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OF

THE SUPREME COURT

JUNE 25 THROUGH SEPTEMBER 30, 2018

END OF TERM

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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Vol. 585 (Pp. 529–979; 1012–1058)
UNITED STATES REPORTS
Part 2

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
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CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
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* JUSTICE KENNEDY retired effective July 31, 2018.

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.

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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.)
(For next subsequent allotment, see *post*, p. III.)

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 August 1, 2018, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

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

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For the Seventh Circuit, Elena Kagan, Associate Justice.

For the Eighth Circuit, Neil M. Gorsuch, Associate Justice.

For the Ninth Circuit, John G. Roberts, Jr., Chief 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.

August 1, 2018.

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

INDEX

(Vol. 585 U. S., Part 2)

CUMULATIVE TABLE OF CASES REPORTED

(Vol. 585 U. S., Parts 1 and 2)

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 1001 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1001 *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

OHIO ET AL. *v.* AMERICAN EXPRESS CO. ET AL.

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

No. 16–1454. Argued February 26, 2018—Decided June 25, 2018

Respondent credit-card companies American Express Company and American Express Travel Related Services Company (collectively, Amex) operate what economists call a "two-sided platform," providing services to two different groups (cardholders and merchants) who depend on the platform to intermediate between them. Because the interaction between the two groups is a transaction, credit-card networks are a special type of two-sided platform known as a "transaction" platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. Unlike traditional markets, two-sided platforms exhibit "indirect network effects," which exist where the value of the platform to one group depends on how many members of another group participate. Two-sided platforms must take these effects into account before making a change in price on either side, or they risk creating a feedback loop of declining demand. Thus, striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

Visa and MasterCard—two of the major players in the credit-card market—have significant structural advantages over Amex. Amex competes with them by using a different business model, which focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than the other credit-card companies. Amex must continually invest in its cardholder rewards program to maintain its cardholders' loyalty. But to fund those investments, it must charge merchants higher fees than its rivals. Although this business model has stimulated competitive innovations in the credit-card market, it sometimes causes friction with merchants. To avoid higher fees, merchants sometimes attempt to dissuade cardholders from using Amex cards at the point of sale—a practice known as "steering." Amex places antisteering provisions in its contracts with merchants to combat this.

In this case, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate § 1 of

the Sherman Antitrust Act. The District Court agreed, finding that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders—and that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. The Second Circuit reversed. It determined that the credit-card market is one market, not two. And it concluded that Amex's antisteering provisions did not violate § 1.

Held: Amex's antisteering provisions do not violate federal antitrust law. Pp. 540–552.

(a) Section 1 of the Sherman Act prohibits "unreasonable restraints" of trade. *State Oil Co.* v. *Khan*, 522 U. S. 3, 10. Restraints may be unreasonable in one of two ways—unreasonable *per se* or unreasonable as judged under the "rule of reason." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723. The parties agree that Amex's antisteering provisions should be judged under the rule of reason using a three-step burden-shifting framework. They ask this Court to decide whether the plaintiffs have satisfied the first step in that framework—*i. e.*, whether they have proved that Amex's antisteering provisions have a substantial anticompetitive effect that harms consumers in the relevant market. Pp. 540–542.

(b) Applying the rule of reason generally requires an accurate definition of the relevant market. In this case, both sides of the two-sided credit-card market—cardholders and merchants—must be considered. Only a company with both cardholders and merchants willing to use its network could sell transactions and compete in the credit-card market. And because credit-card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services, they exhibit more pronounced indirect network effects and interconnected pricing and demand. Indeed, credit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole. Pp. 542–547.

(c) The plaintiffs have not carried their burden to show anticompetitive effects. Their argument—that Amex's antisteering provisions increase merchant fees—wrongly focuses on just one side of the market. Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the two-sided credit-card market. They failed to do so. Pp. 547–552.

Syllabus

(1) The plaintiffs offered no evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. It uses higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes it valuable to merchants. In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees: Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted. Pp. 547–549.

(2) The plaintiffs' evidence that Amex's merchant-fee increases between 2005 and 2010 were not entirely spent on cardholder rewards does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 237. There is no such evidence here. Output of credit-card transactions increased during the relevant period, and the plaintiffs did not show that Amex charged more than its competitors. P. 549.

(3) The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while they have been in place, the market experienced expanding output and improved quality. Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Amex's competitors have exploited its higher merchant fees to their advantage. Lastly, there is nothing inherently anticompetitive about the provisions. They actually stem negative externalities in the credit-card market and promote interbrand competition. And they do not prevent competing credit-card networks from offering lower merchant fees or promoting their broader merchant acceptance. Pp. 549–552.

838 F. 3d 179, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 552.

Eric C. Murphy, State Solicitor of Ohio, argued the cause for petitioners and state respondents. With him on the

briefs were *Michael DeWine*, Attorney General of Ohio, *Michael J. Hendershot*, Chief Deputy Solicitor, and *Hannah C. Wilson*, Deputy Solicitor, and the Attorneys General for their respective States as follows: *George Jepsen* of Connecticut, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Brian E. Frosh* of Maryland, *Bill Schuette* of Michigan, *Tim Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Peter Kilmartin* of Rhode Island, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Thomas J. Donovan, Jr.*, of Vermont.

Deputy Solicitor General Stewart argued the cause for the United States as respondent supporting petitioners urging vacatur and remand. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Delrahim*, *Brian H. Fletcher*, *Kristen C. Limarzi*, *Robert B. Nicholson*, *Nickolai G. Levin*, and *Andrew J. Ewalt.*

Evan R. Chesler argued the cause for respondent American Express et al. With him on the brief were *Peter T. Barbur*, *Kevin J. Orsini*, *Rory A. Leraris*, *Mark Califano*, *Suzanne E. Wachsstock*, *Michael K. Kellogg*, *Aaron M. Panner*, *Derek T. Ho*, *Benjamin J. Horwich*, and *Justin P. Raphael.**

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*Briefs of *amici curiae* urging reversal 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, *Judith N. Vale*, Senior Assistant Solicitor General, *Beau W. Buffier*, Bureau Chief, *Elinor R. Hoffman*, Deputy Bureau Chief, and *Jeremy R. Kashia*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jahna Lindemuth* of Alaska, *Xavier Becerra* of California, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Curtis T. Hill, Jr.*, of Indiana, *Andy Beshear* of Kentucky, *Janet T. Mills* of Maine, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Hector H. Balderas* of New Mexico, *Josh Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Bob Ferguson* of Washington, and *Brad Schimel* of Wisconsin; for Ahold U. S. A., Inc., et al. by *Paul E. Slater*, *Eric L. Bloom*, *Phillip F. Cramer*, *Ryan T. Holt*, *Eric G. Osborne*, *Richard Alan Arnold*,

JUSTICE THOMAS delivered the opinion of the Court.

American Express Company and American Express Travel Related Services Company (collectively, Amex) provide credit-card services to both merchants and cardholders. When a cardholder buys something from a merchant who accepts Amex credit cards, Amex processes the transaction through its network, promptly pays the merchant, and subtracts a fee. If a merchant wants to accept Amex credit cards—and attract Amex cardholders to its business—Amex requires the merchant to agree to an antisteering contractual

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William J. Blechman, *Joseph M. Vanek*, *David P. Germaine*, and *Matthew T. Slater*; for the American Antitrust Institute by *Richard M. Brunell*; for the American Medical Association et al. by *Matthew L. Cantor* and *Jeffrey I. Shinder*; for the Australian Retailers Association by *Robert N. Kaplan*; for Discover Financial Services by *Elizabeth P. Papez* and *Andrew C. Nichols*; for the International Air and Transport Association et al. by *Donald I. Baker*, *W. Todd Miller*, and *David A. Berg*; for the Medical Advisory Group by *James A. Wilson*, *Robert N. Webner*, *Kenneth J. Rubin*, and *Nathan L. Colvin*; for the Open Markets Institute by *Deepak Gupta*; for the United States Public Interest Group Education Fund, Inc., by *Sharon K. Robertson*, *Michael Landis*, and *Gregory P. Slover*; for Wal-Mart Stores, Inc., et al. by *Mark T. Stancil*, *Matthew M. Madden*, *Deborah White*, *Alden L. Atkins*, *John P. Elwood*, *William L. Taylor*, and *David B. Goldston*; for John M. Connor et al. by *Anthony J. Bolognese*; for 20 Merchants by *George D. Ruttinger*, *Andrew I. Gavil*, *Charles D. Austin*, and *Jordan L. Ludwig*; and for 28 Professors of Antitrust Law by *Eric F. Citron*.

Briefs of *amici curiae* urging affirmance were filed for Antitrust Law Scholars et al. by *Jonathan M. Jacobson*, *Daniel P. Weick*, and *Elyse Dorsey*; for the Australian Taxpayers' Alliance by *Kenneth E. Lee*, *Teena-Ann V. Sankoorikal*, and *Dylan A. Stern*; for the Clearing House Association L. L. C. by *Richard S. Taffet*, *David B. Salmons*, *Judd E. Stone*, and *Robert C. Hunter*; for the Computer & Communications Industry Association by *Neal Kumar Katyal*, *Jessica L. Ellsworth*, and *Eugene A. Sokoloff*; for Pharmaceutical Research and Manufacturers of America by *Aaron M. Streett*, *Joseph Ostoyich*, and *William Lavery*; for David S. Evans et al. by *Elai Katz*; and for J. Gregory Sidak et al. by *Robert M. Langer* and *Aaron S. Bayer*.

Thomas R. McCarthy, *Bryan K. Weir*, and *David E. Wheeler* filed a brief for Verizon Communications Inc. as *amicus curiae*.

provision. The antisteering provision prohibits merchants from discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee. In this case, we must decide whether Amex's antisteering provisions violate federal antitrust law. We conclude they do not.

I

A

Credit cards have become a primary way that consumers in the United States purchase goods and services. When a cardholder uses a credit card to buy something from a merchant, the transaction is facilitated by a credit-card network. The network provides separate but interrelated services to both cardholders and merchants. For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. Cardholders also can receive rewards based on the amount of money they spend, such as airline miles, points for travel, or cash back. For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment. This saves merchants the trouble and risk of extending credit to customers, and it increases the number and value of sales that they can make.

By providing these services to cardholders and merchants, credit-card companies bring these parties together, and therefore operate what economists call a "two-sided platform." As the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them. See Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667 (2008) (Evans & Schmalensee); Evans & Noel, Defining Antitrust Markets When Firms Operate Two-Sided Platforms, 2005 Colum. Bus. L. Rev. 667, 668 (Evans & Noel); Filistrucchi, Geradin, Van

Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 296 (2014) (Filistrucchi). For credit cards, that interaction is a transaction. Thus, credit-card networks are a special type of two-sided platform known as a "transaction" platform. See *id.*, at 301, 304, 307; Evans & Noel 676–678. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. See Klein, Lerner, Murphy, & Plache, Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 Antitrust L. J. 571, 580, 583 (2006) (Klein). For example, no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network. See Filistrucchi 301.

Two-sided platforms differ from traditional markets in important ways. Most relevant here, two-sided platforms often exhibit what economists call "indirect network effects." Evans & Schmalensee 667. Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate. D. Evans & R. Schmalensee, Matchmakers: The New Economics of Multisided Platforms 25 (2016). In other words, the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A credit card, for example, is more valuable to cardholders when more merchants accept it and is more valuable to merchants when more cardholders use it. See Evans & Noel 686–687; Klein 580, 584. To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. See Evans & Schmalensee 675; Evans & Noel 680; Muris, Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets, 2005 Colum. Bus. L. Rev. 515, 532–533 (Muris); Rochet & Tirole,

Platform Competition in Two-Sided Markets, 1 J. Eur. Econ. Assn. 990, 1013 (2003). Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand. See Evans & Schmalensee 675; Evans & Noel 680–681. Two-sided platforms therefore must take these indirect network effects into account before making a change in price on either side. See Evans & Schmalensee 675; Evans & Noel 680–681.[1]

Sometimes indirect network effects require two-sided platforms to charge one side much more than the other. See Evans & Schmalensee 667, 675, 681, 690–691; Evans & Noel 668, 691; Klein 585; Filistrucchi 300. For two-sided platforms, "'the [relative] price structure matters, and platforms must design it so as to bring both sides on board.'" Evans & Schmalensee 669 (quoting Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006)). The optimal price might require charging the side with more elastic demand a below-cost (or even negative) price. See Muris 519, 550; Klein 579; Evans & Schmalensee 675; Evans & Noel 681. With credit cards, for example, networks often charge cardholders a lower fee than merchants because cardholders are more price sensitive.[2]

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[1] In a competitive market, indirect network effects also encourage companies to take increased profits from a price increase on side A and spend them on side B to ensure more robust participation on that side and to stem the impact of indirect network effects. See Evans & Schmalensee 688; Evans & Noel 670–671, 695. Indirect network effects thus limit the platform's ability to raise overall prices and impose a check on its market power. See Evans & Schmalensee 688; Evans & Noel 695.

[2] "Cardholders are more price-sensitive because many consumers have multiple payment methods, including alternative payment cards. Most merchants, by contrast, cannot accept just one major card because they are likely to lose profitable incremental sales if they do not take [all] the major payment cards. Because most consumers do not carry all of the

See Muris 522; Klein 573–574, 585, 595. In fact, the network might well *lose* money on the cardholder side by offering rewards such as cash back, airline miles, or gift cards. See Klein 587; Evans & Schmalensee 672. The network can do this because increasing the number of cardholders increases the value of accepting the card to merchants and, thus, increases the number of merchants who accept it. Muris 522; Evans & Schmalensee 692. Networks can then charge those merchants a fee for every transaction (typically a percentage of the purchase price). Striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

B

Amex, Visa, MasterCard, and Discover are the four dominant participants in the credit-card market. Visa, which is by far the largest, has 45% of the market as measured by transaction volume.[3] Amex and MasterCard trail with 26.4% and 23.3%, respectively, while Discover has just 5.3% of the market.

Visa and MasterCard have significant structural advantages over Amex. Visa and MasterCard began as bank cooperatives and thus almost every bank that offers credit cards is in the Visa or MasterCard network. This makes it very likely that the average consumer carries, and the average merchant accepts, Visa or MasterCard. As a result, the vast majority of Amex cardholders have a Visa or MasterCard, but only a small number of Visa and MasterCard cardholders have an Amex. Indeed, Visa and MasterCard account for more than 432 million cards in circulation in the United States, while Amex has only 53 million. And while 3.4 million merchants at 6.4 million locations accept Amex,

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major payment cards, refusing to accept a major card may cost the merchant substantial sales." Muris 522.

[3] All figures are accurate as of 2013.

nearly three million more locations accept Visa, MasterCard, and Discover.[4]

Amex competes with Visa and MasterCard by using a different business model. While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than other networks. Due to its superior rewards, Amex tends to attract cardholders who are wealthier and spend more money. Merchants place a higher value on these cardholders, and Amex uses this advantage to recruit merchants.

Amex's business model has significantly influenced the credit-card market. To compete for the valuable cardholders that Amex attracts, both Visa and MasterCard have introduced premium cards that, like Amex, charge merchants higher fees and offer cardholders better rewards. To maintain their lower merchant fees, Visa and MasterCard have created a sliding scale for their various cards—charging merchants less for low-reward cards and more for high-reward cards. This differs from Amex's strategy, which is to charge merchants the same fee no matter the rewards that its card offers. Another way that Amex has influenced the credit-card market is by making banking and card-payment services available to low-income individuals, who otherwise could not qualify for a credit card and could not afford the fees that traditional banks charge. See 2 Record 3835–3837,

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[4] Discover entered the credit-card market several years after Amex, Visa, and MasterCard. It nonetheless managed to gain a foothold because Sears marketed Discover to its already significant base of private-label cardholders. Discover's business model shares certain features with Amex, Visa, and MasterCard. Like Amex, Discover interacts directly with its cardholders. But like Visa and MasterCard, Discover uses banks that cooperate with its network to interact with merchants.

4527–4529. In sum, Amex's business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.

Despite these improvements, Amex's business model sometimes causes friction with merchants. To maintain the loyalty of its cardholders, Amex must continually invest in its rewards program. But, to fund those investments, Amex must charge merchants higher fees than its rivals. Even though Amex's investments benefit merchants by encouraging cardholders to spend more money, merchants would prefer not to pay the higher fees. One way that merchants try to avoid them, while still enticing Amex's cardholders to shop at their stores, is by dissuading cardholders from using Amex at the point of sale. This practice is known as "steering."

Amex has prohibited steering since the 1950s by placing antisteering provisions in its contracts with merchants. These antisteering provisions prohibit merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on Amex cards; or promoting other cards more than Amex. The antisteering provisions do not, however, prevent merchants from steering customers toward debit cards, checks, or cash.

C

In October 2010, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1.[5] After a 7-week trial, the District

[5] Plaintiffs also sued Visa and MasterCard, claiming that their antisteering provisions violated § 1. But Visa and MasterCard voluntarily revoked their antisteering provisions and are no longer parties to this case.

Court agreed that Amex's antisteering provisions violate § 1. *United States* v. *American Express* Co., 88 F. Supp. 3d 143, 151–152 (EDNY 2015). It found that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders. See *id.*, at 171–175. Evaluating the effects on the merchant side of the market, the District Court found that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. See *id.*, at 195–224.

The Court of Appeals for the Second Circuit reversed. *United States* v. *American Express Co.*, 838 F. 3d 179, 184 (2016). It concluded that the credit-card market is one market, not two. *Id.*, at 196–200. Evaluating the credit-card market as a whole, the Second Circuit concluded that Amex's antisteering provisions were not anticompetitive and did not violate § 1. See *id.*, at 200–206.

We granted certiorari, 583 U. S. 931 (2017), and now affirm.

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C. § 1. This Court has long recognized that, "[i]n view of the common law and the law in this country" when the Sherman Act was passed, the phrase "restraint of trade" is best read to mean "undue restraint." *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 59–60 (1911). This Court's precedents have thus understood § 1 "to outlaw only *unreasonable* restraints." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997) (emphasis added).

Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable *per se* because they "'"always or almost always tend to restrict competition and decrease output."'" *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723 (1988). Typically only "horizontal" restraints—restraints "imposed by

agreement between competitors"—qualify as unreasonable *per se*. *Id.*, at 730. Restraints that are not unreasonable *per se* are judged under the "rule of reason." *Id.*, at 723. The rule of reason requires courts to conduct a fact-specific assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984). The goal is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 886 (2007).

In this case, both sides correctly acknowledge that Amex's antisteering provisions are vertical restraints—*i. e.*, restraints "imposed by agreement between firms at different levels of distribution." *Business Electronics*, *supra*, at 730. The parties also correctly acknowledge that, like nearly every other vertical restraint, the antisteering provisions should be assessed under the rule of reason. See *Leegin*, *supra*, at 882; *State Oil*, *supra*, at 19; *Business Electronics*, *supra*, at 726; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 57 (1977).

To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. See 1 J. Kalinowski, Antitrust Laws and Trade Regulation § 12.02[1] (2d ed. 2017) (Kalinowski); P. Areeda & H. Hovenkamp, Fundamentals of Antitrust Law § 15.02[B] (4th ed. 2017) (Areeda & Hovenkamp); *Capital Imaging Assoc., P. C.* v. *Mohawk Valley Medical Associates, Inc.*, 996 F. 2d 537, 543 (CA2 1993). If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. See 1 Kalinowski § 12.02[1]; Areeda & Hovenkamp § 15.02[B]; *Capital Im-*

aging Assoc., *supra*, at 543. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. See 1 Kalinowski § 12.02[1]; *Capital Imaging Assoc.*, *supra*, at 543.

Here, the parties ask us to decide whether the plaintiffs have carried their initial burden of proving that Amex's antisteering provisions have an anticompetitive effect. The plaintiffs can make this showing directly or indirectly. Direct evidence of anticompetitive effects would be "'proof of actual detrimental effects [on competition],'" *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 460 (1986), such as reduced output, increased prices, or decreased quality in the relevant market, see 1 Kalinowski § 12.02[2]; *Craftsman Limousine, Inc.* v. *Ford Motor Co.*, 491 F. 3d 381, 390 (CA8 2007); *Virgin Atlantic Airways Ltd.* v. *British Airways PLC*, 257 F. 3d 256, 264 (CA2 2001). Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition. See 1 Kalinowski § 12.02[2]; *Tops Markets, Inc.* v. *Quality Markets, Inc.*, 142 F. 3d 90, 97 (CA2 1998); *Spanish Broadcasting System of Fla.* v. *Clear Channel Communications, Inc.*, 376 F. 3d 1065, 1073 (CA11 2004).

Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's antisteering provisions have caused anticompetitive effects in the credit-card market.[6] To assess this evidence, we must first define the relevant market. Once defined, it becomes clear that the plaintiffs' evidence is insufficient to carry their burden.

A

Because "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally

[6] Although the plaintiffs relied on indirect evidence below, they have abandoned that argument in this Court. See Brief for United States 23, n. 4 (citing Pet. for Cert. i, 18–25).

disfavored in antitrust law," *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 466–467 (1992), courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.[7] "Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965); accord, 2 Kalinowski § 24.01[4][a]. Thus, the relevant market is defined as "the area of effective competition." *Ibid.* Typically this is the "arena within which significant substitution in consumption or production occurs." Areeda & Hovenkamp § 5.02; accord, 2 Kalinowski § 24.02[1]; *United States* v. *Grinnell Corp.*,

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[7] The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. See Brief for United States 40–41 (citing *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447 (1986), and *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980) (*per curiam*)). We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. See *Indiana Federation of Dentists*, *supra*, at 450–451, 459 (agreement between competing dentists not to share X rays with insurance companies); *Catalano*, *supra*, at 644–645, 650 (agreement among competing wholesalers not to compete on extending credit to retailers). Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. See *Indiana Federation of Dentists*, *supra*, at 460–461; *Catalano*, *supra*, at 648–649. But vertical restraints are different. See *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 348, n. 18 (1982); *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 888 (2007). Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market. See *id.*, at 898 (noting that a vertical restraint "may not be a serious concern unless the relevant entity has market power"); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 160 (1984) ("[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power").

384 U. S. 563, 571 (1966). But courts should "combin[e]" different products or services into "a single market" when "that combination reflects commercial realities." *Id.*, at 572; see also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 336 (1962) (pointing out that "the definition of the relevant market" must "'correspond to the commercial realities' of the industry").

As explained, credit-card networks are two-sided platforms. Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. See Evans & Schmalensee 674–675; Evans & Noel 680–681. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. See Klein 574, 595, 598, 626. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. See *id.*, at 575, 594, 626. Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.

To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. See Filistrucchi 321–322. Newspapers that sell advertisements, for example, arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. *Id.*, at 297, 315; Klein 579. But in the newspaper-advertisement market, the indirect network effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. See Filistrucchi 321, 323, and n. 99; Klein 583. Because of these weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such. See Filistruc-

chi 321; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610 (1953).

But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually. See Klein 583 ("Because cardholders and merchants jointly consume a single product, payment card transactions, their consumption of payment card transactions must be directly proportional"). To optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants.

Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as "suppl[ying] only one product"—transactions. Klein 580. In the credit-card market, these transactions "are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment." *Ibid.* Tellingly, credit cards determine their market share by measuring the volume of transactions they have sold.[8]

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[8] Contrary to the dissent's assertion, *post*, at 562–563, merchant services and cardholder services are not complements. See Filistrucchi 297 ("[A] two-sided market [is] different from markets for complementary products, in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices"). As already explained, credit-card companies are best understood as sup-

Evaluating both sides of a two-sided transaction platform is also necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions. See Filistrucchi 301. A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex. See *ibid.* Only a company that had both cardholders and merchants willing to use its network could sell transactions and compete in the credit-card market. Similarly, if a merchant accepts the four major credit cards, but a cardholder only uses Visa or Amex, only those two cards can compete for the particular transaction. Thus, competition cannot be accurately assessed by looking at only one side of the platform in isolation.[9]

For all these reasons, "[i]n two-sided transaction markets, only one market should be defined." *Id.*, at 302; see also Evans & Noel 671 ("[F]ocusing on one dimension of . . . competition tends to distort the competition that actually exists among [two-sided platforms]"). Any other analysis would lead to "'"mistaken inferences"'" of the kind that could "'"chill the very conduct the antitrust laws are designed to protect."'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 226 (1993); see also *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 594 (1986) ("'[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition'"); *Leegin*, 551 U. S., at 895 (noting that courts

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plying only one product—transactions—which is jointly consumed by a cardholder and a merchant. See Klein 580. Merchant services and cardholder services are both inputs to this single product. See *ibid.*

[9] Nontransaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers. See Filistrucchi 301.

should avoid "increas[ing] the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"). Accordingly, we will analyze the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects.

B

The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market. The plaintiffs stake their entire case on proving that Amex's agreements increase merchant fees. We find this argument unpersuasive.

As an initial matter, the plaintiffs' argument about merchant fees wrongly focuses on only one side of the two-sided credit-card market. As explained, the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market. See 1 Kalinowski § 12.02[2]; *Craftsman Limousine, Inc.*, 491 F. 3d, at 390; *Virgin Atlantic Airways Ltd.*, 257 F. 3d, at 264. They failed to do so.

1

The plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would

expect to find in a competitive market. As the District Court found, the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins. 88 F. Supp. 3d, at 198, 215. And the evidence about whether Amex charges more than its competitors was ultimately inconclusive. *Id.*, at 199, 202, 215.

Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. Amex began raising its merchant fees in 2005 after Visa and MasterCard raised their fees in the early 2000s. *Id.*, at 195, 199–200. As explained, Amex has historically charged higher merchant fees than these competitors because it delivers wealthier cardholders who spend more money. *Id.*, at 200–201. Amex's higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants. See *id.*, at 192–193. On the other side of the market, Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants. *Id.*, at 160, 191–195. That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends. See Evans & Noel 670–671; Klein 574–575, 594–595, 598, 626.

In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees. Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted and, thus, Amex's antisteering provisions do not apply. See 88 F. Supp. 3d, at 222. This suggests that the cause of increased merchant fees is not Amex's antisteering provisions, but rather increased competition for cardholders and a corre-

sponding marketwide adjustment in the relative price charged to merchants. See Klein 575, 609.

2

The plaintiffs did offer evidence that Amex increased the percentage of the purchase price that it charges merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on cardholder rewards. See 88 F. Supp. 3d, at 195–197, 215. The plaintiffs believe that this evidence shows that the price of Amex's transactions increased.

Even assuming the plaintiffs are correct, this evidence does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. "Market power is the ability to raise price profitably *by restricting output.*" Areeda & Hovenkamp § 5.01 (emphasis added); accord, *Kodak*, 504 U. S., at 464; *Business Electronics*, 485 U. S., at 723. This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd.*, 509 U. S., at 237. There is no such evidence in this case. The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%. See 838 F. 3d, at 206. "Where . . . output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." *Brooke Group Ltd.*, *supra*, at 237. And, as previously explained, the plaintiffs did not show that Amex charged more than its competitors.

