Federal Rule of Civil Procedure 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on. The PSLRA, which governs this litigation, evinces a similar preference, this time embodied in legislation providing for early notice and lead-plaintiff procedures. There is little reason to allow plaintiffs who passed up opportunities to participate in the first (and second) round of class litigation to enter the fray several years after class proceedings first commenced.

Class representatives who commence suit after expiration of the limitation period are unlikely to qualify as diligent in asserting claims and pursuing relief. See, *e. g.*, *McQuiggin* v. *Perkins*, 569 U. S. 383, 391. And respondents' proposed reading would allow extension of the statute of limitations time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*. Pp. 739–744.

(b) If Resh's suit meets the requirements of Rule 23(a) and (b), respondents assert, the suit should be permitted to proceed as a class action in keeping with *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393. *Shady Grove*, however, addressed a case in which a Rule 23 class action could have been maintained absent a state law proscribing class actions, while Resh's class action would be

untimely unless saved by *American Pipe*'s tolling exception. Rule 23 itself does not address timeliness of claims or tolling and nothing in the Rule calls for the revival of class claims if individual claims are tolled.

The clarification of *American Pipe*'s reach does not run afoul of the Rules Enabling Act by abridging or modifying a substantive right. Plaintiffs have no substantive right to bring claims outside the statute of limitations. Nor is the clarification likely to cause a substantial increase in the number of protective class-action filings. Several Courts of Appeals have already declined to read *American Pipe* to permit a successive class action filed outside the limitation period, and there is no showing that these Circuits have experienced a disproportionate number of duplicative, protective class-action filings. Multiple filings, moreover, could aid a district court in determining, early on, whether class treatment is warranted, and if so, who would be the best representative. The Federal Rules provide a range of mechanisms to aid district courts in overseeing complex litigation, but they offer no reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims. Pp. 745–748.

857 F. 3d 994, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment, *post*, p. 748.

Seth Aronson argued the cause for petitioner. With him on the briefs were *William K. Pao*, *Brittany Rogers*, *Michelle C. Leu*, *Abby F. Rudzin*, *Anton Metlitsky*, *Bradley N. Garcia*, and *Jason Zarrow*.

David C. Frederick argued the cause for respondents. With him on the brief were *Jeremy S. B. Newman*, *Matthew M. Guiney*, and *David A. P. Brower*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Mark A. Perry*, *Rachel S. Brass*, *Warren Postman*, and *Deborah R. White*; for DRI–The Voice of the Defense Bar by *Robert L. Wise* and *Susan E. Burnett*; for the Securities Industry and Financial Markets Association by *Lewis J. Liman*, *Jared M. Gerber*, and *Kevin M. Carroll*; and for the Washington Legal Foundation by *George E. Anhang*, *Lyle Roberts*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Julie Nepveu*, *William Alvarado Rivera*, and *Ernest A. Young*; for the

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the tolling rule first stated in *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974). The Court held in *American Pipe* that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint. Where class-action status has been denied, the Court further ruled, members of the failed class could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character. See *id.*, at 544, 552–553. Later, in *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345 (1983), the Court clarified *American Pipe*'s tolling rule: The rule is not dependent on intervening in or joining an existing suit; it applies as well to putative class members who, after denial of class certification, "prefer to bring an individual suit rather than intervene . . . once the economies of a class action [are] no longer available." 462 U. S., at 350, 353–354; see *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 582 U. S. 497, 512 (2017) (*American Pipe* "permitt[ed] a class action to splinter into individual suits"); *Smith* v. *Bayer Corp.*, 564 U. S. 299, 313–314, n. 10 (2011) (under *American Pipe* tolling rule, "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the [existing] suit").

The question presented in the case now before us: Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an

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American Association for Justice et al. by *Deepak Gupta, Matthew W. H. Wessler*, and *Jeffrey R. White*; for Law Professors by *Lumen N. Mulligan, pro se,* and *Tejinder Singh*; for the National Conference on Public Employee Retirement Systems by *Max W. Berger* and *Robert D. Klausner*; for Plaintiffs in Post-*Dukes* Successor Class Actions by *Joseph M. Sellers, Christine Webber*, and *Jocelyn D. Larkin*; for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve*; and for Retired Federal Judges by *Andrew N. Goldfarb* and *John J. Connolly.*

individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations? Our answer is no. *American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.

I

The instant suit is the third class action brought on behalf of purchasers of petitioner China Agritech's common stock, alleging violations of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* In short, the successive complaints each make materially identical allegations that China Agritech engaged in fraud and misleading business practices, causing the company's stock price to plummet when several reports brought the misconduct to light. See App. 60–100 (*Resh* complaint), 205–235 (*Smyth* complaint), 133–156 (*Dean* complaint). The Exchange Act has a two-year statute of limitations that begins to run upon discovery of the facts constituting the violation. 28 U. S. C. § 1658(b). The Act also has a five-year statute of repose. *Ibid.*[1] The parties agree that the accrual date for purposes of the two-year limitation period is February 3, 2011, and for the five-year repose period, November 12, 2009. Brief for Respondents 8, n. 3.

Theodore Dean, a China Agritech shareholder, filed the first class-action complaint on February 11, 2011, at the start of the two-year limitation period. As required by the Pri-

[1] A statute of limitations "begin[s] to run when the cause of action accrues—that is, when the plaintiff can file suit and obtain relief." *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 582 U. S. 497, 504–505 (2017) (internal quotation marks omitted). A statute of repose, by contrast, "begin[s] to run on the date of the last culpable act or omission of the defendant." *Id.*, at 505 (internal quotation marks omitted).

vate Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, Dean's counsel posted notice of the action in two "widely circulated national business-oriented publication[s]," 15 U. S. C. § 78u–4(a)(3)(A)(i), and invited any member of the purported class to move to serve as lead plaintiff. App. 274–280. Six shareholders responded to the notice, seeking to be named lead plaintiffs; other shareholders who had filed their own class complaints dismissed them in view of the *Dean* action. On May 3, 2012, after several months of discovery and deferral of a lead-plaintiff ruling, the District Court denied class certification. The plaintiffs, the District Court determined, had failed to establish that China Agritech stock traded on an efficient market—a necessity for proving reliance on a classwide basis. App. 192. Dean's counsel then published a notice informing shareholders of the certification denial and advising: "You must act yourself to protect your rights. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech." *Id.*, at 281–282. The *Dean* action settled in September 2012, occasioning dismissal of the suit. See 857 F. 3d 994, 998 (CA9 2017).

On October 4, 2012—within the two-year statute of limitations—Dean's counsel filed a new complaint (*Smyth*) with a new set of plaintiffs and new efficient-market evidence. Eight shareholders responded to the PSLRA notice, seeking lead-plaintiff appointment. The District Court again denied class certification, this time on typicality and adequacy grounds. See App. 254. Thereafter, the *Smyth* plaintiffs settled their individual claims with the defendants and voluntarily dismissed their suit. Because the *Smyth* litigation was timely commenced, putative class members who promptly initiated *individual* suits in the wake of the class-action denial would have encountered no statute of limitations bar.

Respondent Michael Resh, who had not sought lead-plaintiff status in either the *Dean* or *Smyth* proceedings and

was represented by counsel who had not appeared in the earlier actions, filed the present suit on June 30, 2014, styling it a class action—a year and a half after the statute of limitations expired. The other respondents moved to intervene, seeking designation as lead plaintiffs; together with Resh, they filed an amended complaint. The District Court dismissed the class complaint as untimely, holding that the *Dean* and *Smyth* actions did not toll the time to initiate class claims. App. to Pet. for Cert. 36a.

The Court of Appeals for the Ninth Circuit reversed: "[P]ermitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling," the court reasoned, "would advance the policy objectives that led the Supreme Court to permit tolling in the first place." 857 F. 3d, at 1004. Applying *American Pipe* tolling to successive class actions, the Ninth Circuit added, would cause no unfair surprise to defendants and would promote economy of litigation by reducing incentives for filing protective class suits during the pendency of an initial certification motion. 857 F. 3d, at 1004.

We granted certiorari, 583 U. S. 1037 (2017), in view of a division of authority among the Courts of Appeals over whether otherwise-untimely successive class claims may be salvaged by *American Pipe* tolling. Compare the instant case and *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F. 3d 637, 652–653 (CA6 2015) (applying *American Pipe* tolling to successive class action), with, *e. g.*, *Basch* v. *Ground Round, Inc.*, 139 F. 3d 6, 11 (CA1 1998) ("Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely."); *Griffin* v. *Singletary*, 17 F. 3d 356, 359 (CA11 1994) (similar); *Korwek* v. *Hunt*, 827 F. 2d 874, 879 (CA2 1987) (*American Pipe* does not apply to successive class suits); *Salazar-Calderon* v. *Presidio Valley Farmers Assn.*, 765 F. 2d 1334, 1351 (CA5 1985) ("Plaintiffs have no

authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any."). See also *Yang* v. *Odom*, 392 F. 3d 97, 112 (CA3 2004) (*American Pipe* tolling does not apply to successive class actions where certification was previously denied due to a class defect, but does apply when certification was denied based on the putative representative's deficiencies).

II

A

American Pipe established that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U. S., at 553. "A contrary rule," the Court reasoned in *American Pipe*, "would deprive [Federal Rule of Civil Procedure] 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Ibid.* This is so, the Court explained, because without tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Ibid.* In *Crown, Cork*, the Court further elaborated: Failure to extend the *American Pipe* rule "to class members filing separate actions," in addition to those who move to intervene, would result in "a needless multiplicity of actions" filed by class members preserving their individual claims—"precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." 462 U. S., at 351.

American Pipe and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial. See, *e. g.*, *American Pipe*, 414 U. S., at 552 (addressing "privilege of intervening in an individual

suit"); *Crown, Cork*, 462 U. S., at 349 (applying *American Pipe* to those who "file individual actions"); 462 U. S., at 352 (tolling benefits "class members who choose to file separate suits").

What about a putative class representative, like Resh, who brings his claims as a new class action after the statute of limitations has expired? Neither decision so much as hints that tolling extends to otherwise time-barred class claims. We hold that *American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action. The "efficiency and economy of litigation" that support tolling of individual claims, *American Pipe*, 414 U. S., at 553, do not support maintenance of untimely successive class actions; any additional *class* filings should be made early on, soon after the commencement of the first action seeking class certification.

American Pipe tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.

With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option for the claims, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.[2]

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[2] Encouraging early class filings will help ensure sufficient time remains under the statute of limitations, in the event that certification is denied for one of the actions or a portion of the class. Subclasses might be pleaded in one or more complaints and taken up if necessary; as class

Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on. See Fed. Rule Civ. Proc. 23(c)(1)(A). Indeed, Rule 23(c) was amended in 2003 to permit district courts to take account of multiple class-representative filings. Before the amendment, Rule 23(c) encouraged district courts to issue certification rulings "as soon as practicable." The amendment changed the recommended timing target to "an early practicable time." The alteration was made to allow greater leeway, more time for class discovery, and additional time to "explore designation of class counsel" and consider "additional [class counsel] applications rather than deny class certification," thus "afford[ing] the best possible representation for the class." Advisory Committee's 2003 Notes on subds. (c)(1)(A) and (g)(2)(A) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 815, 818; see Willging & Lee, From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after *Ortiz*, 58 U. Kan. L. Rev. 775, 785 (2010) (2003 amendments "raised the standard for certifying a class from an early, conditional ruling to a later, relatively final decision" and "expanded the opportunity for parties to engage in discovery prior to moving for class certification").

The PSLRA, which governs this litigation, evinces a similar preference, this time embodied in legislation, for grouping class-representative filings at the outset of litigation. See *supra*, at 736–737. When the *Dean* and *Smyth* timely commenced actions were first filed, counsel put any share-

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discovery proceeds and weaknesses in the class theory or adequacy of representation come to light, the lead complaint might be amended or a new plaintiff might intervene. See Brief for Plaintiffs in Post-*Dukes* Successor Class Actions as *Amici Curiae* 8–10 (describing regional subclasses asserted in the *Dukes* v. *Wal-Mart* litigation following this Court's decision decertifying the nationwide class, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338 (2011)); Pierce, Improving Predictability and Consistency in Class Action Tolling, 23 Geo. Mason L. Rev. 339, 349 (2016) (some *Dukes* plaintiffs moved to amend the original complaint to replead subclasses).

holder who might wish to serve as lead plaintiff on notice of the action. Several heeded the call—six in *Dean* and eight in *Smyth*. See 857 F. 3d, at 997–998. The PSLRA, by requiring notice of the commencement of a class action, aims to draw all potential lead plaintiffs into the suit so that the district court will have the full roster of contenders before deciding which contender to appoint.[3] See Brief for Securities Industry and Financial Markets Association as *Amicus Curiae* 12–13 (PSLRA "seeks to achieve Congress['] goal of curbing duplicative . . . litigation by encouraging all interested parties to apply to serve as lead plaintiff at the early stages of the case [and] providing for the consolidation of similar class actions"). With notice and the opportunity to participate in the first (and second) round of class litigation, there is little reason to allow plaintiffs who passed up those opportunities to enter the fray several years after class proceedings first commenced.

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[3] Although the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, includes a presumption that the most adequate plaintiff is the one who moves first and has the largest financial interest in the case, see 15 U. S. C. § 78u–4(a)(3)(B)(iii)(I), multiple potential lead plaintiffs have reason to apply for the role because there may not be an obvious candidate. Which plaintiff has the largest financial interest may not be immediately apparent; the statute does not define the term, and the size of a shareholder's financial interest can depend on how many shares were purchased and sold, when, and at what price, as well as the order in which the losses are tallied. See, *e. g.*, *Cortina* v. *Anavex Life Sciences Corp.*, 2016 WL 1337305 (SDNY, Apr. 5, 2016). District courts often permit aggregation of plaintiffs into plaintiff groups, so even a small shareholder could apply for lead-plaintiff status, hoping to join with other shareholders to create a unit with the largest financial interest. See Choi & Thompson, Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA, 106 Colum. L. Rev. 1489, 1507, 1521, 1530 (2006) (80% of securities class actions in post-PSLRA data sample had two or more co-lead counsel firms). Thus, it is a reasonable expectation that, in litigation governed by the PSLRA, a district court will have several competing candidates for lead plaintiff to choose among.

Ordinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in pursuit of their claims. See, *e. g.*, *McQuiggin* v. *Perkins*, 569 U. S. 383, 391 (2013); *Menominee Tribe of Wis.* v. *United States*, 577 U. S. 250, 255 (2016). Even *American Pipe*, which did not analyze "criteria of the formal doctrine of equitable tolling in any direct manner," *ANZ*, 582 U. S., at 510, observed that tolling was permissible in the circumstances because plaintiffs who later intervened to pursue individual claims had not slept on their rights, *American Pipe*, 414 U. S., at 554–555. Those plaintiffs reasonably relied on the class representative, who sued timely, to protect their interests in their individual claims. See *Crown, Cork*, 462 U. S., at 350. A would-be class representative who commences suit after expiration of the limitation period, however, can hardly qualify as diligent in asserting claims and pursuing relief. Her interest in representing the class as lead plaintiff, therefore, would not be preserved by the prior plaintiff's timely filed class suit.

Respondents' proposed reading would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. See *Yang*, 392 F. 3d, at 113 (Alito, J., concurring in part and dissenting in part) (tolling for successive class actions could allow "lawyers seeking to represent a plaintiff class [to] extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class"); *Ewing Industries Corp.* v. *Bob Wines Nursery, Inc.*, 795 F. 3d 1324, 1326 (CA11 2015) (tolling for successive class actions allows plaintiffs "limitless bites at the apple").[4] This prospect

[4] Respondents observe that in *Smith* v. *Bayer Corp.*, 564 U. S. 299 (2011), we held that federal class-certification denials do not have preclusive effect in subsequent state-court suits, despite concerns about successive class actions. See Brief for Respondents 40–41. But in *Smith*, we were guided by "the fundamental nature of the general rule that only parties can be bound by prior judgments." 564 U. S., at 313 (internal quota-

points up a further distinction between the individual-claim tolling established by *American Pipe* and tolling for successive class actions. The time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending; the time for filing successive class suits, if tolling were allowed, could be limitless. Respondents' claims happen to be governed by 28 U. S. C. § 1658(b)(2)'s five-year statute of repose, so the time to file complaints has a finite end. Statutes of repose, however, are not ubiquitous. See *Dekalb County Pension Fund* v. *Transocean Ltd.*, 817 F. 3d 393, 397 (CA2 2016). Most statutory schemes provide for a single limitation period without any outer limit to safeguard against serial relitigation. Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*.[5]

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tion marks omitted). The state-court plaintiffs were not parties to the federal-court litigation, hence they could not be bound by its holding—despite a "stron[g] argument" about the inefficiencies of serial class relitigation supporting the contrary position. *Id.*, at 316. No such countervailing presumption favors Resh's untimely third federal class suit.

[5] JUSTICE SOTOMAYOR suggests that the Court might adopt a rule under which tolling "becomes unavailable for future class claims where class certification is denied for a reason that bears on the suitability of the claims for class treatment," but not where "class certification is denied because of the deficiencies of the lead plaintiff as class representative." *Post*, at 753; see *Yang* v. *Odom*, 392 F. 3d 97, 112 (CA3 2004) (embracing similar rule). But Rule 23 contains no instruction to give denials of class certification different effect based on the reason for the denial. And as the Advisory Committee Notes explain, affording district courts time to consider competing claims for class representation will advance the likelihood that lead plaintiff or class counsel deficiencies will be discovered and acted upon early in the litigation. See *supra*, at 741. Rule 23 and putative class members' own interests in adequate representation, and the efficient adjudication thereof, weigh heavily against tolling for successive class actions. There is nothing inequitable in following these guides. See *post*, at 753, n. 2.

B

Respondents emphasize that in *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393 (2010), we said that "[a] class action may be maintained," *id.*, at 398 (internal quotation marks omitted), if the requirements of Rule 23(a) and (b) are satisfied, and "Rule 23 *automatically* applies in all civil actions and proceedings in the United States district courts," *id.*, at 400 (internal quotation marks omitted). See Brief for Respondents 21–23. If Resh's suit meets the requirements of Rule 23(a) and (b), respondents assert, there is no reason why Resh's suit cannot proceed as a class action. *Shady Grove* does not call for that outcome. In *Shady Grove*, the Court held that a federal diversity action could proceed under Rule 23 despite a state law prohibiting class treatment of suits seeking damages of the kind asserted in the *Shady Grove* complaint. 559 U. S., at 396, 416. Our opinion in *Shady Grove* addressed a case in which a Rule 23 class action could have been maintained absent a contrary state-law command. *Id.*, at 396. Resh's case presents the reverse situation: The class action would be untimely unless saved by *American Pipe*'s equitable-tolling exception to statutes of limitations. Rule 23 itself does not address timeliness of claims or tolling and nothing in the Rule calls for the revival of class claims if individual claims are tolled. In fact, as already explained, Rule 23 prescribes the opposite result. See *supra*, at 740–741.

Today's clarification of *American Pipe*'s reach does not run afoul of the Rules Enabling Act by causing a plaintiff's attempted recourse to Rule 23 to abridge or modify a substantive right. See Brief for Respondents 23–26 (citing *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U. S. 442 (2016)). Plaintiffs have no substantive right to bring their claims outside the statute of limitations. That they may do so, in limited circumstances, is due to a judicially crafted tolling rule that itself does not abridge, enlarge, or modify any substantive

right. *American Pipe*, 414 U. S., at 558. Without *American Pipe*, respondents would have no peg to seek tolling here; as we have explained, however, *American Pipe* does not provide for the extension of the statute of limitations sought by Resh for institution of an untimely third class suit.

Respondents urge that *American Pipe*'s logic in fact supports their position because declining to toll the limitation period for successive class suits will lead to a "needless multiplicity" of protective class-action filings. Brief for Respondents 32–34. See also *post*, at 754 (expressing concern about duplicative and dueling class actions). But there is little reason to think that protective class filings will substantially increase. Several Courts of Appeals have already declined to read *American Pipe* to permit a successive class action filed outside the limitation period. See *supra*, at 738–739; 3 W. Rubenstein, Newberg on Class Actions § 9:64, n. 5 (5th ed. 2013). These courts include the Second and Fifth Circuits (no strangers to class-action practice); both courts declined to entertain out-of-time class actions in the 1980's. See *Korwek*, 827 F. 2d 874 (CA2 1987); *Salazar-Calderon*, 765 F. 2d 1334 (CA5 1985). Respondents and their *amici* make no showing that these Circuits have experienced a disproportionate number of duplicative, protective class-action filings.

Amicus National Conference on Public Employee Retirement Systems cites examples of protective filings responding to courts' disallowance of *American Pipe* tolling for statutes of repose, but those examples in fact suggest that protective class filings are uncommon. See Brief for National Conference on Public Employee Retirement Systems as *Amicus Curiae* 7–8. Between dozens and hundreds of class plaintiffs filed protective *individual* claims while class-certification motions were pending in securities cases and the statute of repose was about to run out, placing a permanent bar against their claims. *Ibid.* But none of the plaintiffs

appears to have filed a protective *class* action—even though, if the statute of repose expired and the pending class-certification motions were denied, there would be no further opportunity to assert class claims.[6]

Nor do the incentives of class-action practice suggest that many more plaintiffs will file protective class claims as a result of our holding. Any plaintiff whose individual claim is worth litigating on its own rests secure in the knowledge that she can avail herself of *American Pipe* tolling if certification is denied to a first putative class. The plaintiff who seeks to preserve the ability to lead the class—whether because her claim is too small to make an individual suit worthwhile or because of an attendant financial benefit[7]—has every reason to file a class action early, and little reason to wait in the wings, giving another plaintiff first shot at representation.

In any event, as previously explained, see *supra*, at 740–741, a multiplicity of class-action filings is not necessarily "needless." Indeed, multiple filings may aid a district court in determining, early on, whether class treatment is warranted, and if so, which of the contenders would be the best representative. And sooner rather than later filings are just what Rule 23 encourages. See *ibid.* Multiple timely filings might not line up neatly; they could be filed in different districts, at different times—perhaps when briefing on class certification has already begun—or on behalf of only par-

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[6] The Second Circuit *Petrobras* litigation, referenced in *amicus*' brief, illustrates that multiple timely class filings do not sow unmanageable chaos. Five class actions were filed there and consolidated, along with individual claims, for pretrial purposes, including class-certification determination. See *In re Petrobras Securities*, 862 F. 3d 250, 258 (CA2 2017).

[7] The class representative might receive a share of class recovery above and beyond her individual claim. See, *e. g.*, *Cook* v. *Niedert*, 142 F. 3d 1004, 1016 (CA7 1998) (affirming class representative's $25,000 incentive award).

tially overlapping classes. See Wasserman, Dueling Class Actions, 80 B. U. L. Rev. 461, 464–465 (2000) (describing variety of "dueling" class filings). But district courts have ample tools at their disposal to manage the suits, including the ability to stay, consolidate, or transfer proceedings. District courts are increasingly familiar with overseeing such complex cases, given the surge in multidistrict litigation. See Cabraser & Issacharoff, The Participatory Class Action, 92 N. Y. U. L. Rev. 846, 850–851 (2017) (multidistrict litigation frequently combines individual suits and multiple putative class actions). The Federal Rules provide a range of mechanisms to aid courts in this endeavor. What the Rules do not offer is a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims.

* * *

The watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23 as well. Extending *American Pipe* tolling to successive class actions does not serve that purpose. The contrary rule, allowing no tolling for out-of-time class actions, will propel putative class representatives to file suit well within the limitation period and seek certification promptly. For all the above-stated reasons, it is the rule we adopt today: Time to file a class action falls outside the bounds of *American Pipe*.

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

It is so ordered.

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with the Court that in cases governed by the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U. S. C. § 78u–4, like this one, a plaintiff who seeks to bring

a successive class action may not rely on the tolling rule established by *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974). I cannot, however, join the majority in going further by holding that the same is true for class actions not subject to the PSLRA.

I

A

To understand why the PSLRA is essential to the conclusion the Court reaches here, recall that this case involves a putative class-action lawsuit brought by a plaintiff with a timely individual claim, joined by coplaintiffs with timely individual claims, on behalf of a putative class of absent class members with timely individual claims. See *ante*, at 737. One might naturally think, then, that the class claims in the lawsuit are timely. The majority, however, concludes that the named plaintiffs' and putative class members' class claims are time barred.

At first blush, this result might seem surprising, for the Court has rejected the idea that class claims are categorically different from individual claims. See *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 398 (2010). Although it did not hold that class claims may never be treated differently from individual claims, *Shady Grove* indicates that there must be a special reason for doing so.

Here, the PSLRA supplies that special reason. The PSLRA imposes significant procedural requirements on securities class actions that do not apply to individual or traditionally joined securities claims. See § 78u–4(a)(1).

Foremost among these requirements is a process for the "[a]ppointment of lead plaintiff." § 78u–4(a)(3). Under the PSLRA, the named plaintiff in a putative class action must publish within 20 days of filing the complaint a nationwide notice alerting putative class members to the filing of the

suit and informing them that, "not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff." § 78u–4(a)(3)(A)(i). The district court then must evaluate all prospective lead plaintiffs and choose the "most adequate" one based on a set of enumerated considerations. § 78u–4(a)(3)(B). The PSLRA thus contemplates a process by which all prospective class representatives come forward in the first-filed class action and make their arguments to the court for lead-plaintiff status. See H. R. Conf. Rep. No. 104–369, p. 32 (1995).

Respondents here bypassed that statutory process. They do not dispute that notice was published in the two earlier filed putative class actions concerning the same securities claims as here, as required by the PSLRA. Yet they did not seek to be chosen lead plaintiffs in either of those actions. See *ante*, at 736–738, 741–742. For that reason alone, I agree with the majority that respondents "can hardly qualify as diligent in asserting [class] claims and pursuing relief." *Ante*, at 743. Respondents' failure to utilize the PSLRA's lead-plaintiff selection procedure distinguishes them from the *American Pipe* absent class members, who were subject only to the traditional Federal Rule of Civil Procedure 23 class procedure, which is "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U. S., at 550.

Unlike the PSLRA, Rule 23 contains no requirement of precertification notice to absent putative class members; it provides only for postcertification notice. See Fed. Rule Civ. Proc. 23(c)(2). There thus is no mechanism for absent putative class members to learn that a putative class action is pending, much less that they are entitled to seek to displace the named plaintiff in that lawsuit as class representative. Also unlike the PSLRA, Rule 23 contains no process for a district court to choose from among the various

candidates for lead plaintiff, nor does it specify what would make a person the most adequate representative of the class. See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1765, p. 321 (3d ed. 2005). In class actions not subject to the PSLRA, the class representative is generally the first person who files the suit, and so is self-selected (subject to an adequacy determination), rather than selected by the court.[1] See Rule 23(a)(4) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class"); Rule 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action"); H. R. Conf. Rep. No. 104–369, at 33–35.

The majority points to Rule 23(c)'s requirement that the determination whether to certify a class be made at "'an early practicable time,'" *ante*, at 741, but there is no significance to that requirement with respect to the diligence of would-be class representatives. The Advisory Committee Notes accompanying the 2003 amendment to Rule 23(c), which changed the recommended timing for a certification determination from "as soon as practicable" to "at an early practicable time," explained that the change would permit time for "controlled discovery into the 'merits,'" efforts by defendants "to win dismissal or summary judgment as to the

[1] There may, of course, be competition among putative class members to proceed on behalf of the putative class in an action not governed by the PSLRA, and the district court generally considers their relative qualities. But the point is that the court is not required by Rule 23 to identify and designate as lead plaintiff the person most capable of adequately representing the class; it is only required to determine for certification purposes whether the class representative adequately represents the class. See 7A Wright, Federal Practice and Procedure § 1765, at 321.

individual plaintiffs without certification," and the considered "designation of class counsel." Advisory Committee's 2003 Notes on subd. (c)(1)(A) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 815. The Notes say nothing about lead-plaintiff selection, and Rule 23(c) in no way ensures that potential lead plaintiffs know about the putative class action or about their opportunity to represent the class.

Given these important differences between Rule 23's general class procedures and the specific procedures imposed by the PSLRA, the majority's conclusion that absent class members were not diligent because they failed to ask to be the class representative in a prior suit makes sense only in the PSLRA context. The same conclusion simply does not follow in the generic Rule 23 context, where absent class members are most likely unaware of the existence of a putative class action. Cf. *American Pipe*, 414 U. S., at 551–552 (explaining that even absent class members who are unaware of the putative class action are entitled to tolling).

B

In addition to its focus on plaintiff diligence, the majority offers a separate line of reasoning to support its broad holding. It explains that its limitation on *American Pipe* tolling is necessary to prevent a "limitless" series of class actions, each rendered timely by the tolling effect of the previous ones. *Ante*, at 743. As the majority acknowledges, however, there is no such risk in this case, see *ante*, at 744, because the applicable statute of repose puts a 5-year "outer limit on the right to bring a civil action." *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 8 (2014). The majority is right, of course, that in many other types of cases, no statute of repose will apply. See *ante*, at 744. But the Court has elsewhere pointed to the power of "comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Smith* v. *Bayer Corp.*, 564 U. S. 299, 317

(2011). There is no reason to assume that this existing safeguard will prove inadequate if the Court holds that *American Pipe* tolling is available for successive class actions outside the PSLRA context.

Even if principles of comity prove insufficient such that some modification to the *American Pipe* rule is necessary to prevent indefinite tolling, a narrower form of redress is available. Instead of adopting a blanket no-tolling-of-class-claims-ever rule outside the PSLRA context, the Court might hold, as a matter of equity, that tolling only becomes unavailable for future class claims where class certification is denied for a reason that bears on the suitability of the claims for class treatment. Where, by contrast, class certification is denied because of the deficiencies of the lead plaintiff as class representative, or because of some other nonsubstantive defect, tolling would remain available.[2] See *Yang* v. *Odom*, 392 F. 3d 97, 112 (CA3 2004). This approach would, for instance, ensure that in cases where the only problem with the first suit was the identity of the named plaintiff, a new and more adequate representative could file another suit to represent the class. Preserving the opportunity for such a fix may seem unimportant in a PSLRA case like this one, where the court in the first-filed case will usually have a choice among possible lead plaintiffs. See *ante*, at 742, n. 3. But, as just explained, in class actions not subject to the PSLRA, the certifying court often will have no choice as to the class representative.

Whether this or another rule ultimately is the right one, there is no need for the Court today to reach beyond the

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[2] Such an approach would, of course, be "grounded in the traditional equitable powers of the judiciary," which are "the source of the tolling rule applied in *American Pipe*," and not Rule 23, which "does not so much as mention the extension or suspension of statutory time bars." *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 582 U. S. 497, 509 (2017); see *ante*, at 744, n. 5.

facts of this case, where the specter of indefinite tolling is merely hypothetical, and foreclose the possibility of a more tailored approach.

C

Finally, the majority suggests that its broader approach will encourage multiple potential class representatives to come forward early, which may "aid a district court" in making class certification decisions. *Ante*, at 747. This may well be so in the PSLRA context, given the statute's notice requirement and built-in mechanism for selecting the most adequate lead plaintiff. But in suits not covered by the PSLRA, absent class members may not know of the pending class action early enough to "aid" the court, and will likely have to file a completely separate lawsuit if what they seek is lead-plaintiff status.

In addition to increasing the number of unnecessary filings, a result at odds with *American Pipe*'s concern with avoiding "needless duplication," 414 U. S., at 554, the existence of multiple putative class actions covering the same harm to the same class may lead to a "race toward judgment or settlement." Wasserman, Dueling Class Actions, 80 B. U. L. Rev. 461, 472 (2000). Each class lawyer knows that only the lawyers in the first-resolved case will get paid, because the other suits will then be dismissed on claim-preclusion grounds. *Ibid.* Defense lawyers know this, too, so they are "able to engage in a 'reverse auction,' pitting the various class counsel against one another and agreeing to settle with the lawyer willing to accept the lowest bid on behalf of the class." *Id.*, at 473. This gamesmanship is not in class members' interest, nor in the interest of justice. I therefore think it unwise to encourage the filing of such dueling class actions outside the PSLRA context.

II

Although there is ample support for denying *American Pipe* tolling to successive class actions subject to the

PSLRA, the majority's reasoning does not justify denying *American Pipe* tolling to other successive class actions. The majority could have avoided this error by limiting its decision to the issues presented by the facts of this case.

Despite the Court's misstep in adopting an unnecessarily broad rule, district courts can help mitigate the potential unfairness of denying *American Pipe* tolling to class claims not subject to the PSLRA. Where appropriate, district courts should liberally permit amendment of the pleadings or intervention of new plaintiffs and counsel.

Because I agree with the majority's conclusion just as applied to class actions governed by the PSLRA, like this one, I concur only in the judgment.

Syllabus

HUSTED, OHIO SECRETARY OF STATE *v.* A. PHILIP RANDOLPH INSTITUTE ET AL.

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

No. 16–980. Argued January 10, 2018—Decided June 11, 2018

The National Voter Registration Act (NVRA) addresses the removal of ineligible voters from state voting rolls, 52 U. S. C. § 20501(b), including those who are ineligible "by reason of" a change in residence, § 20507(a)(4). The Act prescribes requirements that a State must meet in order to remove a name on change-of-residence grounds, §§ 20507(b), (c), (d). The most relevant of these are found in subsection (d), which provides that a State may not remove a name on change-of-residence grounds unless the registrant either (A) confirms in writing that he or she has moved or (B) fails to return a preaddressed, postage prepaid "return card" containing statutorily prescribed content and then fails to vote in any election during the period covering the next two general federal elections.

In addition to these specific change-of-residence requirements, the NVRA also contains a general "Failure-to-Vote Clause," § 20507(b)(2), consisting of two parts. It first provides that a state removal program "shall not result in the removal of the name of any person . . . by reason of the person's failure to vote." Second, as added by the Help America Vote Act of 2002 (HAVA), it specifies that "nothing in [this prohibition] may be construed to prohibit a State from using the procedures" described above—sending a return card and removing registrants who fail to return the card and fail to vote for the requisite time. Since one of the requirements for removal under subsection (d) is the failure to vote, the explanation added by HAVA makes clear that the Failure-to-Vote Clause's prohibition on removal "by reason of the person's failure to vote" does not categorically preclude using nonvoting as part of a test for removal. Another provision makes this point even more clearly by providing that "no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added).

Respondents contend that Ohio's process for removing voters on change-of-residence grounds violates this federal law. The Ohio process at issue relies on the failure to vote for two years as a rough way of identifying voters who may have moved. It sends these nonvoters a preaddressed, postage prepaid return card, asking them to verify that they still reside at the same address. Voters who do not return the

card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls.

Held: The process that Ohio uses to remove voters on change-of-residence grounds does not violate the Failure-to-Vote Clause or any other part of the NVRA. Pp. 767–779.

(a) Ohio's law does not violate the Failure-to-Vote Clause. Pp. 767–775.

(1) Ohio's removal process follows subsection (d) to the letter: It does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years. See § 20507(d)(1)(B). P. 767.

(2) Nonetheless, respondents argue that Ohio's process violates subsection (b)'s Failure-to-Vote Clause by using a person's failure to vote twice over: once as the trigger for sending return cards and again as one of the two requirements for removal. But Congress could not have meant for the Failure-to-Vote Clause to cannibalize subsection (d) in that way. Instead, the Failure-to-Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way. The phrase "by reason of" in the Failure-to-Vote Clause denotes some form of causation, see *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176, and in context sole causation is the only type of causation that harmonizes the Failure-to-Vote Clause and subsection (d). Any other reading would mean that a State that follows subsection (d) nevertheless can violate the Failure-to-Vote Clause. When Congress enacted HAVA, it made this point explicit by adding to the Failure-to-Vote Clause an explanation of how the clause is to be read, *i. e.*, in a way that does not contradict subsection (d). Pp. 767–770.

(3) Respondents' and the dissent's alternative reading is inconsistent with both the text of the Failure-to-Vote Clause and the clarification of its meaning in § 21083(a)(4). Among other things, their reading would make HAVA's new language worse than redundant, since no sensible person would read the Failure-to-Vote Clause as prohibiting what subsections (c) and (d) expressly allow. Nor does the Court's interpretation render the Failure-to-Vote Clause superfluous; the clause retains meaning because it prohibits States from using nonvoting both as the ground for removal and as the sole evidence for another ground for removal (*e. g.*, as the sole evidence that someone has died). Pp. 770–774.

(4) Respondents' additional argument—that so many registered voters discard return cards upon receipt that the failure to send cards back is worthless as evidence that an addressee has moved—is based on a dubious empirical conclusion that conflicts with the congressional

judgment found in subsection (d). Congress clearly did not think that the failure to send back a return card was of no evidentiary value, having made that conduct one of the two requirements for removal under subsection (d). Pp. 774–775.

(b) Nor has Ohio violated other NVRA provisions. Pp. 775–779.

(1) Ohio removes the registrants at issue on a permissible ground: change of residence. The failure to return a notice and the failure to vote simply serve as *evidence* that a registrant has moved, not as the ground itself for removal. Pp. 775–776.

(2) The NVRA contains no "reliable indicator" prerequisite to sending notices, requiring States to have good information that someone has moved before sending them a return card. So long as the trigger for sending such notices is "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," § 20507(b)(1), States may use whatever trigger they think best, including the failure to vote. Pp. 776–777.

(3) Ohio has not violated the NVRA's "reasonable effort" provision, § 20507(a)(4). Even assuming that this provision authorizes federal courts to go beyond the restrictions set out in subsections (b), (c), and (d) and strike down a state law that does not meet some standard of "reasonableness," Ohio's process cannot be unreasonable because it uses the change-of-residence evidence that Congress said it could: the failure to send back a notice coupled with the failure to vote for the requisite period. Ohio's process is accordingly lawful. Pp. 777–779.

838 F. 3d 699, reversed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 780. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 782. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 806.

Eric E. Murphy, State Solicitor of Ohio, argued the cause for petitioner. With him on the briefs were *Michael DeWine*, Attorney General of Ohio, *Michael J. Hendershot*, Chief Deputy Solicitor, and *Steven T. Voigt*, Principal Assistant Attorney General.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Acting Solicitor General Wall*, *Acting Assistant Attorney General Gore*, *Deputy Solicitor General Stewart*, and *Brian H. Fletcher*.

Counsel

Paul M. Smith argued the cause for respondents. On the brief were *Brenda Wright*, *Stuart C. Naifeh*, *Naila S. Awan*, *Dale E. Ho*, *Sophia Lin Lakin*, *Theresa J. Lee*, *Cecillia D. Wang*, *Julie A. Ebenstein*, *T. Alora Thomas*, *Rachel Wainer Apter*, *Freda Levenson*, *Daniel P. Tokaji*, and *David D. Cole*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Georgia et al. by *Christopher M. Carr*, Attorney General of Georgia, *Sarah Hawkins Warren*, Solicitor General, and *Andrew A. Pinson*, Deputy Solicitor General, and by the Attorneys General of their respective States as follows: *Steve Marshall* of Alabama, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Tim Fox* of Montana, *Adam Paul Laxalt* of Nevada, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean Reyes* of Utah, and *Patrick Morrisey* of West Virginia; for the American Civil Rights Union by *J. Christian Adams* and *Kaylan L. Phillips*; for the Buckeye Institute by *Michael A. Carvin*, *Robert Alt*, and *Anthony J. Dick*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for Former Attorneys of the Civil Rights Division of the United States Dept. of Justice by *William S. Consovoy* and *J. Michael Connolly*; for Judicial Watch, Inc., by *Robert D. Popper*, *Chris Fedeli*, and *Lauren M. Burke*; for the Landmark Legal Foundation et al. by *Richard P. Hutchison* and *Linda Carver Whitlow Knight*; and for the National Conference of State Legislatures et al. by *Joshua P. Davis* and *Lisa E. Soronen*.

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, *Steven C. Wu*, Deputy Solicitor General, and *Seth M. Rokosky*, Assistant Solicitor General, and by the Attorneys General of their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Brian E. Frosh* of Maryland, *Hector Balderas* of New Mexico, *Ellen F. Rosenblum* of Oregon, and *Bob Ferguson* of Washington; for American History Professors by *Richard P. Bress*; for Asian Americans Advancing Justice | AAJC by *Brigida Benitez*, *Jessica I. Rothschild*, *Niyati Shah*, and *John Yang*; for Certain Members of the Congressional Black Caucus by *Linda C. Goldstein*; for Common Cause by *Emmet J. Bondurant*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*,

JUSTICE ALITO delivered the opinion of the Court.

It has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate. Pew Center on the States, Election Initiatives Issue Brief 1 (Feb. 2012). And about 2.75 million people are said to be registered to vote in more than one State. *Ibid.*

At issue in today's case is an Ohio law that aims to keep the State's voting lists up to date by removing the names of those who have moved out of the district where they are registered. Ohio uses the failure to vote for two years as a rough way of identifying voters who may have moved, and it then sends a preaddressed, postage prepaid card to these individuals asking them to verify that they still reside at the same address. Voters who do not return this card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls. We are asked to decide whether this program complies with federal law.

Brianne J. Gorod, and *David H. Gans*; for Current and Former Ohio Elections Officials by *Rachel Bloomekatz*; for the Lawyers' Committee for Civil Rights Under Law et al. by *Michael C. Keats*, *Kristen Clarke*, *Jon M. Greenbaum*, and *Ezra D. Rosenberg*; for the League of Women Voters of the United States et al. by *John A. Freedman*, *Wendy R. Weiser*, *Myrna Pérez*, and *Elisabeth S. Theodore*; for the Libertarian National Committee by *Jason D. Hirsch*, *Thomas G. Saunders*, and *Ari J. Savitzky*; for the Libertarian Party of Ohio et al. by *Mark R. Brown* and *Oliver Hall*; for NAACP Legal Defense and Educational Fund, Inc., et al. by *Thomas M. Bondy*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, *Leah C. Aden*, and *John Paul Schnapper-Casteras*; for the National Association for the Advancement of Colored People et al. by *Gilda R. Daniels*, *Martin L. Saad*, *James Workman*, and *H. Lee Thompson*; for the National Disability Rights Network by *Paul M. Smith*, *Danielle Lang*, *William Alvarado Rivera*, *Daniel B. Kohrman*, *Nicole G. Berner*, and *Claire Prestel*; for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve*; for VoteVets Action Fund by *Aderson B. Francois* and *Deborah N. Archer*; for Sen. Sherrod Brown by *Steven A. Hirsch* and *David J. Silbert*; and for Eric H. Holder, Jr., et al. by *Samuel R. Bagenstos*.

I

A

Like other States, Ohio requires voters to reside in the district in which they vote. Ohio Rev. Code Ann. §3503.01(A) (Lexis Supp. 2017); see National Conference of State Legislatures, Voting by Nonresidents and Noncitizens (Feb. 27, 2015). When voters move out of that district, they become ineligible to vote there. See §3503.01(A). And since more than 10% of Americans move every year,[1] deleting the names of those who have moved away is no small undertaking.

For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections, but in 1993, with the enactment of the National Voter Registration Act (NVRA), Congress intervened. The NVRA "erect[s] a complex superstructure of federal regulation atop state voter-registration systems." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1, 5 (2013). The Act has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls. See §2, 107 Stat. 77, 52 U. S. C. §20501(b).

To achieve the latter goal, the NVRA requires States to "conduct a general program that makes a reasonable effort to remove the names" of voters who are ineligible "by reason of" death or change in residence. §20507(a)(4). The Act also prescribes requirements that a State must meet in

[1] Dept. of Commerce, United States Census Bureau, CB16–189, Americans Moving at Historically Low Rates (Nov. 16, 2016), https://www.census.gov/newsroom/press-releases/2016/cb16-189.html (all Internet materials as last visited June 8, 2018). States must update the addresses of even those voters who move within their county of residence, for (among other reasons) counties may contain multiple voting districts. Cf. *post*, at 793 (BREYER, J., dissenting). For example, Cuyahoga County contains 11 State House districts. See House District Map, Ohio House Districts 2012–2022, http://www.ohiohouse.gov/members/district-map.

order to remove a name on change-of-residence grounds. §§ 20507(b), (c), (d).

The most important of these requirements is a prior notice obligation. Before the NVRA, some States removed registrants without giving any notice. See J. Harris, Nat. Munic. League, Model Voter Registration System 45 (rev. 4th ed. 1957). The NVRA changed that by providing in § 20507(d)(1) that a State may not remove a registrant's name on change-of-residence grounds unless either (A) the registrant confirms in writing that he or she has moved or (B) the registrant fails to return a preaddressed, postage prepaid "return card" containing statutorily prescribed content. This card must explain what a registrant who has not moved needs to do in order to stay on the rolls, *i. e.*, either return the card or vote during the period covering the next two general federal elections. § 20507(d)(2)(A). And for the benefit of those who have moved, the card must contain "information concerning how the registrant can continue to be eligible to vote." § 20507(d)(2)(B). If the State does not send such a card or otherwise get written notice that the person has moved, it may not remove the registrant on change-of-residence grounds. See § 20507(d)(1).[2]

While the NVRA is clear about the need to send a "return card" (or obtain written confirmation of a move) before pruning a registrant's name, no provision of federal law specifies the circumstances under which a return card may be sent. Accordingly, States take a variety of approaches. See Nat. Assn. of Secretaries of State (NASS) Report: Maintenance of State Voter Registration Lists 5–6 (Dec. 2017). The NVRA

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[2] The principal dissent attaches a misleading label to this return card, calling it a "'last chance' notice." *Post*, at 787–788, 790–791, 793 (opinion of BREYER, J.). It is actually no such thing. Sending back the notice does not represent a voter's "last chance" to avoid having his or her name stricken from the rolls. Instead, such a voter has many more chances over a period of four years to avoid that result. All that the voter must do is vote in any election during that time. See 52 U. S. C. § 20507(d)(1)(B).

itself sets out one option. A State may send these cards to those who have submitted "change-of-address information" to the United States Postal Service. § 20507(c)(1). Thirty-six States do at least that. See NASS Report, *supra*, at 5, and n. v (listing States). Other States send notices to every registered voter at specified intervals (say, once a year). See, *e. g.*, Iowa Code § 48A.28.3 (2012); S. C. Code Ann. §§ 7–5–330(F), 7–5–340(2)–(3) (2017 Cum. Supp.); see also S. Rep. No. 103–6, p. 46 (1993). Still other States, including Ohio, take an intermediate approach, see NASS Report, *supra*, at 5–6, such as sending notices to those who have turned in their driver's licenses, *e. g.*, Ind. Code §§ 3–7–38.2–2(b)(2), (c)(4) (2004), or sending notices to those who have not voted for some period of time, see, *e. g.*, Ga. Code Ann. § 21–2–234 (Supp. 2017); Ohio Rev. Code Ann. § 3503.21(B)(2); Okla. Admin. Code § 230:15–11–19(a)(3) (2016); 25 Pa. Cons. Stat. § 1901(b)(3) (2007); Wis. Stat. § 6.50(1) (2017 West Cum. Supp.).

When a State receives a return card confirming that a registrant has left the district, the State must remove the voter's name from the rolls. §§ 20507(d)(1)(A), (3). And if the State receives a card stating that the registrant has not moved, the registrant's name must be kept on the list. See § 20507(d)(2)(A).

What if no return card is mailed back? Congress obviously anticipated that some voters who received cards would fail to return them for any number of reasons, and it addressed this contingency in § 20507(d), which, for convenience, we will simply call "subsection (d)." Subsection (d) treats the failure to return a card as *some evidence*—but by no means conclusive proof—that the voter has moved. Instead, the voter's name is kept on the list for a period covering two general elections for federal office (usually about four years). Only if the registrant fails to vote during that period and does not otherwise confirm that he or she still lives in the district (*e. g.*, by updating address information online)

may the registrant's name be removed. § 20507(d)(2)(A); see §§ 20507(d)(1)(B), (3).

In addition to these specific change-of-residence requirements, the NVRA also imposes two general limitations that are applicable to state removal programs. First, all such programs must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." § 20507(b)(1). Second, the NVRA contains what we will call the "Failure-to-Vote Clause." See § 20507(b)(2).

At present, this clause contains two parts. The first is a prohibition that was included in the NVRA when it was originally enacted in 1993. It provides that a state program "shall not result in the removal of the name of any person . . . by reason of the person's failure to vote." *Ibid.* The second part, added by the Help America Vote Act of 2002 (HAVA), 116 Stat. 1666, explains the meaning of that prohibition. This explanation says that "nothing in [the prohibition] may be construed to prohibit a State from using the procedures described in [§§ 20507](c) and (d) to remove an individual from the official list of eligible voters." § 20507(b)(2).

These referenced subsections, §§ 20507(c) and (d), are the provisions allowing the removal of registrants who either submitted change-of-address information to the Postal Service (subsection (c)) or did not mail back a return card and did not vote during a period covering two general federal elections (subsection (d)). And since one of the requirements for removal under subsection (d) is the failure to vote during this period, the explanation added by HAVA in 2002 makes it clear that the statutory phrase "by reason of the person's failure to vote" in the Failure-to-Vote Clause does not categorically preclude the use of nonvoting as part of a test for removal.

Another provision of HAVA makes this point more directly. After directing that "registrants who have not responded to a notice and . . . have not voted in 2 consecutive

general elections for Federal office shall be removed," it adds that "no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added).

B

Since 1994, Ohio has used two procedures to identify and remove voters who have lost their residency qualification.

First, the State utilizes the Postal Service option set out in the NVRA. The State sends notices to registrants whom the Postal Service's "national change of address service" identifies as having moved. Ohio Rev. Code Ann. § 3503.21(B)(1). This procedure is undisputedly lawful. See 52 U. S. C. § 20507(c)(1).

But because according to the Postal Service "[a]s many as 40 percent of people who move do not inform the Postal Service,"[3] Ohio does not rely on this information alone. In its so-called Supplemental Process, Ohio "identif[ies] electors whose lack of voter activity indicates they may have moved." Record 401 (emphasis deleted). Under this process, Ohio sends notices to registrants who have "not engage[d] in any voter activity for a period of two consecutive years." *Id.*, at 1509. "Voter activity" includes "casting a ballot" in any election—whether general, primary, or special and whether federal, state, or local. *Id.*, at 1507. (And Ohio regularly holds elections on both even and odd years.) Moreover, the term "voter activity" is broader than simply voting. It also includes such things as signing a petition, "filing a voter registration form, and updating a voting address with a variety of [state] entities." *Id.*, at 295, 357.

After sending these notices, Ohio removes registrants from the rolls only if they "fai[l] to respond" and "continu[e]

[3] U. S. Postal Service, Office of Inspector Gen., MS–MA–15–006, Strategies for Reducing Undeliverable as Addressed Mail 15 (2015); see also Brief for Buckeye Institute as *Amicus Curiae* 10. Respondents and one of their *amici* dispute this statistic. See Tr. of Oral Arg. 46; Brief for Asian Americans Advancing Justice et al. as *Amici Curiae* 27–28.

to be inactive for an additional period of four consecutive years, including two federal general elections." *Id.*, at 1509; see Ohio Rev. Code Ann. § 3503.21(B)(2). Federal law specifies that a registration may be canceled if the registrant does not vote "in an election during the period" covering two general federal elections after notice, § 20507(d)(1)(B)(ii), but Ohio rounds up to "four consecutive years" of nonvoting after notice, Record 1509. Thus, a person remains on the rolls if he or she votes in any election during that period—which in Ohio typically means voting in any of the at least four elections after notice. Combined with the two years of nonvoting before notice is sent, that makes a total of six years of nonvoting before removal. *Ibid.*

C

A pair of advocacy groups and an Ohio resident (respondents here) think that Ohio's Supplemental Process violates the NVRA and HAVA. They sued petitioner, Ohio's Secretary of State, seeking to enjoin this process. Respondents alleged, first, that Ohio removes voters who have not actually moved, thus purging the rolls of *eligible* voters. They also contended that Ohio violates the NVRA's Failure-to-Vote Clause because the failure to vote plays a prominent part in the Ohio removal scheme: Failure to vote for two years triggers the sending of a return card, and if the card is not returned, failure to vote for four more years results in removal.

The District Court rejected both of these arguments and entered judgment for the Secretary. It held that Ohio's Supplemental Process "mirror[s] the procedures established by the NVRA" for removing people on change-of-residence grounds and does not violate the Failure-to-Vote Clause because it does not remove anyone "**solely** for [their] failure to vote." App. to Pet. for Cert. 43a, 57a, 69a–70a.

A divided panel of the Court of Appeals for the Sixth Circuit reversed. 838 F. 3d 699 (2016). It focused on respondents' second argument, holding that Ohio violates the

Failure-to-Vote Clause because it sends change-of-residence notices "based 'solely' on a person's failure to vote." *Id.*, at 711. In dissent, Judge Siler explained why he saw the case as a simple one: "The State cannot remove the registrant's name from the rolls for a failure to vote only, and Ohio does not do [that]." *Id.*, at 716.

We granted certiorari, 581 U. S. 1006 (2017), and now reverse.

II

A

As noted, subsection (d), the provision of the NVRA that directly addresses the procedures that a State must follow before removing a registrant from the rolls on change-of-residence grounds, provides that a State may remove a registrant who "(i) has failed to respond to a notice" and "(ii) has not voted or appeared to vote . . . during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice" (about four years). 52 U. S. C. §20507(d)(1)(B). Not only are States allowed to remove registrants who satisfy these requirements, but federal law makes this removal mandatory. §20507(d)(3); see also §21083(a)(4)(A).

Ohio's Supplemental Process follows subsection (d) to the letter. It is undisputed that Ohio does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years.

B

Respondents argue (and the Sixth Circuit held) that, even if Ohio's process complies with subsection (d), it nevertheless violates the Failure-to-Vote Clause—the clause that generally prohibits States from removing people from the rolls "by reason of [a] person's failure to vote." §20507(b)(2); see also §21083(a)(4)(A). Respondents point out that Ohio's Supple-

mental Process uses a person's failure to vote twice: once as the trigger for sending return cards and again as one of the requirements for removal. Respondents conclude that this use of nonvoting is illegal.

We reject this argument because the Failure-to-Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way. Instead, as permitted by subsection (d), Ohio removes registrants only if they have failed to vote *and* have failed to respond to a notice.

When Congress clarified the meaning of the NVRA's Failure-to-Vote Clause in HAVA, here is what it said: "[C]onsistent with the [NVRA], . . . no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added). The meaning of these words is straightforward. "Solely" means "alone." Webster's Third New International Dictionary 2168 (2002); American Heritage Dictionary 1654 (4th ed. 2000). And "by reason of" is a "quite formal" way of saying "[b]ecause of." C. Ammer, American Heritage Dictionary of Idioms 67 (2d ed. 2013). Thus, a State violates the Failure-to-Vote Clause only if it removes registrants for no reason other than their failure to vote.

This explanation of the meaning of the Failure-to-Vote Clause merely makes explicit what was implicit in the clause as originally enacted. At that time, the clause simply said that a state program "shall not result in the removal of the name of any person from the [rolls for federal elections] by reason of the person's failure to vote." 107 Stat. 83. But that prohibition had to be read together with subsection (d), which authorized removal if a registrant did not send back a return card and also failed to vote during a period covering two successive general elections for federal office. If possible, "[w]e must interpret the statute to give effect to both

provisions," *Ricci* v. *DeStefano*, 557 U. S. 557, 580 (2009), and here, that is quite easy.

The phrase "by reason of" denotes some form of causation. See *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009). Thus, the Failure-to-Vote Clause applies when nonvoting, in some sense, causes a registrant's name to be removed, but the law recognizes several types of causation. When a statutory provision includes an undefined causation requirement, we look to context to decide whether the statute demands only but-for cause as opposed to proximate cause or sole cause. See *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 265–268 (1992). Cf. *CSX Transp., Inc.* v. *McBride*, 564 U. S. 685, 692–693 (2011).

Which form of causation is required by the Failure-to-Vote Clause? We can readily rule out but-for causation. If "by reason of" in the Failure-to-Vote Clause meant but-for causation, a State would violate the clause if the failure to vote played a necessary part in the removal of a name from the list. *Burrage* v. *United States*, 571 U. S. 204, 211 (2014). But the removal process expressly authorized by subsection (d) allows a State to remove a registrant if the registrant, in addition to failing to send back a return card, fails to vote during a period covering two general federal elections. So if the Failure-to-Vote Clause were read in this way, it would cannibalize subsection (d).

Interpreting the Failure-to-Vote Clause as incorporating a proximate cause requirement would lead to a similar problem. Proximate cause is an elusive concept, see *McBride*, *supra*, at 692–693, but no matter how the term is understood, it is hard to escape the conclusion that the failure to vote is a proximate cause of removal under subsection (d). If a registrant, having failed to send back a return card, also fails to vote during the period covering the next two general federal elections, removal is the direct, foreseeable, and closely connected consequence. See *Paroline* v. *United States*, 572

U. S. 434, 444–445 (2014); *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 654 (2008).

By process of elimination, we are left with sole causation. This reading harmonizes the Failure-to-Vote Clause and subsection (d) because the latter provision does not authorize removal solely by reason of a person's failure to vote. Instead, subsection (d) authorizes removal only if a registrant also fails to mail back a return card.

For these reasons, we conclude that the Failure-to-Vote Clause, as originally enacted, referred to sole causation. And when Congress enacted HAVA, it made this point explicit. It added to the Failure-to-Vote Clause itself an explanation of how it is to be read, *i. e.*, in a way that does not contradict subsection (d). And in language that cannot be misunderstood, it reiterated what the clause means: "[R]egistrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added). In this way, HAVA dispelled any doubt that a state removal program may use the failure to vote as a factor (but not the sole factor) in removing names from the list of registered voters.

That is exactly what Ohio's Supplemental Process does. It does not strike any registrant solely by reason of the failure to vote. Instead, as expressly permitted by federal law, it removes registrants only when they have failed to vote *and* have failed to respond to a change-of-residence notice.

C

Respondents and the dissent advance an alternative interpretation of the Failure-to-Vote Clause, but that reading is inconsistent with both the text of the clause and the clarification of its meaning in § 21083(a)(4)(A). Respondents argue that the clause allows States to consider nonvoting only to the extent that subsection (d) requires—that is, only

after a registrant has failed to mail back a notice. Any other use of the failure to vote, including as the trigger for mailing a notice, they claim, is proscribed. In essence, respondents read the language added to the clause by HAVA—"except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d)"—as an exception to the general rule forbidding the use of nonvoting. See Brief for Respondents 37. And the Sixth Circuit seemed to find this point dispositive, reasoning that "'exceptions in statutes must be strictly construed.'" 838 F. 3d, at 708 (quoting *Detroit Edison Co.* v. *SEC*, 119 F. 2d 730, 739 (CA6 1941)).

We reject this argument for three reasons. First, it distorts what the new language added by HAVA actually says. The new language does not create an exception to a general rule against the use of nonvoting. It does not say that the failure to vote may not be used "except that this paragraph does not prohibit a State from using the procedures described in subsections (c) and (d)." Instead, it says that "nothing in this paragraph *may be construed*" to have that effect. § 20507(b)(2) (emphasis added). Thus, it sets out not an exception, but a rule of interpretation. It does not narrow the language that precedes it; it clarifies what that language means. That is precisely what Congress said when it enacted HAVA: It added the "may not be construed" provision to "[c]larif[y]," not to alter, the prohibition's scope. § 903, 116 Stat. 1728.

Second, under respondents' reading, HAVA's new language is worse than superfluous. Even without the added language, no sensible person would read the Failure-to-Vote Clause as prohibiting what subsections (c) and (d) expressly allow. Yet according to respondents, that is all that the new language accomplishes. So at a minimum, it would be redundant.

But the implications of this reading are actually worse than that. There is no reason to create an exception to a

prohibition unless the prohibition would otherwise forbid what the exception allows. So if the new language were an exception, it would seem to follow that prior to HAVA, the Failure-to-Vote Clause *did* outlaw what subsections (c) and (d) specifically authorize. And that, of course, would be nonsensical.

Third, respondents' reading of the language that HAVA added to the Failure-to-Vote Clause makes it hard to understand why Congress prescribed in another section of the same Act, *i. e.*, § 21083(a)(4)(A), that "no registrant may be removed solely by reason of a failure to vote." As interpreted by respondents, the amended Failure-to-Vote Clause prohibits any use of nonvoting with just two narrow exceptions—the uses allowed by subsections (c) and (d). So, according to respondents, the amended Failure-to-Vote Clause prohibits much more than § 21083(a)(4)(A). That provision, in addition to allowing the use of nonvoting in accordance with subsections (c) and (d), also permits the use of nonvoting in any other way that does not treat nonvoting as the sole basis for removal.

There is no plausible reason why Congress would enact the provision that respondents envision. As interpreted by respondents, HAVA would be like a law that contains one provision making it illegal to drive with a blood alcohol level of 0.08 or higher and another provision making it illegal to drive with a blood alcohol level of 0.10 or higher. The second provision would not only be redundant; it would be confusing and downright silly.

Our reading, on the other hand, gives the new language added to the Failure-to-Vote Clause "real and substantial effect." *Husky Int'l Electronics, Inc.* v. *Ritz*, 578 U. S. 356, 359 (2016) (internal quotation marks omitted). It clarifies the meaning of the prohibition against removal by reason of nonvoting, a matter that troubled some States prior to HAVA's enactment. See, *e. g.*, FEC Report on the NVRA to the 106th Congress 19 (1999).

Respondents and the dissent separately claim that the Failure-to-Vote Clause must be read to bar the use of nonvoting as a trigger for sending return cards because otherwise it would be "superfluous." *Post*, at 797 (opinion of BREYER, J.); see Brief for Respondents 29. After all, subsection (d) already prohibits States from removing registrants because of a failure to vote alone. See § 20507(d)(1). To have meaning independent of subsection (d), respondents reason, the Failure-to-Vote Clause must prohibit other uses of the failure to vote, including its use as a trigger for sending out notices.

This argument is flawed because the Failure-to-Vote Clause has plenty of work to do under our reading. Most important, it prohibits the once-common state practice of removing registered voters simply because they failed to vote for some period of time. Not too long ago, "[c]ancellation for failure to vote [was] the principal means used . . . to purge the [voter] lists." Harris, Model Voter Registration System, at 44. States did not use a person's failure to vote as evidence that the person had died or moved but as an independent ground for removal. See *ibid.*[4] Ohio was one such State. Its Constitution provided that "[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." Art. V, § 1 (1977).

In addition, our reading prohibits States from using the failure to vote as the sole cause for removal on *any* ground, not just because of a change of residence. Recall that subsection (d)'s removal process applies only to change-of-residence removals but that the Failure-to-Vote Clause applies to *all* removals. Without the Failure-to-Vote Clause, therefore, States could use the failure to vote as conclusive evidence of ineligibility for some reason other than change

[4] See, *e. g.*, Haw. Rev. Stat. § 11–17(a) (1993); Idaho Code Ann. § 34–435 (1981); Minn. Stat. § 201.171 (1992); Mont. Code Ann. § 13–2–401(1) (1993); N. J. Stat. Ann. § 19:31–5 (West Supp. 1989); Okla. Stat., Tit. 26, § 4–120.2 (1991); Utah Code § 20–2–24(1)(b) (1991).

of residence, such as death, mental incapacity, or a criminal conviction resulting in prolonged imprisonment.

D

Respondents put forth one additional argument regarding the Failure-to-Vote Clause. In essence, it boils down to this. So many properly registered voters simply discard return cards upon receipt that the failure to send them back is worthless as evidence that the addressee has moved. As respondents' counsel put it at argument, "a notice that doesn't get returned" tells the State "absolutely nothing about whether the person has moved." Tr. of Oral Arg. 41, 58. According to respondents, when Ohio removes registrants for failing to respond to a notice and failing to vote, it functionally "removes people solely for non-voting" unless the State has additional "reliable evidence" that a registrant has moved. *Id.*, at 50, 72.

This argument is based on a dubious empirical conclusion that the NVRA and HAVA do not allow us to indulge. Congress clearly did not think that the failure to send back a return card was of no evidentiary value because Congress made that conduct one of the two requirements for removal under subsection (d).

Requiring additional evidence not only second-guesses the congressional judgment embodied in subsection (d)'s removal process, but it also second-guesses the judgment of the Ohio Legislature as expressed in the State's Supplemental Process. The Constitution gives States the authority to set the qualifications for voting in congressional elections, Art. I, § 2, cl. 1; Amdt. 17, as well as the authority to set the "Times, Places and Manner" to conduct such elections in the absence of contrary congressional direction, Art. I, § 4, cl. 1. We have no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant's failure to send back a return card. See *Inter Tribal*, 570 U. S., at 16–19; see also *id.*, at 36–37

(THOMAS, J., dissenting); *id.*, at 42–43, 46 (ALITO, J., dissenting).

For all these reasons, we hold that Ohio law does not violate the Failure-to-Vote Clause.

III

We similarly reject respondents' argument that Ohio violates other provisions of the NVRA and HAVA.

A

Respondents contend that Ohio removes registered voters on a ground not permitted by the NVRA. They claim that the NVRA permits the removal of a name for only a few specified reasons—a person's request, criminal conviction, mental incapacity, death, change of residence, and initial ineligibility. Brief for Respondents 25–26; see 52 U. S. C. §§ 20507(a)(3), (4).[5] And they argue that Ohio removes registrants for other reasons, namely, for failing to respond to a notice and failing to vote.

This argument plainly fails. Ohio simply treats the failure to return a notice and the failure to vote as evidence that a registrant has moved, not as a ground for removal. And in doing this, Ohio simply follows federal law. Subsection (d), which governs removals "on the ground that the registrant has changed residence," treats the failure to return a notice and the failure to vote as evidence that this ground is satisfied. § 20507(d)(1).

If respondents' argument were correct, then it would also be illegal to remove a name under § 20507(c) because that would constitute removal for submitting change-of-address information to the Postal Service. Likewise, if a State removed a name after receiving a death certificate or a judg-

[5] We assume for the sake of argument that Congress has the constitutional authority to limit voting eligibility requirements in the way respondents suggest.

ment of criminal conviction, that would be illegal because receipt of such documents is not listed as a permitted ground for removal under § 20507(a)(3) or § 20507(a)(4). About this argument no more need be said.

B

Respondents maintain, finally, that Ohio's procedure is illegal because the State sends out notices without having any "reliable indicator" that the addressee has moved. Brief for Respondents 31. The "[f]ailure to vote for a mere two-year period," they argue, does not reliably "indicate that a registrant has moved out of the jurisdiction." *Id.*, at 30; see also, *e. g.*, Brief for State of New York et al. as *Amici Curiae* 13–28.

This argument also fails. The degree of correlation between the failure to vote for two years and a change of residence is debatable, but we know from subsection (d) that Congress thought that the failure to vote for a period of two consecutive general elections was a good indicator of change of residence, since it made nonvoting for that period an element of subsection (d)'s requirements for removal. In a similar vein, the Ohio Legislature apparently thought that nonvoting for two years was sufficiently correlated with a change of residence to justify sending a return card.

What matters for present purposes is not whether the Ohio Legislature overestimated the correlation between nonvoting and moving or whether it reached a wise policy judgment about when return cards should be sent. For us, all that matters is that no provision of the NVRA prohibits the legislature from implementing that judgment. Neither subsection (d) nor any other provision of the NVRA demands that a State have some particular quantum of evidence of a change of residence before sending a registrant a return card. So long as the trigger for sending such notices is "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," § 20507(b)(1), States can use whatever plan they

think best. That may be why not even the Sixth Circuit relied on this rationale.

Respondents attempt to find support for their argument in subsection (c), which allows States to send notices based on Postal Service change-of-address information. This provision, they argue, implicitly sets a minimum reliability requirement. Thus, they claim, a State may not send out a return card unless its evidence of change of residence is at least as probative as the information obtained from the Postal Service. See Tr. of Oral Arg. 56.