3

The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while these agreements have been in place, the credit-card market experienced expanding output and improved quality. Amex's business model spurred Visa

and MasterCard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served. Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%. See D. Evans & R. Schmalensee, Paying With Plastic: The Digital Revolution in Buying and Borrowing 88–89 (2d ed. 2005) (Paying With Plastic).

Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Instead, fierce competition between networks has constrained Amex's ability to raise these fees and has, at times, forced Amex to lower them. For instance, when Amex raised its merchant prices between 2005 and 2010, some merchants chose to leave its network. 88 F. Supp. 3d, at 197. And when its remaining merchants complained, Amex stopped raising its merchant prices. *Id.*, at 198. In another instance in the late 1980s and early 1990s, competition forced Amex to offer lower merchant fees to "everyday spend" merchants—supermarkets, gas stations, pharmacies, and the like—to persuade them to accept Amex. See *id.*, at 160–161, 202.

In addition, Amex's competitors have exploited its higher merchant fees to their advantage. By charging lower merchant fees, Visa, MasterCard, and Discover have achieved broader merchant acceptance—approximately 3 million more locations than Amex. *Id.*, at 204. This broader merchant acceptance is a major advantage for these networks and a significant challenge for Amex, since consumers prefer cards that will be accepted everywhere. *Ibid.* And to compete even further with Amex, Visa and MasterCard charge different merchant fees for different types of cards to maintain their comparatively lower merchant fees and broader accept-

ance. Over the long run, this competition has created a trend of declining merchant fees in the credit-card market. In fact, since the first credit card was introduced in the 1950s, merchant fees—including Amex's merchant fees—have decreased by more than half. See *id.*, at 202–203; Paying With Plastic 54, 126, 152.

Lastly, there is nothing inherently anticompetitive about Amex's antisteering provisions. These agreements actually stem negative externalities in the credit-card market and promote interbrand competition. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance"—the promise of a frictionless transaction. 88 F. Supp. 3d, at 156. A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants. This externality endangers the viability of the entire Amex network. And it undermines the investments that Amex has made to encourage increased cardholder spending, which discourages investments in rewards and ultimately harms both cardholders and merchants. Cf. *Leegin*, 551 U. S., at 890–891 (recognizing that vertical restraints can prevent retailers from free riding and thus increase the availability of "tangible or intangible services or promotional efforts" that enhance competition and consumer welfare). Perhaps most importantly, antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance.[10]

[10] The plaintiffs argue that *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972), forbids any restraint that would restrict competition in part of the market—here, for example, merchant steering. See Brief for Petitioners and Respondents Nebraska, Tennessee, and Texas 30, 42. *Topco* does not stand for such a broad proposition. *Topco* concluded that a horizontal agreement between competitors was unreasonable *per se*, even though the agreement did not extend to every competitor in the market. See 405 U. S., at 599, 608. A horizontal agreement between competitors is markedly different from a vertical agreement that incidentally affects

In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects. Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions. And it is "[t]he promotion of interbrand competition," after all, that "is . . . 'the primary purpose of the antitrust laws.'" *Id.*, at 890.

* * *

Because Amex's antisteering provisions do not unreasonably restrain trade, we affirm the judgment of the Court of Appeals.

It is so ordered.

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

For more than 120 years, the American economy has prospered by charting a middle path between pure laissez-faire and state capitalism, governed by an antitrust law "dedicated to the principle that *markets*, not individual firms and certainly not political power, produce the optimal mixture of goods and services." 1 P. Areeda & H. Hovenkamp, Antitrust Law ¶100b, p. 4 (4th ed. 2013) (Areeda & Hovenkamp). By means of a strong antitrust law, the United States has sought to avoid the danger of monopoly capitalism. Long gone, we hope, are the days when the great trusts presided unfettered by competition over the American economy.

This lawsuit is emblematic of the American approach. Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. See GAO, Credit and Debit Cards: Federal Entities Are Taking

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one particular method of competition. See *Leegin*, 551 U. S., at 888; *Maricopa County Medical Soc.*, 457 U. S., at 348, n. 18.

Actions To Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist 31–35 (GAO–08–558, 2008). The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition over credit-card merchant fees by eliminating a contractual barrier with anticompetitive effects. The majority rejects that effort. But because the challenged contractual term clearly has serious anticompetitive effects, I dissent.

I

I agree with the majority and the parties that this case is properly evaluated under the three-step "rule of reason" that governs many antitrust lawsuits. *Ante*, at 541–542. Under that approach, a court looks first at the agreement or restraint at issue to assess whether it has had, or is likely to have, anticompetitive effects. *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 459 (1986). In doing so, the court normally asks whether the restraint may tend to impede competition and, if so, whether those who have entered into that restraint have sufficient economic or commercial power for the agreement to make a negative difference. See *id.*, at 459–461. Sometimes, but not always, a court will try to determine the appropriate market (the market that the agreement affects) and determine whether those entering into that agreement have the power to raise prices above the competitive level in that market. See *ibid.*

It is important here to understand that in cases under § 1 of the Sherman Act (unlike in cases challenging a merger under § 7 of the Clayton Act, 15 U. S. C. § 18), it may well be unnecessary to undertake a sometimes complex, market power inquiry:

> "Since the purpose [in a Sherman Act § 1 case] of the inquiries into . . . market power is [simply] to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detri-

> mental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Federation of Dentists*, *supra*, at 460–461 (quoting 7 P. Areeda, Antitrust Law ¶1511, p. 429 (3d ed. 1986)).

Second (as treatise writers summarize the case law), if an antitrust plaintiff meets the initial burden of showing that an agreement will likely have anticompetitive effects, normally the "burden shifts to the defendant to show that the restraint in fact serves a legitimate objective." 7 Areeda & Hovenkamp ¶1504b, at 415; see *California Dental Assn.* v. *FTC*, 526 U. S. 756, 771 (1999); *id.*, at 788 (BREYER, J., dissenting).

Third, if the defendant successfully bears this burden, the antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer, *i. e.*, that the agreement "on balance" remains unreasonable. 7 Areeda & Hovenkamp ¶1507a, at 442.

Like the Court of Appeals and the parties, the majority addresses only the first step of that three-step framework. *Ante,* at 542.

II

A

This case concerns the credit-card business. As the majority explains, *ante,* at 534–535, that business involves the selling of two different but related card services. First, when a shopper uses a credit card to buy something from a participating merchant, the credit-card company pays the merchant the amount of money that the merchant's customer has charged to his card and charges the merchant a fee, say, 5%, for that speedy-payment service. I shall refer to that kind of transaction as a merchant-related card service. Second, the credit-card company then sends a bill to the merchant's

customer, the shopper who holds the card; and the shopper pays the card company the sum that merchant charged the shopper for the goods or services he or she bought. The cardholder also often pays the card company a fee, such as an annual fee for the card or an interest charge for delayed payment. I shall call that kind of transaction a shopper-related card service. The credit-card company can earn revenue from the sale (directly or indirectly) of each of these services: (1) speedy payment for merchants and (2) credit for shoppers. (I say "indirectly" to reflect the fact that card companies often create or use networks of banks as part of the process—but I have found nothing here suggesting that that fact makes a significant difference to my analysis.)

Sales of the two basic card services are related. A shopper can pay for a purchase with a particular credit card only if the merchant has signed up for merchant-related card services with the company that issued the credit card that the shopper wishes to use. A firm in the credit-card business is therefore unlikely to make money unless quite a few merchants agree to accept that firm's card and quite a few shoppers agree to carry and use it. In general, the more merchants that sign up with a particular card company, the more useful that card is likely to prove to shoppers and so the more shoppers will sign up; so too, the more shoppers that carry a particular card, the more useful that card is likely to prove to merchants (as it obviously helps them obtain the shoppers' business) and so the more merchants will sign up. Moreover, as a rough rule of thumb (and assuming constant charges), the larger the networks of paying merchants and paying shoppers that a card firm maintains, the larger the revenues that the firm will likely receive, since more payments will be processed using its cards. Thus, it is not surprising that a card company may offer shoppers incentives (say, points redeemable for merchandise or travel) for using its card or that a firm might want merchants to accept its card exclusively.

B

This case focuses upon a practice called "steering." American Express has historically charged higher merchant fees than its competitors. App. to Pet. for Cert. 173a–176a. Hence, fewer merchants accept American Express' cards than its competitors'. *Id.*, at 184a–187a. But, perhaps because American Express cardholders are, on average, wealthier, higher spending, or more loyal to American Express than other cardholders, vast numbers of merchants still accept American Express cards. See *id.*, at 156a, 176a–177a, 184a–187a. Those who do, however, would (in order to avoid the higher American Express fee) often prefer that their customers use a different card to charge a purchase. Thus, the merchant has a monetary incentive to "steer" the customer toward the use of a different card. A merchant might tell the customer, for example, "American Express costs us more," or "please use Visa if you can," or "free shipping if you use Discover." See *id.*, at 100a–102a.

Steering makes a difference, because without it, the shopper does not care whether the merchant pays more to American Express than it would pay to a different card company—the shopper pays the same price either way. But if steering works, then American Express will find it more difficult to charge more than its competitors for merchant-related services, because merchants will respond by steering their customers, encouraging them to use other cards. Thus, American Express dislikes steering; the merchants like it; and the shoppers may benefit from it, whether because merchants will offer them incentives to use less expensive cards or in the form of lower retail prices overall. See *id.*, at 92a, 97a–104a.

In response to its competitors' efforts to convince merchants to steer shoppers to use less expensive cards, American Express tried to stop, or at least to limit, steering by placing antisteering provisions in most of its contracts with merchants. It called those provisions "nondiscrimination

provisions." They prohibited steering of the forms I have described above (and others as well). See *id.*, at 95a–96a, 100a–101a. After placing them in its agreements, American Express found it could maintain, or even raise, its higher merchant prices without losing too many transactions to other firms. *Id.*, at 195a–198a. These agreements—the "nondiscrimination provisions"—led to this lawsuit.

C

In 2010 the United States and 17 States brought this antitrust case against American Express. They claimed that the "nondiscrimination provisions" in its contracts with merchants created an unreasonable restraint of trade. (Initially Visa and MasterCard were also defendants, but they entered into consent judgments, dropping similar provisions from their contracts with merchants.) After a 7-week bench trial, the District Court entered judgment for the Government, setting forth its findings of fact and conclusions of law in a 97-page opinion. 88 F. Supp. 3d 143 (EDNY 2015).

Because the majority devotes little attention to the District Court's detailed factual findings, I will summarize some of the more significant ones here. Among other things, the District Court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions. See *id.*, at 195–196. In doing so, American Express did not take account of the possibility that large merchants would respond to the price increases by encouraging shoppers to use a different credit card because the nondiscrimination provisions prohibited any such steering. *Id.*, at 215. The District Court pointed to merchants' testimony stating that, had it not been for those provisions, the large merchants would have responded to the price increases by encouraging customers to use other, less expensive cards. *Ibid.*

The District Court also found that even though American Express raised its merchant prices 20 times in this 5-year

period, it did not lose the business of any large merchant. *Id.*, at 197. Nor did American Express increase benefits (or cut credit-card prices) to American Express cardholders in tandem with the merchant price increases. *Id.*, at 196. Even had there been no direct evidence of injury to competition, American Express' ability to raise merchant prices without losing any meaningful market share, in the District Court's view, showed that American Express possessed power in the relevant market. See *id.*, at 195.

The District Court also found that, in the absence of the provisions, prices to merchants would likely have been lower. *Ibid.* It wrote that in the late 1990's, Discover, one of American Express' competitors, had tried to develop a business model that involved charging lower prices to merchants than the other companies charged. *Id.*, at 213. Discover then invited each "merchant to save money by shifting volume to Discover," while simultaneously offering merchants additional discounts "if they would steer customers to Discover." *Ibid.* The court determined that these efforts failed because of American Express' (and the other card companies') "nondiscrimination provisions." These provisions, the court found, "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *Id.*, at 214. Because the provisions eliminated any advantage that lower prices might produce, Discover "abandoned its low-price business model" and raised its merchant fees to match those of its competitors. *Ibid.* This series of events, the court concluded, was "emblematic of the harm done to the competitive process" by the "nondiscrimination provisions." *Ibid.*

The District Court added that it found no offsetting procompetitive benefit to shoppers. *Id.*, at 225–238. Indeed, it found no offsetting benefit of any kind. See *ibid.*

American Express appealed, and the U. S. Court of Appeals for the Second Circuit held in its favor. 838 F. 3d 179 (2016). The Court of Appeals did not reject any fact found

by the District Court as "clearly erroneous." See Fed. Rule Civ. Proc. 52(a)(6). Rather, it concluded that the District Court had erred in step 1 of its rule-of-reason analysis by failing to account for what the Second Circuit called the credit-card business' "two-sided market" (or "two-sided platform"). 838 F. 3d, at 185–186, 196–200.

III

The majority, like the Court of Appeals, reaches only step 1 in its "rule of reason" analysis. *Ante*, at 542–543. To repeat, that step consists of determining whether the challenged "nondiscrimination provisions" have had, or are likely to have, anticompetitive effects. See *Indiana Federation of Dentists*, 476 U. S., at 459. Do those provisions tend to impede competition? And if so, does American Express, which imposed that restraint as a condition of doing business with its merchant customers, have sufficient economic or commercial power for the provision to make a negative difference? See *id.*, at 460–461.

A

Here the District Court found that the challenged provisions have had significant anticompetitive effects. In particular, it found that the provisions have limited or prevented price competition among credit-card firms for the business of merchants. 88 F. Supp. 3d, at 209. That conclusion makes sense: In the provisions, American Express required the merchants to agree not to encourage customers to use American Express' competitors' credit cards, even cards from those competitors, such as Discover, that intended to charge the merchants lower prices. See *id.*, at 214. By doing so, American Express has "disrupt[ed] the normal price-setting mechanism" in the market. *Id.*, at 209. As a result of the provisions, the District Court found, American Express was able to raise merchant prices repeatedly without any significant loss of business, because merchants were unable to respond to such price increases by encouraging shoppers to

pay with other cards. *Id.*, at 215. The provisions also meant that competitors like Discover had little incentive to lower their merchant prices, because doing so did not lead to any additional market share. *Id.*, at 214. The provisions thereby "suppress[ed] [American Express'] competitors' incentive[s] to offer lower prices . . . resulting in higher profit-maximizing prices across the network services market." *Id.*, at 209. Consumers throughout the economy paid higher retail prices as a result, and they were denied the opportunity to accept incentives that merchants might otherwise have offered to use less expensive cards. *Id.*, at 216, 220. I should think that, considering step 1 alone, there is little more that need be said.

The majority, like the Court of Appeals, says that the District Court should have looked not only at the market for the card companies' merchant-related services but also at the market for the card companies' shopper-related services, and that it should have combined them, treating them as a single market. *Ante*, at 546–547; 838 F. 3d, at 197. But I am not aware of any support for that view in antitrust law. Indeed, this Court has held to the contrary.

In *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610 (1953), the Court held that an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint. The Government in that case claimed that a newspaper's advertising policy violated the Sherman Act's "rule of reason." See *ibid.* In support of that argument, the Government pointed out, and the District Court had held, that the newspaper dominated the market for the sales of newspapers to readers in New Orleans, where it was the sole morning daily newspaper. *Ibid.* But this Court reversed. We explained that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in

effect that readership is in turn sold to the buyers of advertising space." *Ibid.* We then added:

> "This case concerns solely one of these markets. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan." *Ibid.*

Here, American Express stands accused not of limiting or harming competition for shopper-related card services, but only of merchant-related card services, because the challenged contract provisions appear only in American Express' contracts with merchants. That is why the District Court was correct in considering, at step 1, simply whether the agreement had diminished competition in merchant-related services.

B

The District Court did refer to market definition, and the majority does the same. *Ante*, at 542–547. And I recognize that properly defining a market is often a complex business. Once a court has identified the good or service directly restrained, as *Times-Picayune Publishing Co.* requires, it will sometimes add to the relevant market what economists call "substitutes": other goods or services that are reasonably substitutable for that good or service. See, *e. g.*, *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 395–396 (1956) (explaining that cellophane market includes other, substitutable flexible wrapping materials as well). The reason that substitutes are included in the relevant market is that they restrain a firm's ability to profitably raise prices, because customers will switch to the substitutes rather than pay the higher prices. See 2B Areeda & Hovenkamp ¶561, at 378.

But while the market includes substitutes, it does not include what economists call complements: goods or services that are used together with the restrained product, but that cannot be substituted for that product. See *id.*, ¶565a, at 429; *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 463 (1992). An example of complements is gasoline and tires. A driver needs both gasoline and tires to drive, but they are not substitutes for each other, and so the sale price of tires does not check the ability of a gasoline firm (say, a gasoline monopolist) to raise the price of gasoline above competitive levels. As a treatise on the subject states: "Grouping complementary goods into the same market" is "economic nonsense" and would "undermin[e] the rationale for the policy against monopolization or collusion in the first place." 2B Areeda & Hovenkamp ¶565a, at 431.

Here, the relationship between merchant-related card services and shopper-related card services is primarily that of complements, not substitutes. Like gasoline and tires, both must be purchased for either to have value. Merchants upset about a price increase for merchant-related services cannot avoid that price increase by becoming cardholders, in the way that, say, a buyer of newspaper advertising can switch to television advertising or direct mail in response to a newspaper's advertising price increase. The two categories of services serve fundamentally different purposes. And so, also like gasoline and tires, it is difficult to see any way in which the price of shopper-related services could act as a check on the card firm's sale price of merchant-related services. If anything, a lower price of shopper-related card services is likely to cause more shoppers to use the card, and increased shopper popularity should make it *easier* for a card firm to raise prices to merchants, not *harder*, as would be the case if the services were substitutes. Thus, unless there is something unusual about this case—a possibility I discuss below, see *infra*, at 565–572—there is no justification for treating shopper-related services and merchant-related services

as if they were part of a single market, at least not at step 1 of the "rule of reason."

C

Regardless, a discussion of market definition was legally unnecessary at step 1. That is because the District Court found strong *direct* evidence of anticompetitive effects flowing from the challenged restraint. 88 F. Supp. 3d, at 207–224. As I said, *supra*, at 558, this evidence included Discover's efforts to break into the credit-card business by charging lower prices for merchant-related services, only to find that the "nondiscrimination provisions," by preventing merchants from encouraging shoppers to use Discover cards, meant that lower merchant prices did not result in any additional transactions using Discover credit cards. 88 F. Supp. 3d, at 213–214. The direct evidence also included the fact that American Express raised its merchant prices 20 times in five years without losing any appreciable market share. *Id.*, at 195–198, 208–212. It also included the testimony of numerous merchants that they would have steered shoppers away from American Express cards in response to merchant price increases (thereby checking the ability of American Express to raise prices) had it not been for the nondiscrimination provisions. See *id.*, at 221–222. It included the factual finding that American Express "did not even account for the possibility that [large] merchants would respond to its price increases by attempting to shift share to a competitor's network" because the nondiscrimination provisions prohibited steering. *Id.*, at 215. It included the District Court's ultimate finding of fact, not overturned by the Court of Appeals, that the challenged provisions "were integral to" American Express' "[price] increases and thereby caused merchants to pay higher prices." *Ibid.*

As I explained above, this Court has stated that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of

actual detrimental effects . . . can obviate the need for" those inquiries. *Indiana Federation of Dentists*, 476 U. S., at 460–461 (internal quotation marks omitted). That statement is fully applicable here. Doubts about the District Court's market-definition analysis are beside the point in the face of the District Court's findings of actual anticompetitive harm.

The majority disagrees that market definition is irrelevant. See *ante*, at 543–544, and n. 7. The majority explains that market definition is necessary because the nondiscrimination provisions are "vertical restraints" and "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first determines the relevant market." *Ante*, at 543, n. 7. The majority thus, in a footnote, seems categorically to exempt vertical restraints from the ordinary "rule of reason" analysis that has applied to them since the Sherman Act's enactment in 1890. The majority's only support for this novel exemption is *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877 (2007). But *Leegin* held that the "rule of reason" *applied* to the vertical restraint at issue in that case. See *id.*, at 898–899. It said nothing to suggest that vertical restraints are not subject to the usual "rule of reason" analysis. See also *infra*, at 575.

One critical point that the majority's argument ignores is that proof of actual adverse effects on competition *is*, *a fortiori*, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved. See *Indiana Federation of Dentists*, *supra*, at 460 ("[T]he purpose of the inquiries into market definition and market power is to determine *whether an arrangement has the potential for* genuine adverse effects on competition" (emphasis added)). The District Court's findings of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough

power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances. And so the majority's extensive discussion of market definition is legally unnecessary.

D

The majority's discussion of market definition is also wrong. Without raising any objection in general with the longstanding approach I describe above, *supra*, at 561–563, the majority agrees with the Court of Appeals that the market for American Express' card services is special because it is a "two-sided transaction platform." *Ante*, at 534–537, 544–547. The majority explains that credit-card firms connect two distinct groups of customers: first, merchants who accept credit cards, and second, shoppers who use the cards. *Ante*, at 534–535; accord, 838 F. 3d, at 186. The majority adds that "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network." *Ante*, at 535. And it explains that the credit-card market involves "indirect network effects," by which it means that shoppers want a card that many merchants will accept and merchants want to accept those cards that many customers have and use. *Ibid.* From this, the majority concludes that "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market." *Ante*, at 544; accord, 838 F. 3d, at 197.

1

Missing from the majority's analysis is any explanation as to *why*, given the purposes that market definition serves in antitrust law, the fact that a credit-card firm can be said to operate a "two-sided transaction platform" means that its merchant-related and shopper-related services should be combined into a single market. The phrase "two-sided transaction platform" is not one of antitrust art—I can find

no case from this Court using those words. The majority defines the phrase as covering a business that "offers different products or services to two different groups who both depend on the platform to intermediate between them," where the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other" side of the platform. *Ante*, at 534–535. I take from that definition that there are four relevant features of such businesses on the majority's account: They (1) offer different products or services, (2) to different groups of customers, (3) whom the "platform" connects, (4) in simultaneous transactions. See *ibid.*

What is it about businesses with those four features that the majority thinks justifies a special market-definition approach for them? It cannot be the first two features—that the company sells different products to different groups of customers. Companies that sell multiple products to multiple types of customers are commonplace. A firm might mine for gold, which it refines and sells both to dentists in the form of fillings and to investors in the form of ingots. Or a firm might drill for both oil and natural gas. Or a firm might make both ignition switches inserted into auto bodies and tires used for cars. I have already explained that, ordinarily, antitrust law will not group the two nonsubstitutable products together for step 1 purposes. *Supra*, at 561–563.

Neither should it normally matter whether a company sells related, or complementary, products, *i. e.*, products which must both be purchased to have any function, such as ignition switches and tires, or cameras and film. It is well established that an antitrust court in such cases looks at the product where the attacked restraint has an anticompetitive effect. *Supra*, at 560; see *Eastman Kodak*, 504 U. S., at 463. The court does not combine the customers for the separate, nonsubstitutable goods and see if "overall" the restraint has a negative effect. See *ibid.*; 2B Areeda & Hovenkamp

¶565a. That is because, as I have explained, the complementary relationship between the products is irrelevant to the purposes of market definition. See s*upra,* at 561–563.

The majority disputes my characterization of merchant-related and shopper-related services as "complements." See *ante,* at 545–546, n. 8. The majority relies on an academic article which devotes one sentence to the question, saying that "a two-sided market [is] different from markets for complementary products [*e. g.*, tires and gas], in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices." Filistrucchi, Geradin, Van Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 297 (2014) (Filistrucchi). I agree that two-sided platforms—at least as some academics define them, but see *infra*, at 570–572—may be distinct from some types of complements in the respect the majority mentions (even though the services resemble complements because they must be used together for either to have value). But the distinction the majority mentions has nothing to do with the relevant question. The relevant question is whether merchant-related and shopper-related services are *substitutes*, one for the other, so that customers can respond to a price increase for one service by switching to the other service. As I have explained, the two types of services are not substitutes in this way. *Supra,* at 562–564. And so the question remains, just as before: What is it about the economic relationship between merchant-related and shopper-related services that would justify the majority's novel approach to market definition?

What about the last two features—that the company connects the two groups of customers to each other, in simultaneous transactions? That, too, is commonplace. Consider a farmers' market. It brings local farmers and local shoppers together, and transactions will occur only if a farmer and a

shopper simultaneously agree to engage in one. Should courts abandon their ordinary step 1 inquiry if several competing farmers' markets in a city agree that only certain kinds of farmers can participate, or if a farmers' market charges a higher fee than its competitors do and prohibits participating farmers from raising their prices to cover it? Why? If farmers' markets are special, what about travel agents that connect airlines and passengers? What about internet retailers, who, in addition to selling their own goods, allow (for a fee) other goods-producers to sell over their networks? Each of those businesses seems to meet the majority's four-prong definition.

Apparently as its justification for applying a special market-definition rule to "two-sided transaction platforms," the majority explains that such platforms "often exhibit" what it calls "indirect network effects." *Ante*, at 535. By this, the majority means that sales of merchant-related card services and (different) shopper-related card services are interconnected, in that increased merchant-buyers mean increased shopper-buyers (the more stores in the card's network, the more customers likely to use the card), and vice versa. See *ibid.* But this, too, is commonplace. Consider, again, a farmers' market. The more farmers that participate (within physical and esthetic limits), the more customers the market will likely attract, and vice versa. So too with travel agents: The more airlines whose tickets a travel agent sells, the more potential passengers will likely use that travel agent, and the more potential passengers that use the travel agent, the easier it will likely be to convince airlines to sell through the travel agent. And so forth. Nothing in antitrust law, to my knowledge, suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good. See *supra*, at 561–563.

To justify special treatment for "two-sided transaction platforms," the majority relies on the Court's decision in *United States* v. *Grinnell Corp.*, 384 U. S. 563, 571–572 (1966). In *Grinnell*, the Court treated as a single market several different "central station services," including burglar alarm services and fire alarm services. *Id.*, at 571. It did so even though, for *consumers*, "burglar alarm services are not interchangeable with fire alarm services." *Id.*, at 572. But that is because, for *producers*, the services were indeed interchangeable: A company that offered one could easily offer the other, because they all involve "a single basic service—the protection of property through use of a central service station." *Ibid.* Thus, the "commercial realit[y]" that the *Grinnell* Court relied on, *ibid.*, was that the services being grouped were what economists call "producer substitutes." See 2B Areeda & Hovenkamp ¶561, at 378. And the law is clear that "two products produced interchangeably from the same production facilities are presumptively in the same market," even if they are not "close substitutes for each other on the demand side." *Ibid.* That is because a firm that produces one such product can, in response to a price increase in the other, easily shift its production and thereby limit its competitor's power to impose the higher price. See *id.*, ¶561a, at 379.