Nothing in subsection (c) suggests that it is designed to play this role. Subsection (c) says that "[a] State may meet" its obligation "to remove the names" of ineligible voters on change-of-residence grounds by sending notices to voters who are shown by the Postal Service information to have moved, but subsection (c) does not even hint that it imposes any sort of minimum reliability requirement for sending such notices. §§20507(a)(4), (c). By its terms, subsection (c) simply provides one way—the minimal way—in which a State "*may* meet the [NVRA's] requirement[s]" for change-of-residence removals. §20507(c) (emphasis added). As respondents agreed at argument, it is not the only way. Tr. of Oral Arg. 53.

C

Nothing in the two dissents changes our analysis of the statutory language.

1

Despite its length and complexity, the principal dissent sets out only two arguments. See *post*, at 789 (opinion of BREYER, J.). The first is one that we have already discussed at length, namely, that the Failure-to-Vote Clause prohibits any use of the failure to vote except as permitted by subsections (c) and (d). We have explained why this argument is insupportable, *supra*, at 770–775, and the dissent has no answer to any of the problems we identify.

The dissent's only other argument is that Ohio's process violates § 20507(a)(4), which requires States to make a "reasonable effort" to remove the names of ineligible voters from the rolls. The dissent thinks that this provision authorizes the federal courts to go beyond the restrictions set out in subsections (b), (c), and (d) and to strike down any state law that does not meet their own standard of "reasonableness." But see Brief for United States as *Amicus Curiae* 28–29. The dissent contends that Ohio's system violates this supposed "reasonableness" requirement primarily because it relies on the failure to mail back the postcard sent to those who have not engaged in voter activity for two years. Based on its own cobbled-together statistics, *post*, at 793–794, and a feature of human nature of which the dissent has apparently taken judicial notice (*i. e.*, "the human tendency not to send back cards received in the mail," *post*, at 794), the dissent argues that the failure to send back the card in question "has no tendency to reveal accurately whether the registered voter has changed residences"; it is an "irrelevant factor" that "shows nothing at all that is statutorily significant." *Post*, at 794–795, 798.

Whatever the meaning of § 20507(a)(4)'s reference to reasonableness, the principal dissent's argument fails since it is the federal NVRA, not Ohio law, that attaches importance to the failure to send back the card. See §§ 20507(d)(1)(B)(i), (2)(A). The dissenters may not think that the failure to send back the card means anything, but that was not Congress's view. The NVRA plainly reflects Congress's judgment that the failure to send back the card, coupled with the failure to vote during the period covering the next two general federal elections, is significant evidence that the addressee has moved.

It is not our prerogative to judge the reasonableness of that congressional judgment, but we note that, whatever the general "human tendency" may be with respect to mailing back cards received in the mail, the notice sent under subsec-

tion (d) is nothing like the solicitations for commercial products or contributions that recipients may routinely discard. The notice in question here warns recipients that unless they take the simple and easy step of mailing back the preaddressed, postage prepaid card—or take the equally easy step of updating their information online—their names may be removed from the voting rolls if they do not vote during the next four years. See Record 295–296, 357. It was Congress's judgment that a reasonable person with an interest in voting is not likely to ignore notice of this sort.

2

JUSTICE SOTOMAYOR's dissent says nothing about what is relevant in this case—namely, the language of the NVRA—but instead accuses us of "ignor[ing] the history of voter suppression" in this country and of "uphold[ing] a program that appears to further the . . . disenfranchisement of minority and low-income voters." *Post*, at 809. Those charges are misconceived.

The NVRA prohibits state programs that are discriminatory, see §20507(b)(1), but respondents did not assert a claim under that provision. And JUSTICE SOTOMAYOR has not pointed to any evidence in the record that Ohio instituted or has carried out its program with discriminatory intent.

* * *

The dissents have a policy disagreement, not just with Ohio, but with Congress. But this case presents a question of statutory interpretation, not a question of policy. We have no authority to second-guess Congress or to decide whether Ohio's Supplemental Process is the ideal method for keeping its voting rolls up to date. The only question before us is whether it violates federal law. It does not.

The judgment of the Sixth Circuit is reversed.

It is so ordered.

THOMAS, J., concurring.

I join the Court's opinion in full. I write separately to add that respondents' proposed interpretation of the National Voter Registration Act (NVRA) should also be rejected because it would raise significant constitutional concerns.

Respondents would interpret the NVRA to prevent States from using failure to vote as evidence when deciding whether their voting qualifications have been satisfied. Brief for Respondents 25–30. The Court's opinion explains why that reading is inconsistent with the text of the NVRA. See *ante,* at 767–777. But even if the NVRA were "susceptible" to respondents' reading, it could not prevail because it "raises serious constitutional doubts" that the Court's interpretation avoids. *Jennings* v. *Rodriguez*, 583 U. S. 281, 286 (2018).

As I have previously explained, constitutional text and history both "confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1, 29 (2013) (dissenting opinion). The Voter Qualifications Clause provides that, in elections for the House of Representatives, "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U. S. Const., Art. I, § 2, cl. 1. The Seventeenth Amendment imposes an identical requirement for elections of Senators. And the Constitution recognizes the authority of States to "appoint" Presidential electors "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2; see *Inter Tribal Council of Ariz.*, 570 U. S., at 35, n. 2 (opinion of THOMAS, J.). States thus retain the authority to decide the qualifications to vote in federal elections, limited only by the requirement that they not " 'establish special requirements' " for congressional elections " 'that do not apply in elections for the state legislature.' " *Id.*, at 26 (quoting *U. S. Term*

Limits, Inc. v. *Thornton*, 514 U. S. 779, 865 (1995) (THOMAS, J., dissenting)). And because the power to establish requirements would mean little without the ability to enforce them, the Voter Qualifications Clause also "gives States the authority . . . to verify whether [their] qualifications are satisfied." 570 U. S., at 28.

Respondents' reading of the NVRA would seriously interfere with the States' constitutional authority to set and enforce voter qualifications. To vote in Ohio, electors must have been a state resident 30 days before the election, as well as a resident of the county and precinct where they vote. Ohio Rev. Code Ann. § 3503.01(A) (Lexis Supp. 2017); see also Ohio Const., Art. V, § 1. Ohio uses a record of nonvoting as one piece of evidence that voters no longer satisfy the residence requirement. Reading the NVRA to bar Ohio from considering nonvoting would therefore interfere with the State's "authority to verify" that its qualifications are met "in the way it deems necessary." *Inter Tribal Council of Ariz.*, *supra*, at 36. Respondents' reading thus renders the NVRA constitutionally suspect and should be disfavored. See *Jennings*, *supra*, at 286.

Respondents counter that Congress' power to regulate the "Times, Places and Manner" of holding congressional elections includes the power to impose limits on the evidence that a State may consider when maintaining its voter rolls. See Brief for Respondents 51–55; see also Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators"). But, as originally understood, the Times, Places and Manner Clause grants Congress power "only over the 'when, where, and how' of holding congressional elections," not over the question of who can vote. *Inter Tribal Council of Ariz.*, *supra*, at 29

(opinion of THOMAS, J.) (quoting T. Parsons, Notes of Convention Debates, Jan. 16, 1788, in 6 Documentary History of the Ratification of the Constitution 1211 (J. Kaminski & G. Saladino eds. 2000) (Massachusetts ratification delegate Sedgwick)). The "'Manner of holding Elections'" was understood to refer to "the circumstances under which elections were held and the mechanics of the actual election." 570 U. S., at 30 (quoting Art. I, § 4, cl. 1). It does not give Congress the authority to displace state voter qualifications or dictate what evidence a State may consider in deciding whether those qualifications have been met. See 570 U. S., at 29–33. The Clause thus does not change the fact that respondents' reading of the NVRA is constitutionally suspect.

The Court's interpretation of the NVRA was already the correct reading of the statute: The NVRA does not prohibit a State from considering failure to vote as evidence that a registrant has moved. The fact that this reading avoids serious constitutional problems is an additional reason why, in my view, today's decision is undoubtedly correct.

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

Section 8 of the National Voter Registration Act of 1993 requires States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in the residence of the registrant." § 8(a)(4), 107 Stat. 82–83, 52 U. S. C. § 20507(a)(4). This case concerns the State of Ohio's change-of-residence removal program (called the Supplemental Process), under which a registered voter's failure to vote in a single federal election begins a process that may well result in the removal of that voter's name from the federal voter rolls. See *infra*, at 788. The question is whether the Supplemental Process violates § 8, which prohibits a State from removing registrants from the

federal voter roll "by reason of the person's failure to vote." §20507(b)(2). In my view, Ohio's program does just that. And I shall explain why and how that is so.

I

This case concerns the manner in which States maintain federal voter registration lists. In the late 19th and early 20th centuries, a number of "[r]estrictive registration laws and administrative procedures" came into use across the United States—from literacy tests to the poll tax and from strict residency requirements to "selective purges." H. R. Rep. No. 103–9, p. 2 (1993). Each was designed "to keep certain groups of citizens from voting" and "discourage participation." *Ibid.* By 1965, the Voting Rights Act abolished some of the "more obvious impediments to registration," but still, in 1993, Congress concluded that it had "unfinished business" to attend to in this domain. *Id.*, at 3. That year, Congress enacted the National Voter Registration Act "to protect the integrity of the electoral process," "increase the number of eligible citizens who register to vote in elections for Federal office," and "ensure that accurate and current voter registration rolls are maintained." §20501(b). It did so mindful that "the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority." S. Rep. No. 103–6, p. 3 (1993).

In accordance with these aims, §8 of the Registration Act sets forth a series of requirements that States must satisfy in their "administration of voter registration for elections for Federal office." §20507. Ohio's Supplemental Process fails to comport with these requirements; it erects needless hurdles to voting of the kind Congress sought to eliminate by enacting the Registration Act. Four of §8's provisions are critical to this case: subsections (a), (b), (c), and (d). The text of each subsection is detailed and contains multiple parts. Given the complexity of the statute, readers should

consult these provisions themselves (see Appendix A, *infra*, at 802–804) and try to keep the thrust of those provisions in mind while reading this opinion. At the outset, I shall address each of them.

A

1

We begin with subsection (a)'s "Reasonable Program" requirement. That provision says that "each State shall":

> "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in the residence of the registrant, in accordance with subsections (b), (c), and (d)." § 20507(a)(4).

This provision tells each State that it must try to remove ineligible voters from the rolls, that it must act reasonably in doing so, and that, when it does so, it must follow the rules contained in the next three subsections of § 8—namely, subsections (b), (c), and (d).

2

Subsection (b)'s "Failure-to-Vote" Clause generally forbids state change-of-residence removal programs that rely upon a registrant's failure to vote as a basis for removing the registrant's name from the federal voter roll. Before 1993, when Congress enacted this prohibition, many States would assume a registered voter had changed his address, and consequently remove that voter from the rolls, simply because the registrant had failed to vote. Recognizing that many registered voters who do not vote "may not have moved," S. Rep. No. 103–6, at 17, Congress consequently prohibited States from using the failure to vote as a proxy for moving and thus a basis for purging the voter's name from the rolls. The Failure-to-Vote Clause, as originally enacted, said:

> "Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elec-

> tions for Federal office . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 107 Stat. 83; see § 20507(b)(2).

As I shall discuss, Congress later clarified that "using the procedures described in subsections (c) and (d) to remove an individual" from the federal voter roll is permissible and does not violate the Failure-to-Vote Clause. See § 8(b)(2) of the National Voter Registration Act, 107 Stat. 83, and as amended, 116 Stat. 1728, 52 U. S. C. § 20507(b)(2).

3

Subsection (c), which is entitled "Voter Removal Programs," explains how "[a] State may meet the requirement of subsection (a)(4)." § 20507(c)(1). Because subsection (a)(4) itself incorporates all of the relevant requirements of subsections (b), (c), and (d) within it, see § 20507(a)(4), subsection (c) sets forth one way a State can comply with the basic requirements of § 8 at issue in this case (including subsection (b)). A State's removal program qualifies under subsection (c) if the following two things are true about the program:

> "(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and
>
> "(B) if it appears [that] the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address." § 20507(c)(1).

The upshot is that subsection (c) explains one way a State may comply with subsection (a)'s Reasonable Program requirement without violating subsection (b)'s Failure-to-Vote prohibition. It is a roadmap that points to a two-step removal process. At step 1, States first *identify* registered

voters whose addresses may have changed; here, subsection (c) points to one (but not the only) method a State may use to do so. At step 2, subsection (c) explains, States must "*confirm* the change of address" by using a special notice procedure, which is further described in subsection (d).

4

Subsection (d) sets forth the final procedure, which Ohio refers to as the "Confirmation Procedure." Brief for Petitioner 7. The statute makes clear that a State must use the Confirmation Procedure to "confirm" a change of address in respect to any registered voter it initially identifies as someone who has likely changed addresses. It works as follows: the State must send the registrant identified as having likely moved a special kind of notice by forwardable mail. That notice must warn the registrant that his or her name will be removed from the voter roll unless the registrant either returns an attached card and confirms his or her current address in writing or votes in an election during the period covering the next two federal elections. In a sense, the notice a State is required to send as part of the Confirmation Procedure gives registered voters whom the State has identified as likely ineligible a "last chance" to correct the record before being removed from the federal registration list. The Confirmation Procedure is mandatory for all change-of-residence removals, regardless of the method the State uses to make its initial identification of registrants whose addresses may have changed. In particular, subsection (d) says:

> "A State shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has changed residence unless the registrant [either]—
>
> "(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

> "(B)(i) has failed to respond to a notice described in [subsection (d)(2)]; and (ii) has not voted [in two subsequent federal elections]." §20507(d)(1).

Subsection (d)(2) then goes on to describe (in considerable detail) the "last chance" notice the State must send to the registrant. In particular, the notice must be sent by *forwardable* mail so that the notice will reach the registrant even if the registrant has changed addresses. It must include a postage-prepaid, preaddressed "return card" that the registrant may send back to the State to confirm or correct the State's record of his or her current address. And the notice must warn the registrant that unless the card is returned, if the registrant does not vote in the next two federal elections, then his or her name will be removed from the list of eligible voters.

* * *

In sum, §8 tells States the following:

- In general, establish a removal-from-registration program that "makes a reasonable effort" to remove voters who become ineligible because they change residences.
- Do not target registered voters for removal from the registration roll because they have failed to vote. However, "using the procedures described in subsections (c) and (d) to remove an individual" from the federal voter roll is permissible and does not violate the Failure-to-Vote prohibition.
- The procedures described in subsections (c) and (d) consist of a two-step removal process in which at step 1, the State uses change-of-address information (which the State may obtain, for instance, from the Postal Service) to identify registrants whose addresses may have changed; and then at step 2, the State must use the mandatory "last chance" notice procedure described in subsection (d) to confirm the change of address.

- The "last chance" confirmation notice must be sent by forwardable mail. It must also include a postage-prepaid, preaddressed "return card" that the registrant may send back to the State verifying his or her current address. And it must warn the registrant that unless the card is returned, if the registrant does not vote in the next two federal elections, then his or her name will be removed from the list of eligible voters.

B

The Supplemental Process, Ohio's program for removing registrants from the federal rolls on the ground that the voter has changed his address, is much simpler. Each of Ohio's 88 boards of elections sends its version of subsection (d)'s "last chance" notice to those on a list "of individuals who, according to the board's records, have not engaged in certain kinds of voter activity"—including "casting a ballot"—for a period of "generally two years." Record 1507. Accordingly, each board's list can include registered voters who failed to vote in a single federal election. And anyone on the list who "continues to be inactive" by failing to vote for the next "four consecutive years, including two federal elections," and fails to respond to the notice is removed from the federal voter roll. *Id.*, at 1509. Under the Supplemental Process, a person's failure to vote is the sole basis on which the State identifies a registrant as a person whose address may have changed and the sole reason Ohio initiates a registered voter's removal using subsection (d)'s Confirmation Procedure.

II

Section 8 requires that Ohio's program "mak[e] a reasonable effort to remove" ineligible registrants from the rolls because of "a change in the residence of the registrant," and it must do so "in accordance with subsections (b), (c), and

(d)." §20507(a)(4)(B). In my view, Ohio's program is unlawful under §8 in two respects. It first violates subsection (b)'s Failure-to-Vote prohibition because Ohio uses nonvoting in a manner that is expressly prohibited and not otherwise authorized under §8. In addition, even if that were not so, the Supplemental Process also fails to satisfy subsection (a)'s Reasonable Program requirement, since using a registrant's failure to vote is not a reasonable method for identifying voters whose registrations are likely invalid (because they have changed their addresses).

First, as to subsection (b)'s Failure-to-Vote Clause, recall that Ohio targets for removal registrants who fail to vote. In identifying registered voters who have likely changed residences by looking to see if those registrants failed to vote, Ohio's program violates subsection (b)'s express prohibition on "*[a]ny* State program or activity [that] result[s] in the removal" of a registered voter "by reason of the person's failure to vote." §20507(b)(2) (emphasis added). In my view, these words are most naturally read to prohibit a State from considering a registrant's failure to vote as part of any process "that is used to start, or has the effect of starting, a purge of the voter rolls." H. R. Rep. No. 103–9, at 15. In addition, Congress enacted the Failure-to-Vote Clause to prohibit "the elimination of names of voters from the rolls solely due to [a registrant's] failure to respond to a mailing." *Ibid.* But that is precisely what Ohio's Supplemental Process does. The program violates subsection (b)'s prohibition because under it, a registrant who fails to vote in a single federal election, fails to respond to a forwardable notice, and fails to vote for another four years may well be purged. Record 1508. If the registrant had voted at any point, the registrant would not have been removed. See *supra*, at 788; *infra*, at 792–795.

Ohio does use subsection (d)'s Confirmation Procedure, but that procedure alone does not satisfy §8's requirements.

How do we know that Ohio's use of the Confirmation Procedure alone cannot count as statutorily significant? The statute's basic structure along with its language makes clear that this is so.

In respect to language, § 8 says that the function of subsection (d)'s Confirmation Procedure is "to *confirm* the change of address" whenever the State has already "identif[ied] registrants whose addresses may have changed." §§ 20507(c)(1), (d)(2). The function of the Confirmation Procedure is *not* to make the initial identification of registrants whose addresses may have changed. As a matter of English usage, you cannot *confirm* that an event happened without already having some reason to believe at least that it might have happened. Black's Law Dictionary 298 (6th ed. 1990) (defining "confirm" as meaning "[t]o complete or establish that which was imperfect or uncertain").

Ohio, of course, says that it has a ground for believing that those persons they remove from the rolls have, in fact, changed their address, but the ground is the fact that the person did not vote—the very thing that the Failure-to-Vote Clause forbids Ohio to use as a basis for removing a registered voter from the registration roll.

In respect to structure, two statutory illustrations make clear what the word "confirm" already suggests, namely, that the Confirmation Procedure is a *necessary* but not a *sufficient* procedure for removing a registered voter from the voter roll. The first illustration of how the Confirmation Procedure is supposed to function appears in subsection (c), which describes a removal process under which the State first *identifies* registrants who have likely changed addresses and then "*confirm[s]*" that change of residence using the Confirmation Procedure and sending the required "last chance" notice. § 20507(c)(1) (emphasis added). The identification method subsection (c) says a State may use is "change-of-address information supplied by the Postal Service." § 20507(c)(1)(A). A person does not notify the Postal Service that he is moving unless he is likely to move or has

already moved. And, as the Registration Act says, "if it appears from change-of-address provided by the Postal Service that . . . the registrant has moved to a different residence not in the same registrar's jurisdiction," the State has a reasonable (hence acceptable) basis for "us[ing] the notice procedure described in subsection (d)(2) to confirm the change of address." §20507(c)(1)(B).

The second illustration of how the Confirmation Procedure is supposed to function appears in a portion of the statute I have not yet discussed—namely, §6 of the National Voter Registration Act, which sets out the rules for voter registration by mail. See §6, 107 Stat. 80, 52 U. S. C. §20505. In particular, §6(d), entitled "Undelivered Notices," says that, "[i]f a notice of the disposition of a mail voter registration application . . . is sent by *non*forwardable mail and is returned undelivered," at that point the State "may proceed in accordance with section 8(d)," namely, the Confirmation Procedure, and send the same "last chance" notice that I have just discussed. §20505(d) (emphasis added).

Note that §6(d) specifies a *non*forwardable mailing—and not a *forwardable* mailing, like one specified in §8(d). This distinction matters. Why? If a person moves, a forwardable mailing will be sent along (*i. e.*, "forwarded") to that person's new address; in contrast, a *non*forwardable mailing will not be forwarded to the person's new address but instead will be returned to the sender and marked "undeliverable." And so a *non*forwardable mailing that is returned to the sender marked "undeliverable" indicates that the intended recipient may have moved. After all, the Postal Service, as the majority points out, returns mail marked "undeliverable" if the intended recipient has moved—not if the person still lives at his old address. *Ante*, at 765, and n. 3.

Under §6(d), the Registration Act expressly endorses *non*forwardable mailings as a reasonable method for States to use at step 1 to identify registrants whose addresses may have changed *before* the State proceeds to step 2 and sends the *forwardable* notice required under subsection (d)'s Con-

firmation Procedure. Specifically, § 6(d) explains that, if a State sends its registrants a mailing by *non*forwardable mail (which States often do), and if "[that mailing] is returned undelivered," the State has a fairly good reason for believing that the person has moved and therefore "may proceed in accordance with" § 8(d) by sending the "last chance" *forwardable* notice that the Confirmation Procedure requires. § 20505(d). In contrast to a *non*forwardable notice that is returned undeliverable, which tells the State that a registrant has likely moved, a *forwardable* notice that elicits no response whatsoever tells the State close to nothing at all. That is because, as I shall discuss, most people who receive confirmation notices from the State simply do not send back the "return card" attached to that mailing—whether they have moved or not.

In sum, § 6(d), just like §§ 8(a) and 8(c), indicates that the State, as an initial matter, must use a reasonable method to identify a person who has likely moved and then must send that person a confirmatory notice that will in effect give him a "last chance" to remain on the rolls. And these provisions thus tend to deny, not to support, the majority's suggestion that somehow sending a "last chance" notice is itself a way (other than nonvoting) to identify someone who has likely moved.

I concede that some individuals who have, in fact, moved do, in fact, send a return card back to the State making clear that they have moved. And some registrants do send back a card saying that they have *not* moved. Thus, the Confirmation Procedure will sometimes help provide *confirmation* of what the initial identification procedure is supposed to accomplish: finding registrants who have probably moved. But more often than not, the State fails to receive anything back from the registrant, and the fact that the State hears nothing from the registrant essentially proves nothing at all.

Anyone who doubts this last statement need simply consult figures in the record along with a few generally available

statistics. As a general matter, the problem these numbers reveal is as follows: Very few registered voters move outside of their county of registration. But many registered voters fail to vote. Most registered voters who fail to vote also fail to respond to the State's "last chance" notice. And the number of registered voters who both fail to vote and fail to respond to the "last chance" notice exceeds the number of registered voters who move outside of their county each year.

Consider the following facts. First, Ohio tells us that a small number of Americans—about 4% of *all* Americans—move outside of their county each year. Record 376. (The majority suggests the relevant number is 10%, *ante*, at 761, but that includes people who move within their county.) At the same time, a large number of American voters fail to vote, and Ohio voters are no exception. In 2014, around 59% of Ohio's registered voters failed to vote. See Brief for League of Women Voters et al. as *Amici Curiae* 16, and n. 12 (citing Ohio Secretary of State, 2014 Official Election Results).

Although many registrants fail to vote and only a small number move, under the Supplemental Process, Ohio uses a registrant's failure to vote to identify that registrant as a person whose address has likely changed. The record shows that in 2012 Ohio identified about 1.5 million registered voters—nearly 20% of its 8 million registered voters—as likely ineligible to remain on the federal voter roll because they changed their residences. Record 475. Ohio then sent those 1.5 million registered voters subsubsection (d) "last chance" confirmation notices. In response to those 1.5 million notices, Ohio only received back about 60,000 return cards (or 4%) which said, in effect, "You are right, Ohio. I have, in fact, moved." *Ibid.* In addition, Ohio received back about 235,000 return cards which said, in effect, "You are *wrong*, Ohio, I have *not* moved." In the end, however, there were *more than 1,000,000 notices*—the vast majority

of notices sent—to which Ohio received back *no* return card at all. *Ibid.*

What about those registered voters—more than 1 million strong—who did not send back their return cards? Is there any reason at all (other than their failure to vote) to think they moved? The answer to this question must be no. There is no reason at all. First, those 1 million or so voters accounted for about 13% of Ohio's voting population. So if those 1 million or so registered voters (or even half of them) had, in fact, moved, then vastly more people must move each year in Ohio than is generally true of the roughly 4% of *all* Americans who move to a different county nationwide (not all of whom are registered voters). See *id.*, at 376. But there is no reason to think this. Ohio offers no such reason. And the streets of Ohio's cities are not filled with moving vans; nor has Cleveland become the Nation's residential moving companies' headquarters. Thus, I think it fair to assume (because of the human tendency not to send back cards received in the mail, confirmed strongly by the actual numbers in this record) the following: In respect to change of residence, the failure of more than 1 million Ohio voters to respond to *forwardable notices* (the vast majority of those sent) shows nothing at all that is statutorily significant.

To put the matter in the present statutory context: When a State relies upon a registrant's failure to vote to initiate the Confirmation Procedure, it violates the Failure-to-Vote Clause, and a State's subsequent use of the Confirmation Procedure cannot save the State's program from that defect. Even if that were not so, a nonreturned confirmation notice adds nothing to the State's understanding of whether the voter has moved or not. And that, I repeat, is because a nonreturned confirmation notice (as the numbers show) cannot reasonably indicate a change of address.

Finally, let us return to §8's basic mandate and purpose. Ohio's program must "mak[e] *a reasonable effort* to remove the names of ineligible voters" from its federal rolls on

change-of-residence grounds. § 20507(a)(4) (emphasis added). Reasonableness under § 8(a) is primarily measured in terms of the program's compliance with "subsections (b), (c), and (d)." § 20507(a)(4)(B). That includes the broad prohibition on removing registrants because of their failure to vote. More generally, the statute seeks to "protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." §§ 20501(b)(3), (4). Ohio's system adds to its non-voting-based identification system a factor that has no tendency to reveal accurately whether the registered voter has changed residences. Nothing plus one is still one. And if that "one" consists of a failure to vote, then Ohio's program also fails to make the requisite "reasonable effort" to comply with subsection (a)'s statutory mandate. It must violate the statute.

III

The majority tries to find support in two provisions of a different statute, namely, the Help America Vote Act of 2002, 116 Stat. 1666, the pertinent part of which is reprinted in Appendix B, *infra*, at 804–805. The first is entitled "Clarification of Ability of Election Officials To Remove Registrants From Official List of Voters on Grounds of Change of Residence." § 903, 116 Stat. 1728. That provision was added to the National Voter Registration Act's Failure-to-Vote Clause, subsection (b)(2), which says that a State's registrant removal program "shall not result in the removal of the name of any person from the official list . . . by reason of the person's failure to vote." § 20507(b)(2); see *supra*, at 785. The "Clarification" adds:

> "except that nothing in this paragraph may be construed to prohibit a State *from using the procedures described in subsections (c) and (d)* to remove an individual from the official list of eligible voters if the individual—(A) has not either notified the applicable registrar (in person or in writing) or responded . . . to the [confirmation] no-

> tice sent by the applicable registrar; and then (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office." § 903, 116 Stat. 1728 (emphasis added).

This amendment simply clarified that the use of nonvoting specified in subsections (c) and (d) does not violate the Failure-to-Vote Clause. The majority asks why, if the matter is so simple, Congress added the new language at all. The answer to this question is just what the title attached to the new language says, namely, Congress added the new language for purposes of *clarification*. And the new language clarified any confusion States may have had about the relationship between, on the one hand, subsection (b)'s broad prohibition on any use of a person's failure to vote in removal programs and, on the other hand, the requirement in subsections (c) and (d) that a State consider whether a registrant has failed to vote at the end of the Confirmation Procedure. This reading finds support in several other provisions in both the National Voter Registration Act and the Help America Vote Act, which make similar clarifications. See, *e. g.*, § 20507(c)(2)(B) (clarifying that a particular prohibition "shall not be construed to preclude" States from complying with separate statutory obligations); see also §§ 20510(d)(2) (similar rule of construction), 21081(c)(1), 21083(a)(1)(B), (a)(2)(A)(iii), (b)(5), (d)(1)(A)–(B), 21084.

The majority also points out another provision of the Help America Vote Act, § 303. See § 303(a)(4), 116 Stat. 1708, 52 U. S. C. § 21083(a)(4). That provision once again reaffirms that a State's registration list-maintenance program must "mak[e] a *reasonable effort* to remove registrants who are ineligible to vote" and adds that "*consistent with the National Voter Registration Act of 1993* . . . registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no

registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added).

The majority tries to make much of the word "solely." But the majority makes too much of too little. For one thing, the Registration Act's Failure-to-Vote Clause under subsection (b) does not use the word "solely." And § 303 of the Help America Vote Act tells us to interpret its language (which includes the word "solely") "consistent with the" Registration Act. § 21083(a)(4)(A). For another, the Help America Vote Act says that "nothing in this [Act] may be construed to authorize or require conduct prohibited under [the National Voter Registration Act], or to supersede, restrict or limit the application of . . . [t]he National Voter Registration Act." § 21145(a)(4).

The majority's view of the statute leaves the Registration Act's Failure-to-Vote Clause with nothing to do in respect to change-of-address programs. Let anyone who doubts this read subsection (d) (while remaining aware of the fact that it requires the sending of a confirmation notice) and ask himself or herself: What *else* is there for the Failure-to-Vote Clause to do? The answer is nothing. Section 8(d) requires States to send a confirmation notice for all change-of-address removals, and, in the majority's view, failing to respond to that forwardable notice is always a valid cause for removal, even if that notice was sent by reason of the registrant's initial failure to vote. Thus the Failure-to-Vote Clause is left with no independent weight since complying with subsection (d) shields a State from violating subsection (b). To repeat the point, under the majority's view, the Failure-to-Vote Clause is superfluous in respect to change-of-address programs: Subsection (d) already accomplishes everything the majority says is required of a State's removal program—namely, the sending of a notice.

Finally, even if we were to accept the majority's premise that the question here is whether Ohio's system removes registered voters from the registration list "solely by reason

of a failure to vote," that would not change anything. As I have argued, Part II, *supra*, the failure to respond to a forwardable notice is an irrelevant factor in terms of what it shows about whether that registrant changed his or her residence. To add an irrelevant factor to a failure to vote, say, a factor like having gone on vacation or having eaten too large a meal, cannot change Ohio's sole use of "failure to vote" into something it is not.

IV

JUSTICE THOMAS, concurring, suggests that my reading of the statute "'raises serious constitutional doubts.'" *Ante*, at 780 (quoting *Jennings* v. *Rodriguez*, 583 U. S. 281, 286 (2018). He believes that it "would seriously interfere with the States' constitutional authority to set and enforce voter qualifications." *Ante*, at 781. At the same time, the majority "assume[s]" that "Congress has the constitutional authority to limit voting eligibility requirements in the way respondents suggest." *Ante*, at 775, n. 5. But it suggests possible agreement with JUSTICE THOMAS, for it makes this assumption only "for the sake of argument." *Ibid.*

Our cases indicate, however, that § 8 neither exceeds Congress' authority under the Elections Clause, Art. I, § 4, nor interferes with the State's authority under the Voter Qualification Clause, Art. 1, § 2. Indeed, this Court's precedents interpreting the scope of congressional authority under the Elections Clause make clear that Congress has the constitutional power to adopt the statute before us.

The Elections Clause states:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U. S. Const., Art. I, § 4, cl. 1.

The Court has frequently said that "[t]he Clause's substantive scope is broad" and that it "empowers Congress to preempt state regulations governing the 'Times, Places and Manner' of holding congressional elections." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1, 8 (2013). We have long held that "[t]he power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'" *Id.*, at 9 (quoting *Ex parte Siebold*, 100 U. S. 371, 392 (1880)).

The words "'Times, Places, and Manner,'" we have said, are "'comprehensive words'" that "'embrace authority to provide a complete code for congressional elections.'" *Tribal Council*, *supra*, at 8–9 (quoting *Smiley* v. *Holm*, 285 U. S. 355, 366 (1932)). That "'complete code'" includes the constitutional authority to enact "regulations relating to 'registration.'" 570 U. S., at 8–9; see also *Cook* v. *Gralike*, 531 U. S. 510, 524 (2001); *Roudebush* v. *Hartke*, 405 U. S. 15, 24–25 (1972). That is precisely what §8 does.

Neither does §8 tell the States "*who* may vote in" federal elections. *Tribal Council*, 570 U. S., at 16. Instead, §8 considers the *manner* of registering those whom the State itself considers qualified. Unlike the concurrence, I do not read our precedent as holding to the contrary. But see *id.*, at 26 (THOMAS, J., dissenting). And, our precedent strongly suggests that, given the importance of voting in a democracy, a State's effort (because of failure to vote) to remove from a federal election roll those it considers otherwise qualified is unreasonable. Cf. *Carrington* v. *Rash*, 380 U. S. 89, 91–93, 96 (1965) (State can impose "reasonable residence restrictions of the availability of the ballot" but cannot forbid otherwise qualified members of military to vote); see also *Kramer* v. *Union Free School Dist. No. 15*, 395 U. S. 621, 625 (1969) ("States have the power to impose *reasonable* citizenship,

age, and residency requirements on the availability of the ballot" (emphasis added)); *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966) ("To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor").

For these reasons, with respect, I dissent.

APPENDIXES

A

The National Voter Registration Act of 1993

"SEC. 2. FINDINGS AND PURPOSES.

"(a) FINDINGS.—The Congress finds that—

"(1) The right of citizens of the United States to vote is a fundamental right;

"(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

"(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation . . . , including racial minorities.

"(b) PURPOSES.—The purposes of this Act are—

"(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

"(2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

"(3) to protect the integrity of the electoral process; and

"(4) to ensure that accurate and current voter registration rolls are maintained." 107 Stat. 77.

"SEC. 5. SIMULTANEOUS APPLICATION FOR VOTER REGISTRATION AND APPLICATION FOR MOTOR VEHICLE DRIVER'S LICENSE.

. . . . .

"(d) CHANGE OF ADDRESS.—Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes." *Id.*, at 78–79.

"SEC. 6. MAIL REGISTRATION.