Unlike the various types of central station services at issue in *Grinnell Corp.*, however, the shopper-related and merchant-related services that American Express provides are not "producer substitutes" any more than they are traditional substitutes. For producers as for consumers, the services are instead complements. Credit-card companies must sell them together for them to be useful. As a result, the credit-card companies cannot respond to, say, merchant-related price increases by shifting production away from shopper-related services to merchant-related services. The relevant "commercial realities" in this case are thus com-

pletely different from those in *Grinnell Corp.* (The majority also cites *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 336–337 (1962), for this point, but the "commercial realities" considered in that case were that "shoe stores in the outskirts of cities compete effectively with stores in central downtown areas," and thus are part of the same market. *Id.*, at 338–339. Here, merchant-related services do not, as I have said, compete with shopper-related services, and so *Brown Shoe Co.* does not support the majority's position.) Thus, our precedent provides no support for the majority's special approach to defining markets involving "two-sided transaction platforms."

3

What about the academic articles the majority cites? The first thing to note is that the majority defines "two-sided transaction platforms" much more broadly than the economists do. As the economists who coined the term explain, if a "two-sided market" meant simply that a firm connects two different groups of customers via a platform, then "pretty much any market would be two-sided, since buyers and sellers need to be brought together for markets to exist and gains from trade to be realized." Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006). The defining feature of a "two-sided market," according to these economists, is that "the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount." *Id.*, at 664–665; accord, Filistrucchi 299. That requirement appears nowhere in the majority's definition. By failing to limit its definition to platforms that economists would recognize as "two sided" in the relevant respect, the majority carves out a much broader exception to the ordinary antitrust rules than the academic articles it relies on could possibly support.

Even as limited to the narrower definition that economists use, however, the academic articles the majority cites do not

support the majority's flat rule that firms operating "two-sided transaction platforms" should always be treated as part of a single market for all antitrust purposes. *Ante*, at 545–547. Rather, the academics explain that for market-definition purposes, "[i]n some cases, the fact that a business can be thought of as two-sided may be irrelevant," including because "nothing in the analysis of the practices [at issue] really hinges on the linkages between the demands of participating groups." Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667, 689 (2008). "In other cases, the fact that a business is two-sided will prove important both by identifying the real dimensions of competition and focusing on sources of constraints." *Ibid.* That flexible approach, however, is precisely the one the District Court followed in this case, by considering the effects of "[t]he two-sided nature of the . . . card industry" throughout its analysis. 88 F. Supp. 3d, at 155.

Neither the majority nor the academic articles it cites offer any explanation for why the features of a "two-sided transaction platform" justify always treating it as a single antitrust market, rather than accounting for its economic features in other ways, as the District Court did. The article that the majority repeatedly quotes as saying that "'[i]n two-sided transaction markets, only one market should be defined,'" *ante*, at 546 (quoting Filistrucchi 302), justifies that conclusion only for purposes of assessing the effects of a merger. In such a case, the article explains, "[e]veryone would probably agree that a payment card company such as American Express is either in the relevant market on both sides or on neither side . . . . The analysis of a merger between two payment card platforms should thus consider . . . both sides of the market." *Id.*, at 301. In a merger case this makes sense, but it is also meaningless, because, whether there is one market or two, a reviewing court will consider both sides, because it must examine the effects of the merger in each affected market and submarket. See *Brown Shoe Co.*, 370

U. S., at 325. As for a nonmerger case, the article offers only *United States* v. *Grinnell* as a justification, see Filistrucchi 303, and as I have already explained, *supra*, at 569–570, *Grinnell* does not support this proposition.

E

Put all of those substantial problems with the majority's reasoning aside, though. Even if the majority were right to say that market definition was relevant, and even if the majority were right to further say that the District Court should have defined the market in this case to include shopper-related services as well as merchant-related services, that *still* would not justify the majority in affirming the Court of Appeals. That is because, as the majority is forced to admit, the plaintiffs *made* the factual showing that the majority thinks is required. See *ante*, at 549.

Recall why it is that the majority says that market definition matters: because if the relevant market includes both merchant-related services and card-related services, then the plaintiffs had the burden to show that as a result of the nondiscrimination provisions, "the price of credit-card transactions"—considering both fees charged to merchants and rewards paid to cardholders—"was higher than the price one would expect to find in a competitive market." *Ante*, at 547–548. This mirrors the Court of Appeals' holding that the Government had to show that the "nondiscrimination provisions" had "made *all* [American Express] customers on both sides of the platform—*i. e.*, both merchants and cardholders—worse off overall." 838 F. 3d, at 205.

The problem with this reasoning, aside from it being wrong, is that the majority admits that the plaintiffs *did* show this: They "offer[ed] evidence" that American Express "increased the percentage of the purchase price that it charges merchants . . . and that this increase was not entirely spent on cardholder rewards." *Ante*, 549 (citing 88 F. Supp. 3d, at 195–197, 215). Indeed, the plaintiffs did not

merely "offer evidence" of this—they persuaded the District Court, which made an unchallenged factual finding that the merchant price increases that resulted from the nondiscrimination provisions "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and *resulted in a higher net price*." *Id.*, at 215 (emphasis added).

In the face of this problem, the majority retreats to saying that even net price increases do not matter after all, absent a showing of lower output, because if output is increasing, "'rising prices are equally consistent with growing product demand.'" *Ante*, at 549 (quoting *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 237 (1993)). This argument, unlike the price argument, has nothing to do with the credit-card market being a "two-sided transaction platform," so if this is the basis for the majority's holding, then nearly all of the opinion is dicta. The argument is also wrong. It is true as an economic matter that a firm exercises market power by restricting output in order to raise prices. But the relevant restriction of output is as compared with a hypothetical world in which the restraint was not present and prices were lower. The fact that credit-card use in general has grown over the last decade, as the majority says, see *ante*, at 549–550, says nothing about whether such use would have grown more or less without the nondiscrimination provisions. And because the relevant question is a comparison between reality and a hypothetical state of affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the Sherman Act does not apply at all.

In any event, there are features of the credit-card market that may tend to limit the usual relationship between price and output. In particular, merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders. See, *e. g.*, 88

F. Supp. 3d, at 216; Brief for John M. Connor et al. as *Amici Curiae* 34–35. Thus, higher credit-card merchant fees may have only a limited effect on credit-card transaction volume, even as they disrupt the marketplace by extracting anticompetitive profits.

IV

A

For the reasons I have stated, the Second Circuit was wrong to lump together the two different services sold, *at step 1*. But I recognize that the Court of Appeals has not yet considered whether the relationship between the two services might make a difference at steps 2 and 3. That is to say, American Express might wish to argue that the nondiscrimination provisions, while anticompetitive in respect to merchant-related services, nonetheless have an adequate offsetting procompetitive benefit in respect to its shopper-related services. I believe that American Express should have an opportunity to ask the Court of Appeals to consider that matter.

American Express might face an uphill battle. A Sherman Act §1 defendant can rarely, if ever, show that a procompetitive benefit in the market for one product offsets an anticompetitive harm in the market for another. In *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 611 (1972), this Court wrote:

> "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking."

American Express, pointing to vertical price-fixing cases like our decision in *Leegin*, argues that comparing competition-

related pros and cons is more common than I have just suggested. See 551 U. S., at 889–892. But *Leegin* held only that vertical price fixing is subject to the "rule of reason" instead of being *per se* unlawful; the "rule of reason" still applies to vertical agreements just as it applies to horizontal agreements. See *id.*, at 898–899.

Moreover, the procompetitive justifications for vertical price-fixing agreements are not apparently applicable to the distinct types of restraints at issue in this case. A vertically imposed price-fixing agreement typically involves a manufacturer controlling the terms of sale for its own product. A television manufacturer, for example, will insist that its dealers not cut prices for the manufacturer's own televisions below a particular level. Why might a manufacturer want its dealers to refrain from price competition in the manufacturer's own products? Perhaps because, for example, the manufacturer wants to encourage the dealers to develop the market for the manufacturer's brand, thereby increasing *interbrand* competition for the same ultimate product, namely, a television. This type of reasoning does not appear to apply to American Express' nondiscrimination provisions, which seek to control the terms on which merchants accept *other brands'* cards, not merely American Express' own.

Regardless, I would not now hold that an agreement such as the one before us can never be justified by procompetitive benefits of some kind. But the Court of Appeals would properly consider procompetitive justifications not at step 1, but at steps 2 and 3 of the "rule of reason" inquiry. American Express would need to show just how this particular anticompetitive merchant-related agreement has procompetitive benefits in the shopper-related market. In doing so, American Express would need to overcome the District Court's factual findings that the agreement had no such effects. See 88 F. Supp. 3d, at 224–238.

B

The majority charts a different path. Notwithstanding its purported acceptance of the three-step, burden-shifting framework I have described, *ante*, at 541–542, the majority addresses American Express' procompetitive justifications now, at step 1 of the analysis, see *ante*, at 549–552. And in doing so, the majority inexplicably ignores the District Court's factual findings on the subject.

The majority reasons that the challenged nondiscrimination provisions "stem negative externalities in the credit-card market and promote interbrand competition." *Ante*, at 551. The "negative externality" the majority has in mind is this: If one merchant persuades a shopper not to use his American Express card at that merchant's store, that shopper becomes less likely to use his American Express card at other merchants' stores. *Ibid.* The majority worries that this "endangers the viability of the entire [American Express] network," *ibid.*, but if so that is simply a consequence of American Express' merchant fees being higher than a competitive market will support. "The antitrust laws were enacted for 'the protection of *competition*, not *competitors.*'" *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 338 (1990). If American Express' merchant fees are so high that merchants successfully induce their customers to use other cards, American Express can remedy that problem by lowering those fees or by spending more on cardholder rewards so that cardholders decline such requests. What it may not do is demand contractual protection from price competition.

In any event, the majority ignores the fact that the District Court, in addition to saying what I have just said, also rejected this argument on independent factual grounds. It explained that American Express "presented no expert testimony, financial analysis, or other direct evidence establishing that without its [nondiscrimination provisions] it will, in fact, be unable to adapt its business to a more competitive mar-

ket." 88 F. Supp. 3d, at 231. It further explained that the testimony that was provided on the topic "was notably inconsistent," with some of American Express' witnesses saying only that invalidation of the provisions "would require American Express to adapt its current business model." *Ibid.* After an extensive discussion of the record, the District Court found that "American Express possesses the flexibility and expertise necessary to adapt its business model to suit a market in which it is required to compete on both the cardholder and merchant sides of the [credit-card] platform." *Id.*, at 231–232. The majority evidently rejects these factual findings, even though no one has challenged them as clearly erroneous.

Similarly, the majority refers to the nondiscrimination provisions as preventing "free riding" on American Express' "investments in rewards" for cardholders. *Ante*, at 551; see also *ante*, at 539 (describing steering in terms suggestive of free riding). But as the District Court explained, "[p]lainly . . . investments tied to card use (such as Membership Rewards points, purchase protection, and the like) are not subject to free-riding, since the network does not incur any cost if the cardholder is successfully steered away from using his or her American Express card." 88 F. Supp. 3d, at 237. This, I should think, is an unassailable conclusion: American Express pays rewards to cardholders only for transactions in which cardholders use their American Express cards, so if a steering effort succeeds, no rewards are paid. As for concerns about free riding on American Express' fixed expenses, including its investments in its brand, the District Court acknowledged that free riding was in theory possible, but explained that American Express "ma[de] no effort to identify the fixed expenses to which its experts referred or to explain how they are subject to free riding." *Ibid.*; see also *id.*, at 238 (American Express' own data showed "that the network's ability to confer a credentialing benefit trails that of its competitors, casting doubt on

whether there is in fact any particular benefit associated with accepting [American Express] that is subject to free riding"). The majority does not even acknowledge, much less reject, these factual findings, despite coming to the contrary conclusion.

Finally, the majority reasons that the nondiscrimination provisions "do not prevent Visa, MasterCard, or Discover from competing against [American Express] by offering lower merchant fees or promoting their broader merchant acceptance." *Ante*, at 551. But again, the District Court's factual findings were to the contrary. As I laid out above, the District Court found that the nondiscrimination provisions *in fact did prevent* Discover from pursuing a low-merchant-fee business model, by "den[ying] merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." 88 F. Supp. 3d, at 214; see *supra*, at 558. The majority's statements that the nondiscrimination provisions are procompetitive are directly contradicted by this and other factual findings.

* * *

For the reasons I have explained, the majority's decision in this case is contrary to basic principles of antitrust law, and it ignores and contradicts the District Court's detailed factual findings, which were based on an extensive trial record. I respectfully dissent.

Syllabus

ABBOTT, GOVERNOR OF TEXAS, ET AL. *v.* PEREZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 17–586. Argued April 24, 2018—Decided June 25, 2018*

In 2011, the Texas Legislature adopted a new congressional districting plan and new districting maps for the two houses of the State Legislature to account for population growth revealed in the 2010 census. To do so, Texas had to comply with a complicated legal regime. The Equal Protection Clause of the Fourteenth Amendment forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. *Shaw* v. *Reno*, 509 U. S. 630, 641. But other legal requirements tend to require that state legislatures consider race in drawing districts. Like all States, Texas is subject to § 2 of the Voting Rights Act of 1965 (VRA), which is violated when a state districting plan provides "less opportunity" for racial minorities "to elect representatives of their choice," *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 425. And at the time, Texas was also subject to § 5, which barred it from making any districting changes unless it could prove that they did not result in retrogression with respect to the ability of racial minorities to elect the candidates of their choice, *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 259. In an effort to harmonize these conflicting demands, the Court has assumed that compliance with the VRA is a compelling State interest for Fourteenth Amendment purposes, see, *e. g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 193; and a State's consideration of race in making a districting decision is narrowly tailored if the State has "good reasons" for believing that its decision is necessary in order to comply with the VRA, *Cooper* v. *Harris*, 581 U. S. 285, 293.

The Texas Legislature's 2011 plans were immediately tied up in litigation and never used. The case was assigned to a three-judge court (Texas court). Texas also submitted the plans for preclearance to the District Court for the District of Columbia (D. C. court). The Texas court drew up interim plans for the State's rapidly approaching primaries, giving no deference to the Legislature's plans. Texas chal-

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*Together with No. 17–626, *Abbott, Governor of Texas, et al.* v. *Perez et al.*, also on appeal from the same court.

lenged the court-ordered plans in this Court, which reversed and remanded with instructions for the Texas court to start with the Texas Legislature's 2011 plans but to make adjustments as required by the Constitution and the VRA. The Texas court then adopted new interim plans. After the D. C. court denied preclearance of the 2011 plans, Texas used the Texas court's interim plans for the 2012 elections. In 2013, the Legislature repealed the 2011 plans and enacted the Texas court's plans (with minor modifications). After *Shelby County* v. *Holder*, 570 U. S. 529, was decided, Texas, no longer covered by § 5, obtained a vacatur of the D. C. court's preclearance order. But the Texas court did not dismiss the case against the 2011 plans as moot. Instead, it allowed the plaintiffs to amend their complaint to challenge the 2013 plans and held that their challenges to the 2011 plans were live. Texas conducted its 2014 and 2016 elections under the 2013 plans. In 2017, the Texas court found defects in several of the districts in the 2011 federal congressional and State House plans (the State Senate plan is not at issue here). Subsequently, it also invalidated multiple Congressional (CD) and House (HD) Districts in the 2013 plans, holding that the Legislature failed to cure the "taint" of discriminatory intent allegedly harbored by the 2011 Legislature. And the court relied on that finding to invalidate several challenged 2013 districts. The court also held that three districts—CD27, HD32, and HD34—were invalid under § 2 of the VRA because they had the *effect* of depriving Latinos of the equal opportunity to elect their candidates of choice. And it found that HD90 was a racial gerrymander based on changes made by the 2013 Legislature. It gave the state attorney general three days to tell the court whether the Legislature would remedy the violations; and if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

Held:

1. This Court has jurisdiction to review the orders at issue. Pp. 594–603.

(a) The Texas court's orders fall within 28 U. S. C. § 1253, which gives the Court jurisdiction to hear an appeal from an order of a three-judge district court "granting or denying . . . an interlocutory or permanent injunction." The Texas court did not *call* its orders "injunctions," but where an order has the "practical effect" of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 83. Pp. 594–598.

(b) The text of the orders and the context in which they were issued make clear that they qualify as interlocutory injunctions under § 1253. The orders were unequivocal that the current legislative plans "violate § 2 and the Fourteenth Amendment" and that these violations "must be remedied." And the short timeframe the attorney general

was given to act is strong evidence that the court did not intend to allow the elections to go ahead under the plans it had just condemned. The unmistakable import of these actions is that the court intended to have new plans ready for use in this year's elections. Texas also had reason to fear that if it tried to conduct elections under those plans, the court would infer an evil motive and perhaps subject the State to the strictures of preclearance under § 3(c) of the VRA. These cases differ from *Gunn* v. *University Comm. to End War in Viet Nam*, 399 U. S. 383, where the order did not have the same practical effect as an injunction. Nor does it matter that the remedy is not yet known. The issue here is whether this year's elections can be held under the plans enacted by the Legislature, not whether any particular remedies should ultimately be ordered if it is determined that the current plans are flawed. Section 1253 must be strictly but sensibly construed, and here the District Court's orders, for all intents and purposes, constituted injunctions. Thus, § 1253 provides jurisdiction. Pp. 598–603.

2. The Texas court erred in requiring the State to show that the 2013 Legislature purged the "taint" that the court attributed to the defunct and never-used plans enacted by a prior Legislature in 2011. Pp. 603–614.

(a) Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 481. In redistricting cases, the "good faith of [the] state legislature must be presumed." *Miller* v. *Johnson*, 515 U. S. 900, 915. The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination, which is but "one evidentiary source" relevant to the question of intent. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 267. Here, the 2011 plans were repealed, and not reenacted, by the 2013 Legislature. Nor did it use criteria that arguably carried forward the effects of the 2011 Legislature's discriminatory intent. Instead, it enacted, with only small changes, the Texas court plans developed pursuant to this Court's instructions. The Texas court contravened these basic burden of proof principles, referring, *e. g.*, to the need to "cure" the earlier Legislature's "taint" and concluding that the Legislature had engaged in no deliberative process to do so. This fundamentally flawed approach must be reversed. Pp. 603–607.

(b) Both the 2011 Legislature's intent and the court's interim plans are relevant to the extent that they give rise to—or tend to refute—inferences about the 2013 Legislature's intent, but they must be weighed together with other relevant direct and circumstantial evidence of the Legislature's intent. But when this evidence is taken into ac-

count, the evidence in the record is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination. Pp. 607–614.

3. Once the Texas court's intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. The Texas court's holding as to the three districts in which it relied on § 2's "effects" test are reversed, but its holding that HD90 is a racial gerrymander is affirmed. Pp. 614–622.

(a) To make out a § 2 "effects" claim, a plaintiff must establish the three "*Gingles* factors": (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. *Thornburg* v. *Gingles*, 478 U. S. 30, 48–51. A plaintiff who makes that showing must then prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. Pp. 614–619.

(1) The Texas court held that CD27 violates § 2 because it has the effect of diluting the votes of Nueces County Latino voters, who, the court concluded, should have been included in a Latino opportunity district rather than CD27, which is not such a district. Plaintiffs, however, could not show that an additional Latino opportunity district could be created in that part of Texas. Pp. 614–616.

(2) The Texas court similarly erred in holding that HD32 and HD34, which make up the entirety of Nueces County, violate § 2. The 2013 plan created two districts that lie wholly within the county: HD34 is a Latino opportunity district, but HD32 is not. The court's findings show that these two districts do not violate § 2, and it is hard to see how the ultimate *Gingles* vote dilution standard could be met if the alternative plan would not enhance the ability of minority voters to elect the candidates of their choice. Pp. 616–619.

(b) HD90 is an impermissible racial gerrymander. HD90 was not copied from the Texas court's interim plans. Instead, the 2013 Legislature substantially modified that district. In 2011, the Legislature, responding to pressure from counsel to one of the plaintiff groups, increased the district's Latino population in an effort to make it a Latino opportunity district. It also moved the city of Como, which is predominantly African-American, out of the district. When Como residents and their Texas House representative objected, the Legislature moved Como back. But that decreased the Latino population, so the Legislature moved more Latinos into the district. Texas argues that its use of race as the predominant factor in HD90's design was permissible because it had "*good reasons* to believe" that this was necessary to sat-

Syllabus

isfy § 2, *Bethune-Hill*, 580 U. S., at 194. But it is the State's burden to prove narrow tailoring, and Texas did not do so on the record here. Pp. 620–622.

No. 17–586, 274 F. Supp. 3d 624, reversed; No. 17–626, 267 F. Supp. 3d 750, reversed in part and affirmed in part; and cases remanded.

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, in which GORSUCH, J., joined, *post*, p. 622. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 622.

Scott A. Keller, Solicitor General of Texas, argued the cause for appellants in both cases. With him on the briefs were *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Matthew H. Frederick*, Deputy Solicitor General, *Andrew B. Davis*, Assistant Solicitor General, *Paul D. Clement*, and *Erin E. Murphy*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Solicitor General Francisco*, *Acting Assistant Attorney General Gore*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Friel*, *Jeffrey E. Sandberg*, and *Bonnie I. Robin-Vergeer*.

Renea Hicks argued the cause for appellees in No. 17–586. With him on the brief were *Marc E. Elias*, *Bruce V. Spiva*, *Abha Khanna*, *José Garza*, *David Richards*, *Allison J. Riggs*, *Robert Notzon*, *Victor L. Goode*, *Luis R. Vera, Jr.*, *Gary L. Bledsoe*, *J. Gerald Herbert*, *Mark P. Gaber*, *Jessica Ring Amunson*, *Gerald H. Goldstein*, *Donald H. Flanary III*, *Jesse Gaines*, and *Rolando L. Rios*. *Ms. Riggs* argued the cause for appellees in No. 17–626. With her on the brief were *Pamela S. Karlan*, *Jeffrey L. Fisher*, *David T. Goldberg*, *Messrs. Richards*, *Garza*, *Notzon*, *Goode*, *Bledsoe*, and *Vera*, and *Nina Perales*.†

†A brief of *amici curiae* urging reversal was filed for the State of Louisiana et al. by *Jeff Landry*, Attorney General of Louisiana, and *Elizabeth B. Murrill*, Solicitor General, and by the Attorneys General for their re-

JUSTICE ALITO delivered the opinion of the Court.

Before us for review are orders of a three-judge court in the Western District of Texas effectively directing the State not to conduct this year's elections using districting plans that the court itself adopted some years earlier. The court developed those plans for use in the 2012 elections pursuant to our directions in *Perry* v. *Perez*, 565 U. S. 388 (2012) (*per curiam*). We instructed the three-judge court to start with the plans adopted by the Texas Legislature (or Legislature) in 2011 but to make adjustments as required by the Constitution and the Voting Rights Act. *Id.*, at 392–396. After those plans were used in 2012, the Texas Legislature enacted them (with only minor modifications) in 2013, and the plans were used again in both 2014 and 2016.

Last year, however, the three-judge court reversed its prior analysis and held that some of the districts in those plans are unlawful. After reviewing the repealed 2011 plans, which had never been used, the court found that they were tainted by discriminatory intent and that the 2013 Legislature had not "cured" that "taint."

We now hold that the three-judge court committed a fundamental legal error. It was the challengers' burden to show that the 2013 Legislature acted with discriminatory intent when it enacted plans that the court itself had produced. The 2013 Legislature was not obligated to show that it had "cured" the unlawful intent that the court attributed to the

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spective States as follows: *Steven T. Marshall* of Alabama, *Joshua D. Hawley* of Missouri, *Michael DeWine* of Ohio, *Alan Wilson* of South Carolina, and *Brad D. Schimel* of Wisconsin.

Briefs of *amici curiae* urging affirmance were filed for the Campaign Legal Center et al. by *Kristen Clarke*, *Ezra D. Rosenberg*, *Jon M. Greenbaum*, *Danielle M. Lang*, *Adav Noti*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, and *Leah C. Aden*; and for Common Cause et al. by *Eugene R. Fidell*, *Charles A. Rothfeld*, *Michael B. Kimberly*, *Andrew J. Pincus*, and *Paul W. Hughes*.

2011 Legislature. Thus, the essential pillar of the three-judge court's reasoning was critically flawed.

When the congressional and state legislative districts are reviewed under the proper legal standards, all but one of them, we conclude, are lawful.

I

A

The 2010 decennial census revealed that the population of Texas had grown by more than 20% and the State was therefore apportioned four additional seats in the United States House of Representatives. C. J. S. 369a.[1] To accommodate this new allocation and the population changes shown by the census, the Legislature adopted a new congressional districting plan, as well as new districting maps for the two houses of the State Legislature.

Redistricting is never easy, and the task was especially complicated in Texas in 2011. Not only was the Legislature required to draw districts that were substantially equal in population, see *Perry*, *supra*, at 391–392; *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), and to comply with special state-law districting rules,[2] but federal law imposed complex and delicately balanced requirements regarding the consideration of race.

Then, as now, federal law restricted the use of race in making districting decisions. The Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient

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[1] There are several appendixes in these cases. We use "App." to refer to the joint appendix filed at the merits stage. We use "C. J. S." and "H. J. S." to refer to the appendixes attached to Texas's jurisdictional statements in No. 17–586 and No. 17–626, respectively. We use "C. J. S. Findings" and "H. J. S. Findings" to refer to appellees' supplemental appendixes in No. 17–586 and No. 17–626.

[2] See, *e. g.*, Tex. Const., Art. III, § 25 (Senate), § 26 (House).

justification. *Shaw* v. *Reno*, 509 U. S. 630, 641 (1993). It also prohibits intentional "vote dilution"—"invidiously . . . minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities." *Mobile* v. *Bolden*, 446 U. S. 55, 66–67 (1980) (plurality opinion).

While the Equal Protection Clause imposes these important restrictions, its application in the field of districting is complicated. For one thing, because a voter's race sometimes correlates closely with political party preference, see *Cooper* v. *Harris*, 581 U. S. 285, 308 (2017); *Easley* v. *Cromartie*, 532 U. S. 234, 243 (2001), it may be very difficult for a court to determine whether a districting decision was based on race or party preference. Here, the three-judge court found that the two factors were virtually indistinguishable.[3]

At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 52 U. S. C. § 10301 *et seq.*, pulls in the opposite direction: It often insists that districts be created precisely because of race. Two provisions of the VRA exert such demands, and in 2011, Texas was subject to both. At that time, Texas was covered by § 5 of the VRA[4] and was thus barred from making any districting changes unless it could prove that they did not result in "retrogression" with respect to the ability of racial minorities to elect the candidates of their choice. *Alabama Legislative Black Caucus* v.