. . . . .

"(d) UNDELIVERED NOTICES.—If a notice of the disposition of a mail voter registration application under section 8(a)(2) is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 8(d)." *Id.*, at 79–80.

"SEC. 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION.

"(a) IN GENERAL.—In the administration of voter registration for elections for Federal office, each State shall—

"(1) ensure that any eligible applicant is registered to vote in an election—

. . . . .

"(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

"(3) provide that the name of a registrant may not be removed from the official list of eligible voters except—

"(A) at the request of the registrant;

"(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

"(C) as provided under paragraph (4);

"(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—

"(A) the death of the registrant; or

"(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

. . . . .

"(b) CONFIRMATION OF VOTER REGISTRATION.—Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

"(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U. S. C. 1973 et seq.); and

"(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

"(c) VOTER REMOVAL PROGRAMS.—(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which—

"(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

"(B) if it appears from information provided by the Postal Service that—

"(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

"(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

"(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

"(B) Subparagraph (A) shall not be construed to preclude—

"(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

"(ii) correction of registration records pursuant to this Act.

"(d) REMOVAL OF NAMES FROM VOTING ROLLS.—"(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

"(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

"(B)(i) has failed to respond to a notice described in paragraph (2); and

"(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

"(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

"(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than

the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

"(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

"(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection." *Id.*, at 82–84.

B

The Help America Vote Act of 2002

"SEC. 303. COMPUTERIZED STATEWIDE VOTER REGISTRATION LIST REQUIREMENTS AND REQUIREMENTS FOR VOTERS WHO REGISTER BY MAIL.

"(a) COMPUTERIZED STATEWIDE VOTER REGISTRATION LIST REQUIREMENTS.—

. . . . .

"(4) MINIMUM STANDARD FOR ACCURACY OF STATE VOTER REGISTRATION RECORDS.—The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

"(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from

the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U. S. C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

"(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." 116 Stat. 1708–1710.

"SEC. 903. CLARIFICATION OF ABILITY OF ELECTION OFFICIALS TO REMOVE REGISTRANTS FROM OFFICIAL LIST OF VOTERS ON GROUNDS OF CHANGE OF RESIDENCE.

"Section 8(b)(2) of the National Voter Registration Act of 1993 . . . is amended by striking the period at the end and inserting the following: ', except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

"'(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

"'(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.'" *Id.*, at 1728.

"SEC. 906. NO EFFECT ON OTHER LAWS.

"(a) IN GENERAL.— . . . [N]othing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws [including]:

. . . . .

"(4) The National Voter Registration Act of 1993." *Id.*, at 1729.

JUSTICE SOTOMAYOR, dissenting.

I join the principal dissent in full because I agree that the statutory text plainly supports respondents' interpretation. I write separately to emphasize how that reading is bolstered by the essential purposes stated explicitly in the National Voter Registration Act of 1993 (NVRA) to increase the registration and enhance the participation of eligible voters in federal elections. 52 U. S. C. §§ 20501(b)(1)–(2). Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. The Court errs in ignoring this history and distorting the statutory text to arrive at a conclusion that not only is contrary to the plain language of the NVRA but also contradicts the essential purposes of the statute, ultimately sanctioning the very purging that Congress expressly sought to protect against.

Concerted state efforts to prevent minorities from voting and to undermine the efficacy of their votes are an unfortunate feature of our country's history. See *Schuette* v. *BAMN*, 572 U. S. 291, 337–338 (2014) (SOTOMAYOR, J., dissenting). As the principal dissent explains, "[i]n the late 19th and early 20th centuries, a number of '[r]estrictive registration laws and administrative procedures' came into use across the United States." *Ante*, at 783 (opinion of BREYER, J.). States enforced "poll tax[es], literacy tests, residency requirements, selective purges, . . . and annual registration requirements," which were developed "to keep certain groups of citizens from voting." H. R. Rep. No. 103–9, p. 2 (1993). Particularly relevant here, some States erected procedures requiring voters to renew registrations "whenever [they] moved or failed to vote in an election," which "sharply depressed turnout, particularly among blacks and immigrants." A. Keyssar, The Right To Vote 124 (2009). Even after the passage of the Voting Rights Act in 1965, many obstacles remained. See *ante*, at 783 (opinion of BREYER, J.).

Congress was well aware of the "long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens" when it enacted the NVRA. S. Rep. No. 103–6, p. 18 (1993). Congress thus made clear in the statutory findings that "the right of citizens of the United States to vote is a fundamental right," that "it is the duty of the Federal, State, and local governments to promote the exercise of that right," and that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation . . . and disproportionately harm voter participation by various groups, including racial minorities." 52 U. S. C. § 20501(a). In light of those findings, Congress enacted the NVRA with the express purposes of "increas[ing] the number of eligible citizens who register to vote" and "enhanc[ing] the participation of eligible citizens as voters." §§ 20501(b)(1)–(2). These stated purposes serve at least in part to counteract the history of voter suppression, as evidenced by § 20507(b)(2), which forbids "the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Ibid.*

Of course, Congress also expressed other objectives, "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." §§ 20501(b)(3)–(4).* The statute contemplates, however, that States can, and indeed must, further all four stated objectives. As relevant here, Congress crafted the NVRA with the understanding that, while States are required to make a "reasonable effort" to remove ineligi-

*The majority characterizes these objectives as ones to "remov[e] ineligible persons from the States' voter registration rolls," *ante*, at 761, but maintaining "accurate" rolls and "protecting the integrity of the electoral process" surely encompass more than just removing ineligible voters. An accurate voter roll and fair electoral process should also reflect the continued enrollment of eligible voters. In this way, the NVRA's enhanced-participation and accuracy-maintenance goals are to be achieved simultaneously, and are mutually reinforcing.

ble voters from the registration lists, § 20507(a)(4), such removal programs must be developed in a manner that "prevent[s] poor and illiterate voters from being caught in a purge system which will require them to needlessly reregister" and "prevent[s] abuse which has a disparate impact on minority communities," S. Rep. No. 103–6, at 18.

Ohio's Supplemental Process reflects precisely the type of purge system that the NVRA was designed to prevent. Under the Supplemental Process, Ohio will purge a registrant from the rolls after six years of not voting, *e. g.*, sitting out one Presidential election and two midterm elections, and after failing to send back one piece of mail, even though there is no reasonable basis to believe the individual actually moved. See *ante*, at 794–795 (BREYER, J., dissenting). This purge program burdens the rights of eligible voters. At best, purged voters are forced to "needlessly reregister" if they decide to vote in a subsequent election; at worst, they are prevented from voting at all because they never receive information about when and where elections are taking place.

It is unsurprising in light of the history of such purge programs that numerous *amici* report that the Supplemental Process has disproportionately affected minority, low-income, disabled, and veteran voters. As one example, *amici* point to an investigation that revealed that in Hamilton County, "African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity" since 2012, as "compared to only 4% of voters in a suburban, majority-white neighborhood." Brief for National Association for the Advancement of Colored People et al. as *Amici Curiae* 18–19. *Amici* also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them

particularly vulnerable to unwarranted removal under the Supplemental Process. See Brief for Asian Americans Advancing Justice | AAJC et al. as *Amici Curiae* 15–26; Brief for National Disability Rights Network et al. as *Amici Curiae* 17, 21–24, 29–31; Brief for VoteVets Action Fund as *Amicus Curiae* 23–30. See also Brief for Libertarian National Committee as *Amicus Curiae* 19–22 (burdens on principled nonvoters).

Neither the majority nor Ohio meaningfully dispute that the Supplemental Process disproportionately burdens these communities. At oral argument, Ohio suggested that such a disparate impact is not pertinent to this case because respondents did not challenge the Supplemental Process under § 20507(b)(1), which requires that any removal program "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act." Tr. of Oral Arg. 23. The fact that respondents did not raise a claim under § 20507(b)(1), however, is wholly irrelevant to our assessment of whether, as a matter of statutory interpretation, the Supplemental Process removes voters "by reason of the person's failure to vote" in violation of § 20507(b)(2). Contrary to the majority's view, *ante*, at 779, the NVRA's express findings and purpose are highly relevant to that interpretive analysis because they represent "the assumed facts and the purposes that the majority of the enacting legislature . . . had in mind, and these can shed light on the meaning of the operative provisions that follow." A. Scalia & B. Garner, Reading Law 218 (2012). Respondents need not demonstrate discriminatory intent to establish that Ohio's interpretation of the NVRA is contrary to the statutory text and purpose.

In concluding that the Supplemental Process does not violate the NVRA, the majority does more than just misconstrue the statutory text. It entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Con-

gress set out to eradicate. States, though, need not choose to be so unwise. Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote. The majority of States have found ways to maintain accurate voter rolls without initiating removal processes based solely on an individual's failure to vote. See App. to Brief for League of Women Voters of the United States et al. as *Amici Curiae* 1a–9a; Brief for State of New York et al. as *Amici Curiae* 22–28. Communities that are disproportionately affected by unnecessarily harsh registration laws should not tolerate efforts to marginalize their influence in the political process, nor should allies who recognize blatant unfairness stand idly by. Today's decision forces these communities and their allies to be even more proactive and vigilant in holding their States accountable and working to dismantle the obstacles they face in exercising the fundamental right to vote.

Syllabus

SVEEN ET AL. *v.* MELIN

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

No. 16–1432. Argued March 19, 2018—Decided June 11, 2018

The legal system has long used default rules to resolve estate litigation in a way that conforms to decedents' presumed intent. In 2002, Minnesota enacted a statute establishing one such default rule. The statute provides that "the dissolution or annulment of a marriage revokes any revocable . . . beneficiary designation . . . made by an individual to the individual's former spouse." Minn. Stat. § 524.2–804, subd. 1. Under the statute, if one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation so that the insurance proceeds will instead go to the contingent beneficiary or the policyholder's estate upon his death. The law does this on the theory that the policyholder would want that result. But if he does not, he may rename the ex-spouse as beneficiary.

Mark Sveen and respondent Kaye Melin were married in 1997. The next year, Sveen purchased a life insurance policy, naming Melin as the primary beneficiary and designating his two children from a prior marriage, petitioners Ashley and Antone Sveen, as contingent beneficiaries. The Sveen-Melin marriage ended in 2007, but the divorce decree made no mention of the insurance policy and Sveen took no action to revise his beneficiary designations. After Sveen passed away in 2011, Melin and the Sveen children made competing claims to the insurance proceeds. The Sveens argued that under Minnesota's revocation-on-divorce law, their father's divorce canceled Melin's beneficiary designation, leaving them as the rightful recipients. Melin claimed that because the law did not exist when the policy was purchased and she was named as the primary beneficiary, applying the later-enacted law to the policy violates the Constitution's Contracts Clause. The District Court awarded the insurance money to the Sveens, but the Eighth Circuit reversed, holding that the retroactive application of Minnesota's law violates the Contracts Clause.

Held: The retroactive application of Minnesota's statute does not violate the Contracts Clause. That Clause restricts the power of States to disrupt contractual arrangements, but it does not prohibit all laws affecting pre-existing contracts, see *El Paso* v. *Simmons*, 379 U. S. 497, 506–507. The two-step test for determining when such a law crosses the constitutional line first asks whether the state law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.*

v. *Spannaus*, 438 U. S. 234, 244. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. See *id.*, at 246; *El Paso*, 379 U. S., at 514–515; *Texaco, Inc.* v. *Short*, 454 U. S. 516, 531. If such factors show a substantial impairment, the inquiry turns to whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 411–412.

The Court stops after the first step here, because three aspects of Minnesota's law, taken together, show that the law does not substantially impair pre-existing contractual arrangements. First, the law is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. It applies a prevalent legislative presumption that a divorcee would not want his former partner to benefit from his life insurance policy and other will substitutes. Thus the law often honors, not undermines, the intent of the only contracting party to care about the beneficiary term. Second, the law is unlikely to disturb any policyholder's expectations at the time of contracting, because an insured cannot reasonably rely on a beneficiary designation staying in place after a divorce. Divorce courts have wide discretion to divide property upon dissolution of a marriage, including by revoking spousal beneficiary designations in life insurance policies or by mandating that such designations remain. Because a life insurance purchaser cannot know what will happen to that policy in the event of a divorce, his reliance interests are next to nil. And that fact cuts against providing protection under the Contracts Clause. Last, the law supplies a mere default rule, which the policyholder can undo in a moment. If the law's presumption about what an insured wants after divorcing is wrong, the insured may overthrow it simply by sending a change-of-beneficiary form to his insurer.

This Court has long held that laws imposing such minimal paperwork burdens do not violate the Contracts Clause. It has repeatedly sustained so-called recording statutes, which extinguish contractual interests unless timely recorded at government offices. See *Jackson* v. *Lamphire*, 3 Pet. 280; *Vance* v. *Vance*, 108 U. S. 514; *Texaco, Inc.* v. *Short*, 454 U. S. 516. The Court has also upheld laws mandating other kinds of notifications or filings against Contracts Clause attack. See *Curtis* v. *Whitney*, 13 Wall. 68; *Gilfillan* v. *Union Canal Co. of Pa.*, 109 U. S. 401; *Conley* v. *Barton*, 260 U. S. 677. The Minnesota law places no greater obligation on a contracting party than these laws—while imposing a lesser penalty for noncompliance. Filing a change-of-

beneficiary form is as easy as satisfying the paperwork requirements that this Court's prior cases approved. And if an insured wants his ex-spouse to stay as beneficiary but does not send in his form, the result is only that the insurance money is redirected to his contingent beneficiaries, not that his contractual rights are extinguished. Pp. 818–826.

853 F. 3d 410, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed a dissenting opinion, *post*, p. 826.

Adam G. Unikowsky argued the cause for petitioners. With him on the briefs were *Daniel Doda* and *Clifford W. Berlow.*

Shay Dvoretzky argued the cause for respondent. With him on the brief were *Jeffrey R. Johnson* and *Robert J. Lange.**

JUSTICE KAGAN delivered the opinion of the Court.

A Minnesota law provides that "the dissolution or annulment of a marriage revokes any revocable[] beneficiary designation[] made by an individual to the individual's former spouse." Minn. Stat. § 524.2–804, subd. 1 (2016). That statute establishes a default rule for use when Minnesotans divorce. If one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation—on the theory that the policyholder would want that result. But if he does not, the policyholder may rename the ex-spouse as beneficiary.

We consider here whether applying Minnesota's automatic-revocation rule to a beneficiary designation made before the statute's enactment violates the Contracts Clause of the Constitution. We hold it does not.

**Robert W. Goldman* filed a brief for the American College of Trust & Estate Counsel as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Women's Law Project et al. by *David A. Barrett*; and for James W. Ely, Jr., by *Dana Berliner*, *Jeffrey H. Redfern*, and *Mr. Ely, pro se.*

I

All good trust-and-estate lawyers know that "[d]eath is not the end; there remains the litigation over the estate." 8 The Collected Works of Ambrose Bierce 365 (1911). That epigram, beyond presaging this case, helps explain the statute at its center.

The legal system has long used default rules to resolve estate litigation in a way that conforms to decedents' presumed intent. At common law, for example, marriage automatically revoked a woman's prior will, while marriage *and* the birth of a child revoked a man's. See 4 J. Kent, Commentaries on American Law 507, 512 (1830). The testator could then revive the old will or execute a new one. But if he (or she) did neither, the laws of intestate succession (generally prioritizing children and current spouses) would control the estate's distribution. See 95 C. J. S., Wills § 448, pp. 409–410 (2011); R. Sitkoff & J. Dukeminier, Wills, Trusts, and Estates 63 (10th ed. 2017). Courts reasoned that the average person would prefer that allocation to the one in the old will, given the intervening life events. See T. Atkinson, Handbook of the Law of Wills 423 (2d ed. 1953). If he'd only had the time, the thought went, he would have replaced that will himself.

Changes in society brought about changes in the laws governing revocation of wills. In addition to removing gender distinctions, most States abandoned the common-law rule canceling whole wills executed before a marriage or birth. In its place, they enacted statutes giving a new spouse or child a specified share of the decedent's estate while leaving the rest of his will intact. See Sitkoff & Dukeminier, Wills, Trusts, and Estates, at 240. But more important for our purposes, climbing divorce rates led almost all States by the 1980s to adopt another kind of automatic-revocation law. So-called revocation-on-divorce statutes treat an individual's divorce as voiding a testamentary bequest to a former spouse. Like the old common-law rule, those laws rest on a

"judgment about the typical testator's probable intent." *Id.*, at 239. They presume, in other words, that the average Joe does not want his ex inheriting what he leaves behind.

Over time, many States extended their revocation-on-divorce statutes from wills to "will substitutes," such as revocable trusts, pension accounts, and life insurance policies. See Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1109 (1984) (describing nonprobate assets). In doing so, States followed the lead of the Uniform Probate Code, a model statute amended in 1990 to include a provision revoking on divorce not just testamentary bequests but also beneficiary designations to a former spouse. See §§2–804(a)(1), (b)(1), 8 U. L. A. 330, 330–331 (2013). The new section, the drafters wrote, aimed to "unify the law of probate and nonprobate transfers." §2–804, Comment, *id.*, at 333. The underlying idea was that the typical decedent would no more want his former spouse to benefit from his pension plan or life insurance than to inherit under his will. A wealth transfer was a wealth transfer—and a former spouse (as compared with, say, a current spouse or child) was not likely to be its desired recipient. So a decedent's failure to change his beneficiary probably resulted from "inattention," not "intention." Statement of the Joint Editorial Bd. for Uniform Probate Code, 17 Am. College Trust & Est. Counsel 184 (1991). Agreeing with that assumption, 26 States have by now adopted revocation-on-divorce laws substantially similar to the Code's.[1] Minnesota is one.

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[1] See Ala. Code §30–4–17 (2016); Alaska Stat. §13.12.804 (2016); Ariz. Rev. Stat. Ann. §14–2804 (2012); Colo. Rev. Stat. §15–11–804 (2017); Fla. Stat. §732.703 (2017); Haw. Rev. Stat. §560:2–804 (2006); Idaho Code Ann. §15–2–804 (2017 Cum. Supp.); Iowa Code §598.20A (2017); Mass. Gen. Laws, ch. 190B, §2–804 (2016); Mich. Comp. Laws Ann. §700.2807 (West 2018 Cum. Supp.); Minn. Stat. §524.2–804, subd. 1 (2016); Mont. Code Ann. §72–2–814 (2017); Nev. Rev. Stat. §111.781 (2015); N. J. Stat. Ann. §3B:3–14 (West 2007); N. M. Stat. Ann. §45–2–804, (2014); N. Y. Est., Powers & Trusts Law Ann. §5–1.4 (West 2018 Cum. Supp.); N. D. Cent.

Under prior Minnesota law, a divorce alone did not affect a beneficiary designation—but a particular divorce decree could do so. Take first the simple case: Joe names his wife Ann as beneficiary of his insurance policy, later gets divorced, but never changes the designation. Upon his death, Ann would receive the insurance proceeds—even if Joe had just forgotten to redirect the money. In other words, the insurance contract's beneficiary provision would govern after the divorce, exactly as it would have before. See *Larsen* v. *Northwestern Nat. Life Ins. Co.*, 463 N. W. 2d 777, 779 (Minn. App. 1990). But now introduce a complication, in the form of a court addressing a spousal designation in a divorce decree. In Minnesota, as across the nation, divorce courts have always had "broad discretion in dividing property upon dissolution of a marriage." *Maurer* v. *Maurer*, 623 N. W. 2d 604, 606 (Minn. 2001); see 24 Am. Jur. 2d, Divorce and Separation § 456 (2008). In exercising that power, a court could revoke a beneficiary designation to a soon-to-be ex-spouse; or conversely, a court could mandate that the old designation remain. See, *e. g.*, *Paul* v. *Paul*, 410 N. W. 2d 329, 330 (Minn. App. 1987); *O'Brien* v. *O'Brien*, 343 N. W. 2d 850, 853 (Minn. 1984). Either way, the court, rather than the insured, would decide whether the ex-spouse would stay the beneficiary.

In contrast to the old law, Minnesota's new revocation-on-divorce statute starts from another baseline: the cancellation, rather than continuation, of a beneficiary designation. Enacted in 2002 to track the Code, the law provides that "the dissolution or annulment of a marriage revokes any revocable[] disposition, beneficiary designation, or appointment of property made by an individual to the individual's

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Code Ann. § 30.1–10–04 (2010); Ohio Rev. Code Ann. § 5815.33 (Lexis 2017); 20 Pa. Cons. Stat. § 6111.2 (2010); S. C. Code Ann. § 62–2–507 (2017 Cum. Supp.); S. D. Codified Laws § 29A–2–804 (2004); Tex. Fam. Code Ann. § 9.301 (West 2006); Utah Code § 75–2–804 (Supp. 2017); Va. Code Ann. § 20–111.1 (2016); Wash. Rev. Code § 11.07.010 (2016); Wis. Stat. § 854.15 (2011).

former spouse in a governing instrument." Minn. Stat. § 524.2–804, subd. 1. The term "governing instrument" is defined to include an "insurance or annuity policy," along with a will and other will substitutes. § 524.1–201. So now when Joe and Ann divorce, the clause naming Ann as Joe's insurance beneficiary is automatically revoked. If nothing else occurs before Joe's death, his insurance proceeds go to any contingent beneficiary named in the policy (perhaps his daughter Emma) or, failing that, to his estate. See § 524.2–804, subd. 2.

Something else, however, may well happen. As under Minnesota's former law, a divorce decree may alter the natural state of things. So in our example, the court could direct that Ann remain as Joe's insurance beneficiary, despite the normal revocation rule. See § 524.2–804, subd. 1 (providing that a "court order" trumps the rule). And just as important, the policyholder himself may step in to override the revocation. Joe, for example, could agree to a marital settlement ensuring Ann's continued status as his beneficiary. See *ibid.* (providing that such an agreement controls). Or else, and more simply, he could notify his insurance company at any time that he wishes to restore Ann to that position.

But enough of our hypothetical divorcees: It is time they give way to Mark Sveen and Kaye Melin, whose marriage and divorce led to this case. In 1997, Sveen and Melin wed. The next year, Sveen purchased a life insurance policy. He named Melin as the primary beneficiary, while designating his two children from a prior marriage, Ashley and Antone Sveen, as the contingent beneficiaries. The Sveen-Melin marriage ended in 2007. The divorce decree made no mention of the insurance policy. And Sveen took no action, then or later, to revise his beneficiary designations. In 2011, he passed away.

In this action, petitioners the Sveen children and respondent Melin make competing claims to the insurance proceeds. The Sveens contend that under Minnesota's revocation-on-

divorce law, their father's divorce canceled Melin's beneficiary designation and left the two of them as the rightful recipients. Melin notes in reply that the Minnesota law did not yet exist when her former husband bought his insurance policy and named her as the primary beneficiary. And she argues that applying the later-enacted law to the policy would violate the Constitution's Contracts Clause, which prohibits any state "Law impairing the Obligation of Contracts." Art. I, § 10, cl. 1.

The District Court rejected Melin's argument and awarded the insurance money to the Sveens. See Civ. No. 14–5015 (D Minn., Jan. 7, 2016), App. to Pet. for Cert. 9a–16a. But the Court of Appeals for the Eighth Circuit reversed. It held that a "revocation-upon-divorce statute like [Minnesota's] violates the Contract Clause when applied retroactively." 853 F. 3d 410, 412 (2017).

We granted certiorari, 583 U. S. 1036 (2017), to resolve a split of authority over whether the Contracts Clause prevents a revocation-on-divorce law from applying to a preexisting agreement's beneficiary designation.[2] We now reverse the decision below.

II

The Contracts Clause restricts the power of States to disrupt contractual arrangements. It provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U. S. Const., Art. I, § 10, cl. 1. The origins of the Clause lie in legislation enacted after the Revolutionary War to relieve debtors of their obligations to creditors. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 502–503 (1987). But the Clause applies to any kind of con-

[2] Compare 853 F. 3d 410, 414 (CA8 2017) (case below) (yes, it does); *Parsonese* v. *Midland Nat. Ins. Co.*, 550 Pa. 423, 434, 706 A. 2d 814, 819 (1998) (same), with *Lazar* v. *Kroncke*, 862 F. 3d 1186, 1199–1200 (CA9 2017) (no, it does not); *Stillman* v. *Teachers Ins. & Annuity Assn. College Retirement Equities Fund*, 343 F. 3d 1311, 1322 (CA10 2003) (same); *In re Estate of DeWitt*, 54 P. 3d 849, 859–860 (Colo. 2002) (same).

tract. See *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 244–245, n. 16 (1978). That includes, as here, an insurance policy.

At the same time, not all laws affecting pre-existing contracts violate the Clause. See *El Paso* v. *Simmons*, 379 U. S. 497, 506–507 (1965). To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.*, 438 U. S., at 244. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. See *id.*, at 246; *El Paso*, 379 U. S., at 514–515; *Texaco, Inc.* v. *Short*, 454 U. S. 516, 531 (1982). If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 411–412 (1983).

Here, we may stop after step one because Minnesota's revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements. True enough that in revoking a beneficiary designation, the law makes a significant change. As Melin says, the "whole point" of buying life insurance is to provide the proceeds to the named beneficiary. Brief for Respondent 16. But three aspects of Minnesota's law, taken together, defeat Melin's argument that the change it effected "severely impaired" her ex-husband's contract. *Ibid.* First, the statute is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the

statute supplies a mere default rule, which the policyholder can undo in a moment. Indeed, Minnesota's revocation statute stacks up well against laws that this Court upheld against Contracts Clause challenges as far back as the early 1800s.[3] We now consider in detail each of the features that make this so.

To begin, the Minnesota statute furthers the policyholder's intent in many cases—indeed, the drafters reasonably thought in the typical one. As earlier described, legislatures have long made judgments about a decedent's likely testamentary intent after large life changes—a marriage, a birth, or a divorce. See *supra*, at 814–815. And on that basis, they have long enacted statutes revoking earlier-made wills by operation of law. Legislative presumptions about divorce are now especially prevalent—probably because they accurately reflect the intent of most divorcing parties. Although there are exceptions, most divorcees do not aspire to enrich their former partners. (And that is true even when an ex-spouse has custody of shared children, given the many ways to provide them with independent support.) The Minnesota statute (like the model code it tracked) applies that

[3] Because that is true, we have no occasion to address Melin's contention that we should abandon our two-step Contracts Clause test to whatever extent it departs from the Clause's original meaning and earliest applications. See Brief for Respondent 6–10, 18–33. Part of Melin's argument focuses on the back half of the test, which we do not reach today. Another part claims that the front half goes wrong in exempting *in*substantial impairments from the Clause's reach. But as we explain below, see *infra*, at 822–824, the Court has always recognized that some laws affect contracts without violating the Contracts Clause. See, *e. g.*, *Curtis* v. *Whitney*, 13 Wall. 68, 70 (1872) ("No[t] every statute which affects the value of a contract impair[s] its obligation"). And in particular, the Court has always approved statutes like this one, which enable a party with only minimal effort to protect his original contract rights against the law's operation. See, *e. g.*, *Jackson* v. *Lamphire*, 3 Pet. 280, 290 (1830). So this case presents no clash, of the kind Melin says we should resolve, between the Court's two-step test and any older approach to applying the Contracts Clause.

understanding to beneficiary designations in life insurance policies and other will substitutes. See *supra*, at 815–817. Melin rightly notes that this extension raises a brand-new constitutional question because "an insurance policy is a contract under the Contracts Clause, and a will is not." Brief for Respondent 44 (internal quotation marks omitted). But in answering that question, it matters that the old legislative presumption equally fits the new context: A person would as little want his ex-spouse to benefit from his insurance as to collect under his will. Or said otherwise, the insured's failure to change the beneficiary after a divorce is more likely the result of neglect than choice. And that means the Minnesota statute often honors, not undermines, the intent of the only contracting party to care about the beneficiary term. The law no doubt changes how the insurance contract operates. But does it impair the contract? Quite the opposite for lots of policyholders.

And even when presumed and actual intent diverge, the Minnesota law is unlikely to upset a policyholder's expectations at the time of contracting. That is because an insured cannot reasonably rely on a beneficiary designation remaining in place after a divorce. As noted above, divorce courts have wide discretion to divide property between spouses when a marriage ends. See *supra*, at 816. The house, the cars, the sporting equipment are all up for grabs. See Judgment and Decree in No. 14–cv–5015 (D Minn.), p. 51 (awarding Melin, among other things, a snowmobile and all-terrain vehicle). And (what matters here) so too are the spouses' life insurance policies, with their beneficiary provisions. Although not part of the Sveen-Melin divorce decree, they could have been; as Melin acknowledges, they sometimes are. See *supra*, at 816; Brief for Respondent 38. Melin counters that the Contracts Clause applies only to legislation, not to judicial decisions. See *id.*, at 38–39; see also *post*, at 834 (GORSUCH, J., dissenting). That is true, but of no moment. The power of divorce courts over insurance policies is rele-

vant here because it affects whether a party can reasonably expect a beneficiary designation to survive a marital breakdown. We venture to guess that few people, when purchasing life insurance, give a thought to what will happen in the event of divorce. But even if someone out there does, he can conclude only that . . . he cannot possibly know. So his reliance interests are next to nil. And as this Court has held before, that fact cuts against providing protection under the Contracts Clause. See, *e. g.*, *El Paso*, 379 U. S., at 514–515.

Finally, a policyholder can reverse the effect of the Minnesota statute with the stroke of a pen. The law puts in place a presumption about what an insured wants after divorcing. But if the presumption is wrong, the insured may overthrow it. And he may do so by the simple act of sending a change-of-beneficiary form to his insurer. (Or if he wants to commit himself forever, like Ulysses binding himself to the mast, he may agree to a divorce settlement continuing his ex-spouse's beneficiary status. See *supra*, at 817.) That action restores his former spouse to the position she held before the divorce—and in so doing, cancels the state law's operation. The statute thus reduces to a paperwork requirement (and a fairly painless one, at that): File a form and the statutory default rule gives way to the original beneficiary designation.

In cases going back to the 1800s, this Court has held that laws imposing such minimal paperwork burdens do not violate the Contracts Clause. One set of decisions addresses so-called recording statutes, which extinguish contractual interests unless timely recorded at government offices. In *Jackson* v. *Lamphire*, 3 Pet. 280 (1830), for example, the Court rejected a Contracts Clause challenge to a New York law granting title in property to a later rather than earlier purchaser whenever the earlier had failed to record his deed. It made no difference, the Court held, whether the unrecorded deed was "dated before or after the passage" of the

statute; in neither event did the law's modest recording condition "impair[ ] the obligation of contracts." *Id.*, at 290. Likewise, in *Vance* v. *Vance*, 108 U. S. 514 (1883), the Court upheld a statute rendering unrecorded mortgages unenforceable against third parties—even when the mortgages predated the law. We reasoned that the law gave "due regard to existing contracts" because it demanded only that the mortgagee make a "public registration," and gave him several months to do so. *Id.*, at 517, 518. And more recently, in *Texaco, Inc.* v. *Short*, 454 U. S. 516 (1982), the Court held that a statute terminating pre-existing mineral interests unless the owner filed a "statement of claim" in a county office did not "unconstitutionally impair" a contract. *Id.*, at 531. The filing requirement was "minimal," we explained, and compliance with it would effectively "safeguard any contractual obligations or rights." *Ibid.*

So too, the Court has long upheld against Contracts Clause attack laws mandating other kinds of notifications or filings. In *Curtis* v. *Whitney*, 13 Wall. 68 (1872), for example, the Court approved a statute retroactively affecting buyers of "certificates" for land offered at tax sales. The law required the buyer to notify the tax-delinquent property owner, who could then put up the funds necessary to prevent the land's final sale. If the buyer failed to give the notice, he could not take the land—and if he provided the notice, his chance of gaining the land declined. Still, the Court made short work of the Contracts Clause claim. Not "every statute which affects the value of a contract," the Court stated, "impair[s] its obligation." *Id.*, at 70. Because the law's notice rule was "easy [to] compl[y] with," it did not raise a constitutional problem. *Id.*, at 71. Similarly, in *Gilfillan* v. *Union Canal Co. of Pa.*, 109 U. S. 401 (1883), the Court sustained a state law providing that an existing bondholder's failure to reject a settlement proposal in writing would count as consent to the deal. The law operated to reduce the interest received by an investor who did not respond. Yet the Court

rebuffed the ensuing Contracts Clause suit. "If [the bondholder did] not wish to abandon his old rights and accept the new," the Court explained, "all he ha[d] to do [was] to say so in writing." *Id.*, at 406. And one last: In *Conley* v. *Barton*, 260 U. S. 677 (1923), the Court held that the Contracts Clause did not bar a State from compelling existing mortgagees to complete affidavits before finally foreclosing on properties. The law effectively added a paperwork requirement to the mortgage contracts' foreclosure terms. But the Court said it was "only [a] condition, easily complied with, which the law, for its purposes, requires." *Id.*, at 681.

The Minnesota statute places no greater obligation on a contracting party—while imposing a lesser penalty for noncompliance. Even supposing an insured wants his life insurance to benefit his ex-spouse, filing a change-of-beneficiary form with an insurance company is as "easy" as, say, providing a landowner with notice or recording a deed. *Curtis*, 13 Wall., at 71. Here too, with only "minimal" effort, a person can "safeguard" his contractual preferences. *Texaco*, 454 U. S., at 531. And here too, if he does not "wish to abandon his old rights and accept the new," he need only "say so in writing." *Gilfillan*, 109 U. S., at 406. What's more, if the worst happens—if he wants his ex-spouse to stay as beneficiary but does not send in his form—the consequence pales in comparison with the losses incurred in our earlier cases. When a person ignored a recording obligation, for example, he could forfeit the sum total of his contractual rights—just ask the plaintiffs in *Jackson* and *Vance*. But when a policyholder in Minnesota does not redesignate his ex-spouse as beneficiary, his right to insurance does not lapse; the upshot is just that his contingent beneficiaries (here, his children) receive the money. See *supra*, at 817. That redirection of proceeds is not nothing; but under our precedents, it gives the policyholder—who, again, could have "easily" and entirely escaped the law's effect—no right to complain of a Contracts Clause violation. *Conley*, 260 U. S., at 681.

In addressing those precedents, Melin mainly urges us to distinguish between two ways a law can affect a contract. The Minnesota law, Melin claims, "operate[s] on the contract itself" by "directly chang[ing] an express term" (the insured's beneficiary designation). Brief for Respondent 51; Tr. of Oral Arg. 57. In contrast, Melin continues, the recording statutes "impose[ ] a consequence" for failing to abide by a "procedural" obligation extraneous to the agreement (the State's recording or notification rule). Brief for Respondent 51; Tr. of Oral Arg. 58. The difference, in her view, parallels the line between rights and remedies: The Minnesota law explicitly alters a person's entitlement under the contract, while the recording laws interfere with his ability to enforce that entitlement against others. See Tr. of Oral Arg. 57–59; see also *post*, at 834–835 (GORSUCH, J., dissenting).

But we see no meaningful distinction among all these laws. The old statutes also "act[ed] on the contract" in a significant way. Tr. of Oral Arg. 59. They added a paperwork obligation nowhere found in the original agreement—"record the deed," say, or "notify the landowner." And they informed a contracting party that unless he complied, he could not gain the benefits of his bargain. Or viewed conversely, the Minnesota statute also "impose[s] a consequence" for not satisfying a burden outside the contract. Brief for Respondent 51. For as we have shown, that law overrides a beneficiary designation only when the insured fails to send in a form to his insurer. See *supra*, at 822. Of course, the statutes (both old and new) vary in their specific mechanisms. But they all make contract benefits contingent on some simple filing—or more positively spun, enable a party to safeguard those benefits by taking an action. And that feature is what the Court, again and again, has found dispositive.

Nor does Melin's attempt to distinguish the cases gain force when framed in terms of rights and remedies. First, not all the old statutes, as a formal matter, confined the consequence of noncompliance to the remedial sphere. In *Gil-*

fillan, for example, the result of failing to give written consent to a settlement was to diminish the interest rate a bondholder got, not to prevent him from enforcing a claim against others. And second, even when the consequence formally related to enforcement—for example, precluding an earlier purchaser from contesting a later one's title—the laws in fact wiped out substantive rights. Failure to record or notify, as noted earlier, would mean that the contracting party lost what (according to his agreement) was his land or mortgage or mineral interest. See *supra*, at 824. In *Texaco*, we replied to an argument like Melin's by saying that when the results of "eliminating a remedy" and "extinguishing a right" are "identical," the Contracts Clause "analysis is the same." 454 U. S., at 528; see *El Paso*, 379 U. S., at 506–507. That statement rebuts Melin's claim too. Once again: Just like Minnesota's statute, the laws discussed above hinged core contractual benefits on compliance with noncontractual paperwork burdens. When all is said and done, that likeness controls.

For those reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, dissenting.

The Court's argument proceeds this way. Because people are *inattentive* to their life insurance beneficiary designations when they divorce, the legislature needs to change those designations retroactively to ensure they aren't misdirected. But because those same people are simultaneously *attentive* to beneficiary designations (not to mention the legislature's activity), they will surely undo the change if they don't like it. And even if that weren't true, it would hardly matter. People know *existing* divorce laws sometimes allow *courts* to reform insurance contracts. So people should know a *legislature* might enact *new* laws upending insurance

contracts at divorce. For these reasons, a statute rewriting the most important term of a life insurance policy—who gets paid—somehow doesn't "substantially impair" the contract. It just "makes a significant change." *Ante*, at 819.

Respectfully, I cannot agree. Minnesota's statute automatically alters life insurance policies upon divorce to remove a former spouse as beneficiary. Everyone agrees that the law is valid when applied prospectively to policies purchased after the statute's enactment. But Minnesota wants to apply its law retroactively to policies purchased before the statute's adoption. The Court of Appeals held that this violated the Contracts Clause, which guarantees people the "right to 'rely on the law . . . as it existed when the[ir] contracts were made.'" *Metropolitan Life Ins. Co.* v. *Melin*, 853 F. 3d 410, 413 (CA8 2017) (quoting *Whirlpool Corp.* v. *Ritter*, 929 F. 2d 1318, 1323 (CA8 1991)). That judgment seems to me exactly right.

I

Because legislation often disrupts existing social arrangements, it usually applies only prospectively. This longstanding and "sacred" principle ensures that people have fair warning of the law's demands. *Reynolds* v. *McArthur*, 2 Pet. 417, 434 (1829); 3 H. Bracton, De Legibus et Consuetudinibus Angliae 530–531 (1257) (T. Twiss ed. 1880). It also prevents majoritarian legislatures from condemning disfavored minorities for past conduct they are powerless to change. See, *e. g.*, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 266 (1994); Vermeule, Veil of Ignorance Rules in Constitutional Law, 111 Yale L. J. 399, 408 (2001).

When it comes to legislation affecting contracts, the Constitution hardens the presumption of prospectivity into a mandate. The Contracts Clause categorically prohibits states from passing "*any* . . . Law impairing the Obligation of Contracts." Art. I, § 10, cl. 1 (emphasis added). Of course, the framers knew how to impose more nuanced limits on state power. The very section of the Constitution where

the Contracts Clause is found permits states to take otherwise unconstitutional action when "absolutely necessary," if "actually invaded," or "wit[h] the Consent of Congress." Cls. 2 and 3. But in the Contracts Clause the framers were absolute. They took the view that treating existing contracts as "inviolable" would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 206 (1819).

The categorical nature of the Contracts Clause was not lost on anyone, either. When some delegates at the Constitutional Convention sought softer language, James Madison acknowledged the "'inconvenience'" a categorical rule could sometimes entail "'but thought on the whole it would be overbalanced by the utility of it.'" Kmiec & McGinnis, The Contract Clause: A Return to the Original Understanding, 14 Hastings Const. L. Q. 525, 530 (1987). During the ratification debates, these competing positions were again amply aired. Antifederalists argued that the proposed Clause would prevent states from passing valuable legislation. *Id.*, at 532–533. Federalists like Madison countered that the rule of law permitted "property rights and liberty interests [to] be dissolved only by prospective laws of general applicability." *Id.*, at 532. And, of course, the people chose to ratify the Constitution—categorical Clause and all.

For much of its history, this Court construed the Contracts Clause in this light. The Court explained that any legislative deviation from a contract's obligations, "however minute, or apparently immaterial," violates the Constitution. *Green* v. *Biddle*, 8 Wheat. 1, 84 (1823). "All the commentators, and all the adjudicated cases upon Constitutional Law agree[d] in th[is] fundamental propositio[n]." *Winter* v. *Jones*, 10 Ga. 190, 195 (1851). But while absolute in its field, the Clause also left significant room for legislatures to address changing social conditions. States could regulate con-

tractual rights prospectively. *Ogden* v. *Saunders*, 12 Wheat. 213, 262 (1827). They could retroactively alter contractual *remedies*, so long as they did so reasonably. *Sturges*, *supra*, at 200. And perhaps they could even alter contracts without "impairing" their obligations if they made the parties whole by paying just compensation. See *West River Bridge Co.* v. *Dix*, 6 How. 507, 532–533 (1848); *El Paso* v. *Simmons*, 379 U. S. 497, 525 (1965) (Black, J., dissenting). But what they could *not* do is destroy substantive contract rights—the "Obligation of Contracts" that the Clause protects.

More recently, though, the Court has charted a different course. Our modern cases permit a state to "substantial[ly] impai[r]" a contractual obligation in pursuit of "a significant and legitimate public purpose" so long as the impairment is "'reasonable.'" *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 411–412 (1983). That test seems hard to square with the Constitution's original public meaning. After all, the Constitution does not speak of "substantial" impairments—it bars "any" impairment. Under a balancing approach, too, how are the people to know today whether their lawful contracts will be enforced tomorrow, or instead undone by a legislative majority with different sympathies? Should we worry that a balancing test risks investing judges with discretion to choose which contracts to enforce—a discretion that might be exercised with an eye to the identity (and popularity) of the parties or contracts at hand? How are judges supposed to balance the often radically incommensurate goods found in contracts and legislation? And does this test risk reducing the "Contract Clause's protection" to the "Court's judgment" about the "'reasonableness'" of the legislation at hand? *Simmons*, 379 U. S., at 529 (Black, J., dissenting). Many critics have raised serious objections along these and other lines. See, *e. g.*, *ibid.*; Kmiec & McGinnis, *supra*, at 552; Rappaport, Note, A Procedural Approach to the Contract Clause, 93 Yale L. J. 918, 918 (1984); Epstein, Toward a Revitalization of the

Contract Clause, 51 U. Chi. L. Rev 703, 705–717 (1984); J. Ely, The Contract Clause: A Constitutional History 7–29 (2016). They deserve a thoughtful reply, if not in this case then in another.

II

Even under our modern precedents, though, I still do not see how the statute before us might survive unscathed. Recall that our recent precedents indicate a state law "substantially impairing" contracts violates the Contracts Clause unless it is "reasonable" in light of a "significant and legitimate public purpose."

Start with the substantial impairment question. No one pays life insurance premiums for the joy of it. Or even for the pleasure of knowing that the insurance company will eventually have to cough up money to *someone.* As the Court concedes, the choice of beneficiary is the "'whole point.'" *Ante,* at 819. So when a state alters life insurance contracts by undoing their beneficiary designations it surely "substantially impairs" them. This Court has already recognized as much, holding that a law "displac[ing] the beneficiary selected by the insured . . . and plac[ing] someone else in her stead . . . frustrates" a scheme designed to deliver proceeds to the named beneficiary. *Hillman* v. *Maretta,* 569 U. S. 483, 494 (2013) (quoting *Wissner* v. *Wissner,* 338 U. S. 655, 659 (1950); internal quotation marks omitted). As Justice Washington explained long ago, legislation "changing the objects of [the donor's] bounty . . . changes so materially the terms of a contract" that the law can only be said to "impair its obligation." *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518, 662 (1819) (concurring opinion). Just so.

Cases like ours illustrate the point. Kaye Melin testified that, despite their divorce, she and the decedent, Mark Sveen, agreed (repeatedly) to keep each other as the primary beneficiaries in their respective life insurance policies. Affidavit of Kaye Melin in No. 14–cv–05015, Doc. 46, ¶¶3, 4, 10–14. Ms. Melin noted that they adopted this arrangement not

only because they remained friends but because they paid the policy premiums from their joint checking account. Deposition of Kaye Melin in No. 14–cv–0515, Doc. 45–4, pp. 26–27, 64–65. Of course, we don't know for sure whether removing Ms. Melin as beneficiary undid Mr. Sveen's true wishes. The case comes to us after no one was able to meet Minnesota's clear and convincing evidence standard to prove Mr. Sveen's intent. But what we do know is the retroactive removal of Ms. Melin undid the central term of the contract Mr. Sveen signed and left in place for years, even after his divorce, until the day he died.

Nor are arrangements like the ones Ms. Melin described so unusual. As the federal government has recognized, revocation on divorce statutes cannot be assumed to "effectuat[e] the insured's 'true' intent" because a policyholder "might want his ex-spouse to receive insurance proceeds for a number of reasons—out of a sense of obligation, remorse, or continuing affection, or to help care for children of the marriage that remain in the ex-spouse's custody." Brief for United States as *Amicus Curiae* in *Hillman* v. *Maretta*, O. T. 2012, No. 11–1221, p. 28. After all, leaving your ex-spouse life insurance proceeds can be a cheaper, quicker, and more private way to provide for minor or disabled children than leaving the matter to a trustee or other fiduciary. See, *e. g.*, Feder & Sitkoff, Revocable Trusts and Incapacity Planning: More Than Just a Will Substitute, 24 Elder L. J. 1, 15–18 (2016). For these reasons, the federal government and nearly half the states today do not treat divorce as automatically revoking insurance beneficiary designations. Brief for Petitioners 8–9, and nn. 1–2; *Hillman*, *supra*, at 494–495.

Consider next the question of the impairment's reasonableness. Our cases suggest that a substantial impairment is unreasonable when "an evident and more moderate course would serve [the state's] purposes equally well." *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 31 (1977); see also *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S.

234, 247 (1978) (analyzing whether an impairment of private contracts "was necessary to meet an important general social problem"). Here, Minnesota's stated purpose is to ensure proceeds aren't misdirected to a former spouse because a policyholder forgets to update his beneficiary designation after divorce. But the state could have easily achieved that goal without impairing contracts *at all*. It could have required courts to confirm that divorcing couples have reviewed their life insurance designations. See Va. Code Ann. § 20–111.1(E) (2017); Utah Code § 30–3–5(1)(e)(i) (2018). It could have instructed insurance companies to notify policyholders of their right to change beneficiary designations. It could have disseminated information on its own. Or it could have required attorneys in divorce proceedings to address the question with affected parties. A host of women's rights organizations have advocated for these and other alternatives in various states. See, *e. g.*, Brief for Women's Law Project et al. as *Amici Curiae* 34–35. Yet there's no evidence Minnesota investigated any of them, let alone found them wanting.

III

What's the Court's reply? It says that we don't have to decide whether the statute *reasonably impairs* contracts because it doesn't *substantially impair* them in the first place. It's easy enough to see why the Court might take this tack given the many obvious and less burdensome alternatives Minnesota never considered. To save the law, the Court must place all its chips on a "no substantial impairment" argument. The gamble, though, proves a tricky one.

The Court first stresses that individuals sometimes neglect their beneficiary designations after divorce. Because of this, it says, Minnesota's law affords "many" persons what they would want if only they had thought about it. *Ante*, at 820. But as we've seen the law depends on a stereotype about divorcing couples that not everyone fits. A sizeable (and maybe growing) number of people *do* want to keep their

former spouses as beneficiaries. Brief for Women's Law Project 25–26. Even the Court admits the law's presumption will sometimes prove "wrong." *Ante*, at 822. And that tells us all we need to know. That the law is *only sometimes* wrong in predicting what divorcing policyholders want may go some way to establishing its *reasonableness* at the second step of our inquiry. But at the first step, where we ask only whether the law substantially impairs contracts, the answer is unavoidable. The statute substantially impairs contracts by displacing the term that is the " 'whole point' " of the contract. *Ante*, at 819. This Court would never say a law doesn't substantially burden a minority's religious practice because it reflects most people's preferences. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993). Equally, I do not see how a statute doesn't substantially impair contracts just because it reflects "many" people's preferences. *Ante*, at 820. The Contracts Clause does not seek to maximize the bottom line but to protect minority rights "from improvident majoritarian impairment." L. Tribe, American Constitutional Law § 9–8, p. 613 (2d ed. 1988).

The Court's answer to this problem introduces an apparent paradox. If the statute substantially impairs contracts, it says, the impairment can be easily undone. Anyone unhappy with the statute's beneficiary re-designation can just re-re-designate the beneficiary later. *Ante*, at 822. Yet the Court just finished telling us the statute is justified because most policyholders *neglect* their beneficiary designations after divorce. Both claims cannot be true. The statute cannot simultaneously be necessary because people are inattentive to the details of their insurance policies and constitutional because they are hyperaware of those same details.

Perhaps seeking a way out of this problem, the Court offers an entirely different line of argument. Here the Court suggests the statute doesn't substantially impair contracts because it does no more than a divorce court might. *Ante*, at 821–822. But this argument doesn't work either.

Courts may apply *pre-existing* law to alter a beneficiary designation to ensure an equitable distribution of marital property in specific cases. That hardly means *legislatures* may retroactively *change* the law to rearrange beneficiary designations for everyone. A court can fine you for violating an existing law against jaywalking. That doesn't mean a legislature could hold you retroactively liable for violating a new law against jaywalking that didn't exist when you crossed the street. No one would take that idea seriously when it comes to crime, and the Contracts Clause ensures we don't when it comes to contracts, either. After all, the Clause applies only to the "law[s]" legislatures "pass," not to the rulings of courts. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 451 (1924) (emphasis deleted). That's because legislatures exist to pass new laws of general applicability responsive to majoritarian will, often upsetting settled expectations along the way. The same does not hold true for courts that are supposed to apply existing laws to discrete cases and controversies independently and without consulting shifting political winds.

The Court finally claims that its course finds support in cases where we've approved retroactive legislation. *Ante*, at 822–824. Those cases, though, involved statutes altering contractual *remedies*. *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 434, and n. 13 (1934) (noting that each of the 19th-century cases relied on by the Court today affected only "remedial processes"). And Minnesota's law changes the key contractual obligation—who gets the insurance proceeds—not the method by which the contract's existing obligation is satisfied. Although the Constitution allows legislatures some flexibility to address changing social conditions through retroactive remedial legislation, it does not permit upsetting settled expectations in contractual obligations. See, *e. g.*, *Fletcher* v. *Peck*, 6 Cranch 87, 137–138 (1810); *Simmons*, 379 U. S., at 526 (Black, J., dissenting). We must respect that line found in the text of the Constitu-

tion, not elide it. Indeed, our precedent teaches that if remedial changes are just disguised efforts at impairing obligations they will violate the Constitution too. *Blaisdell*, *supra*, at 434, n. 13 (collecting cases).

Consider just how different our case is from the classic remedial change the Contracts Clause permits. In *Jackson* v. *Lamphire*, 3 Pet. 280 (1830), a shady landowner sold the same tract to two people. *Id.*, at 287–288. The Court held that the second buyer was entitled to keep the land because he recorded the deed as a retroactive law required. *Id.*, at 289–290. At the same time, nothing in *Jackson* or the new statute stopped the first buyer (who failed to record his deed) from obtaining damages from the seller for breach of contract. See *id.*, at 287–291. The statute altered the first buyer's remedy, but he remained free to enforce the obligation found in his contract. By contrast, the statute here changes the "'whole point'" of the contract's obligation, substituting a new beneficiary in place of the one found in the contract's terms. *Ante*, at 819.

Even the remedial case on which the Court leans most heavily does little to help its cause. In *Gilfillan* v. *Union Canal Co. of Pa.*, 109 U. S. 401 (1883), the Court upheld a statute requiring bondholders to enforce their contract rights within a shortened timeframe (that is, altering the remedy) or else accept a reorganization plan that threatened a poorer rate of interest. *Id.*, at 402–403, 406. The Court gave three primary reasons for upholding this change. It emphasized that the bonds at issue were "of a peculiar character" because "each bondholder under them enter[ed] by fair implication into certain contract relations with" the other bondholders who approved the reorganization. *Id.*, at 403. It observed that "'a calamity common to all'" had occurred, as the company that issued the bonds "was bankrupt" and payment of "its debts in the ordinary way was impossible." *Id.*, at 405. Finally, it added that the plaintiff challenging the statute had "actual notice" of the law and so

faced no difficulty in asserting his contract rights in a timely manner. *Id.*, at 406. These considerations, the Court concluded, justified shortening the limitations period for obtaining full relief even though it might reduce a late-moving party's interest rate a few points. No comparable considerations are present here. And this statute doesn't just *reduce* Ms. Melin's remedy; it *denies* her one altogether.

*

The judicial power to declare a law unconstitutional should never be lightly invoked. But the law before us cannot survive an encounter with even the breeziest of Contracts Clause tests. It substantially impairs life insurance contracts by retroactively revising their key term. No one can offer any reasonable justification for this impairment in light of readily available alternatives. Acknowledging this much doesn't even require us to hold the statute invalid in all applications, only that it cannot be applied to contracts formed before its enactment. I respectfully dissent.

Syllabus

WASHINGTON *v.* UNITED STATES ET AL.

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

No. 17–269. Argued April 18, 2018—Decided June 11, 2018
853 F. 3d 946, affirmed by an equally divided Court.

Noah G. Purcell, Solicitor General of Washington, argued the cause for petitioner. With him on the briefs were *Robert W. Ferguson*, Attorney General of Washington, *Fronda C. Woods*, Assistant Attorney General, and *Jay D. Geck* and *Anne E. Egeler*, Deputy Solicitors General.

Allon Kedem argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Wood*, *Deputy Assistant Attorney General Kneedler*, *William B. Lazarus*, and *Evelyn S. Ying.*

William M. Jay argued the cause for tribal respondents. With him on the brief were *Brian T. Burgess*, *Jaime A. Santos*, *Kevin P. Martin*, *Riyaz A. Kanji*, *John C. Sledd*, *Jane G. Steadman*, *Mary Neil*, *James R. Sigel*, *Deanne E. Maynard*, *Brian R. Matsui*, *Thomas Zeilman*, *Craig Dorsay*, *Lea Ann Easton*, *Brian Gruber*, *Alan C. Stay*, *Ann E. Tweedy*, *Lauren Rasmussen*, *Steve Suagee*, *Sam Hough*, *Earle David Lees*, *Kevin R. Lyon*, *Samuel J. Stiltner*, *John Howard Bell*, *Harry R. Sachse*, *Timothy J. Filer*, *Scott Owen Mannakee*, *David Hawkins*, *Arthur W. Harrigan, Jr.*, *Tyler L. Farmer*, *Kristin Ballinger*, *James Rittenhouse Bellis*, *Emily Hutchinson Haley*, and *Mason D. Morisset.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *Lawrence G. Wasden*, Attorney General of Idaho, *Steven L. Olsen*, Chief of Civil Litigation, and *Clay R. Smith*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Bill Schuette* of Michigan, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Mike Hunter* of Oklahoma, *Brad D. Schimel*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE KENNEDY took no part in the decision of this case.

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of Wisconsin, and *Peter K. Michael* of Wyoming; for the American Forest & Paper Association et al. by *Timothy S. Bishop* and *Chad M. Clamage*; for Business Organizations et al. by *Eric D. Miller* and *Jennifer A. MacLean*; for Citizens Equal Rights Foundation et al. by *James J. Devine, Jr.*, *Lana E. Marcussen*, and *Lawrence A. Kogan*; for Modoc Point Irrigation District et al. by *Ronald S. Yockim*; for Pacific Legal Foundation by *Damien M. Schiff*; and for Washington State Association of Counties et al. by *Robert M. McKenna*, *Brian T. Moran*, and *Marc R. Shapiro*.

Briefs of *amici curiae* urging affirmance were filed for the Confederated Tribes of the Warm Springs Reservation of Oregon et al. by *Howard G. Arnett*; for Law Professors by *Collette Routel*; for the National Congress of American Indians et al. by *Troy A. Eid*, *Jennifer H. Weddle*, *Paul Spruhan*, and *John T. Harrison*; for Pacific Coast Federation of Fishermen's Associations et al. by *Amanda W. Goodin*, *Janette K. Brimmer*, *Jonathan W. Dettmann*, and *Craig S. Coleman*; for Washington State Officials et al. by *Pratik A. Shah*; and for Daniel J. Evans by *Joseph P. Mentor, Jr.*

Reporter's Note

Orders commencing with May 14, 2018, begin with page 970. The preceding orders in 584 U. S., from March 22 through May 9, 2018, were reported in Part 1, at 901–970. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 17–7063. ODEJIMI *v.* TOWN OF WINDSOR, NEW YORK, 583 U. S. 1127;

No. 17–7160. MALUMPHY *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 583 U. S. 1130;

No. 17–7249. BAEZ ROMERO *v.* DHL EXPRESS (USA), INC., ET AL., 583 U. S. 1170;

No. 17–7278. WEISSERT *v.* PALMER, WARDEN, 583 U. S. 1133;

No. 17–7314. LILLIE *v.* HERNANDEZ, WARDEN, 583 U. S. 1134;

No. 17–7327. COTTON, AKA CORNELIUS-COTTON *v.* SUPREME COURT OF THE UNITED STATES ET AL., 583 U. S. 1171;

No. 17–7450. DARBY *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS, 583 U. S. 1159;

No. 17–7466. IN RE CERVANTES, 583 U. S. 1113;

No. 17–7470. RIOS *v.* LEWIS, WARDEN, 583 U. S. 1188;

No. 17–7487. MARTINEZ *v.* UNITED STATES, 583 U. S. 1138; and

No. 17–7565. JACKSON *v.* UNITED STATES, 583 U. S. 1161. Petitions for rehearing denied.

MAY 4, 2018

Certiorari Denied

No. 17–8787 (17A1220). BUTTS *v.* GEORGIA. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 17–8788 (17A1221). BUTTS *v.* SELLERS, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MAY 9, 2018

Dismissal Under Rule 46

No. 16–388. PATTERSON ET AL. *v.* RAYMOURS FURNITURE CO., INC. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 659 Fed. Appx. 40.

MAY 14, 2018

Certiorari Granted—Vacated and Remanded

No. 16–617. UNITED STATES *v.* HERNANDEZ-LARA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pau-*

peris granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Beckles* v. *United States*, 580 U. S. 256 (2017). Reported below: 817 F. 3d 651.

No. 16–6288. SOLANO-CRUZ *v.* UNITED STATES. Reported below: 667 Fed. Appx. 476. C. A. 5th Cir.;

No. 16–7214. PERDOMO *v.* UNITED STATES. Reported below: 661 Fed. Appx. 823. C. A. 5th Cir.;

No. 16–8058. ALVARO-VELASCO *v.* UNITED STATES (Reported below: 670 Fed. Appx. 854); MONTES BENAVIDES *v.* UNITED STATES (671 Fed. Appx. 350); CASTRO-CASTRO, AKA CASTRO-VALDES, AKA CASTRO-VALDEZ, AKA RIVERA-CASTRO *v.* UNITED STATES (672 Fed. Appx. 413); CANALES-BONILLA *v.* UNITED STATES (664 Fed. Appx. 403); GARRIDO, AKA GARRIDO-ARRIAGA *v.* UNITED STATES (671 Fed. Appx. 362); GONZALEZ-BAUTISTA *v.* UNITED STATES (671 Fed. Appx. 237); LARA-GRACIA *v.* UNITED STATES (671 Fed. Appx. 248); MORALES-LEON, AKA MORALES *v.* UNITED STATES (671 Fed. Appx. 327); MORALES-SANCHEZ *v.* UNITED STATES (671 Fed. Appx. 283); PEREZ-DE LEON *v.* UNITED STATES (671 Fed. Appx. 249); TZACIR-GARCIA *v.* UNITED STATES (674 Fed. Appx. 387); and VALDEZ, AKA VALDEZ CARRION *v.* UNITED STATES (671 Fed. Appx. 297). C. A. 5th. Cir.;

No. 16–8453. PEREZ-JIMENEZ *v.* UNITED STATES. Reported below: 671 Fed. Appx. 938. C. A. 5th Cir.;

No. 16–8675. AGUIRRE-ARELLANO *v.* UNITED STATES (Reported below: 677 Fed. Appx. 158); ESPARZA-CASILLAS *v.* UNITED STATES (678 Fed. Appx. 195); MENDOZA-ACEVES *v.* UNITED STATES (677 Fed. Appx. 169); RIVERA-HERNANDEZ *v.* UNITED STATES (679 Fed. Appx. 371); TORRES, AKA TORRES-MENJIVAR, AKA TORRES-MENJYBAR *v.* UNITED STATES (677 Fed. Appx. 145); VALLE-RAMIREZ *v.* UNITED STATES (677 Fed. Appx. 187); VANEGAS-MARTINEZ *v.* UNITED STATES (678 Fed. Appx. 260); and ANASTACIO-MORALES *v.* UNITED STATES (677 Fed. Appx. 167). C. A. 5th Cir.;

No. 16–8734. CASTANEDA-MORALES, AKA VARGAS-BUSTOS *v.* UNITED STATES (Reported below: 673 Fed. Appx. 437); MORALES-CARDENAS *v.* UNITED STATES (677 Fed. Appx. 200); VALASQUEZ-RIOS *v.* UNITED STATES (677 Fed. Appx. 186); VEGA-ZAPATA, AKA GONZALEZ, AKA MEDINA *v.* UNITED STATES (678 Fed. Appx. 237); and PEREZ-CONDE *v.* UNITED STATES (682 Fed. Appx. 332). C. A. 5th Cir.;

No. 16–8996. TAYLOR *v.* UNITED STATES. C. A. 8th Cir.;

No. 16–9319. LINARES-MAZARIEGO *v.* UNITED STATES. Reported below: 677 Fed. Appx. 182. C. A. 5th Cir.;

No. 17–5283. GOMEZ-UREABA ET AL. *v.* UNITED STATES. Reported below: 686 Fed. Appx. 271. C. A. 5th Cir.;

No. 17–5305. GARCIA-HERNANDEZ, AKA DANIEL-GARCIA, AKA HERNANDEZ GARCIA, AKA HERNANDEZ-GARCIA, AKA GARCIA *v.* UNITED STATES (Reported below: 689 Fed. Appx. 252); and DELGADO CRUZ, AKA DELGADO, AKA CRUZ DELGADO, AKA CRUZ-DELGADO *v.* UNITED STATES (692 Fed. Appx. 187). C. A. 5th Cir.;

No. 17–5484. MCCOY *v.* UNITED STATES. C. A. 8th Cir.;

No. 17–5495. WINTERS *v.* UNITED STATES. Reported below: 691 Fed. Appx. 286. C. A. 8th Cir.;

No. 17–5767. XING LIN *v.* UNITED STATES. Reported below: 683 Fed. Appx. 41. C. A. 2d Cir.;

No. 17–6065. HERNANDEZ-RAMIREZ, AKA HERNANDEZ *v.* UNITED STATES (Reported below: 693 Fed. Appx. 371); and RAMOS, AKA MARQUEZ-RAMOS *v.* UNITED STATES (690 Fed. Appx. 880). C. A. 5th Cir.;

No. 17–6117. EIZEMBER *v.* UNITED STATES. C. A. 8th Cir.;

No. 17–6340. ENIX *v.* UNITED STATES. C. A. 11th Cir.;

No. 17–6368. ECOURSE-WESTBROOK *v.* UNITED STATES. C. A. 11th Cir.;

No. 17–6628. OROZCO *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir.;

No. 17–6926. CARREON *v.* UNITED STATES. C. A. 5th Cir.; and

No. 17–7183. CASABON-RAMIREZ, AKA CASABON *v.* UNITED STATES. Reported below: 706 Fed. Appx. 214. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Sessions* v. *Dimaya*, *ante*, p. 148.

No. 16–7667. GARCIA BELLO, AKA BELLO, AKA GARCIA, AKA BELO, AKA RODRIGO GARCIA *v.* UNITED STATES (Reported below: 670 Fed. Appx. 354); FLORES *v.* UNITED STATES (670 Fed. Appx. 261); SANCHEZ OLIVAREZ, AKA SANCHEZ, AKA OLIVAREZ SANCHEZ, AKA OLIVARE SANCHEZ, AKA SANCHEZ-OLIVAREZ *v.* UNITED STATES (670 Fed. Appx. 254); MAYORGA-SALAZAR *v.* UNITED STATES (670 Fed. Appx. 847); AMAYA-GUERRERO, AKA AMAYA *v.* UNITED STATES (671 Fed. Appx. 314); MARTINEZ-

Castillo, aka Gonzales, aka Noges-Saucedo, aka Martinez-Savavedra *v.* United States (670 Fed. Appx. 863); Vazquez-Hernandez *v.* United States (671 Fed. Appx. 259); Guerrero-Araniva, aka Araniva-Guerrero *v.* United States (664 Fed. Appx. 404); Olvera-Castro *v.* United States (671 Fed. Appx. 915); Sanabia-Sanchez, aka Sarabia-Sanchez *v.* United States (671 Fed. Appx. 255); Trejo-Dominguez, aka Dominguez Trejo, aka Hernandez-Herrera *v.* United States (671 Fed. Appx. 324); Reyes-Diaz *v.* United States (671 Fed. Appx. 914); Carrillo-Hernandez, aka Carillo-Hernandez, aka Carrillo, aka Hernandez Carrillo, aka Carrillo Hernandez *v.* United States (671 Fed. Appx. 361); Trevino-Rodriguez *v.* United States (672 Fed. Appx. 490); and Cabrera *v.* United States (671 Fed. Appx. 352). C. A. 5th. Cir. Motion for leave to proceed *in forma pauperis* and certiorari as to Daniel G. Bello, Fidel Flores, Jose S. Olivarez, Rudy Martinez-Castillo, Lugardo Vazquez-Hernandez, Angel D. Sanabia-Sanchez, Lino I. Carrillo-Hernandez, and Hector A. Cabrera granted, judgments vacated, and case remanded for further consideration in light of *Sessions* v. *Dimaya*, *ante*, p. 148. Certiorari as to Genaro Mayorga-Salazar, Marion A. Amaya-Guerrero, Rudith V. Guerrero-Araniva, Tito Olvera-Castro, Carlos Trejo-Dominguez, Evaristo Reyes-Diaz, and Francisco D. Trevino-Rodriguez denied.

No. 16–8777. Glover *v.* United States; and

No. 16–8997. Davis *v.* United States. C. A. 5th Cir. Reported below: 677 Fed. Appx. 933. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Sessions* v. *Dimaya*, *ante*, p. 148.

No. 16–9660. Larios-Villatoro *v.* United States (Reported below: 684 Fed. Appx. 411); and Hernandez-Hernandez *v.* United States (689 Fed. Appx. 228). C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari as to Daniel Larios-Villatoro granted, judgment vacated, and case remanded for further consideration in light of *Sessions* v. *Dimaya*, *ante*, p. 148. Certiorari as to Jaime A. Hernandez-Hernandez denied.

No. 17–97. United States *v.* Jenkins. C. A. 7th Cir. Reported below: 849 F. 3d 390;

No. 17–651. United States *v.* Jackson. C. A. 7th Cir. Reported below: 865 F. 3d 946; and

No. 17–820. DIAZ-ESPARZA *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir. Reported below: 697 Fed. Appx. 338. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Sessions* v. *Dimaya*, *ante*, p. 148.

No. 17–350. PNC BANK N. A. ET AL. *v.* SECURE AXCESS, LLC. C. A. Fed. Cir. Certiorari granted, judgment vacated as moot, and case remanded to the Court of Appeals with instructions to remand the case to the Patent Trial and Appeal Board to vacate the Board's order. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 848 F. 3d 1370.

Certiorari Dismissed

No. 17–8027. POINTER *v.* ALLIED BARTON SECURITY CO. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 17–8113. JOHNSON *v.* BEARD ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 679 Fed. Appx. 583.

No. 17–8122. WOODS *v.* ADAMS ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 698 Fed. Appx. 528.