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[3] The court found: "[I]t is difficult to differentiate an intent to affect Democrats from an intent to affect minority voters. Making minorities worse off will likely make Democrats worse off, and vice versa." C. J. S. Findings 467a (citation omitted). "This correlation is so strong that [an expert] assessed whether districts were minority opportunity districts by looking at Democratic results/wins (noting that in Texas, minority candidates of choice means Democrats)." *Ibid.*

[4] See *Shelby County* v. *Holder*, 570 U. S. 529 (2013).

Alabama, 575 U. S. 254, 259 (2015). That showing obviously demanded consideration of race.

On top of this, Texas was (and still is) required to comply with §2 of the VRA. A State violates §2 if its districting plan provides "'less opportunity'" for racial minorities "'to elect representatives of their choice.'" *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 425 (2006) (*LULAC*). In a series of cases tracing back to *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), we have interpreted this standard to mean that, under certain circumstances, States must draw "opportunity" districts in which minority groups form "effective majorit[ies]," *LULAC*, *supra*, at 426.

Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to "'competing hazards of liability.'" *Bush* v. *Vera*, 517 U. S. 952, 977 (1996) (plurality opinion). In an effort to harmonize these conflicting demands, we have assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest, see, *e. g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 193 (2017); *Shaw* v. *Hunt*, 517 U. S. 899, 915 (1996), and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has "'good reasons'" for believing that its decision is necessary in order to comply with the VRA. *Cooper*, *supra*, at 293.

B

Facing this legal obstacle course, the Texas Legislature in 2011 adopted new districting plans, but those plans were immediately tied up in litigation and were never used. Several plaintiff groups quickly filed challenges in the District Court for the Western District of Texas, arguing that some

of the districts in the new plans were racial gerrymanders, some were based on intentional vote dilution, and some had the effect of depriving minorities of the equal opportunity to elect the candidates of their choice. This case was assigned to a three-judge court, as required by 28 U. S. C. § 2284(a). (We will call this court "the Texas court" or simply "the District Court.")

The situation was further complicated by the requirement that Texas obtain preclearance of its new plans. To do this, Texas filed for a declaratory judgment in the District Court for the District of Columbia. See *Texas* v. *United States*, 887 F. Supp. 2d 133 (2012). (We will call this court "the D. C. court.") By early 2012, the D. C. court had not yet issued a decision, and Texas needed usable plans for its rapidly approaching primaries. Accordingly, the Texas court drew up interim plans for that purpose. *Perez* v. *Perry*, 835 F. Supp. 2d 209 (2011). In creating those plans, the majority of the Texas court thought that it was not "required to give any deference to the Legislature's enacted plan." *Id.*, at 213. Instead, it based its plans on what it called "neutral principles that advance the interest of the collective public good." *Id.*, at 212.[5]

Texas challenged those court-ordered plans in this Court, and we reversed. *Perry* v. *Perez*, 565 U. S. 388 (2012) (*per curiam*). Noting that "[r]edistricting is 'primarily the duty and responsibility of the State,'" we held that the Texas court should have respected the legislative judgments embodied in the 2011 plans to the extent allowed by the Constitution and the VRA. *Id.*, at 392–399.

We remanded the case with very specific instructions. The Texas court was told to start with the plans adopted by the Legislature but to modify those plans as needed so as "not to incorporate . . . any legal defects." *Id.*, at 394. With

[5]Judge Smith dissented, arguing that the majority had produced a "runaway plan" that "award[ed] judgment on the pleadings in favor of one side—a slam-dunk victory for the plaintiffs." *Perez* v. *Perry*, 835 F. Supp. 2d 209, 218 (WD Tex. 2011).

respect to claims under the Constitution or §2 of the VRA, the District Court was told to change a district if the plaintiffs were *likely* to succeed on the merits of their challenge. *Ibid.* And with respect to §5 claims, the court was instructed to make whatever changes were needed to obviate any legal claim that was "not insubstantial."[6] *Id.*, at 395. Thus, our instructions, in an abundance of caution, demanded changes in the challenged 2011 plans without proof that those changes were actually required by either the Constitution or the VRA.

On remand, the Texas court ordered additional briefing and heard two more days of argument. App. 29a, 35a–50a; Order in Civ. No. 11–cv–00360, Doc. No. 616. It issued two opinions, totaling more than 70 pages, and analyzed disputed districts in detail. C. J. S. 367a–423a; H. J. S. 300a–315a. While stressing the preliminary nature of its determinations, see C. J. S. 368a; H. J. S. 314a–315a, the court found that some districts required change and that others were lawful, C. J. S. 367a–423a; H. J. S. 300a–315a. The court then adopted plans for the State's congressional districts and for both houses of the State Legislature. (The plan for the State Senate is not at issue.)

Both the congressional plan and the plan for the Texas House departed significantly from the State's 2011 plans. At least 8 of the 36 congressional districts were markedly altered, and 21 districts in the plan for the Texas House were "substantially" changed. *Id.*, at 314a; C. J. S. 397a–408a.

In August 2012, the D. C. court denied preclearance of the plans adopted by the Legislature in 2011, see *Texas* v. *United States*, *supra*, so the State conducted the 2012 elections under the interim plans devised by the Texas court. At the same time, Texas filed an appeal in this Court contesting the

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[6] The Texas court was given more leeway to make changes to districts challenged under §5 because it would have been inappropriate for that court to address the "merits of §5 challenges," a task committed by statute to the District Court for the District of Columbia. *Perez*, 565 U. S., at 394.

decision of the D. C. court,[7] but that appeal ultimately died for two reasons.

First, the 2011 plans were repealed. The Texas attorney general urged the Legislature to pass new redistricting plans, C. J. S. 429a, and in his view, the "best way to remedy the violations found by the D. C. court" was to "adopt the [Texas court's] interim plans as the State's permanent redistricting maps." *Id.*, at 432a. Doing so, he said, would "confirm the legislature's intent" to adopt "a redistricting plan that fully comports with the law." *Id.*, at 429a.

The Governor called a special session to do just that, and the Legislature complied. One of the legislative sponsors, Senator Seliger, explained that, although "'the Texas Legislature remains confident that the legislatively-drawn maps adopted in 2011 are fair and legal . . . , there remain several outstanding legal questions regarding these maps that undermine the stability and predictability of the electoral process in Texas.'" 274 F. Supp. 3d 624, 649, n. 40 (2017). Counsel for one of the plaintiff groups, the Mexican American Legal Defense and Education Fund (MALDEF), testified in favor of the plans. C. J. S. 436a–439a. The 2013 Legislature then repealed the 2011 plans and enacted the Texas court's interim plans with just a few minor changes. The federal congressional plan was not altered at all, and only small modifications were made to the plan for the Texas House. C. J. S. Findings 231a–232a.

On the day after the Legislature passed the new plans and the day before the Governor signed them, this Court issued its decision in *Shelby County* v. *Holder*, 570 U. S. 529 (2013), which invalidated the coverage formula in § 4 of the VRA. Now no longer subject to § 5, Texas obtained a vacatur of the D. C. court's order on preclearance. 274 F. Supp. 3d, at 634–635, and n. 11.

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[7] Notice of Appeal in *Texas* v. *United States*, Civ. No. 11–cv–1303 (D DC, Aug. 31, 2012), Doc. 234.

With the never-effective 2011 plans now repealed and any preclearance issues overcome by events, the State argued in the Texas court that the plaintiffs' case against the 2011 plans was moot. In September 2013, the Texas court allowed the plaintiffs to amend their complaints to challenge the 2013 plans, but the court held that their challenges to the 2011 plans were still alive, reasoning that the repeal of the 2011 plans represented the "voluntary cessation" of allegedly unconstitutional conduct.[8]

Texas conducted its 2014 and 2016 elections under the plans that had been preliminarily approved by the Texas court and subsequently adopted (with only minor changes) by the Legislature in 2013. But in March and April 2017, after multiple trials, the Texas court issued a pair of rulings on the defunct 2011 plans. The court reaffirmed the conclusions it had reached in 2012 about defects in the 2011 plans, and it went further. Contrary to its earlier decision, it held that Congressional District (CD) 35 is an impermissible racial gerrymander and that CD27 violates § 2 of the VRA because it has the effect of diluting the electoral opportunities of Latino voters. C. J. S. 181a, 193a–194a. Previously, the court had provided detailed reasons for rejecting the very arguments that it now accepted. *Id.*, at 409a–423a. Similarly, the court held that multiple districts in the plan for the Texas House were the result of intentional vote dilution. These included districts in the counties of Nueces (House District (HD) 32, HD34), Bell (HD54, HD55), and Dallas (HD103, HD104, HD105). H. J. S. 275a–276a.[9]

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[8] We express no view on the correctness of this holding.

[9] Judge Smith again dissented, on both mootness and the merits. On mootness, Judge Smith explained that, "[s]ix years later, we are still enveloped in litigation over plans that have never been used and will never be implemented." C. J. S. 349a. On the merits, Judge Smith argued that the majority erroneously inferred a "complex, widespread conspiracy of scheming and plotting, by various legislators and staff, carefully designed to obscure the alleged race-based motive," when the intent was in fact partisan. H. J. S. 294a; C. J. S. 351a.

In August 2017, having ruled on the repealed 2011 plans, the Texas court finally turned its attention to the plans then in effect—*i. e.*, the plans that had been developed by the court, adopted by the Legislature in 2013, and used in both the 2014 and 2016 elections. The court invalidated the districts in those plans that correspond to districts in the 2011 plan that it had just held to be unlawful, *i. e.*, CD27, CD35, HD32, HD34, HD54, HD55, HD103, HD104, and HD105. See 274 F. Supp. 3d 624 (No. 17–586) and 267 F. Supp. 3d 750 (2017) (No. 17–626).

In reaching these conclusions, the court pointed to the discriminatory intent allegedly harbored by the 2011 Legislature, and it attributed this same intent to the 2013 Legislature because it had failed to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." 274 F. Supp. 3d, at 645–652; 267 F. Supp. 3d, at 757. The court saw "no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." 274 F. Supp. 3d, at 649. And it faulted the State because it "did not accept [findings of the D. C. court] and instead appealed to the Supreme Court." *Ibid.* Seeing no evidence that the State had undergone "a change of heart," the court concluded that the Legislature's "decision to adopt the [District Court's] plans" was a "litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." *Id.*, at 649–650. Finally, summarizing its analysis, the court reiterated that the 2011 Legislature's "discriminatory taint was not removed by the [2013] Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy." *Id.*, at 686.

The Texas court's decisions about CD35 and all but three of the Texas House districts were based entirely on its finding that the 2013 Legislature had not purged its predeces-

sor's discriminatory intent. However, the court also held that three districts—CD27, HD32, and HD34—were invalid under § 2 of the VRA because they had the effect of depriving Latinos of the equal opportunity to elect their candidates of choice. *Id.*, at 682–686; 267 F. Supp. 3d, at 775–783. And the court found independent proof that HD90 was a racial gerrymander. *Id.*, at 788–794.

The court held that violations in all these districts "must be remedied." 274 F. Supp. 3d, at 686; see also 267 F. Supp. 3d, at 795 (describing State House district violations that "must be remedied"). Mindful that October 1 was the deadline for the Texas secretary of state to provide voter registration templates to the State's counties, App. 380a–381a, the court took steps to bring about prompt remedial action. In two orders issued on August 15 and 24, the Texas attorney general was instructed to advise the court, within three days, "whether the Legislature intends to take up redistricting in an effort to cure these violations." 274 F. Supp. 3d, at 686; 267 F. Supp. 3d, at 795. If the Legislature chose not to do so, the court warned, it would "hold a hearing to consider remedial plans." *Ibid.* After the Governor made clear that the State would not act, the court ordered the parties to proceed with a hearing on the congressional plan on September 5, as well as a hearing on the plan for the Texas House on September 6. 274 F. Supp. 3d, at 686; 267 F. Supp. 3d, at 795; App. 134a–136a; Defendants' Opposed Motion To Stay Order on Plan C235 Pending Appeal or Final Judgment in Civ. No. 11–cv–00360, Doc. 1538, pp. 3–4; Defendants' Opposed Motion To Stay Order on Plan H358 Pending Appeal or Final Judgment, Doc. 1550, pp. 4–5.

Texas applied for stays of both orders, but the District Court denied the applications. App. 134a–136a. Texas then asked this Court to stay the orders, and we granted that relief. After receiving jurisdictional statements, we postponed consideration of jurisdiction and set the cases for consolidated argument. 583 U. S. 1088 (2018).

II

Before reaching the merits of these appeals, we must assure ourselves that we have jurisdiction to review the orders at issue. Appellants claim that the orders amount to injunctions and are therefore appealable to this Court under 28 U. S. C. § 1253. Appellees disagree, contending that the orders do not qualify as injunctions. We hold that we have jurisdiction because the orders were effectively injunctions in that they barred Texas from using the districting plans now in effect to conduct this year's elections.

A

The Judiciary Act of 1789, 1 Stat. 73, "established the general principle that only final decisions of the federal district courts would be reviewable on appeal." *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 83 (1981) (emphasis deleted). But because "rigid application of this principle was found to create undue hardship in some cases," Congress created exceptions. *Ibid.* Two are relevant here. We have jurisdiction under 28 U. S. C. § 1253 to hear an appeal from an order of a three-judge district court "granting or denying . . . an interlocutory or permanent injunction." Similarly, § 1292(a)(1) gives the courts of appeals jurisdiction over "[i]nterlocutory orders of the district courts" "granting, continuing, modifying, refusing or dissolving injunctions," "except where a direct review may be had in the Supreme Court."

The orders in these cases fall within § 1253. To be sure, the District Court did not *call* its orders "injunctions"—in fact, it disclaimed the term, App. 134a–136a—but the label attached to an order is not dispositive. We have previously made clear that where an order has the "practical effect" of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. *Carson*, *supra*, at 83; see also *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 287–288 (1988). We applied this test in

Carson, holding that an order that declined to enter a consent decree prohibiting certain conduct could be appealed under § 1292(a)(1) because it was the practical equivalent of an order denying an injunction and threatened serious and perhaps irreparable harm if not immediately reviewed. 450 U. S., at 83–84, 86–90.

This "practical effect" rule serves a valuable purpose. If an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision in the district court. Lawful and important conduct may be barred, and unlawful and harmful conduct may be allowed to continue. Recognizing this, Congress authorized interlocutory appellate review of such orders. But if the availability of interlocutory review depended on the district court's use of the term "injunction" or some other particular language, Congress's scheme could be frustrated. The harms that Congress wanted to avoid could occur so long as the district court was careful about its terminology. The "practical effect" inquiry prevents such manipulation.

In analogous contexts, we have not allowed district courts to "shield [their] orders from appellate review" by avoiding the label "injunction." *Sampson* v. *Murray*, 415 U. S. 61, 87 (1974). For instance, in *Sampson*, we held that an order labeled a temporary restraining order (which is not appealable under § 1292(a)(1)) should be treated as a "preliminary injunction" (which is appealable) since the order had the same practical effect as a preliminary injunction. *Id.*, at 86–88.

Appellees and the dissent contend that the "practical effect" approach should be confined to § 1292(a)(1), but we see no good reason why it should not apply to § 1253 as well. Appellees note that we "narrowly construe" § 1253, *Goldstein* v. *Cox*, 396 U. S. 471, 478 (1970), but we also construe § 1292(a)(1) "narrowly," *Carson*, *supra*, at 84. In addition, the relevant language in the two provisions is nearly identi-

cal;[10] both provisions serve the same purpose; and we have previously called them "analogous." *Goldstein*, *supra*, at 475.

The provisions are also textually interlocked. Section 1292(a)(1) does not apply where "direct review may be had in the Supreme Court," *i. e.*, where § 1253 applies. If the "practical effects" test applied under § 1292(a)(1) but not § 1253, the consequences would be unfortunate and strange. We would have to identify the magic language needed for an order to qualify as an order granting or denying an injunction, and that standard would hardly constitute the sort of "[s]imple" rule that the dissent prizes. *Post*, at 635 (opinion of SOTOMAYOR, J.). Then, having developed that standard, we would have to apply it in any case in which a party took an appeal to us from an order of a three-judge court that clearly had the practical effect of an injunction. If we concluded that the magic-words test was not met, the order would appear to be appealable to one of the courts of appeals under § 1292(a)(1). In the language of that provision, the order would be an "orde[r] of [a] district cour[t] of the United States . . . granting [an] injunctio[n]." And because this Court would lack jurisdiction under § 1253, the appeal would not fall within § 1292(1)'s exception for cases "where a direct review may be had in the Supreme Court." Having taken pains to provide for review in this Court, and not in the courts of appeals, of three-judge court orders granting injunctions Congress surely did not intend to produce that result.[11]

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[10] In relevant part, § 1253 applies to "an order granting . . . an interlocutory . . . injunction." Section 1292(a)(1) applies to "[i]nterlocutory orders . . . granting . . . injunctions." Although the similarity is obvious, the dissent perceives some unspecified substantive difference.

[11] The dissent sees nothing strange about such a result because we held in *Mitchell* v. *Donovan*, 398 U. S. 427 (1970) (*per curiam*), that we lacked jurisdiction under § 1253 to hear an appeal from a three-judge court order denying a declaratory judgment. The decision in *Donovan* was based on the plain language of § 1253, which says nothing about orders granting or

Appellees argue that an order denying an injunction (the situation in *Carson*) and an order granting an injunction (the situation here) should be treated differently, Brief for Appellees in No. 17–586, p. 27, but they offer no convincing reason for doing so. No authority supports their argument. The language of §§ 1253 and 1292(a)(1) makes no such distinction, and we have stated that the "practical effect" analysis applies to the "granting or denying" of injunctions. *Gulfstream*, *supra*, at 287–288.

In addition, appellees' suggested distinction would put appellate courts in an awkward position. Suppose that a district court granted an injunction that was narrower than the one requested by the moving party. Would an appellate court (whether this Court or a court of appeals) have jurisdiction to rule on only part of that decision? Suppose the appellate court concluded that the district court was correct in refusing to give the movant all the injunctive relief it sought because the movant's entire claim was doomed to fail. Would the appellate court be limited to holding only that the lower court properly denied the relief that was withheld? The rule advocated by the appellees would needlessly complicate appellate review.[12]

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denying declaratory judgments. By contrast, § 1253 gives us jurisdiction to hear appeals from orders granting or denying injunctions.

The same goes for *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens, Inc.*, 397 U. S. 820 (1970) (*per curiam*), also cited by the dissent. In that case, the District Court issued a declaratory judgment, not an injunction. Again, the text of § 1253 says nothing about declaratory judgments.

[12] The inquiry required by the practical effects test is no more difficult when the question is whether an injunction was effectively granted than it is when the question is whether an injunction was effectively denied. Lower courts have had "no problem concluding that [certain orders have] the practical effect of granting an injunction." *I. A. M. Nat. Pension Fund Benefit Plan A* v. *Cooper Industries, Inc.*, 789 F. 2d 21, 24 (CADC 1986); see also *Andrew* v. *American Import Center*, 110 A. 3d 626, 634 (D. C. 2015) ("[G]ranting a stay pending arbitration does have the 'practical effect' of enjoining the party opposing arbitration").

Finally, appellees point in passing to Rule 65(d) of the Federal Rules of Civil Procedure, which requires that an injunction "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Rules 65(d)(1)(B), (C); see Brief for Appellees in No. 17–586, at 27. But as explained in *Gunn* v. *University Comm. to End War in Viet Nam*, 399 U. S. 383, 389, n. 4 (1970), we have never suggested that a failure to meet the specificity requirements of Rule 65(d) would "deprive the Court of jurisdiction under § 1253."

A contrary holding would be perverse. Rule 65(b) protects the party against which an injunction is issued by requiring clear notice as to what that party must do or refrain from doing. Where a vague injunction does not comply with Rule 65(b), the aggrieved party has a particularly strong need for appellate review. It would be odd to hold that there can be no appeal in such a circumstance.

For these reasons, we hold that we have jurisdiction under § 1253 to hear an appeal from an order that has the same practical effect as one granting or denying an injunction.

B

With these principles settled, we conclude that the orders in these cases qualify as interlocutory injunctions under § 1253. The text of the orders and the context in which they were issued make this clear.

The orders are unequivocal that the current legislative plans "violate § 2 and the Fourteenth Amendment" and that these violations "must be remedied." 274 F. Supp. 3d, at 686; see also, *e. g.*, 267 F. Supp. 3d, at 795 ("[V]iolations found by this Court in its Order on [the State House plan] now require a remedy"); *ibid.* ("In Bell County, the intentional discrimination previously found by the Court must be remedied"); *ibid.* ("In Dallas County, the intentional discrimination previously found by the Court must be remedied").

We do not suggest that this language alone is sufficient to show that the orders had the practical effect of enjoining use of the current plans in this year's elections, but the court did not stop with these pronouncements. As we have noted, the orders required the Texas attorney general to inform the court within three days whether the Legislature would remedy the violations, and the orders stated that if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

The short time given the Legislature to respond is strong evidence that the three-judge court did not intend to allow the elections to go ahead under the plans it had just condemned. The Legislature was not in session, so in order to take up the task of redistricting, the Governor would have been required to convene a special session—which is no small matter. And, when the Governor declined to call a special session, the court moved ahead with its scheduled hearings and invited the parties to continue preparing for them even after this Court administratively stayed the August 15 order.

The import of these actions is unmistakable: The court intended to have new plans ready for use in this year's elections. Nothing in the record even hints that the court contemplated the possibility of allowing the elections to proceed under the 2013 plans.

What is more, Texas had reason to believe that it would risk deleterious consequences if it defied the court and attempted to conduct the elections under the plans that the court had found to be based on intentional racial discrimination. In the very orders at issue, the court inferred discriminatory intent from Texas's choice to appeal the D. C. court's preclearance decision rather than immediately taking steps to bring its plans into compliance with that decision. 274 F. Supp. 3d, at 649; see Part III, *infra*. Reading such an order, Texas had reason to fear that if it tried to conduct elections under plans that the court had found to be racially

discriminatory, the court would infer an evil motive and perhaps subject the State once again to the strictures of preclearance under § 3(c) of the VRA.[13] This is a remedy that the plaintiffs hoped to obtain, see, *e. g.*, App. 177a, and that the District Court seemed inclined to consider, see C. J. S. 122a–123a (declining to declare moot the challenges to the long-since-repealed 2011 plans because "there remains the possibility of declaratory and equitable relief under § 3(c)").

Contending that the orders here do not qualify under § 1253, appellees analogize these cases to *Gunn*, 399 U. S. 383, but there is no relevant similarity. In *Gunn*, anti-war protesters were charged with violating a Texas "disturbing-the-peace statute," *id.*, at 384, and they challenged the constitutionality of the statute in federal court. After the state charges were dismissed, the District Court issued a "discursive" opinion "expressing the view that [the statute was] constitutionally invalid." *Id.*, at 386–387. But the court then refrained from going any further, "pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements." *University Comm. to End War in Viet Nam* v. *Gunn*, 289 F. Supp. 469, 475 (WD Tex. 1968). The defendants appealed to this Court, and at the time of our decision two years later, neither the Legislature nor the District Court had taken any further action. We therefore held that we lacked jurisdiction under § 1253. The District Court order in that case did not have the same practical effect as an injunction. Indeed,

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[13] Section 3(c) provides that if "the court finds that violations of the fourteenth or fifteenth amendment justif[y] equitable relief," the court "shall retain jurisdiction for such period as it may deem appropriate and during such period no voting" practice shall go into effect unless first precleared by the court or the United States Attorney General. 52 U. S. C. § 10302(c).

it had no practical effect whatsoever and is thus entirely different from the orders now before us.[14]

Appellees suggest that appellate jurisdiction is lacking in these cases because we do not know at this point "what a remedy would entail, who it would affect, and when it would be implemented." Brief for Appellees in No. 17–586, at 27. The dissent makes a similar argument with respect to two of the Texas House districts. *Post*, at 633–634.[15] But the issue here is whether this year's elections can be held under the plans enacted by the Legislature, not whether any particular remedies would have ultimately been ordered by the District Court.

Appellees and the dissent also fret that this Court will be inundated with redistricting appeals if we accept jurisdiction

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[14] The other authority cited by the dissent is a footnote in *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), a case that came to us in an exceedingly complicated procedural posture. In *Whitcomb*, the District Court held in August 1969 that Indiana's legislative districting scheme was unconstitutional, but the court made it clear that it would take no further action for two months. See *Chavis* v. *Whitcomb*, 305 F. Supp. 1364, 1392 (SD Ind.). The Governor nevertheless appealed to this Court, but by the time we ruled, the Governor had taken another appeal from a later order, entered in December 1969, prohibiting the use of Indiana's current plans and requiring the use of court-created plans in the 1970 elections. See 403 U. S., at 139; Juris. Statement in *Whitcomb* v. *Chavis*, O. T. 1970, No. 92, pp. 1–3. And to further complicate matters, by the time we reviewed the case, the Indiana Legislature had enacted new plans. *Whitcomb*, 403 U. S., at 140.

This Court entertained the later appeal and reversed, but the Court dismissed the earlier—and by then, entirely superfluous—appeal, stating that, at the time when it was issued, "no judgment had been entered and no injunction had been granted or denied." *Id.*, at 138, n. 19. But that cursory conclusion has little relevance here, where the District Court's orders were far more specific, immediate, and likely to demand compliance.

[15] While we think it clear that the District Court effectively enjoined the use of these districts as currently configured for this year's elections, even if the court had not done so, that would not affect our jurisdiction to review the court's order with respect to all other districts.

here, Brief for Appellees in No. 17–626, p. 34; *post*, at 635–637, and n. 8, but there is no reason to fear such a flood. Because § 1253 expressly authorizes "interlocutory" appeals, there is no question that there can be more than one appeal in a case challenging a redistricting plan. District courts sometimes expressly enjoin the use of districting plans before moving on to the remedial phase. See, *e. g.*, *Whitford* v. *Gill*, No. 3:15–cv–421 (WD Wis., Feb. 22, 2017), Doc. 190; *Harris* v. *McCrory*, No. 1:13–cv–949 (MDNC, Feb. 5, 2016), Doc. 143. But appeals from such orders have not overwhelmed our docket. Our holding here will affect only a small category of additional cases.[16]

It should go without saying that our decision does not mean that a State can always appeal a district court order holding a redistricting plan unlawful. A finding on liability cannot be appealed unless an injunction is granted or denied, and in some cases a district court may see no need for interlocutory relief. If a plan is found to be unlawful long before the next scheduled election, a court may defer any injunctive relief until the case is completed. And if a plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.