No. 17–8426. STRAW *v.* SUPREME COURT OF INDIANA ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 17M109. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* CATASTROPHE MANAGEMENT SOLUTIONS. Motion of Chastity

Jones to intervene in order to file petition for writ of certiorari denied.

No. 17M110. WEDINGTON *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 17M111. AL-MAQABLH *v.* ALLEY;
No. 17M112. GILLESPIE *v.* STAUB ET AL.;
No. 17M114. SNELLING *v.* WARREN ET AL.;
No. 17M115. DEVOE *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION;
No. 17M116. WASHINGTON *v.* UNITED STATES ET AL.;
No. 17M117. CARR *v.* BEAM ET AL.; and
No. 17M118. RIVERA *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17M113. MELVIN *v.* WILKIE, ACTING SECRETARY OF VETERANS AFFAIRS. Motion for leave to proceed as a veteran denied.

No. 141, Orig. TEXAS *v.* NEW MEXICO ET AL. Motion of the former Special Master for allowance of fees and disbursements granted, and the former Special Master is awarded a total of $10,101.86 for the period March 13, 2017, through April 2, 2018, to be paid as follows: 37.5% by Texas, 37.5% by New Mexico, 20% by the United States, and 5% by Colorado. [For earlier order herein, see, *e. g.*, *ante*, p. 914.]

No. 17–1237. OSAGE WIND, LLC, ET AL. *v.* OSAGE MINERALS COUNCIL. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17–8544. ROBINETT *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 17–1412. IN RE RODRIGUEZ; and
No. 17–8559. IN RE JONES. Petitions for writs of habeas corpus denied.

No. 17–8584. IN RE BRICE. 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. 17–7976. IN RE LEE; and

No. 17–8417. IN RE LINDSEY. Petitions for writs of mandamus denied.

Certiorari Granted

No. 17–1104. AIR & LIQUID SYSTEMS CORP. ET AL. *v.* DEVRIES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DEVRIES, DECEASED, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 873 F. 3d 232.

No. 17–1042. BNSF RAILWAY CO. *v.* LOOS. C. A. 8th Cir. Motion of Association of American Railroads for leave to file brief as *amicus curiae* granted. Certiorari granted. Reported below: 865 F. 3d 1106.

Certiorari Denied. (See also Nos. 16–7667 and 16–9660, *supra.*)

No. 15–1494. SESSIONS, ATTORNEY GENERAL *v.* MAGANA-PENA. C. A. 9th Cir. Certiorari denied. Reported below: 628 Fed. Appx. 547.

No. 15–1496. SESSIONS, ATTORNEY GENERAL *v.* LOPEZ-ISLAVA. C. A. 9th Cir. Certiorari denied. Reported below: 628 Fed. Appx. 552.

No. 16–398. SESSIONS, ATTORNEY GENERAL *v.* MIRANDA-GODINEZ. C. A. 9th Cir. Certiorari denied. Reported below: 649 Fed. Appx. 456.

No. 16–966. SESSIONS, ATTORNEY GENERAL *v.* GOLICOV. C. A. 10th Cir. Certiorari denied. Reported below: 837 F. 3d 1065.

No. 16–978. SESSIONS, ATTORNEY GENERAL *v.* BAPTISTE. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 3d 601.

No. 16–6259. GONZALEZ-LONGORIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 3d 670.

No. 16–6392. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 814 F. 3d 340.

No. 16–7373. PRICKETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 839 F. 3d 697.

No. 16–9318. MALDONADO-LANDAVERDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 181.

No. 17–684. VICO *v.* UNITED STATES; and
No. 17–685. VICO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 594.

No. 17–731. OMNIA ITALIAN DESIGN, INC. *v.* STONE CREEK, INC. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 3d 426.

No. 17–809. STANFORD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 693 Fed. Appx. 908.

No. 17–818. HUERTAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 864 F. 3d 214.

No. 17–867. BARROSO ET AL. *v.* SHERIFF OF BEXAR COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 680 Fed. Appx. 338.

No. 17–903. HOERLE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 297 Neb. 840, 901 N. W. 2d 327.

No. 17–952. WYOMING *v.* SAM. Sup. Ct. Wyo. Certiorari denied. Reported below: 2017 WY 98, 401 P. 3d 834.

No. 17–979. BIC CORP. ET AL. *v.* MARKETQUEST GROUP, INC., DBA ALL-IN-ONE. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 927.

No. 17–982. TEIXEIRA ET AL. *v.* ALAMEDA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 670.

No. 17–1066. KOPRAS *v.* MARCO MARINE CONSTRUCTION, INC. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 237 So. 3d 302.

No. 17–1085. PERSONAL AUDIO, LLC *v.* ELECTRONIC FRONTIER FOUNDATION. C. A. Fed. Cir. Certiorari denied. Reported below: 867 F. 3d 1246.

No. 17–1090. PETRO-HUNT, LLC *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 862 F. 3d 1370.

No. 17–1099. Coscia *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 3d 782.

No. 17–1130. Okechuku *v.* United States; and
No. 17–7295. Iwuoha *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 3d 678.

No. 17–1204. Schroeter *v.* Kedra, Individually and as Personal Representative of the Estate of Kedra. C. A. 3d Cir. Certiorari denied. Reported below: 876 F. 3d 424.

No. 17–1213. General Motors LLC *v.* Bavlsik et al. C. A. 8th Cir. Certiorari denied. Reported below: 870 F. 3d 800.

No. 17–1228. Catanach *v.* Thomson, Judge, District Court of New Mexico, First Judicial District. C. A. 10th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 595.

No. 17–1232. Cosgriff et al. *v.* Winnebago County, Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 3d 912.

No. 17–1239. Walls *v.* South Carolina Department of Social Services. Ct. App. S. C. Certiorari denied.

No. 17–1253. Beavers *v.* Schneider National, Inc. C. A. 9th Cir. Certiorari denied.

No. 17–1258. Bolton et al. *v.* Crowley, Hoge & Fein, P. C. Ct. App. D. C. Certiorari denied. Reported below: 170 A. 3d 214.

No. 17–1264. Common Application, Inc. *v.* CollegeNET, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 405.

No. 17–1273. Hoai Thanh *v.* Ngo. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 200.

No. 17–1277. Boyer, Individually and as Administratrix of the Estate of Ware *v.* Hospital of the University of Pennsylvania et al. C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 3d 273.

No. 17–1288. Stewart *v.* Trierweiler, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 3d 633.

No. 17–1297. HOLMES ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 875 F. 3d 1153.

No. 17–1313. DEK–M NATIONWIDE, LTD. *v.* HILL ET AL. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 17–1317. NIKOLAO *v.* LYON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 3d 310.

No. 17–1319. SECURED MAIL SOLUTIONS LLC *v.* UNIVERSAL WILDE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 873 F. 3d 905.

No. 17–1325. HUMBLE SURGICAL HOSPITAL, LLC *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 3d 478.

No. 17–1326. HESSE *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 17–1347. CASTILLO *v.* DORAL PARK COUNTRY CLUB VILLAS ET AL. Sup. Ct. Fla. Certiorari denied.

No. 17–1377. MAXCREST LTD. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 536.

No. 17–1391. CAMPBELL *v.* STEPHENS. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 289.

No. 17–1394. FUJITA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 725.

No. 17–1405. HANSEN *v.* BLACK. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 3d 554.

No. 17–1417. HOWELL *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 17–1430. WEED *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 3d 68.

No. 17–1440. COLLINS *v.* VILLAGE OF PALATINE, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 3d 839.

No. 17–5476. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 339.

No. 17–6721. ONTIVEROS-CEDILLO *v.* UNITED STATES (Reported below: 698 Fed. Appx. 218); and BOLANOS-GALVAN, AKA ALVARAD, AKA GALVAN BOLANOS, AKA BOLANOS GALVAN *v.* UNITED STATES (697 Fed. Appx. 370). C. A. 5th Cir. Certiorari denied.

No. 17–6751. GUTIERREZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 965.

No. 17–6886. RODRIGUEZ VILLALOBOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 157.

No. 17–6927. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7024. MONROY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 1015.

No. 17–7137. MONTEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 858 F. 3d 1085.

No. 17–7155. AGUILAR *v.* MCDOWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 505.

No. 17–7197. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7248. RAGLAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7277. WINDOM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 863 F. 3d 1322.

No. 17–7387. DOE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 851 F. 3d 238.

No. 17–7521. KITCHEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 842.

No. 17–7603. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7692. STONE *v.* LOUISIANA DEPARTMENT OF REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 216.

No. 17–7960. CLAYTON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 535 S. W. 3d 829.

No. 17–7964. FLORES *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE TRANSITORIAL PLANNING DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 300.

No. 17–7965. GLOVER *v.* LANE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–7978. LUCY *v.* GROW. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 575.

No. 17–7980. WARD *v.* DEVILLE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–7981. WOODELL *v.* LINK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied.

No. 17–7984. TEDTAOTAO *v.* TERRITORY OF GUAM. Sup. Ct. Guam. Certiorari denied. Reported below: 2017 Guam 12.

No. 17–7993. POWDRILL *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 17–7994. MONTGOMERY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–8000. BETHUNE *v.* METROPOLITAN TRANSPORTATION AUTHORITY/LONG ISLAND BUS ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 17–8009. ENDENCIA *v.* WELLS FARGO BANK, AS TRUSTEE. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 17–8012. ALLEN *v.* HILL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8017. ADAMSON *v.* GRIFFIN, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 17–8018. BELL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–8019. BOSTON *v.* JOHNSON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8034. KING *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143242–U.

No. 17–8042. PEYTON *v.* BROWN ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–8053. BOOKER *v.* TIMMONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 88.

No. 17–8054. BAILEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8058. CRYSTAL *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 234 So. 3d 669.

No. 17–8066. AMURA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 17–8067. BOND *v.* CLARK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 132.

No. 17–8069. BUXTON *v.* HILL ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8072. LIGGINS *v.* JPMORGAN CHASE BANK, N. A. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2016-Ohio-3528.

No. 17–8080. NASBY *v.* NEVADA. Ct. App. Nev. Certiorari denied. Reported below: 133 Nev. 1054.

No. 17–8081. PETTAWAY *v.* TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 17–8089. ROBERTS *v.* HOOKS, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 777.

No. 17–8091. NELSON *v.* AMALGAMATED TRANSIT UNION LOCAL 1181–1061, AFL–CIO, ET AL. C. A. 2d Cir. Certiorari denied.

No. 17–8096. BERARDI *v.* PARAMO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 517.

No. 17–8098. KARABAJAKYAN *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 553.

No. 17–8099. JACKSON *v.* HAINSWORTH, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 713 Fed. Appx. 68.

No. 17–8102. GASCA DURAN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8112. KONSDORF *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 17–8116. MORRIS *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 17–8117. WHITE *v.* JACKSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 199.

No. 17–8118. TOWNES *v.* NEW MEXICO. Dist. Ct. N. M., Bernalillo County. Certiorari denied.

No. 17–8124. ZARYCHTA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8145. STEILMAN *v.* MICHAEL, DIRECTOR, MONTANA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 389 Mont. 512, 407 P. 3d 313.

No. 17–8146. SMITH *v.* SEMPLE, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied.

No. 17–8154. MILLER *v.* BALDWIN. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 408.

No. 17–8161. HAYNES *v.* OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION. Sup. Ct. Ore. Certiorari denied. Reported below: 362 Ore. 15, 403 P. 3d 394.

No. 17–8165. RAMOS-PEREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 129.

No. 17–8166. STEELE *v.* HOLLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8189. CHAPMAN *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied.

No. 17–8192. LAWRENCE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 235 So. 3d 875.

No. 17–8193. BRYANT *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 3d 988.

No. 17–8245. SEELEY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 86 N. E. 3d 241.

No. 17–8253. CASTILLO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 17–8257. SIVAK *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 17–8281. TANH HUU LAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8294. WELDON *v.* PACHECO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 837.

No. 17–8332. MERIDYTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 722.

No. 17–8336. DIAMOND *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 905 N. W. 2d 870.

No. 17–8339. Winfield *v.* Dorethy, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 871 F. 3d 555.

No. 17–8340. West *v.* Grounds, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 476.

No. 17–8346. Toland *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 560.

No. 17–8347. Pruett *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 678.

No. 17–8348. McElderry *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 3d 863.

No. 17–8355. Ismay *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 17–8356. Guzman-Ortiz *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 849 F. 3d 708.

No. 17–8359. Hampton *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8360. Gadsden *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 756.

No. 17–8361. Holness *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 237.

No. 17–8364. Meras Chavez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 17–8366. Roller *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 309.

No. 17–8371. Hawthorne *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 566.

No. 17–8372. Cerny et al. *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. Reported below: 707 Fed. Appx. 29.

No. 17–8374. Gooch *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 842 F. 3d 1274.

No. 17–8375. Faraj *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 427.

No. 17–8380. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 3d 570.

No. 17–8383. HARSHAW *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 176 A. 3d 173.

No. 17–8384. LECOMPT *v.* HOOKS, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 107.

No. 17–8385. MARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 822.

No. 17–8387. MURRAY *v.* KIRBY, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 518.

No. 17–8389. COX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 891.

No. 17–8394. NORTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 303.

No. 17–8395. PEREZ-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 828.

No. 17–8398. CHESSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 184.

No. 17–8399. CATERBONE *v.* NATIONAL SECURITY AGENCY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 678.

No. 17–8402. BERNABE GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 367.

No. 17–8403. GONZALEZ-ROSALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 815.

No. 17–8404. JEROME *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 853.

No. 17–8410. CERDA-ANIMA *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–8412. DYE *v.* BARNES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 686.

No. 17–8414. YOUNG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8415. YOUNG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 705 Fed. Appx. 94.

No. 17–8416. LIZANO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 804.

No. 17–8433. AKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8434. TEDDER *v.* YELDELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 196.

No. 17–8437. WILLIAMS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 17–8438. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 777.

No. 17–8441. EDELMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 17–8446. CARSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 3d 584.

No. 17–8448. MEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 190.

No. 17–8449. MORRIS *v.* RICHARDS ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–8451. GUEVARA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 684.

No. 17–8453. GORIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 876 F. 3d 40.

No. 17–8456. RICHARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 843.

No. 17–8458. QUIROZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 423.

No. 17–8467. FAIRCLOTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 887.

No. 17–8472. CONTRERAS *v.* DAVIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 160.

No. 17–8474. SPEARS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8477. SMITH *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8479. ROBBINS *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 235 So. 3d 205.

No. 17–8482. PEREZ-PADRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 872.

No. 17–8483. LEWIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 111.

No. 17–8488. ZUKOWSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8497. DINKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 240.

No. 17–8498. COLEMAN *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–8499. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 960.

No. 17–8503. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 192.

No. 17–8508. REASON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 591.

No. 17–8509. ANGEL SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 215.

No. 17–8510. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 151643, 89 N. E. 3d 960.

No. 17–8517. OKHIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 17–8519. Socha *v.* Richardson, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 983.

No. 17–8538. Watson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 499.

No. 16–991. Sessions, Attorney General *v.* Shuti. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 828 F. 3d 440.

No. 17–1103. Abbott et al. *v.* Bell, Mayor of the City of Birmingham, Alabama, et al. Sup. Ct. Ala. Motion of Committee for a Unified Independent Party, Inc., et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 272 So. 3d 613.

No. 17–1110. Slough et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 865 F. 3d 767.

No. 17–1244. Griffin *v.* Coca-Cola Refreshments USA, Inc., et al. C. A. 11th Cir. Certiorari before judgment denied.

No. 17–1245. Thyssen-Bornemisza Collection Foundation *v.* Cassirer et al. C. A. 9th Cir. Motion of Comunidad Judía De Madrid et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 862 F. 3d 951.

No. 17–8312. Springer *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Kagan and Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 875 F. 3d 968.

No. 17–8367. Ontiveros *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 875 F. 3d 533.

No. 17–8405. Mirabal *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 876 F. 3d 1029.

No. 17–8409. CARR *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. 16–9236. FIELDS *v.* FLORIDA, 583 U. S. 840;

No. 17–958. WILLIAMS *v.* COURT SERVICES AND OFFENDER SUPERVISION AGENCY ET AL., 583 U. S. 1168;

No. 17–999. JACKSON *v.* CONNECTICUT DEPARTMENT OF PUBLIC HEALTH ET AL., *ante*, p. 904;

No. 17–1017. BRUNS ET UX. *v.* BRYANT ET AL., *ante*, p. 904;

No. 17–1068. EDIONSERI *v.* SESSIONS, ATTORNEY GENERAL, *ante*, p. 904;

No. 17–1071. PAIGE *v.* LEGAULT ET AL., 583 U. S. 1182;

No. 17–6124. BARTLETT *v.* MORTON, COMMISSIONER, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL., 583 U. S. 1017;

No. 17–6156. AGUILAR *v.* CALIFORNIA, 583 U. S. 1018;

No. 17–6588. FOREMAN *v.* TERRIS, WARDEN, 583 U. S. 1023;

No. 17–6872. LOMACK *v.* FARRIS, WARDEN, 583 U. S. 1124;

No. 17–6902. STONE *v.* MARYLAND, 583 U. S. 1124;

No. 17–6909. J'WEIAL *v.* SEXTON, ACTING WARDEN, 583 U. S. 1124;

No. 17–6924. HAYNES *v.* ACQUINO ET AL., 583 U. S. 1124;

No. 17–7009. BISHOP ET UX. *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL., 583 U. S. 1126;

No. 17–7040. WILLIAMS *v.* PENNSYLVANIA, 583 U. S. 1127;

No. 17–7065. STONE *v.* MARYLAND, 583 U. S. 1127;

No. 17–7130. IN RE ARMSTRONG, 583 U. S. 1114;

No. 17–7158. IN RE COLEN, 583 U. S. 1114;

No. 17–7236. MAHJOR *v.* GREENPOINT MORTGAGE FUNDING, INC., ET AL., 583 U. S. 1158;

No. 17–7353. COOLEY *v.* STEWART, WARDEN, ET AL., 583 U. S. 1186;

No. 17–7378. CARACCIOLI *v.* FACEBOOK, INC., 583 U. S. 1136;

No. 17–7397. IN RE OLIVER, 583 U. S. 1113;

No. 17–7499. STRAW *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, 583 U. S. 1188;

No. 17–7522. JOHNSON *v.* LOYOLA UNIVERSITY OF NEW ORLEANS, 583 U. S. 1188;

No. 17–7527. DILLON *v.* DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL., 583 U. S. 1171;

No. 17–7533. MILLS *v.* INDIANA DEPARTMENT OF CHILD SERVICES ET AL., 583 U. S. 1188;

No. 17–7547. CROMARTIE *v.* LAW OFFICES OF E. PEYTON FAULK, LLC, ET AL., *ante*, p. 906;

No. 17–7745. R. D. *v.* TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, 583 U. S. 1192;

No. 17–7810. DORSEY *v.* DEPARTMENT OF EDUCATION ET AL., 583 U. S. 1193;

No. 17–7840. CLAYBORNE *v.* TECUMSEH DEPARTMENT OF CORRECTIONS ET AL., *ante*, p. 920; and

No. 17–7870. LYNCH *v.* PFIZER, INC., *ante*, p. 909. Petitions for rehearing denied.

No. 17–807. TINGLE *v.* PERDUE, SECRETARY OF AGRICULTURE, ET AL., *ante*, p. 910. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 17–6175. ALLEN *v.* UNITED STATES ET AL., 583 U. S. 1026. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

MAY 21, 2018

Certiorari Granted—Vacated and Remanded

No. 17–5992. LYLE *v.* UNITED STATES. C. A. 2d Cir. Reported below: 856 F. 3d 191; and

No. 17–6520. HOUSTON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 689 Fed. Appx. 170. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Byrd* v. *United States*, *ante*, p. 395.

Miscellaneous Orders

No. 17A1138. JOVEL-JOVEL *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir. Application for stay of removal, addressed to JUSTICE KAGAN and referred to the Court, denied.

No. 17M119. GLENN *v.* WELLS FARGO BANK, N. A.;

No. 17M120. SANCHEZ *v.* CITY OF CHICAGO, ILLINOIS, ET AL.; and

No. 17M121. QUILES *v.* CHAPPIUS, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17–938. CITY OF CIBOLO, TEXAS *v.* GREEN VALLEY SPECIAL UTILITY DISTRICT. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17–7606. IN RE WILLIAMS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 915] denied.

No. 17–8650. IN RE BENITEZ. Petition for writ of habeas corpus denied.

No. 17–8138. IN RE WATSON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 16–1275. VIRGINIA URANIUM, INC., ET AL. *v.* WARREN ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 848 F. 3d 590.

No. 17–773. CULBERTSON *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION. C. A. 11th Cir. Certiorari granted. Reported below: 861 F. 3d 1197.

No. 17–1011. JAM ET AL. *v.* INTERNATIONAL FINANCE CORP. C. A. D. C. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 860 F. 3d 703.

No. 17–1107. ROYAL, WARDEN *v.* MURPHY. C. A. 10th Cir. Certiorari granted. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 875 F. 3d 896.

Certiorari Denied

No. 17–830. TRENT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 3d 699.

No. 17–925. BROSSART ET AL. *v.* JANKE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF FOR NELSON COUNTY, NORTH DAKOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 859 F. 3d 616.

No. 17–1059. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 3d 899.

No. 17–1120. TMBC, LLC *v.* McKeage et al. C. A. 8th Cir. Certiorari denied. Reported below: 847 F. 3d 992.

No. 17–1135. Demirchyan *v.* Sessions, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 335.

No. 17–1282. Milione *v.* City University of New York et al. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 153 App. Div. 3d 807, 59 N. Y. S. 3d 796.

No. 17–1294. Rothschild Digital Media Innovations, LLC *v.* Sony Interactive Entertainment America, LLC, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 706 Fed. Appx. 682.

No. 17–1298. Highland Construction Management Services, LP, et al. *v.* Wells Fargo Bank, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 281.

No. 17–1303. Maguire Financial, LP *v.* PowerSecure International, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 541.

No. 17–1305. Borrell *v.* Richer et al. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 3d 154.

No. 17–1306. Young *v.* Life Essential-Rafiki, Inc. Ct. App. Ga. Certiorari denied.

No. 17–1311. Coulter *v.* Coulter. C. A. 3d Cir. Certiorari denied. Reported below: 715 Fed. Appx. 158.

No. 17–1315. Cooper *v.* Countrywide Home Loans, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 741.

No. 17–1324. Pieper et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 137.

No. 17–1331. Clements et al. *v.* Southwestern Bell Telephone Co., dba AT&T Oklahoma, et al. Sup. Ct. Okla. Certiorari denied. Reported below: 2017 OK 107, 413 P. 3d 539.

No. 17–1345. Washington et al. *v.* Kellwood Co. C. A. 2d Cir. Certiorari denied. Reported below: 714 Fed. Appx. 35.

No. 17–1359. TOSTE ET AL. *v.* EL DORADO COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 574.

No. 17–1389. SALDANA-FOUNTAIN *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 295.

No. 17–1395. WILCOX *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 669.

No. 17–1420. LARRY DOIRON, INC., ET AL. *v.* SPECIALTY RENTAL TOOLS & SUPPLY, L. L. P., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 879 F. 3d 568.

No. 17–1427. GILLENWATER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–1431. GRACE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 664 Fed. Appx. 7.

No. 17–1437. RICE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 Fed. Appx. 121.

No. 17–1446. BANKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 530.

No. 17–1461. SMITH ET AL. *v.* BERTHIAUME. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 3d 1354.

No. 17–1466. FULLWOOD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 234 Md. App. 57, 168 A. 3d 1104.

No. 17–5572. GUZMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 147 App. Div. 3d 1450, 47 N. Y. S. 3d 557.

No. 17–5684. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–6262. GATES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–6769. James *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–6877. Robinson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7089. Cavin *v.* Washington, Director, Michigan Department of Corrections, et al. C. A. 6th Cir. Certiorari denied.

No. 17–7210. Kearn *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 863 F. 3d 1299.

No. 17–7368. Anders *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 17–7589. Tarrio *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 17–7717. Orr *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 892.

No. 17–8139. Thomas *v.* Michigan Attorney Grievance Commission. Sup. Ct. Mich. Certiorari denied. Reported below: 501 Mich. 865, 901 N. W. 2d 390.

No. 17–8147. Carrafa *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 17–8181. Raymond *v.* Wells Fargo Bank, N. A. Sup. Ct. Fla. Certiorari denied.

No. 17–8207. Troy-McKoy *v.* University of Illinois et al. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 17–8231. Wheeler *v.* Davis. C. A. 11th Cir. Certiorari denied.

No. 17–8232. Vanaman *v.* Shartle, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 262.

No. 17–8262. Woodson *v.* United States;
No. 17–8263. Woodson *v.* United States;
No. 17–8264. Woodson *v.* United States;
No. 17–8265. Woodson *v.* United States;
No. 17–8266. Woodson *v.* United States;

No. 17–8267. WOODSON *v.* UNITED STATES;
No. 17–8268. WOODSON *v.* UNITED STATES; and
No. 17–8269. WOODSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 115.

No. 17–8271. KOKINDA *v.* GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8305. TAYLOR *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 17–8335. EVANS *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied.

No. 17–8376. GLICK *v.* REVERSE MORTGAGE SOLUTIONS ET AL. Sup. Ct. Mont. Certiorari denied.

No. 17–8378. GRECO *v.* GARNETT, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–8407. MINCEY *v.* DAVIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 642.

No. 17–8408. MILLER *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 276.

No. 17–8435. TORRES *v.* TURNER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8436. WHITNEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 17–8439. JEFFERSON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 145.

No. 17–8455. ROWE *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 17–8465. BUCK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 773.

No. 17–8481. WIGGINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 121.

No. 17–8490. McKinney *v.* Kasich, Governor of Ohio, et al. C. A. 6th Cir. Certiorari denied.

No. 17–8492. Varner *v.* Davey, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 520.

No. 17–8493. Viola *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 17–8496. Whitfield *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 775.

No. 17–8507. Rogers *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 185.

No. 17–8512. Van Buren *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 253.

No. 17–8514. Tillman *v.* Pastrana, Warden. C. A. 11th Cir. Certiorari denied.

No. 17–8522. Accurso *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 17–8525. Ayala-Nunez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 345.

No. 17–8529. Benbow et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 709 Fed. Appx. 25.

No. 17–8539. Ward *v.* Shartle, Warden. C. A. 9th Cir. Certiorari denied.

No. 17–8542. Mendoza-Zazueta *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 557.

No. 17–8545. Bentley *v.* Clark, Superintendent, State Correctional Institution at Albion, et al. C. A. 3d Cir. Certiorari denied.

No. 17–8546. Beckham *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 145.

No. 17–8547. Anderson *v.* Andrews, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 790.

No. 17–8549. BORDEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 441.

No. 17–8550. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8551. ADKINS *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8554. BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 693.

No. 17–8560. KELLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 3d 1037.

No. 17–8562. PALMER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 17–8565. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8569. COOPER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 342 Ga. App. 351, 801 S. E. 2d 589.

No. 17–8571. CRANE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 123.

No. 17–8607. SPAIN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 17–1337. ALCON LABORATORIES, INC., ET AL. *v.* COTTRELL ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 874 F. 3d 154.

No. 17–1366. LESTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari before judgment denied.

No. 17–1370. UNITED STATES EX REL. KING ET AL. *v.* SOLVAY PHARMACEUTICALS, INC. C. A. 5th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 871 F. 3d 318.

No. 17–8515. BROWN *v.* MOONEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, ET AL. C. A. 3d Cir.

Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–5420. BELSER *v.* JAMES ET AL., 583 U. S. 1060;

No. 17–6144. ALLEN *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 583 U. S. 1001;

No. 17–6565. BINGHAM *v.* BLAKELY, WARDEN, 583 U. S. 1043;

No. 17–7135. SPICER *v.* TENNESSEE, 583 U. S. 1129;

No. 17–7254. KELLEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 583 U. S. 1170;

No. 17–7431. WILLIAMS *v.* BLANCHARD ET AL., 583 U. S. 1187;

No. 17–7570. DICKEY *v.* SAMUEL, *ante*, p. 907;

No. 17–7576. SALERNO *v.* DEPARTMENT OF THE INTERIOR, *ante*, p. 907;

No. 17–7594. WILLIAMS *v.* UNITED STATES, 583 U. S. 1161;

No. 17–7600. BASKIN *v.* KANSAS, 583 U. S. 1189;

No. 17–7663. ADKINS *v.* HBL, LLC, *ante*, p. 936;

No. 17–7700. BOLTON *v.* UNITED STATES, 583 U. S. 1190; and

No. 17–7768. CLARK *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 583 U. S. 1192. Petitions for rehearing denied.

No. 16–9563. MENDES DA COSTA *v.* MARCUCILLI ET AL., 583 U. S. 856. Motion of petitioner for leave to file petition for rehearing denied.

MAY 25, 2018

Miscellaneous Order

No. 17–773. CULBERTSON *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION. C. A. 11th Cir. [Certiorari granted, *ante* p. 992.] Amy Weil, Esq., of Atlanta, Ga., is invited to brief and argue this case as *amicus curiae* in support of judgment below.

MAY 29, 2018

Appeal Dismissed

No. 17–1339. AGRE ET AL. *v.* WOLF, GOVERNOR OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. dismissed as moot. Reported below: 284 F. Supp. 3d 591.

Certiorari Granted—Vacated and Remanded

No. 16–996. UNITED HEALTHCARE SERVICES, INC. *v.* RIEDERER. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Epic Systems Corp.* v. *Lewis*, *ante*, p. 497. Reported below: 670 Fed. Appx. 419.

Certiorari Dismissed

No. 17–8715. BAKER *v.* WILLIAMS, WARDEN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 17M122. KEHANO *v.* SEQUEIRA. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17M123. BROWN *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 16–1363. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL. *v.* PREAP ET AL.; and WILCOX, ACTING FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* KHOURY ET AL. C. A. 9th Cir. [Certiorari granted, 583 U. S. 1179.] Motion of petitioners to dispense with printing joint appendix granted.

No. 17–7505. MADISON *v.* ALABAMA. Cir. Ct. Mobile County, Ala. [Certiorari granted, 583 U. S. 1155.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–8797. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

No. 17–8794. IN RE SPENGLER. 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. 17–8225. IN RE CHRISTIAN. Petition for writ of mandamus denied.

No. 17–1403. IN RE SIMMONS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 16–689. National Labor Relations Board *v.* 24 Hour Fitness USA, Inc.; and

No. 16–701. Sanders *v.* National Labor Relations Board et al. C. A. 5th Cir. Certiorari denied.

No. 16–800. National Labor Relations Board *v.* PJ Cheese, Inc. C. A. 5th Cir. Certiorari denied.

No. 16–801. National Labor Relations Board *v.* SF Markets, L. L. C., dba Sprouts Farmers Market. C. A. 5th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 815.

No. 17–935. Planned Parenthood of Arkansas & Eastern Oklahoma et al. *v.* Jegley et al. C. A. 8th Cir. Certiorari denied. Reported below: 864 F. 3d 953.

No. 17–1035. Hoever *v.* Belleis et al. C. A. 11th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 908.

No. 17–1146. Jacobs *v.* Oath for Louisiana, Inc., et al. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2016–1060 (La. App. 4 Cir. 6/22/17), 221 So. 3d 241.

No. 17–1152. Contest Promotions, LLC *v.* City and County of San Francisco, California (two judgments). C. A. 9th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 665 (first judgment); 874 F. 3d 597 (second judgment).

No. 17–1210. Henry et al. *v.* Weiss, Liquidation Trustee of the Walldesign Liquidating Trust, Successor in Interest to the Official Committee of Unsecured Creditors of Walldesign, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 3d 954.

No. 17–1329. Snelling *v.* Woodfin et al. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 524 S. W. 3d 90.

No. 17–1333. Ogunsalu *v.* California. App. Div., Super. Ct. Cal., County of San Diego. Certiorari denied.

No. 17–1336. Coulter *v.* Lindsay et al. Super. Ct. Pa. Certiorari denied. Reported below: 159 A. 3d 947.

No. 17–1342. GASCHO ET AL. *v.* GLOBAL FITNESS HOLDINGS, LLC, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 3d 795.

No. 17–1352. HARRIS *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 3d 682.

No. 17–1358. FAUNTROY *v.* BANK OF NEW YORK. Ct. App. D. C. Certiorari denied.

No. 17–1360. STRATTON *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 176.

No. 17–1361. ROEMER *v.* ATTORNEY GRIEVANCE COMMITTEE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 36.

No. 17–1363. MILLER *v.* GRUENBERG, CHAIRMAN, FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 204.

No. 17–1365. BEZET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 336.

No. 17–1372. BYNUM *v.* MAPLEBEAR INC., DBA INSTACART. C. A. 2d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 23.

No. 17–1378. STANDLEY *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 715 Fed. Appx. 998.

No. 17–1379. ATKINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 830.

No. 17–1396. SHAFER *v.* PADILLA. C. A. 9th Cir. Certiorari denied. Reported below: 868 F. 3d 1110.

No. 17–1399. UNITED STATES EX REL. IBANEZ ET AL. *v.* BRISTOL-MYERS SQUIBB CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 3d 905.

No. 17–1401. ROZBICKI *v.* CHIEF DISCIPLINARY COUNSEL. Sup. Ct. Conn. Certiorari denied. Reported below: 326 Conn. 686, 167 A. 3d 351.

No. 17–1436. MEYER *v.* WILKIE, ACTING SECRETARY OF VETERANS AFFAIRS. C. A. 2d Cir. Certiorari denied. Reported below: 722 Fed. Appx. 26.

No. 17–1441. KIRTON ET AL. *v.* VALLEY HEALTH SYSTEM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 522.

No. 17–1447. PILVER *v.* HILLSBOROUGH COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 585.

No. 17–1448. ROBINSON ET AL. *v.* SESSIONS, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 721 Fed. Appx. 20.

No. 17–1451. CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF OMNI NATIONAL BANK, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 764.

No. 17–1465. GRAHAM-SULT ET AL. *v.* CLAINOS. C. A. 9th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 562.

No. 17–6085. HIGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 17–7213. LEE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 151 Ohio St. 3d 123, 2017-Ohio-7826, 86 N. E. 3d 322.