We appreciate our obligation to heed the limits of our jurisdiction, and we reiterate that § 1253 must be strictly construed. But it also must be sensibly construed, and here the District Court's orders, for all intents and purposes, constituted injunctions barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature. Unless that statute is unconstitutional, this would seriously and irreparably harm[17] the State, and only an inter-

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[16] The dissent cites exactly two cases (*Gunn* and *Whitcomb*) decided during the past half-century in which a party attempted to take an appeal to this Court from a three-judge court order holding a state statute unconstitutional but declining to issue an injunction.

[17] The dissent argues that we give "short shrift" to the irreparable harm question, *post*, at 637, but the inability to enforce its duly enacted plans

locutory appeal can protect that State interest. See *Carson*, 450 U. S., at 89–90. As a result, § 1253 provides jurisdiction.

III

We now turn to the merits of the appeal. The primary question is whether the Texas court erred when it required the State to show that the 2013 Legislature somehow purged the "taint" that the court attributed to the defunct and never-used plans enacted by a prior Legislature in 2011.

A

Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 481 (1997). This rule takes on special significance in districting cases.

Redistricting "is primarily the duty and responsibility of the State," and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller* v. *Johnson*, 515 U. S. 900, 915 (1995) (internal quotation marks omitted). "[I]n assessing the sufficiency of a challenge to a districting plan," a court "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Id.*, at 915–916. And the "good faith of [the] state legislature must be presumed." *Id.*, at 915.

The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Mobile*, 446 U. S., at 74 (plurality opinion). The "ultimate question remains whether a discriminatory intent has been proved in a given case." *Ibid.* The "histori-

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clearly inflicts irreparable harm on the State, see, *e. g.*, *Maryland* v. *King*, 567 U. S. 1301 (2012) (ROBERTS, C. J., in chambers).

cal background" of a legislative enactment is "one evidentiary source" relevant to the question of intent. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 267 (1977). But we have never suggested that past discrimination flips the evidentiary burden on its head.

Neither the District Court nor appellees have pointed to any authority that would justify shifting the burden. The appellees rely primarily on *Hunter* v. *Underwood*, 471 U. S. 222 (1985), but that case addressed a very different situation. *Hunter* involved an equal protection challenge to an article of the Alabama Constitution adopted in 1901 at a constitutional convention avowedly dedicated to the establishment of white supremacy. *Id.*, at 228–230. The article disfranchised anyone convicted of any crime on a long list that included many minor offenses. *Id.*, at 226–227. The court below found that the article had been adopted with discriminatory intent, and this Court accepted that conclusion. *Id.*, at 229. The article was never repealed, but over the years, the list of disqualifying offenses had been pruned, and the State argued that what remained was facially constitutional. *Id.*, at 232–233. This Court rejected that argument because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted. *Id.*, at 233. But the Court specifically declined to address the question whether the then-existing version would have been valid if "[re]enacted today." *Ibid.*

In these cases, we do not confront a situation like the one in *Hunter*. Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature. The 2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court pursuant to instructions from this Court "not to incorporate . . . any legal defects." *Perry*, 565 U. S., at 394.

Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent.

The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true "change of heart" and had "engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." 274 F. Supp. 3d, at 649.

The Texas court's references to the need to "cure" the earlier Legislature's "taint" cannot be dismissed as stray comments. On the contrary, they were central to the court's analysis. The court referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent, and when the court summarized its analysis, it drove the point home. It stated: "The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy." *Id.*, at 686.[18]

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[18] The dissent attempts to rehabilitate this statement by focusing on the last part of this sentence, in which the District Court stated that the Legislature "'"intended [the] taint to be maintained but safe from remedy."'" *Post*, at 654. In making this argument, the dissent, like the District Court, refuses to heed the presumption of legislative good faith and the allocation of the burden of proving intentional discrimination. We do not dispute that the District Court purportedly found that the 2013 Legislature acted with discriminatory intent. The problem is that, in making that finding, it relied overwhelmingly on what it perceived to be the 2013 Legislature's duty to show that it had purged the bad intent of its predecessor.

The dissent labors to explain away all these references to the 2013 Legislature's supposed duty to purge its predecessor's allegedly discriminatory intent, but the dissent loses track of its own argument and characterizes the District Court's reasoning exactly as we have. Indeed, the dissent criticizes us on page 653 of its opinion for saying precisely the same thing that it said 11 pages earlier. On page 653, the dissent states:

> "[T]he majority quotes the orders as requiring proof that the Legislature '"engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."' But the District Court did not put the burden on Texas to make that affirmative showing." *Post*, at 653 (quoting *supra*, at 605, in turn quoting 274 F. Supp. 3d, at 649; citations omitted).

But earlier, the dissent itself describes the District Court's analysis as follows:

> "Despite knowing of the discrimination in its 2011 maps, 'the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.'" *Post*, at 642–643 (quoting 274 F. Supp. 3d, at 649).

And this is not just a single slip of the pen. The dissent writes that the District Court was required "to assess how the 2013 Legislature addressed the known discrimination that motivated" the districts approved by that Court in 2012. *Post*, at 651. The dissent quotes the District Court's statement that "'there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans.'" *Post*, at 644 (quoting 274 F. Supp. 3d, at 649). And there is also this: "Texas was just 'not truly interested in fixing any remaining discrimination in [its 2011 maps].'" *Post*, at 642 (quoting 274 F. Supp. 3d, at 651, n. 45). The District Court's true mode of analysis is so obvious that the

dissent cannot help but repeat it. And that approach was fundamentally flawed and demands reversal.

While a district court's finding of fact on the question of discriminatory intent is reviewed for clear error, see *Cromartie*, 532 U. S., at 242, whether the court applied the correct burden of proof is a question of law subject to plenary review, *U. S. Bank N. A.* v. *Village at Lakeridge, LLC*, 583 U. S. 387, 393 (2018); *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559, 563 (2014). And when a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501 (1984) ("An appellate cour[t has] power to correct errors of law, including those that . . . infect . . . a finding of fact that is predicated on a misunderstanding of the governing rule of law").

B

In holding that the District Court disregarded the presumption of legislative good faith and improperly reversed the burden of proof, we do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature. They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.[19] See, *e. g.*,

[19] The dissent is simply wrong in claiming over and over that we have not thoroughly examined the record. See *post*, at 639, 647–648, 650, 654, 662, 665. The dissent seems to think that the repetition of these charges

Ricci v. *DeStefano*, 557 U. S. 557, 585 (2009); *McCleskey* v. *Zant*, 499 U. S. 467, 497 (1991). There is thus no need for any further prolongation of this already protracted litigation.

The only direct evidence brought to our attention suggests that the 2013 Legislature's intent was legitimate. It wanted to bring the litigation about the State's districting plans to an end as expeditiously as possible. The attorney general advised the Legislature that the best way to do this was to adopt the interim, court-issued plans. The sponsor of the 2013 plans voiced the same objective, and the Legislature then adopted the court-approved plans.

On its face, this explanation of the Legislature's intent is entirely reasonable and certainly legitimate. The Legislature had reason to know that any new plans it devised were likely to be attacked by one group of plaintiffs or another. (The plaintiffs' conflicting positions with regard to some of the districts in the plans now before us bear this out.) Litigating districting cases is expensive and time consuming, and until the districts to be used in the next election are firmly established, a degree of uncertainty clouds the electoral process. Wishing to minimize these effects is understandable and proper.

The court below discounted this direct evidence, but its reasons for doing so are not sound. The court stated that the "strategy" of the 2013 Legislature was to "insulate [the plans] from further challenge, regardless of [the plans'] legal infirmities." 274 F. Supp. 3d, at 650; see also *id.*, at 651, n. 45. But there is no evidence that the Legislature's aim was to gain acceptance of plans that it knew were unlawful.[20]

somehow makes them true. It does not. On the contrary, it betrays the substantive weakness of the dissent's argument.

[20] The dissent and the District Court attach much meaning to the attorney general's use of the term "insulate" when he advised the Legislature to adopt the District Court's plans to avoid further legal challenge. Setting aside that the word "insulate" is a common term used to describe minimizing legal concerns, the context of the letter makes clear that the attorney general was trying to make the point that adopting these plans was the best method of obtaining legal compliance, not the start of a grand

Indeed, there is no evidence that the Legislature thought that the plans were invalid—and as we will explain, the Legislature had sound reasons to believe just the opposite.[21]

The District Court found it significant that the Legislature must have realized that enacting the interim plans would not "end the litigation," because it knew that at least some plaintiffs would pursue their challenges anyway. *Id.*, at 651, n. 45. But even if, as seems likely, the Legislature did not think that all the plaintiffs would immediately abandon all their claims, it does not follow that the Legislature was insincere in stating that it adopted the court-approved plan with the aim of bringing the litigation to a close. It was reasonable for the Legislature to think that approving the court-approved plans might at least reduce objections and thus simplify and expedite the conclusion of the litigation.[22] That MALDEF, counsel for one of the plaintiff groups, testified in favor of the plans is evidence that the Legislature's objective was reasonable. C. J. S. 436a–439a.

Not only does the direct evidence suggest that the 2013 Legislature lacked discriminatory intent, but the circumstan-

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conspiracy to trick the District Court. Indeed, if his plan was to dupe the District Court, shouting it to the world in a public letter was an odd way to go about it.

[21] In any event, the Texas court was simply wrong that Texas believed its plans would be free from any legal challenge. 274 F. Supp. 3d 624, 651 (2017). Texas consistently acknowledged that effects claims would continue to be available and responded in detail to those arguments in both the District Court and this Court. See Brief for Appellants 64; Defendants' Post-Trial Brief, Doc. 1526, p. 53. Moreover, Texas has not argued that intentional discrimination claims are unavailable; it has instead argued that intent must be assessed with respect to the *2013 Legislature*, the Legislature that actually enacted the plans at issue.

[22] The 2013 Legislature had no reason to believe that the District Court would spend four years examining moot plans before reversing its own previous decisions by imputing the intent of the 2011 Legislature to the 2013 Legislature. At the very least, the 2013 Legislature had good reason to believe that adopting the court-approved plans would lessen the time, expense, and complexity of further litigation (even if that belief turned out to be wrong).

tial evidence points overwhelmingly to the same conclusion. Consider the situation when the Legislature adopted the court-approved interim plans. First, the Texas court had adopted those plans, and no one would claim that the court acted with invidious intent when it did so. Second, the Texas court approved those plans only after reviewing them and modifying them as required to comply with our instructions. Not one of the judges on that court expressed the view that the plans were unlawful. Third, we had directed the Texas court to make changes in response to any claims under the Equal Protection Clause and §2 of the VRA if those claims were merely likely to prevail. *Perry*, 565 U. S., at 394. And the Texas court was told to accommodate any claim under §5 of the VRA unless it was "insubstantial." *Id.*, at 395. Fourth, the Texas court had made a careful analysis of all the claims, had provided a detailed examination of individual districts, and had modified many districts. Its work was anything but slapdash. All these facts gave the Legislature good reason to believe that the court-approved interim plans were legally sound.

Is there any evidence from which a contrary inference can reasonably be drawn? Appellees stress the preliminary nature of the Texas court's approval of the interim plans, and as we have said, that fact is relevant. But in light of our instructions to the Texas court and the care with which the interim plans were developed, the court's approval still gave the Legislature a sound basis for thinking that the interim plans satisfied all legal requirements.

The court below and the dissent infer bad faith because the Legislature "pushed the redistricting bills through quickly in a special session." 274 F. Supp. 3d, at 649. But we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith (a concept to which the dissent pays

only the briefest lipservice, *post*, at 641). The "special session" was necessary because the regular session had ended. As explained, the Legislature had good reason to believe that the interim plans were sound, and the adoption of those already-completed plans did not require a prolonged process. After all, part of the reason for adopting those plans was to avoid the time and expense of starting from scratch and leaving the electoral process in limbo while that occurred.[23]

The District Court and the dissent also err when they charge that Representative Darby, the chair of the Texas House Redistricting Committee at the time in question, " 'willfully ignored those who pointed out deficiencies' " in the plans. *Post*, at 643 (quoting 274 F. Supp. 3d, at 651, n. 45). This accusation is not only misleading, it misses the point. The Legislature adopted the interim plans in large part because they had the preliminary approval of the District Court, and Darby was open about the fact that he wanted to minimize amendments to the plans for that reason. See, *e. g.*, Joint Exh. 17.3, pp. S1–S2. That Darby generally hoped to minimize amendments—so that the plans would remain legally compliant—hardly shows that he, or the Legislature, acted with discriminatory intent. In any event, it is misleading to characterize this attitude as "willfu[l] ignor[ance]." The record shows that, although Darby hoped to minimize amendments, he did not categorically refuse to consider changes. This is illustrated by his support for an amendment to HD90, which was offered by the then-incumbent, Democrat Lon Burnam, precisely because it fixed an objection raised by the Mexican-American Legal Caucus

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[23] Moreover, in criticizing the Legislature for moving too quickly, the dissent downplays the significant time and effort that went into consideration of the 2013 plans. Legislative committees held multiple field hearings in four cities, Tr. 1507 (July 14, 2017), and the legislative actors spent significant time considering the legislation, as well as accepting and rejecting amendments, see, *e. g.*, Joint Exh. 17.3, p. S29; Joint Exh. 24.4, p. 21.

(MALC) that the district's Latino population was too low. 267 F. Supp. 3d, at 790.[24]

The Texas court faulted the 2013 Legislature for failing to take into account the problems with the 2011 plans that the D. C. court identified in denying preclearance, *ibid.*, but the basis for that criticism is hard to understand. One of the 2013 Legislature's principal reasons for adopting the court-approved plans was to fix the problems identified by the D. C. court. The attorney general advised the Legislature to adopt the interim plans because he thought that was the "best way to remedy the violations found by the D. C. court." C. J. S. 432a. Chairman Darby similarly stated that the 2013 plans fixed the errors found by the D. C. court, Tr. 1498, 1584–1585 (July 14, 2017), as did Senator Seliger, Joint Exh. 26.2, p. A–5.

There is nothing to suggest that the Legislature proceeded in bad faith—or even that it acted unreasonably—in pursuing this strategy. Recall that we instructed the Texas court, in developing the interim plans, to remedy any § 5 claim that was "not insubstantial." *Perry*, 565 U. S., at 395. And that is just what the interim plans, which the Legislature later enacted, attempted to do. For instance, the D. C. court held that the congressional plan had one too few "ability to elect" districts for Latinos, largely because of changes to CD23, *Texas*, 887 F. Supp. 2d, at 156–159; the interim plan (and, by extension, the 2013 plan) amended CD23, C. J. S. 397a–399a. Similarly, in the plan for the Texas House, the D. C. court found § 5 retrogression with respect to HD35, HD117, and HD149, *Texas*, *supra*, at 167–175, and all of those districts were changed in the 2013 plans, H. J. S. 305a–307a, 312a.

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[24] The dissent tries to minimize the relevance of this amendment by arguing that it turned HD90 into a racial gerrymander. See *post*, at 643, n. 12. But again this is misleading. The Legislature adopted changes to HD90 at the behest of *minority groups*, not out of a desire to discriminate. See Part IV–B, *infra*. That is, Darby was *too* solicitous of changes with respect to HD90.

Although the D. C. court found that the 2011 Legislature acted with discriminatory intent in framing the congressional plan, that finding was based on evidence about districts that the interim plan later changed. The D. C. court was concerned about the intent reflected in the drawing of CDs 9, 18, and 30, but all those districts were amended by the Texas court. *Texas*, *supra*, at 159–160; C. J. S. 406a–408a. With respect to the plan for the Texas House, the D. C. court made no intent findings, but its areas of concern were generally addressed by the Texas court and the 2013 plans. Compare *Texas*, *supra*, at 178 (noting evidence of unlawful intent in HD117), with H. J. S. 307a (amending HD117).[25]

It is indicative of the District Court's mistaken approach that it inferred bad faith from Texas's decision to take an appeal to this Court from the D. C. court's decision denying preclearance. See 274 F. Supp. 3d, at 649 ("Defendants did not accept [these findings] and instead appealed to the Supreme Court"). Congress gave the State the right to appeal, and no bad motive can be inferred from its decision to make use of this right—unless of course the State had no reasonable grounds for appeal. Before our decision in *Shelby County* mooted Texas's appeal to this Court from the D. C. court's preclearance decision, Texas filed a jurisdictional statement claiming that the D. C. court made numerous errors, but the Texas court made no attempt to show that Texas's arguments were frivolous.

As a final note, appellees assert that the 2013 Legislature should have either defended the 2011 plans in litigation or gone back to the drawing board and devised entirely new plans, Brief for Appellees in No. 17–626, at 45, but there is

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[25] In assessing the significance of the D. C. court's evaluation of intent, it is important not to forget that the burden of proof in a preclearance proceeding was on the State. *Texas* v. *United States*, 887 F. Supp. 2d 133, 151 (DC 2012). Particularly where race and partisanship can so often be confused, see *supra*, at 586, and n. 3, the burden of proof may be crucial.

no reason why the Legislature's options should be limited in this way. It was entirely permissible for the Legislature to favor a legitimate option that promised to simplify and reduce the burden of litigation. That the Legislature chose this course is not proof of discriminatory intent.

IV

Once the Texas court's intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. For three of these districts, the District Court relied on the "effects" test of § 2. We reverse as to each of these, but we affirm the District Court's final holding that HD90 is a racial gerrymander.

A

To make out a § 2 "effects" claim, a plaintiff must establish the three so-called "*Gingles* factors." These are (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. *Gingles*, 478 U. S., at 48–51; *LULAC*, 548 U. S., at 425. If a plaintiff makes that showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. *Id.*, at 425–426.

1

The Texas court held that CD27 violates § 2 of the VRA because it has the effect of diluting the votes of Latino voters in Nueces County. C. J. S. 191a. CD27 is anchored in Nueces County (home to Corpus Christi) and follows the Gulf of Mexico to the northeast before taking a turn inland to the northwest in the direction of Austin. Nueces County contains a Latino population of roughly 200,000 (a little less than one-third the size of an ideal Texas congressional district), and the court held that the Nueces County Latinos

should have been included in a Latino opportunity district, rather than CD27, which is not such a district. The court found that an area centered on Nueces County satisfies the *Gingles* factors and that, under the totality of the circumstances, the placement of the Nueces County Latinos in CD27 deprives them of the equal opportunity to elect candidates of their choice. C. J. S. 181a–195a.

The problem with this holding is that plaintiffs could not establish a violation of §2 of the VRA without showing that there is a "'possibility of creating more than the existing number of reasonably compact'" opportunity districts. *LULAC*, *supra*, at 430. And as the Texas court itself found, the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan. 274 F. Supp. 3d, at 684, and n. 85.

Attempting to get around this problem, the Texas court relied on our decision in *LULAC*, but it misapplied our holding. In *LULAC*, we held that the State should have created six proper Latino opportunity districts but instead drew only five. 548 U. S., at 435. Although the State claimed that the plan actually included a sixth opportunity district, that district failed to satisfy the *Gingles* factors. 548 U. S., at 430. We held that a "State's creation of an opportunity district for those without a §2 right offers no excuse for its failure to provide an opportunity district for those with a §2 right." *Ibid.*

Here, the Texas court concluded that Texas committed the same violation as in *LULAC*: It created "an opportunity district for those without a §2 right" (the Latinos in CD35), while failing to create such a district "for those with a §2 right" (the Latinos of Nueces County). *Ibid.* This holding is based on a flawed analysis of CD35.

CD35 lies to the north of CD27 and runs along I–35 from San Antonio up to Austin, the center of Travis County. In the District Court's view, the Latinos of CD35 do not have a

§2 right because one of the *Gingles* factors, majority bloc voting, is not present. The Court reached this conclusion because the non-Latino voters of Travis County tend to favor the same candidates as the great majority of Latinos. There are two serious problems with the District Court's analysis.

First, the Court took the wrong approach in evaluating the presence of majority bloc voting in CD35. The Court looked at only one, small part of the district, the portion that falls within Travis County. 274 F. Supp. 3d, at 683; C. J. S. 175a–176a. But Travis County makes up only 21% of the district. We have made clear that redistricting analysis must take place at the district level. *Bethune-Hill*, 580 U. S., at 191–192. In failing to perform that district-level analysis, the District Court went astray.

Second, here, unlike in *LULAC*, the 2013 Legislature had "good reasons" to believe that the district at issue (here CD35) was a viable Latino opportunity district that satisfied the *Gingles* factors. CD35 was based on a concept proposed by MALDEF, C. J. S. Findings 315a–316a, and the Latino Redistricting Task Force (a plaintiff group) argued that the district is mandated by §2. C. J. S. 174a. The only *Gingles* factor disputed by the court was majority bloc voting, and there is ample evidence that this factor is met. Indeed, the court found that majority bloc voting exists throughout the State. C. J. S. Findings 467a. In addition, the District Court extensively analyzed CD35 in 2012 and determined that it was likely not a racial gerrymander and that even if it was, it likely satisfied strict scrutiny. C. J. S. 415a. In other words, the 2013 Legislature justifiably thought that it had placed a viable opportunity district along the I–35 corridor.

2

The District Court similarly erred in holding that HD32 and HD34 violate §2. These districts make up the entirety of Nueces County, which has a population that is almost ex-

actly equal to twice the population of an ideal Texas House district. (It can fit 2.0295 ideal districts. H. J. S. Findings 91a.) In 2010, Latinos made up approximately 56% of the voting age population of the county. *Ibid.* The 2013 plan created two districts that lie wholly within the county; one, HD34, is a Latino opportunity district, but the other, HD32, is not. 267 F. Supp. 3d, at 767.

Findings made by the court below show that these two districts do not violate § 2 of the VRA. Under *Gingles*, the ultimate question is whether a districting decision dilutes the votes of minority voters, see *LULAC*, *supra*, at 425–426, and it is hard to see how this standard could be met if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice.

The only plaintiff that pressed a § 2 claim with respect to HD32 and HD34 was MALC, 267 F. Supp. 3d, at 767, and as the District Court recognized, that group's own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district. In his analysis, the expert relied on Nueces County election returns for statewide elections between 2010 and 2016. *Id.*, at 775–776. Based on this data, he calculated that when both HD32 and HD34 were maintained as Latino-majority districts, one performed for Latinos in only 7 out of 35 relevant elections, and the other did so in *none* of the 35 elections. *Ibid.* In order to create two performing districts in that area, it was necessary, he found, to break county lines in *multiple* places, *id.*, at 778, but the District Court held that "breaking the County Line Rule" in the Texas Constitution, see Art. III, § 26, to "remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires," 267 F. Supp. 3d, at 783. So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines, the logical result is that Texas did not dilute the Latino vote.

The court refused to accept this conclusion, but its reasons for doing so cannot stand up. As an initial matter, the court thought that the two districts would have to be redrawn based on its finding regarding the intent of the 2013 Legislature,[26] and it therefore deferred a final decision on the § 2 issue and advised the plaintiffs to consider at the remedial phase of the case whether they preferred to have two districts that might not perform or just one safe district. *Id.*, at 783. The court's decision cannot be sustained on this ground, since its finding of discriminatory intent is erroneous.

The only other reason provided by the court was the observation that MALC "failed to show" that two majority-Latino districts in Nueces County would not perform. *Id.*, at 782. This observation twisted the burden of proof beyond recognition. It suggested that a plaintiff might succeed on its § 2 claim because its expert failed to show that the necessary factual basis for the claim could not be established.[27]

[26] The District Court also purported to find a violation of the "one person, one vote" principle in Nueces County, 267 F. Supp. 3d 750, 783 (2017); H. J. S. 254a–255a, but that finding was in actuality a restatement of its racial discrimination finding. The population deviations from the ideal are quite small (0.34% in HD32 and 3.29% in HD34, *id.*, at 254a), and the District Court relied solely on the "evidence of the use of race in drawing the lines in Nueces County" to find a one person, one vote violation. *Id.*, at 255a; see also *id.*, at 254a ("[T]he State intentionally discriminated against minority voters by overpopulating minority districts and underpopulating Anglo districts"). Even assuming that a court could find a one person, one vote violation on the basis of such a small deviation, cf. *Brown* v. *Thomson*, 462 U. S. 835, 842–843 (1983) (noting that deviations under 10% are generally insufficient to show invidious discrimination), the District Court erred in relying on its unsound finding regarding racial discrimination.

Moreover, plaintiffs rejected any separate one person, one vote claims before the District Court, Tr. 22 (July 10, 2017), and they have not mentioned such a claim as a separate theory in their briefing in this Court.

[27] The District Court's belief that simple Latino majorities in Nueces County might be sufficient to create opportunity districts—and that Texas should have known as much—conflicts with other parts of its decision. With respect to numerous other districts, the District Court *chided* Texas

Courts cannot find § 2 effects violations on the basis of *uncertainty*. In any event, if even the District Court remains unsure how to draw these districts to comply with § 2 (after six years of litigation, almost a dozen trials, and numerous opinions), the Legislature surely had the " 'broad discretion' " to comply as it reasonably saw fit in 2013, *LULAC*, 548 U. S., at 429.

The dissent charges us with ignoring the District Court's " 'intensely local appraisal' " of Nueces County, *post*, at 662, but almost none of the "findings" that the District Court made with respect to HD32 and HD34 referred to present local conditions, and none cast any significant light on the question whether another opportunity district is possible at the present time. For instance, what the dissent describes as Texas's "long 'history of voting-related discrimination,' " *id.*, at 663; in no way undermines—or even has any logical bearing on—the conclusions reached by MALC's expert about whether Latino voters would have a real opportunity to elect the candidates of their choice if the county were divided into two districts with narrow majorities of Latino citizens of voting age. The same is true with respect to the District Court's findings regarding racially polarized voting in the county and Latinos' "continuing pattern of disadvantage" relative to non-Latinos. 267 F. Supp. 3d, at 779 (internal quotation marks omitted). Perhaps recognizing as much, both the District Court and the dissent point to the anticipated future growth in the percentage of eligible voters of Latino descent, but the districts now at issue would not necessarily be used beyond 2020, after which time the 2020 census would likely require redistricting once again.

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for focusing on bare numbers and not considering real opportunity to elect. See, *e. g.*, C. J. S. 134a ("[T]he court rejects [the] bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district" because it "may still lack real electoral opportunity" (internal quotation marks omitted)); H. J. S. 121a (Texas "increase[d the Latino population] while simultaneously ensuring that election success rates remained minimally improved").

B

HD90 is a district in Tarrant County that, unlike the other districts at issue in this appeal, was not copied from the District Court's interim plans. Instead, the 2013 Legislature substantially modified the district developed by the District Court, and the District Court held that the 2013 Legislature's creation is an invalid racial gerrymander. 267 F. Supp. 3d, at 794.

In drawing HD90, the Legislature was pulled in opposite directions by competing groups. In 2011, the Legislature, responding to pressure from MALDEF, increased the Latino population of the district in an effort to make it a Latino opportunity district. H. J. S. Findings 258a–262a. In the process of doing so, the Legislature moved the community of Como, which is predominantly African-American, out of the district. But Como residents and the member of the Texas House who represented the district, Lon Burnam, objected, and in 2013, the Legislature moved Como back into the district. 267 F. Supp. 3d, at 788–789. That change was opposed by MALC because it decreased the Latino population below 50%. App. 398a–399a. So the Legislature moved Latinos into the district to bring the Latino population back above 50%. 267 F. Supp. 3d, at 789–790.

In light of these maneuvers, Texas does not dispute that race was the predominant factor in the design of HD90, but it argues that this was permissible because it had "'*good reasons* to believe'" that this was necessary to satisfy §2 of the VRA." *Bethune-Hill*, 580 U. S., at 194.

Texas offers two pieces of evidence to support its claim. The first—that one of the plaintiffs, MALC, demanded as much—is insufficient. A group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what §2 demands. So one group's demands alone cannot be enough.

The other item of evidence consists of the results of the Democratic primaries in 2012 and 2014. In 2012, Repre-

sentative Burnham, who was not the Latino candidate of choice, narrowly defeated a Latino challenger by 159 votes. And in 2014, the present representative, Ramon Romero, Jr., beat Burnam by 110 votes. See Brief for Appellants 70. These election returns may be suggestive, but standing alone, they were not enough to give the State good reason to conclude that it had to alter the district's lines solely on the basis of race. And putting these two evidentiary items together helps, but it is simply too thin a reed to support the drastic decision to draw lines in this way.

We have previously rejected proffers of evidence that were at least as strong as Texas's here. For example, in *Cooper*, 581 U. S., at 300, we analyzed North Carolina's justification for deliberately moving "African-American voters" into a district to "ensure . . . the district's racial composition" in the face of its expansion in size. North Carolina argued that its race-based decisions were necessary to comply with §2, but the State could point to "no meaningful legislative inquiry" into "whether a new, enlarged" district, "created without a focus on race, . . . could lead to §2 liability." *Id.*, at 304. North Carolina pointed to two expert reports on "voting patterns throughout the State," but we rejected that evidence as insufficient. *Ibid.*, n. 5. Here, Texas has pointed to no actual "legislative inquiry" that would establish the need for its manipulation of the racial makeup of the district.

By contrast, where we have accepted a State's "good reasons" for using race in drawing district lines, the State made a strong showing of a pre-enactment analysis with justifiable conclusions. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] . . . considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. 580 U. S., at 194. The State established that it had performed a "functional analysis" and acted to achieve an "in-

formed bipartisan consensus." *Ibid.* Texas's showing here is not equivalent.

Perhaps Texas could have made a stronger showing, but it is the State's burden to prove narrow tailoring, and it did not do so on the record before us. We hold that HD90 is an impermissible racial gerrymander. On remand, the District Court will have to consider what if any remedy is appropriate at this time.

* * *

Except with respect to one Texas House district, we hold that the court below erred in effectively enjoining the use of the districting maps adopted by the Legislature in 2013. We therefore reverse with respect to No. 17–586; reverse in part and affirm in part with respect to No. 17–626; and remand for proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I adhere to my view that §2 of the Voting Rights Act of 1965 does not apply to redistricting. See *Cooper* v. *Harris*, 581 U. S. 285, 327 (2017) (concurring opinion) (citing *Holder* v. *Hall*, 512 U. S. 874, 922–923 (1994) (THOMAS, J., concurring in judgment)). Thus, §2 cannot provide a basis for invalidating any district, and it cannot provide a justification for the racial gerrymander in House District 90. Because the Court correctly applies our precedents and reaches the same conclusion, I join its opinion in full.

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

The Court today goes out of its way to permit the State of Texas to use maps that the three-judge District Court unanimously found were adopted for the purpose of preserving the racial discrimination that tainted its previous maps.

In reaching its desired result, the majority commits three fundamental errors along the way.

First, the majority disregards the strict limits of our appellate jurisdiction and reads into the District Court orders a nonexistent injunction to justify its premature intervention. Second, the majority indulges Texas' distorted reading of the District Court's meticulous orders, mistakenly faulting the court for supposedly shifting the burden of proof to the State to show that it cured the taint of past discrimination, all the while ignoring the clear language and unambiguous factual findings of the orders below. Third, the majority elides the standard of review that guides our resolution of the factual disputes in these appeals—indeed, mentioning it only in passing—and selectively parses through the facts. As a result of these errors, Texas is guaranteed continued use of much of its discriminatory maps.

This disregard of both precedent and fact comes at serious costs to our democracy. It means that, after years of litigation and undeniable proof of intentional discrimination, minority voters in Texas—despite constituting a majority of the population within the State—will continue to be underrepresented in the political process. Those voters must return to the polls in 2018 and 2020 with the knowledge that their ability to exercise meaningfully their right to vote has been burdened by the manipulation of district lines specifically designed to target their communities and minimize their political will. The fundamental right to vote is too precious to be disregarded in this manner. I dissent.

I

A

The first obstacle the majority faces in its quest to intervene in these cases is jurisdictional. The statute that governs our jurisdiction over these appeals is 28 U. S. C. § 1253, which provides that "any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory

or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Unlike the more typical certiorari process, for cases falling within § 1253, appellate review in this Court is mandatory. That is why, until today, this Court has repeatedly recognized and adhered to a "long-established rule" requiring "strict construction" of this jurisdictional statute "to protect our appellate docket." *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 375, 378 (1949); see, *e. g.*, *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 98 (1974) (noting that "only a narrow construction" of our jurisdiction under § 1253 "is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration"); *Gunn* v. *University Comm. to End War in Viet Nam*, 399 U. S. 383, 387 (1970) (similar); *Goldstein* v. *Cox*, 396 U. S. 471, 477–478 (1970) (rejecting a construction of § 1253 that would "involve an expansion of [our] mandatory appellate jurisdiction," even where the statutory text "is subject to [that] construction," in light of "canon of construction" requiring that § 1253 be "narrowly construed"); *Phillips* v. *United States*, 312 U. S. 246, 248–250 (1941) (explaining that § 1253 is an "exceptional procedure" and that "inasmuch as this procedure . . . brings direct review of a district court to this Court, any loose construction . . . would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket").

In line with that command, this Court has held that a ruling on the merits will not suffice to invoke our mandatory appellate jurisdiction in the absence of an order granting or denying an injunction. In fact, even if a three-judge district court unequivocally indicates that a state law must be enjoined as it stands, we have required more before accepting mandatory review. For example, the Court in *Gunn* found no jurisdiction where the three-judge District Court held that a Texas disturbing-the-peace statute was " 'impermissibly and unconstitutionally broad,' " concluded that the plain-

tiffs were "'entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of [the statute] as now worded, insofar as it may affect the rights guaranteed under the First Amendment,'" and stayed the mandate to allow the State to, "'if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements.'" 399 U. S., at 386. Despite the District Court's resolution of the merits and its clear indication that, unless amended, the disturbing-the-peace statute would be enjoined, this Court dismissed an appeal from the State for want of jurisdiction, concluding that the District Court merely wrote a "rather discursive *per curiam* opinion" and "there was no order of any kind either granting or denying an injunction—interlocutory or permanent." *Id.*, at 387. The Court explained that, in addition to the congressional command to "'keep within narrow confines our appellate docket,'" other "policy considerations" counseled limiting "our power of review," including "that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided." *Id.*, at 387–388. Those considerations, the Court thought, were "conspicuously evident" in that case, where the opinion did not specify, for instance, exactly what was to be enjoined or against whom the injunction would run. *Id.*, at 388.

Similarly, *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), concerned a redistricting challenge in which a three-judge District Court held that "a redistricting of [the challenged county was] necessitated" and "that the evidence adduced . . . and the additional apportionment requirements set forth by the Supreme Court call[ed] for a redistricting of the entire state as to both houses of the General Assembly," *Chavis* v. *Whitcomb*, 305 F. Supp. 1364, 1391 (SD Ind. 1969). Recognizing "that the federal judiciary functions within a system of federalism which entrusts the responsibility of legislative apportionment and districting primarily to the state legislature," the District Court afforded the Governor "a reason-

able opportunity to call a Special Session of the General Assembly of the State of Indiana so that it may enact legislation to redistrict the State and reapportion the legislative seats in the General Assembly in accordance with federal constitutional requirements and in compliance with [its] opinion." *Id.*, at 1392. The District Court gave the State a little over two months to enact new statutes "to remedy the improper districting and malapportionment." *Ibid.* When the Governor appealed from that order, this Court dismissed for want of jurisdiction because "at [the] time no judgment had been entered and no injunction had been granted or denied." 403 U. S., at 138, n. 19. The findings of liability on the merits and the unequivocal indication that the redistricting and malapportionment violations had to be remedied were not enough.

B

Straightforward application of this precedent compels the conclusion that this Court lacks jurisdiction over these appeals. Here, Texas appeals from two orders entered by the three-judge District Court on August 15 and 24, 2017. Those orders concern the constitutional and statutory challenges to Texas' State House and federal congressional redistricting plans, enacted by the Texas Legislature (hereinafter Legislature) in 2013 (hereinafter the 2013 maps). As relevant here, the orders concerned Texas House districts in Bell County (HD54 and HD55), Dallas County (HD103, HD104, and HD105), Nueces County (HD32 and HD34), and Tarrant County (HD90), as well as federal congressional districts encompassing Nueces County (CD27) and parts of Travis County (CD35). The District Court concluded that plaintiffs had proved intentional discrimination as to HD54, HD55, HD103, HD104, HD105, HD32, HD34, and CD27.[1] It also

[1] The Fourteenth Amendment and §2 of the Voting Rights Act of 1965 prohibit intentional "vote dilution," *i. e.*, purposefully enacting "a particular voting scheme . . . 'to minimize or cancel out the voting potential of

concluded that plaintiffs had proved a "results" violation under §2 of the Voting Rights Act as to HD32, HD34, and CD27,[2] and had established a racial gerrymandering claim as to HD90 and CD35.[3]

Having ruled on the challengers' statutory and constitutional claims, the District Court stated that all but one of the "violations must be remedied by either the Texas Legislature or [the District] Court." 274 F. Supp. 3d 624, 686 (WD Tex. 2017); see also 267 F. Supp. 3d 750, 795 (WD Tex. 2017).[4] With respect to the §2 results violation concerning HD32 and HD34, however, the District Court noted that it had yet to decide "whether §2 requires a remedy for this results violation." *Id.*, at 783, 795. The District Court then ordered "the [Texas] Office of the Attorney General [to] file a written advisory within three business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered." 274 F. Supp. 3d, at 686; see also 267 F. Supp. 3d, at 795. The court went on: "If the Legislature does not intend to take up redistricting, the [District] Court will hold a hearing to consider remedial plans" on September 5 and 6, 2017, respecting the congressional and Texas House districts. 274 F. Supp. 3d, at 686–687; see also 267 F. Supp.

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racial or ethnic minorities,' an action disadvantaging voters of a particular race." *Miller* v. *Johnson*, 515 U. S. 900, 911 (1995) (citations omitted).

[2] The §2 "results" test focuses, as relevant here, on vote dilution accomplished through cracking or packing, *i. e.*, "the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [those voters] into districts where they constitute an excessive majority." *Thornburg* v. *Gingles*, 478 U. S. 30, 46, n. 11 (1986).

[3] The Fourteenth Amendment "limits racial gerrymanders" and "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Cooper* v. *Harris*, 581 U. S. 285, 291 (2017).

[4] The various appendixes are abbreviated herein consistent with the majority opinion. See *ante*, at 585, n. 1.

3d, at 795. "In preparation for the hearing[s]," the District Court ordered the parties to confer and to "take immediate steps to consult with their experts and mapdrawers and prepare" maps to present at those hearings. 274 F. Supp. 3d, at 687; 267 F. Supp. 3d, at 795.

The District Court went no further. Though there had been a determination on the merits that Texas violated both the Equal Protection Clause and § 2 of the Voting Rights Act with respect to a number of districts in the 2013 maps, the District Court did not enjoin use of the 2013 maps for the upcoming 2018 elections. For instance, with respect to the congressional map, the District Court explained that its order "only partially addresse[d]" the challengers' claims, as it had "bifurcated the remedial phase" from the merits phase. 274 F. Supp. 3d, at 687. Importantly, in denying Texas' motions for a stay, the District Court took care to make abundantly clear the scope of its orders: "Although the [District] Court found violations [in the congressional and Texas House maps], the [District] Court has not enjoined [their] use for any upcoming elections." App. 134a–136a.

That is the end of the inquiry under our precedent, as our past cases are directly on point. Like in *Gunn* and *Whitcomb*, the District Court issued a ruling on the merits against the State. Like in *Gunn* and *Whitcomb*, the District Court was clear that those violations required a remedy. Like in *Gunn* and *Whitcomb*, the District Court stayed its hand and did not enter an injunction, instead allowing the State an opportunity to remedy the violations. Therefore, like in *Gunn* and *Whitcomb*, this Court lacks jurisdiction under § 1253 because there is "no order of any kind either granting or denying an injunction—interlocutory or permanent." *Gunn*, 399 U. S., at 387.[5]

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[5] Contrary to what the majority contends, whether *Whitcomb* involved an "exceedingly complicated procedural posture" has no effect on whether, at the time the State first appealed, the District Court had granted or denied an injunction for purposes of § 1253 jurisdiction. *Ante*, at 601,

C

1

Despite this precedent, the majority nonetheless concludes that our intervention at this early stage is not only authorized, but mandatory. None of the justifications that the majority offers for deviating from our precedent is persuasive.

The majority justifies its jurisdictional overreach by holding that § 1253 mandates appellate review in this Court if a three-judge district court order "has the 'practical effect' of granting or denying an injunction." *Ante*, at 594. It reasons that the Court has "previously made clear that where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Ibid.* That reasoning, however, has no application here. Whereas this Court has applied the "practical effect" rule in the context of the courts of appeals' appellate jurisdiction under 28 U. S. C. § 1292(a)(1), it has never applied it to questions of its own mandatory appellate docket under § 1253. That explains why the only cases the majority can round up to support its position concern jurisdiction

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n. 14. Nor was the order at issue in *Whitcomb* less "specific" or less "likely to demand compliance" than the orders at issue in these appeals. *Ibid.* The District Court in *Whitcomb*, like here, issued an order on the merits finding the State liable and unambiguously holding that a remedy was required. *Chavis* v. *Whitcomb*, 305 F. Supp. 1364, 1391–1392 (SD Ind. 1969). The District Court discussed how the Indiana Legislature might go about redistricting. *Ibid.* Also, the orders here were no more "immediate" than the order in *Whitcomb*. *Ante*, at 601, n. 14. As in *Whitcomb*, the District Court here first attempted to defer to the State to redistrict, and nothing in the record suggests that the court would not have allowed the Texas Legislature a reasonable amount of time to redistrict had the State decided to take up the task, as the District Court did in *Whitcomb*. To the extent the majority relies on the 3-day deadline contained in the orders below, that deadline was solely for the Texas attorney general to inform the District Court whether the Legislature intended to take up redistricting; it was not a deadline to enact new maps. See *infra*, at 638–639. *Whitcomb* is thus not distinguishable in any relevant respect.

under § 1292(a)(1). *Ante,* at 594–595 (citing *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 83–84 (1981), and *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 287–288 (1988)).

This distinction matters a great deal. Courts of appeals generally have jurisdiction over direct appeals from the district courts. See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 13 (3d ed. 1992) ("Courts of appeals jurisdiction extends to nearly every action that might be taken by a district court"). In contrast, exercising mandatory review over direct appeals in this Court is a truly "exceptional procedure," *Phillips*, 312 U. S., at 248, in no small part due to our "necessarily finite docket," 16B Wright, Federal Practice and Procedure § 4003, at 19. Reading § 1253 broadly risks transforming that exceptional procedure into a routine matter, when our precedent commands a strict construction precisely so that we can "'keep within narrow confines our appellate docket.'" *Goldstein*, 396 U. S., at 478.

Brushing that distinction aside, the majority contends that "we also construe § 1292(a)(1) 'narrowly,'" and have referred to the statutes as "'analogous.'" *Ante,* at 595–596. True, but that is no response to the jurisdictional obstacle of § 1253. The command from our precedent is not simply one to undertake the same narrow interpretation as we do for § 1292(a)(1). Rather, our "long-established rule" requires "strict construction" of § 1253, *Stainback*, 336 U. S., at 378, so that even where the statutory text could be read to expand our mandatory appellate docket, this Court will not adopt that reading if a narrower construction is available, *Goldstein*, 396 U. S., at 477–478. That "strict construction" rule exists for a purpose specific to this Court: to protect our "carefully limited appellate jurisdiction." *Board of Regents of Univ. of Tex. System* v. *New Left Ed. Project*, 404 U. S. 541, 543 (1972). Unlike the courts of appeals, which hear cases on mandatory jurisdiction regularly, this Court hears

cases on mandatory jurisdiction only rarely. The majority nowhere grapples with that vital contextual distinction between § 1253 and § 1292(a)(1). Nor does the majority acknowledge that, in interpreting § 1253, this Court has itself recognized that distinction, noting that "this Court *above all others* must limit its review of interlocutory orders." *Goldstein*, 396 U. S., at 478 (emphasis added).

2

Looking to escape that pitfall in its reasoning, the majority turns to the text of the two jurisdictional statutes. But the text provides no refuge for its position. The majority first states that "the relevant language in the two provisions is nearly identical." *Ante*, at 595–596. But whereas § 1253 provides for appeal "from an order granting or denying . . . an interlocutory or permanent injunction," § 1292(a)(1) provides for appeal from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." It is a stretch, to say the least, to characterize these provisions as "nearly identical." *Ante*, at 595–596.

Next, the majority contends that § 1253 and § 1292(a)(1) are "textually interlocked," *ante*, at 596, in that § 1292(a)(1) provides for appeal to the courts of appeals, "except where a direct review may be had in the Supreme Court." In its view, this demonstrates that the "practical effect" rule must apply under § 1253. The majority reasons that "the consequences would be unfortunate and strange" otherwise, imagining that an order from a three-judge district court that had the practical effect of an injunction but did not invoke § 1253 jurisdiction would "appear to be appealable to one of the courts of appeals" in light of the "excep[t]" clause, a result "Congress surely did not intend" given that it took "pains to provide for review in this Court, and not in the courts of appeals, of three-judge court orders granting injunctions." *Ante*, at 596.

This reasoning rests on a mistaken premise. Congress did not provide for review of *every* three-judge court order in this Court. It provided for review of only certain narrow categories of orders, *i. e.*, those granting or denying an injunction. There is nothing "unfortunate" or "strange" about the proposition that orders from a three-judge court that do not fall within these narrow categories of actions made directly appealable to this Court can be appealed only to the courts of appeals. In fact, this Court itself has recognized as much. See, *e. g.*, *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens, Inc.*, 397 U. S. 820 (1970) (*per curiam*) ("The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 U. S. C. § 1253. The judgment of the District Court is vacated and the case is remanded to that court so that it may enter a fresh decree from which timely appeal may be taken to the Court of Appeals" (citation omitted)); see also *Mitchell* v. *Donovan*, 398 U. S. 427, 431–432 (1970) (*per curiam*) (concluding that "this Court lacks jurisdiction of the appeal" under § 1253 and directing "the District Court [to] enter a fresh order . . . thus affording the appellants an opportunity to take a timely appeal to the Court of Appeals").[6] And to the extent a party prematurely appeals to the court of appeals an order that would otherwise fall within § 1253, *e. g.*,

[6] The majority opinion attempts to distinguish *Donovan* and *Rockefeller* by stating that the decisions there were "based on the plain language of § 1253, which says nothing about orders granting or denying declaratory judgments." *Ante*, at 596–597, n. 11. But of course, "the plain language of § 1253" also "says nothing about" noninjunctive orders, like the ones issued by the District Court below. Notably, the order at issue in *Rockefeller* looked similar to the orders on appeal here: There, the three-judge District Court declined to enter an injunction only because "the state ha[d] shown a desire to comply with applicable federal requirements," but its order nevertheless clearly resolved the merits against the State. See *Catholic Medical Center of Brooklyn & Queens, Inc.* v. *Rockefeller*, 305 F. Supp. 1268, 1271 (EDNY 1969).

if Texas had appealed the August 15 and 24 orders to the Court of Appeals for the Fifth Circuit, that court surely will be more than capable of identifying as much and instructing the party to wait for an actual injunction before bringing an appeal to this Court.

3

The majority attempts to bolster its jurisdictional conclusion with a passing reference to the "valuable purpose" served by the "'practical effect'" rule, *i. e.*, preventing district courts from manipulating proceedings by avoiding labeling their orders as "'injunction[s].'" *Ante*, at 595. Notably, the majority cites no evidence for the proposition that district courts are engaging in any kind of manipulation. Nor is there any indication that the District Court here attempted to manipulate the proceedings by shielding its orders from appellate review. Instead, the District Court carefully adhered to a common practice in cases implicating important state interests, staying its hand as to the remedy to allow the State an opportunity to act, as happened in *Gunn* and *Whitcomb*.

More important, the majority ignores the "valuable purposes" served by the longstanding rule requiring strict construction of §1253. Not only does it comply with the congressional command to "'keep within narrow confines our appellate docket,'" but without strict enforcement of the requirement that an order grant or deny an injunction, "it is simply not possible to know with any certainty what the court has decided." *Gunn*, 399 U. S., at 387–388. Such clarity "is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign State." *Id.*, at 389. Orders coming to this Court on direct appeal under the "practical effect" rule will more often than not lack that clarity.

In these cases, for instance, what does the majority read the "practical effect" of the orders to have been with respect to HD32 and HD34? The District Court held that the chal-

lengers had "not proven that § 2 requires breaking the County Line Rule" in the Texas Constitution, Art. III, but that "§ 2 could require" drawing two majority-HCVAP[7] districts. 267 F. Supp. 3d, at 783, 795. Does the majority read that to mean that the § 2 results violation could potentially go without a remedy? If so, there would have been no obstacle to use of the 2013 maps for those districts even after a remedial phase. Or does the majority read that to mean that the challengers still had more to show before the District Court "would" redraw the districts that § 2 "could" require to be redrawn? And what is the effect of the conclusion respecting the County Line Rule on the potential remedy for the intentional vote dilution holding as to HD32 and HD34? The majority conveniently avoids confronting this lack of clarity by ignoring the relevant record, instead stating without explanation that it believes "it clear that the District Court effectively enjoined use of these districts as currently configured." *Ante,* at 601, n. 15. But it cannot escape the reality that its rule will "needlessly complicate appellate review," *ante,* at 597, given that "it is simply not possible [absent an injunction] to know with any certainty what the court has decided," *Gunn*, 399 U. S., at 388.

I do not disagree that "lack of specificity in an injunctive order would [not] alone deprive the Court of jurisdiction under § 1253." *Id.*, at 389, n. 4; see also *ante,* at 598 (quoting *Gunn*). "But the absence of any semblance of effort by the District Court to comply with [the specificity required of injunctive orders under the Federal Rules] makes clear that the court did not think its [orders] constituted an order granting an injunction." *Gunn*, 399 U. S., at 389, n. 4. If any doubt remained as to the effect of the orders here, moreover, the District Court explicitly assured the parties that, even though it had found violations, it was not enjoining use of the 2013 maps for the upcoming elections. App. 134a–136a.

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[7] "HCVAP" stands for Hispanic citizen voting age population.

Finally, it is axiomatic that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.* v. *Friend*, 559 U. S. 77, 94 (2010).

> "Complex jurisdictional tests complicate a case . . . . Complex tests produce appeals and reversals, [and] encourage gamesmanship . . . . Judicial resources too are at stake [as] courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. Simple jurisdictional rules also promote greater predictability." *Ibid.* (citations omitted).

Simple is thus the name of the game when it comes to jurisdictional rules. The rule in the majority opinion is anything but. Although the majority claims that a mere "finding on liability cannot be appealed unless an injunction is granted or denied," *ante,* at 602, the rule it embraces today makes it hard to understand when a finding on liability would not be read, as the majority does here, as having the "practical effect" of an injunction. It is a worrisome prospect that, after today, whenever a three-judge district court expresses that a statutory or constitutional violation must be remedied, the party held liable will straightaway file an appeal in this Court and assert jurisdiction under § 1253, even where the district court is clear that no injunction has issued.[8]

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[8] The majority guarantees that there is "no reason to fear such a flood" of appeals from three-judge district court orders because "appeals from [orders expressly enjoining redistricting plans] have not overwhelmed our docket." *Ante*, at 602. But of course, its jurisdictional ruling applies to all § 1253 cases, not just those involving redistricting. The majority also makes much of the fact that only "two cases (*Gunn* and *Whitcomb*) decided during the past half-century" have involved the scenario at issue here, *i. e.*, an effort to invoke our mandatory jurisdiction to review "a three-judge court order holding a state statute unconstitutional but declining to issue an injunction." *Ante*, at 602, n. 16. The majority never stops to consider, however, that one reason so few cases have come to the Court in this posture may be that *Gunn* and *Whitcomb* drew clear jurisdictional

The majority opinion purports to add a limit by distinguishing between unappealable orders that find a plan "unlawful long before the next scheduled election" or "very close to the election date," and those (presumably) appealable orders that are entered neither "long before" nor "very close" to the next election. *Ante*, at 602.[9] What does that even mean? The orders at issue here were entered about 15 months before the 2018 elections, and according to the majority fall within the not "long before" but not "very close" appealable range. Why this is so, however, the majority never says. Without any definitions for its boundary posts, courts will be left to wonder: What about orders entered 17 or 18 months before an election? Are those considered "long before" so they would be unappealable? And are orders entered 14, 13, or 12 months before the election similarly unappealable because they were entered "very close" to the election date? And what does the majority mean by "the election date"? Does that include primaries? What about registration deadlines, or ballot-printing deadlines? It is not uncommon for there to be, at any given time, multiple impending deadlines relating to an upcoming election. Thinking through the many variations of jurisdictional disputes that will arise over the years following this novel reading of § 1253 should be enough to stop the majority from rewriting our long established jurisprudence in this area.

After today, our mandatory appellate docket will be flooded by unhappy litigants in three-judge district court cases, demanding our review. Given the lack of predictabil-

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lines that litigants easily understood—the same clear lines the majority erases today.

[9] The majority believes these "long before" and "very close" limits guide district courts' determinations about whether to enter an injunction. *Ante*, at 602. Presumably the majority would resort to the same indeterminate limits in determining whether, in its view, a noninjunctive order had the "practical effect" of an injunction such that it would be justified to accept an appeal under § 1253.

ity, the rule will incentivize appeals and "encourage gamesmanship." *Hertz Corp.*, 559 U. S., at 94. The Court will no doubt regret the day it opened its courthouse doors to such time-consuming and needless manipulation of its docket.