No. 17–7233. BELTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 151 Ohio St. 3d 124, 2017-Ohio-7827, 86 N. E. 3d 323.

No. 17–7234. QURASH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143412, 72 N. E. 3d 1272.

No. 17–7484. HESLOP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 485.

No. 17–7609. WRIGHT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2017 IL 119561, 91 N. E. 3d 826.

No. 17–7657. ANDERSON *v.* DUCART, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 905.

No. 17–7884. BADMUS *v.* MUTUAL OF OMAHA INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 260.

No. 17–7924. WILLIAMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 226 So. 3d 758.

No. 17–8128. RIVERA *v.* INFERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 236.

No. 17–8174. PARKER *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied.

No. 17–8176. KEITH *v.* OHIO. Ct. App. Ohio, 3d App. Dist., Crawford County. Certiorari denied. Reported below: 2017-Ohio-5488.

No. 17–8187. SIMMONS *v.* GARRETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 323.

No. 17–8201. WOGENSTAHL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 150 Ohio St. 3d 571, 2017-Ohio-6873, 84 N. E. 3d 1008.

No. 17–8205. SCARZO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 17–8206. EDWARDS *v.* KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 17–8208. BURNETT *v.* BAC HOME LOANS SERVICING, LP, ET AL. C. A. 7th Cir. Certiorari denied.

No. 17–8216. WITHAM *v.* NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 233.

No. 17–8217. WARD *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 17–8219. YERMAL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 17–8221. ARMANDO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 17–8222. SCOTT *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8230. WEST *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 493.

No. 17–8235. YAZDCHI *v.* JPMORGAN CHASE BANK, N. A. C. A. 5th Cir. Certiorari denied.

No. 17–8236. TWILEGAR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 228 So. 3d 550.

No. 17–8237. WASHINGTON *v.* GRIFFIN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 3d 395.

No. 17–8239. BUXTON *v.* THOMPSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MERCER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8241. CASHNER *v.* WIDUP ET AL. C. A. 7th Cir. Certiorari denied.

No. 17–8242. SIERRA *v.* SHAPIRO, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8247. DONOVAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 541 S. W. 3d 196.

No. 17–8248. CIOTTA *v.* HOLLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8249. PEROTTI *v.* O'BOYLE ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–8256. CROMARTIE *v.* ALABAMA STATE UNIVERSITY ET AL. Sup. Ct. Ala. Certiorari denied.

No. 17–8273. BROWER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 17–8277. ANAYA *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 17–8279. BRYANT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 17–8290. WRIGHT *v.* BAYVIEW LOAN SERVICING, LLC, ET AL. (two judgments). C. A. 9th Cir. Certiorari denied. Reported below: 658 Fed. Appx. 344 (first judgment); 659 Fed. Appx. 438 (second judgment).

No. 17–8319. DOREMUS *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION. C. A. 6th Cir. Certiorari denied.

No. 17–8326. WILLIS *v.* LACKNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8329. CARTER *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8391. VAUGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 162.

No. 17–8424. ABELA *v.* WASHINGTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied.

No. 17–8430. DICOSOLA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 867 F. 3d 793.

No. 17–8478. FOREMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8520. BROWN *v.* LEWIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 139.

No. 17–8533. STRINGER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 170 A. 3d 1200.

No. 17–8552. BOOKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 130177–U.

No. 17–8561. LLEWLYN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 879 F. 3d 1291.

No. 17–8563. CRUMP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8570. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 3d 869.

No. 17–8583. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8588. LERMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 3d 628.

No. 17–8590. PHAM *v.* KIRKPATRICK, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 711 Fed. Appx. 67.

No. 17–8591. COAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 246.

No. 17–8594. DONNELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8600. CARBAJAL-VALDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 3d 778.

No. 17–8601. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 880 F. 3d 80.

No. 17–8602. ALFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 567.

No. 17–8604. MCGREGOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 17–8605. PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 296.

No. 17–8606. CISNEROS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8614. VOLKMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8615. SOTOLONGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 958.

No. 17–8617. TYREKE H. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 170406, 89 N. E. 3d 914.

No. 17–8618. DE JESUS VARELA, AKA ISAGUIRES-VARELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 504.

No. 17–8619. TOLLIVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 244.

No. 17–8621. MARIN-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 634.

No. 17–8626. PLEDGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 720.

No. 17–8628. COVINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 880 F. 3d 129.

No. 17–8630. HICKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 708 Fed. Appx. 78.

No. 17–8631. LOBO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 496.

No. 17–8633. BALTIMORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8634. YOUKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 492.

No. 17–8636. WITHROW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 769.

No. 17–8638. HOSKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 876 F. 3d 942.

No. 17–8640. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 3d 713.

No. 17–8642. MANUEL CERVANTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 266.

No. 17–8648. BANKSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 307.

No. 17–8649. GUTHRIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 199.

No. 17–8651. BUENO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 158.

No. 17–8660. RODRIGUEZ CUYA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 720.

No. 17–8665. VIRAMONTES-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 310.

No. 17–8667. RHODES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 780.

No. 17–8669. JAMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 690.

No. 17–8671. DEMERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 526.

No. 17–8672. ROBINSON *v.* MCFADDEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 154.

No. 17–8673. MCCANDLESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8675. DUNNAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8677. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 228.

No. 17–8679. MARTIN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 240 So. 3d 1047.

No. 17–8684. WILLIAMSON *v.* PASTRANA, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 17–8694. BENITEZ *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 17–8695. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 842.

No. 17–8696. LOPEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8697. LOUISSAINT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8698. CHUN HEI LAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 850.

No. 17–8700. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 887 F. 3d 795.

No. 17–8704. ODOFFIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 365.

No. 17–8705. AZOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 881 F. 3d 1.

No. 17–8706. MCCLOUD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8709. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8711. MARQUEZ AREVALO *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8714. GORDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 316.

No. 17–8721. MONTINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8726. TURNER *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 17–8727. STACKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8728. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 477.

No. 17–8735. MADRID *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 392.

No. 17–8736. KEYS *v.* FAULK ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 787.

No. 17–8738. CABELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–8334. CHON *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 718 Fed. Appx. 653.

No. 17–8611. SOREIDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 17–8659. ALBANESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–1024. DAWSON ET AL. *v.* CITY OF GRAND HAVEN, MICHIGAN, *ante*, p. 916;

No. 17–6994. MILNER *v.* PENNSYLVANIA, 583 U. S. 1125;

No. 17–7144. WINDHAM *v.* HARMON LAW OFFICES, P. C., ET AL., 583 U. S. 1157;

No. 17–7235. JOHNSON *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, 583 U. S. 1169;

No. 17–7263. STEELE-KLEIN *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 117, ET AL., 583 U. S. 1184;

No. 17–7284. WILLIAMS *v.* VICTORIA'S SECRET, 583 U. S. 1158;

No. 17–7316. RIVERS *v.* SANZONE ET AL., 583 U. S. 1185;

No. 17–7418. KHATANA *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, 583 U. S. 1187;

No. 17–7434. THOMPSON *v.* TEEBAGY ET AL., 583 U. S. 1188;

No. 17–7481. RICHARD *v.* TEXAS, *ante*, p. 906;

No. 17–7625. CONNER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL., *ante*, p. 919;

No. 17–7760. JENKINS *v.* MISSISSIPPI, 583 U. S. 1192; and

No. 17–7913. SCHUM *v.* FEDERAL COMMUNICATIONS COMMISSION, *ante*, p. 920. Petitions for rehearing denied.

No. 17–7720. DERROW *v.* UNITED STATES, 583 U. S. 1207. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

JUNE 1, 2018

Dismissal Under Rule 46

No. 17–1241. WILLIAMS *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari dismissed under this Court's Rule 46.1.

JUNE 4, 2018

Dismissal Under Rule 46

No. 17–1137. UNITED THERAPEUTICS CORP. *v.* STEADYMED LTD. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 702 Fed. Appx. 990.

Appeal Dismissed

No. 17–1368. SCARNATI, SENATE PRESIDENT PRO TEMPORE *v.* AGRE ET AL. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction. Reported below: 284 F. Supp. 3d 591.

Certiorari Granted—Vacated and Remanded. (See No. 17–654, *ante*, p. 726.)

Certiorari Dismissed

No. 17–8427. STRAW *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 17M124. TUCKER *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION; and

No. 17M125. DAVIS *v.* ANDERSON ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17–654. AZAR, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J. D., *ante*, p. 726. Motion of petitioners to lodge nonrecord material under seal with redacted copies for the public record granted.

No. 17–1183. AIRLINE SERVICE PROVIDERS ASSN. ET AL. *v.* LOS ANGELES WORLD AIRPORTS ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17–8826. IN RE JACKSON. Petition for writ of habeas corpus denied.

No. 17–8836. IN RE CARBAJAL. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 17–8288. In re Ramsey. Petition for writ of mandamus denied.

No. 17–8302. In re Doe. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 17–951. Vitol S. A. et al. *v.* Autoridad de Energia Electrica de Puerto Rico. C. A. 1st Cir. Certiorari denied. Reported below: 859 F. 3d 140.

No. 17–1034. Fernandez-Rundle *v.* McDonough. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 3d 1314.

No. 17–1111. J. B. Hunt Transport, Inc. *v.* Ortega et al. C. A. 9th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 589.

No. 17–1176. Rankin *v.* Longoria et al. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 699.

No. 17–1179. American Economy Insurance Co. et al. *v.* New York et al. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 3d 136, 87 N. E. 3d 126.

No. 17–1185. Mayor and City Council of the City of Baltimore, Maryland, et al. *v.* Humbert. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 3d 546.

No. 17–1197. Laul *v.* Los Alamos National Laboratories. C. A. 10th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 832.

No. 17–1203. Singh *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 711 Fed. Appx. 108.

No. 17–1246. Whirlpool Corp. *v.* Homeland Housewares, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 865 F. 3d 1372.

No. 17–1371. Non *v.* Comcast, Inc., dba Comcast Cable Communications Management LLC, et al. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 920.

No. 17–1385. Dickerson *v.* Quiroz. C. A. 9th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 646.

No. 17–1387. LeMaster et al. *v.* Federal National Mortgage Association. Ct. App. Minn. Certiorari denied.

No. 17–1400. Esrey et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 707 Fed. Appx. 749.

No. 17–1402. Durant *v.* District of Columbia. C. A. D. C. Cir. Certiorari denied. Reported below: 875 F. 3d 685.

No. 17–1413. Zebari *v.* CVS Caremark Corp. et al. C. A. 6th Cir. Certiorari denied.

No. 17–1418. Hammann *v.* 1–800 Ideas, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 956.

No. 17–1435. O'Leary *v.* Office of Personnel Management et al. C. A. Fed. Cir. Certiorari denied. Reported below: 708 Fed. Appx. 669.

No. 17–1458. Luo *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 16 Cal. App. 5th 663, 224 Cal. Rptr. 3d 526.

No. 17–1460. Rohn et al. *v.* Viacom International, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 319.

No. 17–1469. Myers *v.* Montana (three judgments). Sup. Ct. Mont. Certiorari denied.

No. 17–1491. Musselwhite et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 958.

No. 17–1519. Homes for America, Inc. *v.* Sunoco Pipeline, L. P. Commw. Ct. Pa. Certiorari denied. Reported below: 167 A. 3d 309.

No. 17–1520. Blume et al. *v.* Sunoco Pipeline, L. P. Commw. Ct. Pa. Certiorari denied. Reported below: 167 A. 3d 310.

No. 17–7222. St. Aubin *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 537 S. W. 3d 39.

No. 17–7298. Goodwin *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 3d 636.

No. 17–7407. MARTINSON *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 241 Ariz. 93, 384 P. 3d 307.

No. 17–7410. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 582.

No. 17–7568. PITTSINGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 3d 446.

No. 17–7641. CRUZ-GARCIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7689. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–8261. LATORRE *v.* ADRIAN ET AL. Sup. Ct. Fla. Certiorari denied.

No. 17–8275. BLACK *v.* MAYS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 3d 734.

No. 17–8283. SCOTT *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2017 IL App (5th) 140261–U.

No. 17–8284. SIMMONS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 17–8285. RIVERA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8286. SAUNDERS *v.* STEPHAN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 194.

No. 17–8295. CARRILLO *v.* SEXTON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8296. CABOT *v.* MELVIN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–8297. O'DELL *v.* PLUMLEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 139.

No. 17–8301. ROBERSON *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 17–8304. WILLIAMS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 294 Va. 25, 810 S. E. 2d 885.

No. 17–8306. WRIGHT *v.* ERFE, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 17–8309. EDWARDS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8314. TURNER *v.* BOWLES. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 285.

No. 17–8315. WIRTH *v.* NEVADA. Ct. App. Nev. Certiorari denied. Reported below: 133 Nev. 1095.

No. 17–8321. STESHENKO *v.* ALBEE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 869.

No. 17–8324. WELLS *v.* HARRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8325. VOLINO *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8327. LEE *v.* GRIFFITH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 17–8328. WILLIAMS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8338. MAPS *v.* VENZER, JUDGE, 11TH JUDICIAL CIRCUIT OF FLORIDA, MIAMI DADE COUNTY, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–8350. MOHAJER *v.* JPMORGAN CHASE BANK, N. A., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 592.

No. 17–8351. JACKSON *v.* BOUCHARD. C. A. 6th Cir. Certiorari denied.

No. 17–8353. MATTHEWS *v.* ASTORINO, COUNTY EXECUTIVE, WESTCHESTER COUNTY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 17–8357. HARDEN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 231 Md. App. 712.

No. 17–8358. HUGHES *v.* BANK OF AMERICA. C. A. 4th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 92.

No. 17–8362. HERRINGTON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 158.

No. 17–8363. HIRMIZ *v.* NEW HARRISON HOTEL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 475.

No. 17–8373. GLOVER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 151263.

No. 17–8442. MCINTYRE *v.* BP EXPLORATION & PRODUCTION, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 546.

No. 17–8444. FLORES GONZALEZ *v.* FLORIDA ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 233 So. 3d 1159.

No. 17–8573. EL, AKA LEJON-TWIN EL, FKA HILTON *v.* MARINO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 722 Fed. Appx. 262.

No. 17–8595. WILLIAMS *v.* ROBERTSON, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8598. SMITH *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 237 So. 3d 954.

No. 17–8647. ADAMS *v.* ALASKA. Ct. App. Alaska. Certiorari denied. Reported below: 390 P. 3d 1194.

No. 17–8653. MABRY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 17–8662. SKLYARSKY *v.* KOCORAS, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 17–8701. BROCK *v.* HOOKS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8720. BOOKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8723. DUCKETT *v.* MARSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT BENNER TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8729. RODRIGUEZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 230 So. 3d 1249.

No. 17–8731. ELIAS JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–8734. JEFFERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8743. NAPOLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 17–8747. TAC TRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 329.

No. 17–8759. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 226.

No. 17–8760. COLON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 125.

No. 17–8762. BEIERLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 782.

No. 17–8769. SENSENIG ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 139.

No. 17–8771. CLEMENT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8772. NORMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 121.

No. 17–8774. HARDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 643.

No. 17–8782. HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 241.

No. 17–8784. DALE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8802. Oregon-Mendoza *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 893.

No. 17–8803. Alberto Nunez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 888.

No. 17–8804. Willis *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 17–8806. Walker *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 759.

No. 17–8807. Kenney *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 551.

No. 17–8809. Goossen *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 608.

No. 17–8818. Baker *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 17–1390. Filson, Warden, et al. *v.* Browning. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 875 F. 3d 444.

No. 17–6883. Trevino *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 3d 545.

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

The first time this Court considered petitioner Carlos Trevino's case, it held pursuant to *Martinez* v. *Ryan*, 566 U. S. 1 (2012), that a "'procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel . . . was ineffective,'" and if, as in Texas, the "state procedural framework . . . makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino* v. *Thaler*, 569 U. S. 413, 429 (2013) (quoting *Martinez*, 566 U. S., at 17). Having emphasized that the right to adequate

assistance of trial counsel is "critically important," 569 U. S., at 428, the Court remanded Trevino's case with the expectation that, if Trevino could establish that his underlying ineffective-assistance-of-trial-counsel claim was substantial and that his initial-review counsel was ineffective, courts would afford him meaningful review of the underlying claim.

Unfortunately, that is not what happened. When the Court of Appeals for the Fifth Circuit ultimately considered whether Trevino was prejudiced by his trial counsel's failure to investigate and present evidence of his fetal alcohol spectrum disorder (FASD), the panel majority did not properly "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003). Rather, the majority dismissed the new FASD evidence because it purportedly created a "significant double-edged problem" in that it had both mitigating and aggravating aspects, and stopped its analysis short without reweighing the totality of all the evidence. 861 F. 3d 545, 551 (2017). That truncated approach is in direct contravention of this Court's precedent, which has long recognized that a court cannot simply conclude that new evidence in aggravation cancels out new evidence in mitigation; the true impact of new evidence, both aggravating and mitigating, can only be understood by asking how the jury would have considered that evidence in light of what it already knew.

Although this Court is not usually in the business of error correction, this case warrants our intervention and summary disposition. I respectfully dissent from the Court's refusal to correct the Fifth Circuit's flagrant error.

I

A

Under *Strickland* v. *Washington*, 466 U. S. 668 (1984), to establish that trial counsel's "deficient performance prejudiced the defense," a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 687, 694. For purposes of a mitigation-investigation claim like this one, a court must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Sears* v. *Upton*, 561 U. S. 945, 955–956 (2010) (*per curiam*) (inter-

nal quotation marks and alteration omitted); *Wiggins*, 539 U. S., at 534.

Where, as here, new evidence presented during postconviction proceedings includes both mitigating and aggravating factors, a court still must consider all of the mitigating evidence alongside all of the aggravating evidence. The new evidence must not be evaluated in isolation. Moreover, the court must step into the shoes of the jury, and review the evidence as the jury would have in the first instance. See *Williams* v. *Taylor*, 529 U. S. 362, 398 (2000); *Rompilla* v. *Beard*, 545 U. S. 374, 393 (2005).

In Texas, a jury at the penalty phase of a capital trial first considers whether there is a probability that the defendant will be a future threat to society, Tex. Code Crim. Proc. Ann., Art. 37.071, § (2)(b)(1) (Vernon Cum. Supp. 2017), and whether the defendant caused, intended to cause, or anticipated a death, § 2(b)(2). Only if the state has proved those two issues beyond a reasonable doubt will the jury then consider the effect of mitigating evidence on the sentence. §§ 2(c), (g).[1] If even one juror decides that, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed," the court must impose a life sentence. §§ 2(e)(1), (f)(2), (g).

B

With that framework in mind, consider the facts of this case.[2] During the penalty-phase proceedings, the State presented evidence of Trevino's juvenile criminal record and adult convictions.

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[1] If at least one juror decides either of those two issues in the negative, the court must impose a life sentence regardless of the effect of mitigating circumstances. See Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(g).

[2] The procedural history of this case is complex. For present purposes, it is sufficient to note that after this Court's remand, Trevino filed a second amended federal habeas petition. The District Court denied relief. *Trevino* v. *Stephens*, 2015 WL 3651534 (WD Tex., June 11, 2015). The Fifth Circuit granted a certificate of appealability and affirmed the District Court's denial of relief solely on the basis that, on the merits, Trevino could not establish that he was prejudiced by his trial counsel's failure to introduce additional mitigating evidence. See 861 F. 3d 545, 548–551 (2017). Judge Dennis dissented from that decision. *Id.*, at 551–557.

The jury also heard uncontroverted testimony that Trevino was a member of a street gang and a violent prison gang, and, needless to say, the jurors were aware that they had just convicted Trevino of capital murder.

With respect to mitigation, Trevino's counsel presented just one witness, Trevino's aunt, who testified that

> "'(1) she had known [Trevino] all his life, (2) [his] father was largely absent throughout [his] life, (3) [his] mother "has alcohol problems right now," (4) [his] family was on welfare during his childhood, (5) [Trevino] was a loner in school, (6) [Trevino] dropped out of school and went to work for his mother's boyfriend doing roofing work, (7) [Trevino] is the father of one child and is good with children, often taking care of her two daughters, and (8) she knows [he] is incapable of committing capital murder.'" 861 F. 3d, at 547.

With only that mitigation before them, the jury deliberated for approximately eight hours before it unanimously concluded that the State satisfied its burden of showing that Trevino was a continuing threat to society; that he had caused, intended to cause, or anticipated the death of a person; and that the mitigating circumstances were insufficient to warrant a life sentence instead of a death sentence. *Ibid.*

In addition to this evidence presented at trial, Trevino offered new mitigating evidence in support of his habeas petition, including testimony from expert and lay witnesses, relating to his fetal alcohol spectrum disorder. Dr. Rebecca H. Dyer, Ph. D., a clinical and forensic psychologist, reported that Trevino "functions 'within the low average range of intellectual functioning,' and has a 'history of employing poor problem-solving strategies, attentional deficits, poor academic functioning, memory difficulties, and history of substance abuse.'" *Id.*, at 553 (Dennis, J., dissenting). She further stated:

> "'[Trevino's] history of [FASD] clearly had an impact on his cognitive development, academic performance, social functioning, and overall adaptive functioning. These factors, along with his significant history of physical and emotional abuse, physical and emotional neglect, and social deprivation clearly contributed to [Trevino's] ability to make appropriate decisions and choices about his lifestyle, behaviors and actions,

> his ability to withstand and ignore group influences, and his ability to work through and adapt to frustration and anger.'" *Ibid.* (alterations in original).

She concluded that Trevino's FASD "'would . . . have impacted any of [his] decisions to participate in or refrain from any activities that resulted in his capital murder charges,'" *ibid.* (ellipsis and alterations in original), even if the condition "'would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense,'" *id.*, at 549 (majority opinion).

Dr. Paul Conner, Ph. D., a clinical neurologist, further reported that "Trevino demonstrated deficiencies in eight cognitive domains, where only three are necessary for a diagnosis of FASD."[3] *Id.*, at 549–550. Trevino's "'daily functioning skills are essentially at a level that might be expected from an individual who was diagnosed with an intellectual disability.'" *Id.*, at 550.

Trevino's lay witnesses placed his FASD in context. *Ibid.* Linda Mockeridge, a mitigation expert, collected testimony that Trevino's mother drank between 18 and 24 cans of beer every day during her pregnancy; Trevino weighed only four pounds at birth; he was not potty trained until he was six years old and wore diapers at night until he was eight years old; he was developmentally delayed as compared to his siblings; he repeated several grades in elementary school and eventually dropped out of school in the ninth grade, at which point he read at a third-grade level. *Id.*, at 554 (Dennis, J., dissenting).

Trevino's former girlfriend stated that Trevino "was a good father and caring toward her, but was easily influenced by his friends." *Id.*, at 550 (majority opinion). She also recounts instances where he "was violent toward her," including a time when Trevino "put a gun to [her] head" and another when "he attempted to rape her at knifepoint." *Ibid.* She says she "'was always fearful of him,'" and Trevino's brother says he had "wit-

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[3] Trevino showed deficits in "academics, especially math; verbal and visuospatial memory; visuospatial construction; processing speed; executive functioning, especially on tasks that provide lower levels of structure and as such require greater independent problem solving or abstraction skills; communication skills, especially receptive skills; daily living skills, primarily 'community skills'; and socialization skills." *Id.*, at 553–554 (Dennis, J., dissenting).

nessed Trevino be physically violent toward [the former girlfriend], including choking her." *Ibid.*

Trevino's former employer commented that Trevino "was a good worker that lacked initiative." *Ibid.* A friend stated that Trevino is "'peaceful'" and "'not violent,'" but acknowledged that Trevino "'had firearms and was part of a street gang,'" and that when Trevino was released on parole he "went out with friends, 'getting high and drunk and robbing people.'" *Ibid.*

C

Reviewing Trevino's claim *de novo*,[4] the Fifth Circuit majority concluded that the evidence is "insufficient to create a reasonable probability that Trevino would not have been sentenced to death had it been presented to the jury." *Ibid.* The majority first attempted to distinguish *Wiggins*, where the Court concluded that trial counsel rendered ineffective assistance in failing to discover and present mitigation information. "Unlike in *Wiggins*," where the only mitigation presented at trial was "'that Wiggins had no prior convictions,'" the majority reasoned that "Trevino's trial counsel did present mitigating evidence," in that his aunt "covered his mother's alcohol problems, his absent father, his trouble in school, and the love he demonstrated toward [the aunt's] daughters." 861 F. 3d, at 550.

Then, looking at the new evidence in isolation, the majority noted that "[t]he mitigating evidence that Trevino suffers the effects of FASD would be heard along with [his former girlfriend's] graphic testimony of Trevino's violence toward her and [his friend's] testimony that he was involved in gang and criminal activity." *Ibid.* It also found that the additional mitigating evidence was "undermined by Dyer's conclusion that Trevino's FASD 'would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense.'" *Id.*, at 550–551.

In light of these negative aspects of the new evidence, the majority concluded that it created "a significant double-edged problem that was not present in *Wiggins*." *Id.*, at 551. Because "[j]urors could easily infer from this new FASD evidence that

[4] The Court of Appeals' review was *de novo* because the state court "never reached the issue of prejudice." *Rompilla* v. *Beard*, 545 U. S. 374, 390 (2005).

Trevino may have had developmental problems . . . and poor decisionmaking, but that he also engaged in a pattern of violent behavior . . . that he understood was wrong," the majority concluded that he could not establish prejudice. *Ibid.* The analysis stopped there, and over the dissent of one judge, the majority affirmed the denial of habeas relief.

II

In focusing on what it considered to be the "double-edged" nature of the new evidence, the Fifth Circuit majority failed to view the prejudice inquiry holistically. The requisite inquiry demands that courts consider the entirety of the evidence and reweigh it as if the jury had considered it all together in the first instance. *Wiggins*, 539 U. S., at 534. The Court's decisions in *Williams* v. *Taylor*, 529 U. S. 362 (2000), *Rompilla* v. *Beard*, 545 U. S. 374 (2005), and *Wong* v. *Belmontes*, 558 U. S. 15 (2009) (*per curiam*), control the outcome here.

In *Williams*, new mitigation evidence presented in postconviction proceedings revealed that the petitioner was "'borderline mentally retarded,'" experienced severe child abuse and neglect, and as a child spent time in "the custody of the social services bureau." 529 U. S., at 395–396. The Court acknowledged, however, that "not all of the additional evidence was favorable to [the petitioner]." *Id.*, at 396. For example, "juvenile records revealed that he had been thrice committed to the juvenile system" for various offenses. *Ibid.*

The Court did not isolate that new evidence, which included both mitigating and potentially aggravating aspects, and decide that it canceled itself out. Rather, it considered all the evidence and evaluated how the new evidence would have affected the jury's evaluation of future dangerousness and moral culpability in light of what the jury already knew. Specifically, the Court recognized that, although the additional evidence "may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.*, at 398.

In *Rompilla*, the Court again discussed mitigating and aggravating aspects of new evidence presented in support of a failure-to-investigate claim. Postconviction mitigation investigation re-

vealed that the petitioner "'suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions,'" that he read at a third-grade level, and that his mental health problems "'were likely caused by fetal alcohol syndrome.'" 545 U. S., at 392. In addition to this mitigating evidence, the Court acknowledged that new evidence also showed that the petitioner "'early came to [the] attention of juvenile authorities, quit school at 16, [and] started a series of incarcerations . . . often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.'" *Id.*, at 390–391 (some alterations in original).

Despite what the Fifth Circuit majority here would have called the "double-edged" nature of that new evidence, the Court concluded that the petitioner was prejudiced by his counsel's failure to investigate and introduce the evidence because "the undiscovered 'mitigating evidence, *taken as a whole*, "might well have influenced the jury's appraisal" of [Rompilla's] culpability.'" *Id.*, at 393 (alteration in original; emphasis added).

In *Wong*, although the Court concluded that the petitioner had not been prejudiced by his counsel's mitigation presentation, that conclusion resulted from an assessment of all the mitigation and aggravation evidence available in the record, both from trial and from the habeas proceeding. The Court found that much of the new "humanizing evidence" was cumulative of the mitigating evidence presented at trial, 558 U. S., at 22, whereas the new aggravating evidence was "potentially devastating" information that the jury had not heard, namely, that Wong had committed a prior, unrelated murder "execution style," *id.*, at 17. The Court emphasized the importance of considering "all the evidence—the good and the bad—when evaluating prejudice." *Id.*, at 26. It ultimately concluded that because "the worst kind of bad evidence would have come in with the good," all of the mitigating evidence would not have outweighed the aggravating evidence. *Ibid.*

The Fifth Circuit majority's misguided focus on the "double-edged problem" of the new evidence failed to comport with the clear takeaway from *Williams*, *Rompilla*, and *Wong* that a court assessing prejudice based on failure to investigate and present mitigating evidence must consider the value of the newly discovered evidence in the context of the whole record.

That legal error is particularly evident given Texas' capital sentencing scheme. In Texas, if a jury reaches a mitigation in-

quiry, it necessarily already has concluded beyond a reasonable doubt that the defendant poses a continuing threat to society. Tex. Code Crim. Proc. Ann., Art. 37.071, §§2(b)(1), (c), (g). Just as in *Williams*, it may be that the new evidence that Trevino uncovered in his habeas proceedings would "not have overcome [the] finding" that he posed a threat to society. 529 U. S., at 398. In fact, some of the new evidence may bolster that determination. But whether the defendant poses a risk of future dangerousness is not the only inquiry a jury considering death must undertake. Having found future dangerousness, a jury still must consider whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed," in light of variables such as the "circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." §2(e)(1). In that inquiry, as the Court in *Williams* stated, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.*, at 398.

Had the Fifth Circuit majority undertaken a full inquiry, it is unlikely that the new aggravating evidence would have factored substantially into the jury's mitigation decision, as much of the new aggravating evidence "was merely cumulative" of the evidence presented at trial. *Wong*, 558 U. S., at 22. The jury already knew, for example, that Trevino was a member of a street gang and a violent prison gang. The allegations that Trevino assaulted his former girlfriend, although serious, reflected his violent tendencies and were hardly new character-and-background information for a jury that had just convicted Trevino of capital murder. The fact that one expert testified that Trevino's FASD "'would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense,'" 861 F. 3d, at 549, cannot be considered new aggravating evidence given that "Trevino did not assert an insanity defense and the same jury had already found him guilty of the offense," *id.*, at 556 (Dennis, J., dissenting).

In contrast, the new mitigating evidence relating to FASD is completely different in kind from any other evidence that the jury heard about Trevino. At sentencing, the testimony of Trevino's

aunt did not in any sense touch on Trevino's FASD or its implications for his cognitive development.[5] Had the jury learned of the FASD and related testimony, it would have had a much fuller perspective of his character and background. For example, the jurors learned that Trevino dropped out of school early, but they had no idea that his disorder affected his academic functioning, including his problem-solving skills, memory, and reading ability, or that his achievement of basic childhood milestones like potty training had been so severely delayed. As in *Williams*, where the jury had not learned that the petitioner was "'borderline mentally retarded,'" 529 U. S., at 398, the jurors here did not know that Trevino's "'daily functioning skills are essentially at a level that might be expected from an individual who was diagnosed with an intellectual disability.'" 861 F. 3d, at 550.

The jurors heard that Trevino was a good father and often cared for his aunt's children, but they did not know of the childhood abuse and neglect that he overcame to learn to care for other children. The jurors were aware that Trevino's mother had alcohol problems, but they were unaware that she drank 18 to 24 beers per day during pregnancy, resulting in Trevino's developmental delays.

Evidence of FASD also would have helped the jury better understand the circumstances leading to the capital murder charges, as the disorder "'would . . . have impacted any of . . . Trevino's decisions to participate in or refrain from [related] activities.'" *Id.*, at 549. The jurors heard that Trevino had violent tendencies, but they did not know that his FASD impacted his ability to work through and adapt to frustration and anger, or that FASD affected his ability to withstand and ignore group influences.

All in all, the new mitigating evidence had remarkable value, especially given this Court's recognition that evidence relating to

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[5] The Fifth Circuit majority considered the aunt's testimony to have been at least more substantial than the mitigation presented in *Wiggins* v. *Smith*, 539 U. S. 510 (2003), but that point is irrelevant. This Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was only little or no mitigation evidence presented." *Sears* v. *Upton*, 561 U. S. 945, 954 (2010) (*per curiam*) (internal quotation marks omitted). The fact that trial counsel made an "effort to present *some* mitigation evidence" does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.*, at 955 (emphasis in original).

a defendant's cognitive functioning plays an important role in a jury's selection of a penalty. See *Williams*, 529 U. S., at 398; *Rompilla*, 545 U. S., at 391–393. Yet, despite the lack of any other evidence at trial that dealt with Trevino's lifelong cognitive disorder, the Fifth Circuit majority discounted the new evidence in its entirety under its double-edged theory, without considering its potential effect on a jury's "appraisal of [Trevino's] moral culpability." *Williams*, 529 U. S., at 398.

The Fifth Circuit majority's error is glaring, because considering all of the evidence, including that relating to Trevino's FASD, it is obvious that "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U. S., at 537.

III

The Fifth Circuit majority plainly misapplied our precedents. Absent intervention from this Court to correct that error, Trevino remains subject to a death sentence having received inadequate consideration of his claim of ineffective assistance of trial counsel, and with no jury having fairly appraised the substantial new mitigating evidence that a competent counsel would have discovered. That result is indefensible, especially where our failure to intervene sanctions the taking of a life by the state.

I therefore respectfully dissent from the denial of certiorari.

No. 17–7912. R–S–C *v.* SESSIONS, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 869 F. 3d 1176.

No. 17–8674. CAMPBELL *v.* HENRY, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 721 Fed. Appx. 668.