D

Even if the majority were correct to import the "practical effect" rule into the § 1253 context, moreover, that would still not justify the Court's premature intervention in these appeals for at least two reasons. First, while taking from *Carson* the "practical effect" rule it likes, the majority gives short shrift to the second half of that case, in which the Court was explicit that "[u]nless a litigant can show that an interlocutory order . . . might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal." 450 U. S., at 84. Texas has made no showing of a "serious, perhaps irreparable consequence" requiring our immediate intervention, nor has Texas shown that the orders could not be "effectually challenged" after the remedial stage was completed. In fact, when Texas sought a stay of those orders before this Court, the 2018 elections were more than a year away. For the majority, however, it is enough that the District Court found the Texas redistricting maps to be in violation of federal law. *Ante*, at 602–603. That cursory application of *Carson*, in particular whether the injunctions the majority reads into the August 15 and 24 orders could be "effectually challenged" absent immediate appeal to this Court, deprives that limit to our jurisdiction of much of its meaning when assessing Texas' request for our intervention in these cases. Nothing in our precedent supports that truncated approach. And in any event, if Texas wanted review of the orders after any injunction was entered by the District Court, it could have asked this Court for an emergency stay.

Second, the August 15 and 24 orders at issue here simply did not have the "practical effect" of enjoining Texas' use of the 2013 maps. The majority thinks otherwise in part because the District Court noted that the violations "'must be remedied.'" *Ante*, at 598. In addition, the majority believes that "Texas had reason to fear that if it tried to conduct elections under plans that the court had found to be racially discriminatory, the court would infer an evil motive and perhaps subject the State once again to the strictures of preclearance under § 3(c) of the Voting Rights Act." *Ante*, at 599–600. But the majority forgets that the District Court made explicit that "[a]lthough [it] found violations [in the 2013 maps], [it] ha[d] not enjoined [their] use for any upcoming elections." App. 134a–136a. That the District Court requested the Texas attorney general to advise it, within "three business days," whether "the Legislature intends to take up redistricting in an effort to cure [the] violations," 274 F. Supp. 3d, at 686; 267 F. Supp. 3d, at 795, does not undermine that unequivocal statement. Nothing in that language indicates that the District Court required the Legislature to "redraw both maps *immediately*" or else "the court would do so itself." Brief for Appellants 20 (emphasis in original). Instead, recognizing "that the federal judiciary functions within a system of federalism which entrusts the responsibility of legislative . . . districting primarily to the state legislature," *Whitcomb*, 305 F. Supp., at 1392, the District Court gave Texas an opportunity to involve its Legislature and asked for a simple statement of intent so that the court could manage its docket accordingly. This request for a statement of intent, which was necessary for the District Court to manage its own docket, does not transform the orders into injunctions.

As to the second point, if Texas had any "fear" regarding the use of its maps, despite having been explicitly told that the maps were not enjoined, that would still not be enough. This Court recognized in *Gunn* that the State in that case,

faced with the order declaring its statute unconstitutional, "would no doubt hesitate long before disregarding it." 399 U. S., at 390. That hesitation was not enough in *Gunn* to magically transform an order into an injunction for purposes of § 1253, and nothing about these cases justifies the majority taking out its wand today. Whatever "fear" Texas had does not transform the August 15 and 24 orders into injunctions. And absent an injunction, this Court lacks jurisdiction over these appeals. The cases should thus be dismissed.

II

Having rewritten the limits of § 1253, the majority moves to the merits. There again the Court goes astray. It asserts that the District Court legally erred when it purportedly shifted the burden of proof and "required the State to show that the 2013 Legislature somehow purged the 'taint' that the court attributed to the defunct and never-used plans enacted by a prior legislature in 2011." *Ante,* at 603. But that holding ignores the substantial amount of evidence of Texas' discriminatory intent, and indulges Texas' warped reading of the legal analysis and factual record below.[10]

A

Before delving into the content of the August 15 and 24 orders, a quick recap of the rather convoluted history of these cases is useful. In 2011, the Texas Legislature redrew its electoral districts. Various plaintiff groups challenged the 2011 maps under § 2 of the Voting Rights Act and the Fourteenth Amendment, and those lawsuits were consolidated before the three-judge District Court below pursuant to 28 U. S. C. § 2284(a). Because Texas then was subject to preclearance under § 5 of the Voting Rights Act, the 2011

[10] Because the Court reaches the merits of these appeals despite lacking jurisdiction, this dissent addresses that portion of the majority opinion as well.

maps did not take effect immediately, and Texas filed a declaratory action in the District Court for the District of Columbia to obtain preclearance.

"Faced with impending election deadlines and unprecleared plans that could not be used in the [2012] election, [the District] Court was faced with the 'unwelcome obligation' of implementing interim plans so that the primaries could proceed." 274 F. Supp. 3d, at 632. In January 2012, this Court vacated the first iteration of those interim maps in *Perry* v. *Perez*, 565 U. S. 388, 394–395 (2012) (*per curiam*), finding that the District Court failed to afford sufficient deference to the Legislature. In February 2012, the District Court issued more deferential interim plans, but noted that its analysis had been expedited and curtailed, and that it had only made preliminary conclusions that might be revised on full consideration. C. J. S. 367a–424a; H. J. S. 300a–315a.

In August 2012, the D. C. District Court denied preclearance of the 2011 maps. *Texas* v. *United States*, 887 F. Supp. 2d 133 (2012). It concluded that the federal congressional map had "retrogressive effect" and "was enacted with discriminatory intent," *id.*, at 159, 161, and that the State House map was retrogressive and that "the full record strongly suggests that the retrogressive effect . . . may not have been accidental," *id.*, at 178. Texas appealed, and the case was eventually dismissed following *Shelby County* v. *Holder*, 570 U. S. 529 (2013) (holding unconstitutional the formula used to subject States to the preclearance requirement).

In June 2013, the Texas Governor called a special legislative session, and that same month the Legislature adopted the 2012 interim maps as the permanent maps for the State. The Legislature made small changes to the maps, including redrawing the lines in HD90, but the districts at issue in these appeals all remained materially unchanged from the 2011 maps.

The District Court in these cases denied Texas' motion to dismiss the challenges to the 2011 maps, and the challengers

amended their complaints to assert claims respecting the 2013 maps. In April and May 2017, the District Court held that districts in Texas' 2011 maps violated § 2 and the Fourteenth Amendment. The August 15 and 24 orders respecting the 2013 maps followed.

B

The majority believes that, in analyzing the 2013 maps, the District Court erroneously "attributed [the] same [discriminatory] intent [harbored by the 2011 Legislature] to the 2013 Legislature" and required the 2013 Legislature to purge that taint. *Ante,* at 592. The District Court did no such thing. It engaged in a painstaking analysis of discriminatory intent under *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), which is critical to understanding why, as explained in Part II–D, *infra*, the District Court did not improperly presume that the Legislature acted with discriminatory intent.

Under *Arlington Heights*, "in determining whether racially discriminatory intent existed," this Court considers "circumstantial and direct evidence" of: (1) the discriminatory "impact of the official action," (2) the "historical background," (3) the "specific sequence of events leading up to the challenged decision," (4) departures from procedures or substance, and (5) the "legislative or administrative history," including any "contemporary statements" of the lawmakers. 429 U. S., at 266–268. Although this analysis must start from a strong "presumption of good faith," *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995), a court must not overlook the relevant facts. This Court reviews the "findings of fact" made by the District Court, including those respecting legislative motivations, "only for clear error." *Cooper* v. *Harris*, 581 U. S. 285, 293 (2017); see also *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985). The Court therefore "may not reverse just because we 'would have decided the [matter] differently.' . . . A finding that is 'plausible' in light of the

full record—even if another is equally or more so—must govern." *Harris*, 581 U. S., at 293.

The District Court followed the guidance in *Arlington Heights* virtually to a tee, and its factual findings are more than "plausible" in light of the record. To start, there is no question as to the discriminatory impact of the 2013 plans, as the "specific portions of the 2011 plans that [the District Court] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects 'continu[ing] to this day.'" 274 F. Supp. 3d, at 649 (alteration in original). Texas, moreover, has a long "history of discrimination" against minority voters. *Id.*, at 648, n. 37. "In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Texas*, 887 F. Supp. 2d, at 161.

There is also ample evidence that the 2013 Legislature knew of the discrimination that tainted its 2011 maps. "The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment." 274 F. Supp. 3d, at 648, n. 37. The Legislature was also well aware that "the D. C. court concluded that [its 2011] maps were tainted by evidence of discriminatory purpose," H. J. S. 443a, and despite the District Court having warned of the potential that the Voting Rights Act may require further changes to the maps, "the Legislature continued its steadfast refusal to consider [that] possibility," 274 F. Supp. 3d, at 649.

Turning to deliberative process—on which the majority is singularly focused, to the exclusion of the rest of the factors analyzed in the orders below, see Part II–D, *infra*—the District Court concluded that Texas was just "not truly interested in fixing any remaining discrimination in the [maps]." 274 F. Supp. 3d, at 651, n. 45. Despite knowing of the discrimination in its 2011 maps, "the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured

any taint from the 2011 plans."[11] *Id.*, at 649. For instance, Representative Darby, a member of the redistricting committee, "kept stating that he wanted to be informed of legal deficiencies so he could fix them," but "he did not himself seek to have the plan evaluated for deficiencies and he willfully ignored those who pointed out deficiencies, continuing to emphasize that he had thought 'from the start' that the interim plans were fully legal." *Id.*, at 651, n. 45.[12] The

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[11] The majority is correct that our reference to these findings in the District Court orders below is "not just a single slip of the pen." *Ante*, at 606. That is because these findings form part (though not the whole) of the comprehensive analysis that led the District Court to conclude that the 2013 Legislature acted with the specific intent to further the discrimination in its 2011 maps. Full consideration of that analysis, as I have endeavored to do here, requires review of those findings, and when read in the context of the full factual record and legal reasoning contained in the orders below, it is clear that these statements do not come close to suggesting what Texas and the majority read into them, *i. e.*, that the District Court somehow shifted the burden of proof to require Texas to show that it cured the taint from its past maps.

[12] The majority again engages in its own factfinding, without reference to the fact that our review is for clear error only, when it decides that the District Court was wrong in concluding that Representative Darby willfully ignored the deficiencies in the 2013 maps. The legislative hearing that the District Court cited, see 274 F. Supp. 3d, at 651, n. 45, shows, *inter alia*, that Representative Darby: told certain members of the Legislature that changes to district lines would not be considered; rejected proposed amendments where there was disagreement among the impacted members; rejected an amendment to the legislative findings that set out the history underlying the 2011 maps and related court rulings; acknowledged that the accepted amendments did not address concerns of retrogression or minority opportunity to elect their preferred candidates; and dismissed concerns regarding the packing and cracking of minority voters in, *inter alia*, HD32, HD34, HD54, and HD55, stating simply that the 2012 court had already rejected the challengers' claims respecting those districts but without engaging in meaningful discussion of the other legislators' concerns. See Joint Exh. 17.3, pp. S7–S9, S11, S30–S35, S39–S43, S53. Instead of addressing what is evident from the 64-page hearing transcript, the majority fixates on the single fact that Representative

Legislature made no substantive changes to the challenged districts that were the subject of the 2011 complaints, and "there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." *Id.*, at 649. In fact, the only substantive change that the Legislature made to the maps was to add *more* discrimination in the form of a new racially gerrymandered HD90, as the majority concedes. *Ante*, at 620–622.

The absence of a true deliberative process was coupled with a troubling sequence of events leading to the enactment of the 2013 maps. Specifically, "the Legislature pushed the redistricting bills through quickly in a special session," 274 F. Supp. 3d, at 649, despite months earlier having been urged by the Texas attorney general to take on redistricting during the regular session, *id.*, at 634; see also H. J. S. 440a. By pushing the bills through a special session, the Legislature did not have to comply with "a two-thirds rule in the Senate or a calendar rule in the House," 274 F. Supp. 3d, at 649, n. 38, and it avoided the "full public notice and hearing" that would have allowed "'meaningful input' from all Texans, including the minority community," H. J. S. 444a. In addition, "necessary resources were not allocated to support a true deliberative process." 274 F. Supp. 3d, at 649. For instance, the House committee "did not have counsel when the session started." *Ibid.*, n. 39.

Nor can Texas credibly claim to have understood the 2012 interim orders as having endorsed the legality of its maps so that adopting them would resolve the challengers' com-

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Darby accepted an amendment for the redrawing of the new (racially gerrymandered) HD90, believing that this fact somehow erases or outweighs all the evidence in the record showing that Representative Darby was not interested in addressing concerns regarding the interim plans. *Ante*, at 611–612, and n. 24. Even if Representative Darby was in fact responsive to minority concerns regarding the composition of HD90—which the record contradicts, see 267 F. Supp. 3d, at 791, 793—that does not undermine the weight of *all* of the evidence in the record regarding his intent with respect to the enactment of the 2013 maps as a whole.

plaints. In its 2012 interim orders, "the [District] Court clearly warned that its preliminary conclusions . . . were not based on a full examination of the record or the governing law and were subject to revision" "given the severe time constraints . . . at the time" the orders were adopted. *Id.*, at 650. The District Court also explained that the "claims presented . . . involve difficult and unsettled legal issues as well as numerous factual disputes." C. J. S. 367a. During the redistricting hearings, chief legislative counsel for the Texas Legislative Council in 2013, Jeff Archer, advised the Legislature that the District Court "'had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence,'" and had "'made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues.'" 274 F. Supp. 3d, at 650 (alterations in original); see also App. 441a–442a (testimony that interim plans were "impromptu" and "preliminary" and that the District Court "disclaimed making final determinations"). Archer explained that although the Legislature had "'put to bed'" challenges regarding "'those issues that the [District] Court identified so far,'" it had not "'put the rest to bed.'" 274 F. Supp. 3d, at 651, n. 45; see also App. 446a–447a (advising that, "on a realistic level," the Legislature had not "removed legal challenges" and that adopting the interim maps "in no way would inoculate the plans").

There was substantial evidence that the 2013 Legislature instead adopted the interim plans as part of a "strategy [that] involved adopting the interim maps, however flawed," to insulate (and thus continue to benefit from) the discriminatory taint of its 2011 maps. 274 F. Supp. 3d, at 651. Texas hoped that, by adopting the 2012 interim maps, the challengers "would have no remedy, and [the Legislature] would maintain the benefit of such discrimination or unconstitutional effects." *Ibid.* That strategy originated with the Texas attorney general, who was responsible for defending

the State in the redistricting challenges. *Id.*, at 650, and n. 41. He advised the Legislature that adopting the interim plans was the "'best way to avoid further intervention from federal judges'" and to "'*insulate* [Texas'] redistricting plans from further legal challenge.'" *Id.*, at 650 (emphasis added); see also H. J. S. 443a. The Texas attorney general also drafted the "legislative fact findings accompanying the plans, *before* the Legislature had engaged in any fact findings on the bills," stating that the 2012 interim plans "complied 'with all federal and state constitutional provisions or laws applicable to redistricting plans.'" 274 F. Supp. 3d, at 650, n. 41 (emphasis added). That the legislative factfindings were predrafted by the attorney defending Texas in these redistricting challenges—purporting to conclude that the 2012 interim plans complied with the law, when in fact the evidence showed that the Legislature did not engage in a true deliberative process or meaningfully consider evidence of the legality of the plans so that it could have endorsed such factfindings—demonstrates that the adoption of the interim plans was a mere pretext to insulate the discriminatory benefits of the 2011 plans. That explains why legislators thought that removal of those factfindings would "'gu[t] the bill.'" *Ibid.*

In the end, having presided over years of litigation and seeing firsthand all of the evidence, the District Court thought it clear that Texas' "strategy involved adopting the interim maps, however flawed," so that the challengers "would have no remedy, and [Texas] would maintain the benefit of such discrimination and unconstitutional effects." *Id.*, at 651. It is hard to imagine what a more thorough consideration of the *Arlington Heights* factors in these cases would have looked like. Review of the District Court's thorough inquiry leads to the inescapable conclusion that it did not err—let alone clearly err—in concluding that the "Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans." 274 F. Supp. 3d, at 652.

C

In contrast to that thorough *Arlington Heights* inquiry, the majority engages in a cursory analysis of the record to justify its conclusion that the evidence "overwhelmingly" shows that Texas acted with legitimate intent. *Ante*, at 609–610. Two critical things are conspicuously missing from its analysis: first, consideration of the actual factual record (or most of it, anyway),[13] and second, meaningful consideration of the limits of our review of facts on these appeals.[14]

The majority first makes reference to the fact that the Texas attorney general "advised the Legislature that the best way to [end the redistricting litigation] was to adopt the interim, court-issued plans," a position repeated by the sponsor of the plans. *Ante*, at 608. And in its view, it was reasonable for the Legislature to believe that adopting the interim plans "might at least reduce objections and thus simplify and expedite the conclusion of the litigation." *Ante*, at 609. The majority also states that "there is no evidence that the Legislature thought that the plans were invalid." *Ante*, at 609. In reaching those findings, however, the majority ignores all of the evidence in the record that demonstrates that the Legislature was aware of (and ignored) the infirmities in the maps, that it knew that adopting the interim plans would not resolve the litigation concerning the disputed dis-

[13] The majority contends in passing that its analysis takes account of "all the relevant evidence in the record," *ante*, at 607, and n. 19, apparently believing that stating it explicitly somehow makes it true. It does not. The District Court orders in these cases are part of the public record and readers can therefore judge for themselves.

[14] The majority never explains why it believes it appropriate to engage in what amounts to *de novo* review of the factual record. Presumably, it justifies its *de novo* review with its claim of legal error as to the finding of invidious intent. See Part II–D, *infra*. But even if the majority were correct that the District Court improperly shifted the burden to the State to disprove invidious intent, the proper next step would have been to remand to the District Court for reconsideration of the facts in the first instance under the correct legal standard.

tricts, and that it nevertheless moved forward with the bills as a strategy to "insulate" the discriminatory maps from further judicial scrutiny and perpetuate the discrimination embedded in the 2012 interim maps. See Part II–B, *supra*.

Instead of engaging with the factual record, the majority opinion sets out its own view of "the situation when the Legislature adopted the court-approved interim plans." *Ante*, at 610. Under that view, "the Legislature [had] good reason to believe that the court-approved interim plans were legally sound," particularly in light of our remand instructions in *Perry*, 565 U. S. 388. *Ante*, at 610. The majority nowhere considers, however, the evidence regarding what the Legislature *actually* had before it concerning the effect of the interim orders, including the explicit cautionary statements in the orders and the repeated warnings of the chief legislative counsel that the interim plans were preliminary, incomplete, and impromptu.[15] See Part II–B, *supra*.

The majority finds little significance in the fact that the Legislature "'pushed the redistricting bills through quickly

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[15] The majority is also just flat wrong on its characterization of the interim orders. With respect to all but two of the challenged State House districts, the discussion in the interim orders states only in general terms that the District Court "preliminarily [found] that any [§ 2] and constitutional challenges do not have a likelihood of success, and any [§ 5] challenges are insubstantial," emphasizing the "preliminarily nature of [its] order." H. J. S. 303a, 307a–309a. With respect to the congressional districts, the District Court opined that the "claims are not without merit" and were "a close call," but ultimately concluded that the challengers had not at that time demonstrated a likelihood of success on the merits. C. J. S. 409a, 419a. The District Court nevertheless emphasized that there remained "unsettled legal issues as well as numerous factual disputes" such that the interim map was "not a final ruling on the merits of any claims." *Id.*, at 367a. It is a stretch to characterize these interim orders as providing "a careful analysis of all the claims," *ante*, at 610, and borderline disingenuous to state that, despite repeated and explicit warnings that its rulings were not final and subject to change, the District Court was somehow "reversing its own previous decisions" when it finally did render a final decision, *ante*, at 609, n. 22.

in a special session,'" reasoning that a special session was needed "because the regular session had ended." *Ante*, at 610–611. That of course ignores the evidence that the Legislature disregarded requests by the Texas attorney general, months earlier, to take up redistricting during the regular session, that proceeding through a special session permitted the Legislature to circumvent procedures that would have ensured full and adequate consideration, and that resources were not sufficiently allocated to permit considered review of the plans. See Part II–B, *supra*.

Finally, the majority sees nothing wrong with the fact that the Legislature failed "to take into account the problems with the 2011 plans that the D. C. court identified in denying preclearance." *Ante*, at 612. It maintains that the purpose of adopting the interim plans was to "fix the problems identified by the D. C. court" and reasons that the interim maps did just that by modifying any problematic districts. *Ibid.* But of course the finding of discriminatory intent rested not only on what happened with particular districts. Rather, the evidence suggested that discriminatory motive permeated the entire 2011 redistricting process, as the D. C. court considered that "Texas has found itself in court every redistricting cycle [in the last four decades], and each time it has lost"; that "Black and Hispanic members of Congress testified at trial that they were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored"; that the redistricting committees "released a joint congressional redistricting proposal for the public to view only after the start of a special legislative session, and each provided only seventy-two hours' notice before the sole public hearing on the proposed plan in each committee"; that minority members of the Texas Legislature "raised concerns regarding their exclusion from the drafting process and their inability to influence the plan"; and that the Legislature departed from normal procedure in the "failure to release a redistrict-

ing proposal during the regular session, the limited time for review, and the failure to provide counsel with the necessary election data to evaluate [Voting Rights Act] compliance." 887 F. Supp. 2d, at 161. The majority also ignores the findings of retrogression concerning the previous version of CD25, which of course are relevant to the challengers' claims about CD27 and CD35 in this litigation and were not addressed in the 2012 interim plans. See Part III–A, *infra*. That the 2012 interim maps addressed some of the deficiencies identified by the D. C. court in the preclearance litigation does not mean that the Legislature in 2013 was free to wholly disregard the significance of other evidence of discrimination that tainted its 2011 maps and were entrenched in the 2012 interim maps.

Even had the majority not ignored the factual record, it still would be wrong in concluding that the District Court erred in finding that the 2013 Legislature acted with the intent to further and benefit from the discrimination in the 2011 maps. In light of the record before this Court, the finding of invidious intent is at least more than "'plausible'" and thus "must govern." *Harris*, 581 U. S., at 293. The majority might think that it has a "better view of the facts" than the District Court did, but "the very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—'views of the evidence.'" *Id.*, at 299.

D

The majority resists the weight of all this evidence of invidious intent not only by disregarding most of it and ignoring the clear-error posture but also by endorsing Texas' distorted characterizations of the intent analysis in the orders below. Specifically, the majority accepts Texas' argument that the District Court "reversed the burden of proof" and "imposed on the State the obligation of proving that the 2013 Legislature had experienced a true 'change of heart' and had 'engage[d] in a deliberative process to ensure that

the 2013 plans cured any taint from the 2011 plans.'" *Ante*, at 605 (alteration in original). The District Court did no such thing, and only a selective reading of the orders below could support Texas' position.

It is worth noting, as a preliminary matter, that the majority does not question the relevance of historical discrimination in assessing present discriminatory intent. Indeed, the majority leaves undisturbed the longstanding principle recognized in *Arlington Heights* that the "'historical background' of a legislative enactment is 'one evidentiary source' relevant to the question of intent." *Ante*, at 603–604 (quoting *Arlington Heights*, 429 U. S., at 267). With respect to these cases, the majority explicitly acknowledges that, in evaluating whether the 2013 Legislature acted with discriminatory purpose, "the intent of the 2011 Legislature [is] relevant" and "must be weighed together with any other direct and circumstantial evidence" bearing on intent. *Ante*, at 607.

If consideration of this "'historical background'" factor means anything in the context of assessing intent of the 2013 Legislature, it at a minimum required the District Court to assess how the 2013 Legislature addressed the known discrimination that motivated the drawing of the district lines that the Legislature was adopting, unchanged, from the 2011 maps. Therefore, the findings as to whether the 2013 Legislature engaged in a good-faith effort to address any known discrimination that tainted its 2011 plans were entirely apposite, so long as the District Court "weighed [this factor] together with any other direct and circumstantial evidence" bearing on the intent question, and so long as the burden remained on the challengers to establish invidious intent. *Ibid.*

The majority faults the District Court for not adequately engaging in that weighing and giving too "central" a focus to the historical factor in its intent analysis. *Ante*, at 605; see also *ibid.*, n. 18. That alleged "central" focus, the majority contends, led the District Court to shift the

burden of proof on the intent inquiry away from the challengers, instead requiring Texas to show that the Legislature cured its past transgressions. *Ante*, at 605. Those conclusions can only be supported if, as Texas and the majority have done, one engages in a highly selective reading of the District Court orders.

To begin, entirely absent from the majority opinion is any reference to the portions of the District Court orders that unequivocally confirm its understanding that the burden remained on the challengers to show that the 2013 Legislature acted with invidious intent. The District Court was explicit that the challengers bore the burden to "establish their claim by showing that the Legislature adopted the plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination." 274 F. Supp. 3d, at 646; see also *id.*, at 645 (discussing Circuit precedent regarding the showing needed for "a plaintiff [to] meet the purpose standard").[16]

Even when it does look at the actual language of the orders, the majority picks the few phrases that it believes support its argument, choosing to disregard the rest. For in-

[16] The majority spends some time distinguishing *Hunter* v. *Underwood*, 471 U. S. 222 (1985), adamant that it does not support "shifting the burden" as it purports the District Court did below. *Ante*, at 604. But the District Court agreed that *Hunter* was distinguishable and did not rely on it to support any sort of burden shifting. As the majority explains, *Hunter* involved a state constitutional provision adopted with discriminatory intent that, despite pruning over the years, the State never repealed. *Ante*, at 604 (citing 471 U. S., at 229, 232–233). The District Court discussed the differences between *Hunter* and these cases, namely, that *Hunter* "did not involve a later reenactment . . . which is what [Texas] now claims cleanses the plans." 274 F. Supp. 3d, at 647. It noted the important distinction that, "'when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered.'" *Id.*, at 648. That the majority ignores that the District Court did not, as it suggests, rely on *Hunter* as controlling is another example of how it conveniently overlooks the District Court's express legal analysis.

stance, the majority quotes the District Court order as having required Texas to show that the 2013 Legislature had a "'change of heart.'" *Ante*, at 605 (quoting 274 F. Supp. 3d, at 649). When that sentence is read in full, however, it is evident that the District Court was not imposing a "duty to expiate" the bad intent of the previous Legislature, as the majority contends, *ante*, at 605, but instead was describing what the weighing of the direct and circumstantial evidence revealed about the motivations of the 2013 Legislature: "The decision to adopt the interim plans was not a change of heart concerning the validity of [the challengers'] claims . . .—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." 274 F. Supp. 3d, at 649–650.