Rehearing Denied

No. 17–1158. MILLS *v.* REICHLE, *ante*, p. 932;
No. 17–1338. FOX *v.* UNITED STATES, *ante*, p. 951;
No. 17–6328. BELL *v.* HOFFNER, WARDEN, ET AL., 583 U. S. 1020;
No. 17–6864. PHILIPPEAUX *v.* UNITED STATES, 583 U. S. 1078;
No. 17–7638. TRIGG *v.* JONES ET AL., *ante*, p. 936;

No. 17–7673. DUNSMORE *v.* CALIFORNIA, *ante*, p. 936;

No. 17–7691. SUAREZ *v.* ANTHEM, INC., FKA WELLPOINT, *ante*, p. 937;

No. 17–7704. SCOTT *v.* PALMER ET AL., 583 U. S. 1190; and

No. 17–7902. IN RE ALEXANDER, 583 U. S. 1178. Petitions for rehearing denied.

JUNE 11, 2018

Certiorari Granted—Vacated and Remanded

No. 17–6904. STERN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 691 Fed. Appx. 105;

No. 17–7035. SEALED APPELLANT *v.* SEALED APPELLEE. C. A. 5th Cir. Reported below: 695 Fed. Appx. 72;

No. 17–7325. DOWELL *v.* UNITED STATES. C. A. 6th Cir. Reported below: 711 Fed. Appx. 280; and

No. 17–7941. ARMSTEAD *v.* UNITED STATES. C. A. 5th Cir. Reported below: 706 Fed. Appx. 219. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Hughes* v. *United States*, *ante*, p. 675.

Certiorari Dismissed

No. 17–8392. VERA *v.* GIPSON, 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. Reported below: 692 Fed. Appx. 397.

No. 17–8749. MCCLINTON *v.* ARKANSAS. Sup. Ct. Ark. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 2017 Ark. 360, 533 S. W. 3d 578.

Miscellaneous Orders

No. D–3022. IN RE DISBARMENT OF ROBINSON. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. 17M126. LYON *v.* CANADIAN NATIONAL RAILWAY CO. ET AL. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 17M127. ANDERSON *v.* FLORIDA; and

No. 17M128. Consalvo *v.* Florida. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17–1236. Republic of Sudan et al. *v.* Owens et al.;
No. 17–1268. Opati, in Her Own Right, and as Executrix of the Estate of Opati, deceased, et al. *v.* Republic of Sudan et al.; and
No. 17–1406. Republic of Sudan et al. *v.* Opati, in Her Own Right, and as Executrix of the Estate of Opati, Deceased, et al. C. A. D. C. Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 17–7123. Eakins *v.* Wilson et al. Ct. Civ. App. Ala. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [583 U. S. 1113] denied.

No. 17–8933. In re Hernandez; and
No. 17–8996. In re Schweder. Petitions for writs of habeas corpus denied.

No. 17–8848. In re Smotherman. Petition for writ of mandamus denied.

Certiorari Denied

No. 16–9649. Kasowski *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 16–9672. C. D. et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 848 F. 3d 1286.

No. 16–9695. Richter *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 17–582. Presbytery of the Twin Cities Area *v.* Eden Prairie Presbyterian Church, dba Prairie Community Church of the Twin Cities. Ct. App. Minn. Certiorari denied.

No. 17–986. IQ Products Co. *v.* WD–40 Co. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 3d 344.

No. 17–995. American Future Systems, Inc., dba Progressive Business Publications, et al. *v.* Acosta, Secre-

TARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 873 F. 3d 420.

No. 17–997. CLEVELAND CLINIC FOUNDATION ET AL. *v.* TRUE HEALTH DIAGNOSTICS LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 859 F. 3d 1352.

No. 17–1074. RIGHT FIELD ROOFTOPS, LLC, ET AL. *v.* CHICAGO CUBS BASEBALL CLUB, LLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 3d 682.

No. 17–1123. MADDOX *v.* MILLER. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 3d 386.

No. 17–1136. PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA ET AL. *v.* EPISCOPAL CHURCH ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 421 S. C. 211, 806 S. E. 2d 82.

No. 17–1211. FLANIGAN'S ENTERPRISES, INC., OF GEORGIA, ET AL. *v.* CITY OF SANDY SPRINGS, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 929.

No. 17–1227. ALIGN CORP. LTD. *v.* BOUSTRED ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 421 P. 3d 163.

No. 17–1233. ESTRADA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 3d 885.

No. 17–1234. ZIMMERMAN *v.* CORBETT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 873 F. 3d 414.

No. 17–1247. SUN LIFE ASSURANCE COMPANY OF CANADA *v.* JACKSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 877 F. 3d 698.

No. 17–1259. BOARD OF SCHOOL TRUSTEES OF MADISON CONSOLIDATED SCHOOLS ET AL. *v.* ELLIOTT. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 3d 926.

No. 17–1388. LOPEZ GARZA *v.* CITIGROUP INC. C. A. 3d Cir. Certiorari denied. Reported below: 724 Fed. Appx. 95.

No. 17–1407. ROEDER *v.* SCHMIDT, ATTORNEY GENERAL OF KANSAS. Sup. Ct. Kan. Certiorari denied.

No. 17–1409. CLASSEN IMMUNOTHERAPIES, INC. *v.* ELAN PHARMACEUTICALS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 698 Fed. Appx. 1035.

No. 17–1410. ZHAO *v.* YOUNG. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 17–1414. LAMBERT *v.* SESSIONS, ATTORNEY GENERAL, ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–1415. ZORA *v.* WINN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–1416. VAJK *v.* YOUNG ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–1422. WEST *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 17–1424. HUCUL *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 542.

No. 17–1426. FRIENDS OF ANIMALS ET AL. *v.* FISH AND WILDLIFE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 3d 1000.

No. 17–1429. KIM *v.* HOSPIRA, INC. C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 287.

No. 17–1464. BROADNAX ET AL. *v.* WILLIAMS ET AL. Ct. App. D. C. Certiorari denied.

No. 17–1473. FAST FELT CORP. *v.* OWENS CORNING. C. A. Fed. Cir. Certiorari denied. Reported below: 873 F. 3d 896.

No. 17–1481. GREEN *v.* MNUCHIN, SECRETARY OF THE TREASURY. C. A. 9th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 572.

No. 17–1493. MISCEVIC *v.* ESTATE OF M. M. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 3d 927.

No. 17–1506. NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC. *v.* PENNSYLVANIA DEPARTMENT OF REVENUE. Sup. Ct. Pa. Certiorari denied. Reported below: 642 Pa. 729, 171 A. 3d 682.

No. 17–1523. DUNLAP *v.* MNUCHIN, SECRETARY OF THE TREASURY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–1524. SNOW *v.* NICHOLSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 3d 857.

No. 17–1532. KRAMER *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–1545. REPOSA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 17–6292. RODRIGUEZ-SORIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 3d 1040.

No. 17–6898. CREWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–6908. JAMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 702 Fed. Appx. 24.

No. 17–7046. SPIVEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 3d 1207.

No. 17–7151. VAIL-BAILON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 3d 1293.

No. 17–7188. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7299. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 3d 846.

No. 17–7425. ROUNTREE *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 125.

No. 17–7490. ESPINOZA-BAZALDUA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 737.

No. 17–7667. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7678. MCGUIRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7694. GATHERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 583.

No. 17–7991. DOVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 380.

No. 17–8040. DOE *v.* SESSIONS, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 709 Fed. Appx. 63.

No. 17–8046. RIMMER *v.* JONES, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 3d 1039.

No. 17–8074. COX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 573.

No. 17–8354. HASAN *v.* NAVARRETE. Sup. Ct. Cal. Certiorari denied.

No. 17–8369. GREENWAY *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 866 F. 3d 1094.

No. 17–8388. DUCKETT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 231 So. 3d 393.

No. 17–8396. LOCASCIO *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 832.

No. 17–8397. MACON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8400. MASHAK *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL. Sup. Ct. Minn. Certiorari denied.

No. 17–8406. NUNEZ *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–8419. JEAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 243 Ariz. 331, 407 P. 3d 524.

No. 17–8420. MARTIN *v.* TANNER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–8422. DONAHUE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 174 A. 3d 42.

No. 17–8423. THOMPSON *v.* DOWLING, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 524.

No. 17–8429. SHERRATT *v.* UTAH. Ct. App. Utah. Certiorari denied.

No. 17–8440. RUIZ-RIVERA *v.* COMMONWEALTH OF PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied.

No. 17–8445. JOHNSON *v.* FRAKES, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied.

No. 17–8447. COATES, AKA SIMMONS, AKA THOMAS *v.* SESSIONS, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied.

No. 17–8450. NYABWA *v.* UNKNOWN JAILERS AT CORRECTIONS CORPORATION OF AMERICA. C. A. 5th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 379.

No. 17–8452. FIALA *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 17–8454. HUTCHINGS *v.* ONE NEVADA CREDIT UNION, FKA NEVADA FEDERAL CREDIT UNION. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 862.

No. 17–8459. RICHARDSON *v.* BATTS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8460. SANFORD *v.* LINDAMOOD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8461. CROSBY *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–8463. NYABWA *v.* LYCHNER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 395.

No. 17–8464. NYABWA *v.* CORRECTIONS CORPORATION OF AMERICA. C. A. 5th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 355.

No. 17–8466. GARCIA *v.* FOX, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8468. CLARK *v.* OHIO ADULT PAROLE AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–8470. RYAN *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8501. BOOKER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2017 IL App (3d) 140779–U.

No. 17–8502. AMBROSE *v.* TRIERWEILER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8505. BOZIC *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS. C. A. 3d Cir. Certiorari denied. Reported below: 711 Fed. Appx. 671.

No. 17–8511. WOULARD *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 631.

No. 17–8528. AUSTIN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 3d 757.

No. 17–8531. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 17–8534. STARKS *v.* PARBALL CORP., DBA BALLY'S LAS VEGAS. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 525.

No. 17–8568. DAVIS *v.* NICHOLSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–8585. DON *v.* MILES, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 17–8603. CORDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 394.

No. 17–8612. RICHMOND *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143571–U.

No. 17–8625. MILLER *v.* BUTTS. C. A. 7th Cir. Certiorari denied.

No. 17–8658. EASTWOOD *v.* KNIGHT, SUPERINTENDENT, CORRECTIONAL INDUSTRIAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 17–8692. ACKBAR *v.* WILLIAMS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 795.

No. 17–8713. ANDREW *v.* COSTER ET AL. Sup. Ct. Nev. Certiorari denied.

No. 17–8744. SIMMONDS *v.* OHIO. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2017-Ohio-2739.

No. 17–8754. JACKSON *v.* ALABAMA BOARD OF PARDON AND PAROLES. Ct. Crim. App. Ala. Certiorari denied. Reported below: 268 So. 3d 626.

No. 17–8763. ANGEL GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 403.

No. 17–8765. DE LA CRUZ-GUTIERREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 881 F. 3d 221.

No. 17–8767. SCOTT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 877 F. 3d 30.

No. 17–8783. STOREY *v.* CITY OF ALTON, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 706.

No. 17–8785. STOCKTON *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION, WILLIAMSBURG. C. A. 4th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 724.

No. 17–8790. BARBA *v.* MONTGOMERY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 431.

No. 17–8792. ROSS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 778.

No. 17–8796. CRAVENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 810.

No. 17–8798. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 195.

No. 17–8800. PROCTOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8805. WALKER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 17–8813. MORENO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8814. PINEDA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 810.

No. 17–8819. SPENCER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 238 So. 3d 708.

No. 17–8821. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8823. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8828. DRAPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 882 F. 3d 210.

No. 17–8829. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 190.

No. 17–8831. MIRANDA-ZARCO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8832. WRIGHT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 17–8833. WILLIAMS *v.* KRUEGER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–8835. VERNON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8837. YU HUA WANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 676.

No. 17–8838. THORNTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 17–8840. JOHNSTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 17–8852. THOMAS *v.* LAMANNA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 584.

No. 17–8855. STRAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 152.

No. 17–8858. REYES-ROJAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 17–8859. GOINGS *v.* GROSBOLL. Sup. Ct. Ill. Certiorari denied.

No. 17–8861. CASTRO-CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 619.

No. 17–8862. MERCADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 1018.

No. 17–8863. PEEPLES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 3d 282.

No. 17–8864. TAYLOR *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 230 So. 3d 722.

No. 17–8866. ZENOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 595.

No. 17–8872. MONTOYA-CLAVIJO *v.* CLAY. C. A. 5th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 391.

No. 17–8873. MINOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8874. CHALLONER *v.* SEPANEK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8875. MAYEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 781.

No. 17–8877. BRUNKEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 822.

No. 17–8879. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8880. CHANCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8882. WINDSOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 322.

No. 17–8884. FERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 226.

No. 17–8885. SANGANZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 181.

No. 17–8889. WEDINGTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 3d 418.

No. 17–8893. MUIR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 510.

No. 17–8898. DEFOGGI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 3d 1102.

No. 17–8899. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 649.

No. 17–8921. HEBERT *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 17–8936. ISIDRO *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 17–8940. THOMAS *v.* OHIO. Ct. App. Ohio, 9th App. Dist., Summit County. Certiorari denied.

No. 17–8942. TOLBERT *v.* REDNOUR, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–8954. BARGO *v.* RAUNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 548.

No. 17–1079. WYCKOFF ET AL. *v.* OFFICE OF THE COMMISSIONER OF BASEBALL, DBA MAJOR LEAGUE BASEBALL, ET AL. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 705 Fed. Appx. 26.

No. 17–1235. SESSIONS, ATTORNEY GENERAL *v.* PEGUERO MATEO. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 870 F. 3d 228.

No. 17–1434. CARSON *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

No. 17–1494. RODRIGUEZ-DEPENA *v.* PARTS AUTHORITY, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 877 F. 3d 122.

No. 17–7635. MILLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN and JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 868 F. 3d 1182.

Rehearing Denied

No. 16–6392. TAYLOR *v.* UNITED STATES, *ante*, p. 976;
No. 17–1240. TUERK *v.* FLORIDA BAR, *ante*, p. 933;
No. 17–7650. EVERSON *v.* ARMSTRONG ET AL., *ante*, p. 936;
No. 17–7688. BOWLING *v.* WHITE, WARDEN, *ante*, p. 937;
No. 17–7886. IN RE CALTON, 583 U. S. 1178;
No. 17–7919. DULAURENCE *v.* TELEGEN ET AL., *ante*, p. 939;
No. 17–8016. BOATWRIGHT *v.* UNITED STATES, *ante*, p. 941; and
No. 17–8127. YASITH CHHUN *v.* UNITED STATES, *ante*, p. 944. Petitions for rehearing denied.

No. 17–7715. CASANOVA *v.* ULIBARRI, WARDEN, *ante*, p. 946. Petition for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 26, 2018, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1044. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, 544 U. S. 1151, 547 U. S. 1221, 550 U. S. 983, 556 U. S. 1291, 559 U. S. 1119, 563 U. S. 1045, 569 U. S. 1125, 572 U. S. 1161, 578 U. S. 1031, and 581 U. S. 1029.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2018

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Appellate Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2018

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7.

[See *infra*, pp. 1047–1055.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 8. Stay or injunction pending appeal.

(*a*) *Motion for stay.*

(*1*) *Initial motion in the district court.*—A party must ordinarily move first in the district court for the following relief:

. . . . .

(B) approval of a bond or other security provided to obtain a stay of judgment; or

. . . . .

(*2*) *Motion in the court of appeals; conditions on relief.*—A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

. . . . .

(E) The court may condition relief on a party's filing a bond or other security in the district court.

(*b*) *Proceeding against a security provider.*—If a party gives security with one or more security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the security may be served. On motion, a security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly send a copy to each security provider whose address is known.

. . . . .

Rule 11. Forwarding the record.

. . . . .

(*g*) *Record for a preliminary motion in the court of appeals.*—If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a bond or other security provided to obtain a stay of judgment; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

Rule 25. Filing and service.

(*a*) *Filing.*

(*1*) *Filing with the clerk.*—A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(*2*) *Filing:—method and timeliness.*

(*A*) *Nonelectronic filing.*

(*i*) *In general.*—For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(*ii*) *A brief or appendix.*—A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(*iii*) *Inmate filing.*—If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically by an

inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

- it is accompanied by: a declaration in compliance with 28 U. S. C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or
- the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(*B*) *Electronic filing and signing.*

(*i*) *By a represented person—generally required; exceptions.*—A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(*ii*) *By an unrepresented person—when allowed or required.*—A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(*iii*) *Signing.*—A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(*iv*) *Same as a written paper.*—A paper filed electronically is a written paper for purposes of these rules.

(*3*) *Filing a motion with a judge.*—If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the

judge must note the filing date on the motion and give it to the clerk.

(*4*) *Clerk's refusal of documents.*—The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(*5*) *Privacy protection.*—An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(*b*) *Service of all papers required.*—Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(*c*) *Manner of service.*

(1) Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days.

(2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by elec-

tronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

(*d*) *Proof of service.*

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(*e*) *Number of copies.*—When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Rule 26. Computing and extending time.

(*a*) *Computing time.*—The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

. . . . .

(*4*) *"Last day" defined.*—Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(A)(ii), and 25(a)(2)(A)(iii)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

. . . . .

Rule 28.1. Cross-appeals.

. . . . .

(*f*) *Time to serve and file a brief.*—Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Rule 29. Brief of an amicus curiae.

(*a*) *During initial consideration of a case on the merits.*

(*1*) *Applicability.*—This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(*2*) *When permitted.*—The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a

court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

. . . . .

(*b*) *During consideration of whether to grant rehearing.*

(*1*) *Applicability.*—This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(*2*) *When permitted.*—The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

. . . . .

Rule 31. Serving and filing briefs.

(*a*) *Time to serve and file a brief.*

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

. . . . .

Rule 39. Costs.

. . . . .

(*e*) *Costs on appeal taxable in the district court.*—The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Rule 41. Mandate: contents; issuance and effective date; stay.

(*a*) *Contents.*—Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(*b*) *When issued.*—The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

(*c*) *Effective date.*—The mandate is effective when issued.

(*d*) *Staying the mandate pending a petition for certiorari.*

(*1*) *Motion to stay.*—A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay.

(*2*) *Duration of stay; extensions.*—The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) the party who obtained the stay notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed, in which case the stay continues until the Supreme Court's final disposition.

(*3*) *Security.*—The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(*4*) *Issuance of mandate.*—The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.

FORM 4. AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

. . . . .

12. *State the city and state of your legal residence.*

_____

Your daytime phone number: (___) _____
Your age: _____ Your years of schooling: _____

FORM 7. DECLARATION OF INMATE FILING

_____

[*insert name of court; for example, United States District Court for the District of Minnesota*]

A. B., Plaintiff
v.
C. D., Defendant
} Case No. _____

I am an inmate confined in an institution. Today, [*insert date*], I am depositing the [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U. S. C. § 1746; 18 U. S. C. § 1621).

Sign your name here _____
Signed on _____
[*insert date*]

[Note to inmate filers: *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 26, 2018, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1058. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, 550 U. S. 989, 553 U. S. 1105, 556 U. S. 1307, 559 U. S. 1127, 563 U. S. 1051, 566 U. S. 1045, 569 U. S. 1141, 572 U. S. 1169, 575 U. S. 1049, 578 U. S. 1051, and 581 U. S. 1035.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2018

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2016 and May 2017 Reports of the Advisory Committee on Bankruptcy Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2018

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and new Part VIII Appendix.

[See *infra*, pp. 1061–1076.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 3002.1 Notice relating to claims secured by security interest in the debtor's principal residence.

. . . . .

(*b*) *Notice of payment changes; objection.*

(*1*) *Notice.*—The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(*2*) *Objection.*—A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

. . . . .

(*e*) *Determination of fees, expenses, or charges.*—On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

. . . . .

Rule 5005. Filing and transmittal of papers.

(*a*) *Filing.*

. . . . .

(*2*) *Electronic filing and signing.*

(*A*) *By a represented entity—generally required; exceptions.*—An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(*B*) *By an unrepresented individual—when allowed or required.*—An individual not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(*C*) *Signing.*—A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(*D*) *Same as a written paper.*—A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

. . . . .

Rule 7004. Process; service of summons, complaint.

(*a*) *Summons; service; proof of service.*

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(5), (e)–(j), (*l*), and (m) F. R. Civ. P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F. R. Civ. P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

. . . . .

Rule 7062. Stay of proceedings to enforce a judgment.

Rule 62 F. R. Civ. P. applies in adversary proceedings, except that proceedings to enforce a judgment are stayed for 14 days after its entry.

Rule 8002. Time for filing notice of appeal.

(*a*) *In general.*

. . . . .

(*5*) *Entry defined.*

(A) A judgment, order, or decree is entered for purposes of this Rule 8002(a):

(i) when it is entered in the docket under Rule 5003(a), or

(ii) if Rule 7058 applies and Rule 58(a) F. R. Civ. P. requires a separate document, when the judgment, order, or decree is entered in the docket under Rule 5003(a) and when the earlier of these events occurs:

- the judgment, order, or decree is set out in a separate document; or
- 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a).

(B) A failure to set out a judgment, order, or decree in a separate document when required by Rule 58(a) F. R. Civ. P. does not affect the validity of an appeal from that judgment, order, or decree.

(*b*) *Effect of a motion on the time to appeal.*

(*1*) *In general.*—If a party files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

. . . . .

(*c*) *Appeal by an inmate confined in an institution.*

(*1*) *In general.*—If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an

inmate files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U. S. C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8002(c)(1)(A)(i).

. . . . .

Rule 8006. Certifying a direct appeal to the court of appeals.

. . . . .

(*c*) *Joint certification by all appellants and appelees.*

(*1*) *How accomplished.*—A joint certification by all the appellants and appellees under 28 U. S. C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).

(*2*) *Supplemental statement by the court.*—Within 14 days after the parties' certification, the bankruptcy court or the court in which the matter is then pending may file a short supplemental statement about the merits of the certification.

. . . . .

Rule 8007. Stay pending appeal; bonds; suspension of proceedings.

(*a*) *Initial motion in the bankruptcy court.*

(*1*) *In general.*—Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) the approval of a bond or other security provided to obtain a stay of judgment;

. . . . .

(*c*) *Filing a bond or other security.*—The district court, BAP, or court of appeals may condition relief on filing a bond or other security with the bankruptcy court.

(*d*) *Bond or other security for a trusteee or the United States.*—The court may require a trustee to file a bond or other security when the trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

. . . . .

Rule 8010. Completing and transmitting the record.

. . . . .

(*c*) *Record for a preliminary motion in the district court, BAP, or court of appeals.*—This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a bond or other security provided to obtain a stay of judgment; or
- any other intermediate order.

The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically.

Rule 8011. Filing and service; signature.

(*a*) *Filing.*

. . . . .

(*2*) *Method and timeliness.*

(*A*) *Nonelectronic filing.*

(*i*) *In general.*—For a document not filed electronically, filing may be accomplished by mail addressed to the clerk of the district court or BAP. Except as provided in subdivision (a)(2)(A)(ii) and (iii), filing is timely only if the clerk receives the document within the time fixed for filing.

(*ii*) *Brief or appendix.*—A brief or appendix not filed electronically is also timely filed if, on or before the last day for filing, it is:

- mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid; or
- dispatched to a third-party commercial carrier for delivery within 3 days to the clerk.

(*iii*) *Inmate filing.*—If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(A)(iii). A document not filed electronically by an inmate confined in an institution is timely if it is deposited in the institution's internal mailing system on or before the last day for filing and:

- it is accompanied by a declaration in compliance with 28 U. S. C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or
- the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies this Rule 8011(a)(2)(A)(iii).

(*B*) *Electronic filing.*

(*i*) *By a represented person—generally required; exceptions.*—An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(*ii*) *By an unrepresented individual—when allowed or required.*—An individual not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(*iii*) *Same as a written paper.*—A document filed electronically is a written paper for purposes of these rules.

(*C*) *Copies.*—If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.

. . . . .

(*c*) *Manner of service.*

(*1*) *Nonelectronic service.*—Nonelectronic service may be by any of the following:

(A) personal delivery;

(B) mail; or

(C) third-party commercial carrier for delivery within 3 days.

(*2*) *Electronic service.*—Electronic service may be made by sending a document to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person served consented to in writing.

(*3*) *When service is complete.*—Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(*d*) *Proof of service.*

(*1*) *What is required.*—A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

. . . . .

(*e*) *Signature.*—Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the electronic signature of counsel. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.

Rule 8013. Motions; intervention.

. . . . .

(*f*) *Form of documents; length limits; number of copies.*

. . . . .

(*2*) *Format of an electronically filed document.*—A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the length limits under paragraph (3).

(*3*) *Length limits.*—Except by the district court's or BAP's permission, and excluding the accompanying documents authorized by subdivision (a)(2)(C):

(A) a motion or a response to a motion produced using a computer must include a certificate under Rule 8015(h) and not exceed 5,200 words;

(B) a handwritten or typewritten motion or a response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must include a certificate under Rule 8015(h) and not exceed 2,600 words; and

(D) a handwritten or typewritten reply must not exceed 10 pages.

. . . . .

Rule 8015. Form and length of briefs; form of appendices and other papers.

(*a*) *Paper copies of a brief.*—If a paper copy of a brief may or must be filed, the following provisions apply:

. . . . .

(*7*) *Length.*

(*A*) *Page limitation.*—A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with subparagraph (B).

(*B*) *Type-volume limitation.*

(i) A principal brief is acceptable if it contains a certificate under Rule 8015(h) and:

- contains no more than 13,000 words; or
- uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in item (i).

. . . . .

(*f*) *Local variation.*—A district court or BAP must accept documents that comply with the form requirements of this rule and the length limits set by Part VIII of these rules. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all the form requirements of this rule or the length limits set by Part VIII of these rules.

(*g*) *Items excluded from length.*—In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(*h*) *Certicate of compliance.*

(*1*) *Briefs and documents that require a certificate.*—A brief submitted under Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The individual preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(*2*) *Acceptable form.*—The certificate requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.

Rule 8016. Cross-appeals.

. . . . .

(*d*) *Length.*

(*1*) *Page limitation.*—Unless it complies with paragraph (2), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-volume limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) contains no more than 13,000 words; or

(ii) uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) contains no more than 15,300 words; or

(ii) uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in subparagraph (A).

. . . . .

Rule 8017. Brief of an amicus curiae.

(a) *During initial consideration of a case on the merits.*

(1) *Applicability.*—This Rule 8017(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) *When permitted.*—The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a district court or BAP may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.

(3) *Motion for leave to file.*—The motion must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

(*4*) *Contents and form.*—An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:

(A) a table of contents, with page references;

(B) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(C) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(D) unless the amicus curiae is one listed in the first sentence of subdivision (a)(2), a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(E) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and

(F) a certificate of compliance, if required by Rule 8015(h).

(*5*) *Length.*—Except by the district court's or BAP's permission, an amicus brief must be no more than one-half

the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(*6*) *Time for filing.*—An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

(*7*) *Reply brief.*—Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.

(*8*) *Oral argument.*—An amicus curiae may participate in oral argument only with the district court's or BAP's permission.

(*b*) *During consideration of whether to grant rehearing.*

(*1*) *Applicability.*—This Rule 8017(b) governs amicus filings during a district court's or BAP's consideration of whether to grant rehearing, unless a local rule or order in a case provides otherwise.

(*2*) *When permitted.*—The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(*3*) *Motion for leave to file.*—Rule 8017(a)(3) applies to a motion for leave.

(*4*) *Contents, form, and length.*—Rule 8017(a)(4) applies to the amicus brief. The brief must include a certificate under Rule 8015(h) and not exceed 2,600 words.

(*5*) *Time for filing.*—An amicus curiae supporting the motion for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the motion is filed. An amicus curiae opposing the motion for rehearing must file its brief, accompanied by a motion for filing when neces-

sary, no later than the date set by the court for the response.

Rule 8018.1. District-court review of a judgment that the bankruptcy court lacked the constitutional authority to enter.

If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.

Rule 8021. Costs.

. . . . .

(*c*) *Costs on appeal taxable in the bankruptcy court.*—The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

(1) the production of any required copies of a brief, appendix, exhibit, or the record;

(2) the preparation and transmission of the record;

(3) the reporter's transcript, if needed to determine the appeal;

(4) premiums paid for a bond or other security to preserve rights pending appeal; and

(5) the fee for filing the notice of appeal.

. . . . .

Rule 8022. Motion for rehearing.

. . . . .

(*b*) *Form of the motion; length.*—The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. Except by the district court's or BAP's permission:

(1) a motion for rehearing produced using a computer must include a certificate under Rule 8015(h) and not exceed 3,900 words; and

(2) a handwritten or typewritten motion must not exceed 15 pages.

Rule 9025. Security: proceedings against security providers.

Whenever the Code or these rules require or permit a party to give security, and security is given with one or more security providers, each provider submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.

Appendix:
Length Limits Stated in Part VIII of the Federal Rules of Bankruptcy Procedure

This chart shows the length limits stated in Part VIII of Federal Rules of Bankruptcy Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 8015(g)
- If you are using a word limit or line limit (other than the word limit in Rule 8014(f)), you must include the certificate requires by Rule 8015(h).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monospaced when each occupies the same amount of horizontal space.
- For the limits in Rules 8013 and 8022:
  - You must use the word limit if you produce your on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document type	Word limit	Page limit	Line limit
Motions	8013(f)(3)	• Motion • Response to a motion	5,200	20	Not applicable
	8013(f)(3)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	8015(a)(7)	• Principal brief	13,000	30	1,300
	8015(a)(7)	• Reply brief	6,500	15	650

	Rule	Document type	Word limit	Page limit	Line limit
Parties' briefs (where cross-appeal)	8016(d)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	8016(d)	• Appellee's principal and response brief	15,300	35	1,500
	8016(d)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	8014(f)	• Letter citing supplemental authorities	350	Not applicable	Not applicable
Amicus briefs	8017(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Motion for rehearing	8022(b)	• Motion for rehearing	3,900	15	Not applicable

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 26, 2018, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1078. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, 544 U. S. 1173, 547 U. S. 1233, 550 U. S. 1003, 553 U. S. 1149, 556 U. S. 1341, 559 U. S. 1139, 569 U. S. 1149, 572 U. S. 1217, 575 U. S. 1055, 578 U. S. 1061, and 581 U. S. 1049.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2018

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Civil Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2018

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 5, 23, 62, and 65.1.

[See *infra*, pp. 1081–1086.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5. Serving and filing pleadings and other papers.

. . . . .

(*b*) *Service: how made.*

. . . . .

(*2*) *Service in general.*—A paper is served under this rule by:

(A) handing it to the person;

. . . . .

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

. . . . .

(*3*) *Using court facilities.*—[Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)]

. . . . .

(*d*) *Filing.*

(*1*) *Required filings; certificate of service.*

(*A*) Papers after the complaint.—Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(*B*) *Certificate of service.*—No certificate of service is required when a paper is served by filing it with the

court's electronic-filing system. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(*2*) *Nonelectronic filing.*—A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(*3*) *Electronic filing and signing.*—

(*A*) *By a represented person—generally required; exceptions.*—A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(*B*) *By an unrepresented person—when allowed or required.*—A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(*C*) *Signing.*—A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(*D*) *Same as a written paper.*—A paper filed electronically is a written paper for purposes of these rules.

. . . . .

Rule 23. Class actions.

. . . . .

(*c*) *Certification order; notice to class members; judgment; issues classes; subclasses.*

. . . . .

(*2*) *Notice.*

. . . . .

(*B*) *For (b)(3) classes.*—For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

. . . . .

(*e*) *Settlement, voluntary dismissal, or compromise.*—The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(*1*) *Notice to the class.*

(*A*) *Information that parties must provide to the court.*—The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(*B*) *Grounds for a decision to give notice.*—The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(*2*) *Approval of the proposal.*—If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(*3*) *Identifying agreements.*—The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(*4*) *New opportunity to be excluded.*—If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(*5*) *Class-member objections.*

(*A*) *In general.*—Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(*B*) *Court approval required for payment in connection with an objection.*—Unless approved by the court

after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(*C*) *Procedure for approval after an appeal.*—If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(*f*) *Appeals.*—A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

. . . . .

Rule 62. Stay of proceedings to enforce a judgment.

(*a*) *Automatic stay.*—Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(*b*) *Stay by bond or other security.*—At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(*c*) *Stay of an injunction, receivership, or patent accounting order.*—Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(*d*) *Injunction pending an appeal.*—While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

. . . . .

Rule 65.1. Proceedings against a security provider.

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given with one or more security providers, each provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the security. The security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly send a copy of each to every security provider whose address is known.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 26, 2018, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1088. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, 541 U. S. 1103, 544 U. S. 1181, 547 U. S. 1269, 550 U. S. 1165, and 553 U. S. 1155, 556 U. S. 1363, 559 U. S. 1151, 563 U. S. 1063, 566 U. S. 1053, 569 U. S. 1161, 572 U. S. 1223, and 578 U. S. 1067.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2018

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Criminal Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2018

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 12.4, 45, and 49.

[See *infra*, pp. 1091–1094.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2018, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.4. Disclosure statement.

(*a*) *Who must file.*

(*1*) *Nongovernmental corporate party.*—Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(*2*) *Organizational victim.*—Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(*b*) *Time to file; later filing.*—A party must:

(*1*) file the Rule 12.4(a) statement within 28 days after the defendant's initial appearance; and

(*2*) promptly file a later statement if any required information changes.

Rule 45. Computing and extending time.

. . . . .

(*c*) *Additional time after certain kinds of service.*—Whenever a party must or may act within a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and (E), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 49. Serving and filing papers.

(*a*) *Service on a party.*

(*1*) *What is required.*—Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(*2*) *Serving a party's attorney.*—Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

(*3*) *Service by electronic means.*

(*A*) *Using the court's electronic-filing system.*—A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

(*B*) *Using other electronic means.*—A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.

(*4*) *Service by nonelectronic means.*—A paper may be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; or

(E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(*b*) *Filing.*

(*1*) *When required; certificate of service.*—Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(*2*) *Means of filing.*

(A) *Electronically.*—A paper is filed electronically by filing it with the court's electronic-filing system. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature. A paper filed electronically is written or in writing under these rules.

(B) *Nonelectronically.*—A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(*3*) *Means used by represented and unrepresented parties.*

(*A*) Represented party.—A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(*B*) *Unrepresented party.*—A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

(*4*) *Signature.*—Every written motion and other paper must be signed by at least one attorney of record in the attorney's name—or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(*5*) *Acceptance by the clerk.*—The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(*c*) *Service and filing by nonparties.*—A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(*d*) *Notice of a court order.*—When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.