Likewise, the majority quotes the orders as requiring proof that the Legislature "'engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.'" *Ante*, at 605 (quoting 274 F. Supp. 3d, at 649). But the District Court did not put the burden on Texas to make that affirmative showing. Instead, that partial quote is lifted from a sentence in which the District Court, having held a trial on these factual issues, concluded that the challengers had met their burden to show that "the Legislature did not engage in a deliberative process," which it supported later in that paragraph with findings that the Legislature "pushed the redistricting bills through quickly in a special session" without allocating the "necessary resources . . . to support a true deliberative process." *Id.*, at 649.

The majority finally asserts that the District Court "drove the point home" when it "summarized its analysis" as follows: "'The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but safe from remedy.'" *Ante*, at 605 (quoting 274 F. Supp. 3d, at 686). The majority no

doubt hopes that the reader will focus on the portion of the sentence in which the District Court concludes that the discriminatory taint found in the 2011 maps "'was not removed'" by the enactment of the interim maps "'because the Legislature engaged in no deliberative process to remove any such taint.'" *Ante,* at 605 (quoting 274 F. Supp. 3d, at 686).[17] But the majority ignores the import of the remaining part of the sentence, in which the District Court held that the Legislature "in fact intended any such taint to be maintained but be safe from remedy." *Id.*, at 652; see also *id.*, at 686. The majority also conveniently leaves out the sentence that immediately follows: "The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans." *Id.*, at 652. When read in full and in context, it is clear that the District Court remained focused on the evidence proving the intent of the 2013 Legislature to shield its plans from a remedy and thus further the discrimination, rather than simply presuming invidious intent from the failure to remove the taint, as the majority claims.

In selectively reviewing the record below, the majority attempts to shield itself from the otherwise unavoidable conclusion that the District Court did not err. If forced to acknowledge the true scope of the legal analysis in the orders below, the majority would find itself without support for its insistence that the District Court was singularly focused on whether the Legislature "removed" past taint. And then the majority would have to contend with the thorough analysis of the *Arlington Heights* factors, Part II–B, *supra*, that

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[17] Notably, the majority takes no issue with that first conclusion, *i. e.*, that the enactment of the interim plans does not, on its own, insulate the 2013 plans from challenge. It explicitly notes that the opinion does not hold that the "2013 [plans] are unassailable because they were previously adopted on an interim basis by the Texas court," noting that such a factor is relevant insofar as it informs the inquiry into the intent of the 2013 Legislature. *Ante,* at 607.

led the District Court to conclude that the 2013 Legislature acted with invidious intent.

III

The majority fares no better in its district-by-district analysis. In line with the theme underlying the rest of its analysis, the majority opinion overlooks the factual record and mischaracterizes the bulk of the analysis in the orders below in concluding that the District Court erred in finding a §2 results violation as to CD27, HD32, and HD34. I first address CD27, and then turn to HD32 and HD34.

A

1

To put in context the objections to the District Court's conclusion regarding CD27, a brief review of the District Court's factual findings as to that district is necessary. Before 2011, CD27 was a Latino opportunity district, *i. e.*, a majority-HCVAP district with an opportunity to elect a Hispanic-preferred candidate. When the Legislature reconfigured the district in 2013, it moved Nueces County, a majority-HCVAP county, into a new Anglo-majority district to protect an incumbent "who was not the candidate of choice of those Latino voters" and likely would have been "ousted" by them absent the redistricting. C. J. S. 191a. The District Court found that the "placement of Nueces County Hispanics in an Anglo-majority district ensures that the Anglo majority usually will defeat the minority-preferred candidate, given the racially polarized voting in the area." *Id.*, at 189a–190a. It also found that "the political processes are not equally open to Hispanics" in Texas as a result of its "history of official discrimination touching on the right of Hispanics to register, vote, and otherwise to participate in the democratic process [that] is well documented," and that "Latinos bear the effects of past discrimination in areas such as education and employment/income, which hinder their

ability to participate effectively in the political process." *Id.*, at 190a–191a. Given those findings, the District Court concluded that the newly constituted CD27 "has the effect of diluting Nueces County Hispanic voters' electoral opportunity." *Id.*, at 191a.

Texas nevertheless contended (and maintains here) that no §2 results violation existed because only "seven compact Latino opportunity districts could be drawn in South/West Texas," *id.*, at 181a, and that all seven districts already existed under its maps. To explain how it counted to seven, Texas pointed to the creation of CD35 as a supposed new Latino opportunity district that joined Travis County Hispanics with Hispanics in San Antonio. The District Court agreed that only seven such districts could be drawn in the area, but rejected Texas' invocation of CD35 as a defense. The District Court concluded that because Travis County "[did] not have Anglo bloc voting," 274 F. Supp. 3d, at 683, §2 did not require the placement of Travis County Hispanics in an opportunity district, C. J. S. 176a; see also *Thornburg* v. *Gingles*, 478 U. S. 30, 51 (1986). The District Court found that Texas had moved Travis County Hispanics from their pre-2011 district, CD25, to the newly constituted CD35, not to comply with §2, but "to use race as a tool for partisan goals . . . to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25)." 274 F. Supp. 3d, at 683. Thus, it concluded that "CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest." *Ibid.*

Importantly, the District Court concluded that, without CD35, Texas could have drawn one more Latino opportunity district in South/West Texas that included Nueces County Hispanics. C. J. S. 181a; see also *id.*, at 190a ("Plaintiffs have thus shown that a district could be drawn in which Hispanics, including Nueces County Hispanics, are sufficiently numerous and geographically compact to constitute a major-

ity HCVAP"); *id.*, at 192a ("Numerous maps also demonstrated that accommodating the §2 rights of all or most Nueces County Hispanic voters would not compromise the §2 rights of any other voters, and in fact including it substantially accommodates the §2 rights of Hispanic voters in South/West Texas"). Indeed, "[p]lans were submitted during the legislative session and during this litigation that showed that seven compact districts could be drawn that included all or most Nueces County Hispanic voters but not Travis County voters." *Id.*, at 181a, n. 47.

2

Nothing in the record or the parties' briefs suggests that the District Court clearly erred in these findings of fact, which unambiguously support its conclusion that there is a §2 results violation with respect to CD27. Nevertheless, the majority offers two reasons for reversing that conclusion. First, the majority contends that the District Court erred because "in evaluating the presence of majority bloc voting in CD35," it "looked at only one, small part of the district, the portion that falls within Travis County." *Ante*, at 616. It cites to *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 192 (2017), an equal protection racial gerrymandering case, for the proposition "that redistricting analysis must take place at the district level." *Ante*, at 616. According to the majority, then, the District Court should have looked at the existence of majority bloc voting in CD35 as a whole after the 2011 redistricting.

But the majority confuses the relevant inquiry, as well as the relevant timeline. The particular §2 question here does not concern the status of Travis County Latinos in the newly constituted CD35 after the 2011 redistricting. Rather, it concerns the status of Travis County Latinos in the old CD25, prior to the 2011 redistricting. That is because the challengers' §2 claim concerns the choices before the Legislature *at the time of the 2011 redistricting*, when it was deciding which Latinos in Southwest Texas to place in the

new opportunity district to be created in that area of the State. The Legislature chose to include Travis County Latinos in an opportunity district at the expense of the Nueces County Latinos, who were instead moved into a majority-Anglo district. So the question is whether, knowing that Nueces County Latinos indisputably had a §2 right, the Legislature's choice was nevertheless justified because the Travis County Latinos also had a §2 right that needed to be accommodated. In other words, did the Legislature actually create a new §2 opportunity district for persons with a §2 right, or did it simply move people without a §2 right into a new district and just call it an opportunity district? To answer that question, the status of Travis County Latinos in 2011 is the only thing that matters, and the District Court thus correctly focused its inquiry on whether bloc voting existed in Travis County *prior* to the 2011 redistricting, such that Travis County Latinos could be found to have a §2 right. Whether the newly constituted CD35 *now* qualifies as a §2 opportunity district—an inquiry that would, as the majority suggests, call for districtwide consideration—is beside the point.

Second, the majority reasons that "the 2013 Legislature had 'good reasons' to believe that [CD35] was a viable Latino opportunity district that satisfied the *Gingles* factors." *Ante*, at 615. For this, the majority cites to the fact that the district "was based on a concept proposed by MALDEF" and that one group of plaintiffs "argued that the district [was] mandated by §2," and vaguely suggests that, contrary to the District Court's finding, "there is ample evidence" of majority bloc voting in CD35. *Ibid.*[18]

The majority forgets, yet again, that we review factual findings for clear error. *Harris*, 581 U. S., at 293. Indeed,

[18] The majority also believes that the interim orders gave the Legislature cover with respect to CD35, *ante*, at 616, forgetting that the District Court explicitly and repeatedly warned the parties that its interim orders did not resolve all factual and legal disputes in the cases.

its analysis is too cursory even for *de novo* review. The majority does not meaningfully engage with the full factual record below. Instead, it looks only to the handful of favorable facts cited in Texas' briefs. Compare Brief for Appellants 46 with *ante*, at 616–617. Had the majority considered the full record, it could only have found that the District Court cited ample evidence in support of its conclusion that the Legislature had no basis for believing that §2 required its drawing of CD35. In fact, the District Court noted that Texas in 2011 "actually asserted that CD35 is not required by §2," C. J. S. 174a, n. 40, that the main plan architect testified that he was not sure whether §2 required drawing the district, and that testimony at trial showed that the district was drawn because, on paper, it would fulfill the requirement of being majority-HCVAP while providing Democrats only one new district, and "not because all of the *Gingles* factors were satisfied," *id.*, at 179a, n. 45. The District Court also concluded that "there is no evidence that any member of the Legislature . . . had any basis in evidence for believing that CD35 was required by §2 other than its HCVAP-majority status." *Ibid.*

Had the majority properly framed the inquiry and applied the clear-error standard to the full factual record, it could not convincingly dispute the existence of a §2 results violation as to CD27. Texas diluted the voting strength of Nueces County Latinos by transforming a minority-opportunity district into a majority-Anglo district. The State cannot defend that result by pointing to CD35, because its "creation of an opportunity district for [Travis County Latinos] without a §2 right offers no excuse for its failure to provide an opportunity district for [Nueces County Latinos] with a §2 right." *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 430 (2006) (*LULAC*).[19]

[19] It is worth noting that Texas' efforts to suppress the voting strength of minority voters in Nueces County eerily mirror the actions this Court invalidated as a violation of §2 in *LULAC*, 548 U. S. 399. Like in *LULAC*,

B

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I turn now to HD32 and HD34. Before the 2011 redistricting, Nueces County had within it two Latino opportunity districts and part of one Anglo-represented district. 267 F. Supp. 3d, at 767. Due to slower population growth reflected in the 2010 census, however, Nueces County was entitled to have within it only two districts. Accordingly, during the 2011 redistricting, the Legislature opted to "eliminate one of the Latino opportunity districts . . . and draw two districts wholly within Nueces County—one strongly Latino (HD34) and one a safe Anglo Republican seat (HD32) to protect [an] incumbent." *Ibid.* "Based on an analysis of the *Gingles* requirements and the totality of the circumstances," however, the District Court found that the Legislature could have drawn two compact minority districts in Nueces County. *Id.*, at 780. Namely, the evidence demonstrated that it was possible to draw a map with "two districts with greater than 50% HCVAP," that "Latinos in Nueces County are highly cohesive, and that Anglos vote as a block usually to defeat minority preferred candidates." *Id.*, at 777–778.

"a majority-Hispanic district that would likely have elected the Hispanic-preferred candidate was flipped into an Anglo-majority district to protect a candidate that was not preferred by the Hispanic voters." C. J. S. 182a; see also *LULAC*, 548 U. S., at 427–429. And like in *LULAC*, Texas attempted to defend that curtailment of minority voters' rights by pointing to the creation of another supposed opportunity district. 274 F. Supp. 3d, at 684–685; *LULAC*, 548 U. S., at 429. In finding a §2 results violation, the Court concluded that the "vote dilution of a group that was beginning to . . . overcome prior electoral discrimination . . . cannot be sustained." *Id.*, at 442. The Court also rejected Texas' defense, holding that its "creation of an opportunity district for those without a §2 right offers no excuse for its failure to provide an opportunity district for those with a §2 right." *Id.*, at 430. In line with *LULAC*, the Court should hold that Texas has once again contravened §2 in its drawing of CD27.

The District Court then considered two proposed configurations for those districts: one with two HCVAP-majority districts located wholly within Nueces County, and another that required breaking the County Line Rule. *Id.*, at 777. The challengers preferred the latter configuration because, according to their expert, "an exogenous election index" revealed that the two HCVAP-majority districts wholly within Nueces County did "not perform sufficiently." *Id.*, at 778. The District Court did not accept that expert's assessment at face value. Instead, it explained that "an exogenous election index alone will not determine opportunity," and so evaluated the expert testing and ample other evidence and ultimately concluded that the challengers had "not adequately demonstrated that they lack equal opportunity in [an alternative] configuration . . . such that a county line break is necessary." *Id.*, at 778, 781. Thus, although it found that "two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, and that §2 could require those two districts," because §2 did not require the challengers' requested remedy (*i. e.*, breaking the County Line Rule), the District Court had to "consider whether §2 requires a remedy" and directed the challengers to "consider their preferred configuration for the remedy stage" that was to follow (before Texas prematurely appealed). *Id.*, at 783.

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The majority purports to accept these factual findings and contends that they "show that [HD32 and HD34] do not violate §2." *Ante*, at 617. Specifically, the majority points to the fact that the challengers' "own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district" without breaking the County Line Rule, a remedy the District Court concluded was not required by §2. *Ibid.* (emphasis in original). "So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines," the

majority reasons, "the logical result is that Texas did not dilute the Latino vote." *Ibid.* (emphasis in original). In its view, a districting decision cannot be said to dilute the votes of minority voters "if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice." *Ibid.*

At bottom, then, the majority rests its conclusion on one aspect of the challengers' expert evidence, *i. e.*, that it was not possible to place within Nueces County more than one performing Latino district without breaking county lines. The majority acknowledges the District Court's finding that the challengers had "'failed to show' that two majority-Latino districts in Nueces County would not perform," but waves away that finding by concluding that the District Court "twisted the burden of proof beyond recognition" by "suggest[ing] that a plaintiff might succeed on its §2 claim because its expert failed to show that the necessary factual basis for the claim could not be established." *Ante*, at 618. That conclusion is only possible because the majority closes its eyes to significant evidence in the record and misrepresents the District Court's conclusion about the potential for creating two performing Latino-majority districts in Nueces County.

The majority, of course, is right on one thing: The District Court recognized that the challengers' expert opined that the two HCVAP-majority districts would not perform based on the results of an exogenous election index. See *ante*, at 617. But the majority ignores that the District Court rejected that expert's conclusion because "the results of an exogenous election index alone will not determine opportunity," as "[s]uch indices often do not mirror endogenous election performance." 267 F. Supp. 3d, at 778. Instead of "just relying on an exogenous election index to measure opportunity," the District Court "conduct[ed] an intensely local appraisal to determine whether real electoral opportunity exists." *Ibid.*

That "intensely local appraisal" resulted in a lengthy analysis that considered, among other facts: that Texas had a long "history of voting-related discrimination"; that "racially polarized voting exist[s] in Nueces County and its house district elections, the level is high, and the high degree of Anglo bloc voting plays a role in the defeat of Hispanic candidates"; "that Hispanics, including in Nueces County, suffer a 'continuing pattern of disadvantage' relative to non-Hispanics"; that population growth in the county "was [driven by] Hispanic growth" and that the "HCVAP continues to climb"; that the districts "include demographic distributions strongly favoring Hispanic voters," and that the "numbers translate into a significant advantage in house district elections"; and that data analysis showed that "performance for Latinos increased significantly in presidential election years," which "indicates that the districts provide potential to elect." *Id.*, at 778–782.[20]

The District Court's focus on the history of the county as well as its potential performance going forward was an important point of departure from the challengers' expert, who considered only the former. See *LULAC*, 548 U. S., at 442 (noting "a significant distinction" in analysis of what district performance "'had been'" compared to "how it would operate today . . . given the growing Latino political power in the district"). The District Court also found the expert's analysis lacking in other key respects. Namely, the District Court noted that one of the majority-HCVAP districts "provides opportunity, at least in presidential election years";

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[20] The majority contends that the District Court did not engage in a sufficiently local analysis because it cited to the statewide history of discrimination against minority voters, the continuing disadvantage of Latino voters, and racially polarized voting. *Ante*, at 619. The majority not only misapprehends the importance of that statewide evidence to the local appraisal, but again ignores the many other factual findings and analysis that are specific to Nueces County and thus problematic for its conclusion. See *infra*, at 664–665.

that "[m]ost of the elections in [the exogenous election] index did not involve a *Latino* Democrat candidate"; and that the expert "only looked at statewide races and no county races," even though it was "conceivable that, in competitive local races with Latino candidates, Hispanic voters would mobilize in significantly higher numbers." 267 F. Supp. 3d, at 781 (emphasis in original).

Based on this review of the evidence, the District Court concluded "that Hispanics have equal opportunity in two districts drawn wholly within Nueces County (or at least [the challengers] failed to show that they do not)." *Id.*, at 782. It further explained that, whereas the "evidence shows that two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, . . . the evidence does not show that the Legislature was required to break the County Line Rule to draw what [the challengers] consider to be 'effective' districts." *Id.*, at 783.

When read in the context of the full analysis just detailed, it is clear that the District Court was not "twist[ing] the burden of proof," *ante*, at 618, when it observed that the challengers "failed to show that" the two HCVAP-majority districts drawn wholly within Nueces County would not perform. That statement plainly refers to the challengers' failure to rebut the finding that the two districts wholly within Nueces County provided equal electoral opportunity to Hispanics, as they needed to do to show that § 2 required breaking the County Line Rule. If anything is "twisted . . . beyond recognition," *ibid.*, it is the majority opinion's description of the District Court's findings. For while relying on a reference to what the challengers' expert opined, the majority wholly ignores the District Court's lengthy discussion rejecting that opinion on the basis of other evidence in the record.[21]

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[21] Contrary to what the majority suggests, the District Court did not believe that "simple Latino majorities in Nueces County might be sufficient to create opportunity districts" based only on "bare num-

This Court has been clear that "the ultimate right of § 2 is equality of opportunity." *Johnson* v. *De Grandy*, 512 U. S. 997, 1014, n. 11 (1994). The District Court found that two HCVAP-majority districts drawn wholly within Nueces County provided such "equality of opportunity," and its findings of fact are not clearly erroneous. Only by selectively reading the factual record and ignoring the relevant analysis of those facts can the majority escape the § 2 results violation that flows from those findings.

IV

The Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act secure for all voters in our country, regardless of race, the right to equal participation in our political processes. Those guarantees mean little, however, if courts do not remain vigilant in curbing States' efforts to undermine the ability of minority voters to meaningfully exercise that right. For although we have made progress, "voting discrimination still exists; no one doubts that." *Shelby County*, 570 U. S., at 536.

The Court today does great damage to that right of equal opportunity. Not because it denies the existence of that right, but because it refuses its enforcement. The Court intervenes when no intervention is authorized and blinds itself to the overwhelming factual record below. It does all of this to allow Texas to use electoral maps that, in design and ef-

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bers." *Ante*, at 618–619, n. 27. Consistent with its rebuke of Texas elsewhere in the opinion for advocating a "bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district" because it "may still lack 'real electoral opportunity,'" C. J. S. 134a, the District Court in its analysis of HD32 and HD34 was clear that the challengers "could assert that [the] HCVAP-majority districts do not present real electoral opportunity due to racially polarized voting and lower registration and turnout caused by the lingering effects of official discrimination." 267 F. Supp. 3d, at 781. Based on its review of that evidence, it concluded that the two majority-HCVAP districts drawn within Nueces County provided minority voters equal electoral opportunity. *Id.*, at 783.

fect, burden the rights of minority voters to exercise that most precious right that is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); see *Husted* v. *A. Philip Randolph Institute*, 584 U. S. 756, 810 (2018) (SOTOMAYOR, J., dissenting) ("Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote"). Because our duty is to safeguard that fundamental right, I dissent.

Syllabus

TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* HAWAII ET AL.

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

No. 17–965. Argued April 25, 2018—Decided June 26, 2018

In September 2017, the President issued Proclamation No. 9645, seeking to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present a security threat. The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. Foreign states were selected for inclusion based on a review undertaken pursuant to one of the President's earlier Executive Orders. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and intelligence agencies, developed an information and risk assessment "baseline." DHS then collected and evaluated data for all foreign governments, identifying those having deficient information-sharing practices and presenting national security concerns, as well as other countries "at risk" of failing to meet the baseline. After a 50-day period during which the State Department made diplomatic efforts to encourage foreign governments to improve their practices, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient. She recommended entry restrictions for certain nationals from all of those countries but Iraq, which had a close cooperative relationship with the U. S. She also recommended including Somalia, which met the information-sharing component of the baseline standards but had other special risk factors, such as a significant terrorist presence. After consulting with multiple Cabinet members, the President adopted the recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§ 1182(f) and 1185(a), he determined that certain restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information" and "elicit improved identity-management and information-sharing protocols and practices from foreign governments." The Proclamation imposes a range of entry restrictions that vary based on the "distinct circumstances" in each of the eight countries. It exempts lawful permanent residents and pro-

vides case-by-case waivers under certain circumstances. It also directs DHS to assess on a continuing basis whether the restrictions should be modified or continued, and to report to the President every 180 days. At the completion of the first such review period, the President determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals.

Plaintiffs—the State of Hawaii, three individuals with foreign relatives affected by the entry suspension, and the Muslim Association of Hawaii—argue that the Proclamation violates the Immigration and Nationality Act (INA) and the Establishment Clause. The District Court granted a nationwide preliminary injunction barring enforcement of the restrictions. The Ninth Circuit affirmed, concluding that the Proclamation contravened two provisions of the INA: § 1182(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States," and § 1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." The court did not reach the Establishment Clause claim.

Held:

1. This Court assumes without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue. See *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155. Pp. 682–683.

2. The President has lawfully exercised the broad discretion granted to him under § 1182(f) to suspend the entry of aliens into the United States. Pp. 683–697.

(a) By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions. It thus vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale*, 509 U. S., at 187. The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in § 1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. He then issued a Proclamation with extensive findings about the deficiencies and their impact. Based on that review, he

found that restricting entry of aliens who could not be vetted with adequate information was in the national interest.

Even assuming that some form of inquiry into the persuasiveness of the President's findings is appropriate, but see *Webster* v. *Doe*, 486 U. S. 592, 600, plaintiffs' attacks on the sufficiency of the findings cannot be sustained. The 12-page Proclamation is more detailed than any prior order issued under § 1182(f). And such a searching inquiry is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. See, *e. g.*, *Sale*, 509 U. S., at 187–188.

The Proclamation comports with the remaining textual limits in § 1182(f). While the word "suspend" often connotes a temporary deferral, the President is not required to prescribe in advance a fixed end date for the entry restriction. Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations. Finally, the Proclamation properly identifies a "class of aliens" whose entry is suspended, and the word "class" comfortably encompasses a group of people linked by nationality. Pp. 684–688.

(b) Plaintiffs have not identified any conflict between the Proclamation and the immigration scheme reflected in the INA that would implicitly bar the President from addressing deficiencies in the Nation's vetting system. The existing grounds of inadmissibility and the narrow Visa Waiver Program do not address the failure of certain high-risk countries to provide a minimum baseline of reliable information. Further, neither the legislative history of § 1182(f) nor historical practice justifies departing from the clear text of the statute. Pp. 688–693.

(c) Plaintiffs' argument that the President's entry suspension violates § 1152(a)(1)(A) ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA. Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once § 1182 sets the boundaries of admissibility, § 1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. Had Congress intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could have chosen language directed to that end. Common sense and historical practice confirm that § 1152(a)(1)(A) does not limit the President's delegated authority under § 1182(f). Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality. And on plaintiffs' reading, the President would not be permitted to suspend

entry from particular foreign states in response to an epidemic, or even if the United States were on the brink of war. Pp. 694–697.

3. Plaintiffs have not demonstrated a likelihood of success on the merits of their claim that the Proclamation violates the Establishment Clause. Pp. 697–711.

(a) The individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause. A person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. Cf., *e. g.*, *Kerry* v. *Din*, 576 U. S. 86, 101. Pp. 697–699.

(b) Plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. At the heart of their case is a series of statements by the President and his advisers both during the campaign and since the President assumed office. The issue, however, is not whether to denounce the President's statements, but the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, the Court must consider not only the statements of a particular President, but also the authority of the Presidency itself. Pp. 699–702.

(c) The admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U. S. 787, 792. Although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. That review is limited to whether the Executive gives a "facially legitimate and bona fide" reason for its action, *Kleindienst* v. *Mandel*, 408 U. S. 753, 769, but the Court need not define the precise contours of that narrow inquiry in this case. For today's purposes, the Court assumes that it may look behind the face of the Proclamation to the extent of applying rational basis review, *i. e.*, whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. Plaintiffs' extrinsic evidence may be considered, but the policy will be upheld so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds. Pp. 702–705.

(d) On the few occasions where the Court has struck down a policy as illegitimate under rational basis scrutiny, a common thread has been that the laws at issue were "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests." *Romer* v. *Evans*, 517 U. S. 620, 635. The Proclamation does not

Syllabus

fit that pattern. It is expressly premised on legitimate purposes and says nothing about religion. The entry restrictions on Muslim-majority nations are limited to countries that were previously designated by Congress or prior administrations as posing national security risks. Moreover, the Proclamation reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs challenge the entry suspension based on their perception of its effectiveness and wisdom, but the Court cannot substitute its own assessment for the Executive's predictive judgments on such matters. See *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 33–34.

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list. Second, for those countries still subject to entry restrictions, the Proclamation includes numerous exceptions for various categories of foreign nationals. Finally, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. Pp. 705–710.

878 F. 3d 662, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, ALITO, and GORSUCH, JJ., joined. KENNEDY, J., *post*, p. 711, and THOMAS, J., *post*, p. 712, filed concurring opinions. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined, *post*, p. 721. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 728.

Solicitor General Francisco argued the cause for petitioners. With him on the briefs were *Acting Assistant Attorney General Readler, Deputy Solicitors General Wall* and *Kneedler, Deputy Assistant Attorney General Mooppan, Jonathan C. Bond, Michael R. Huston, Sharon Swingle*, and *H. Thomas Byron III.*

Neal Kumar Katyal argued the cause for respondents. With him on the brief were *Russell A. Suzuki*, Acting Attorney General of Hawaii, *Clyde J. Wadsworth*, Solicitor General, and *Deirdre Marie-Iha, Donna H. Kalama, Kimberly T. Guidry, Robert T. Nakatsuji, Kaliko'onalani D. Fernandes,* and *Kevin M. Richardson*, Deputy Attorneys General,

Counsel

Colleen E. Roh Sinzdak, *Mitchell P. Reich*, *Elizabeth Hagerty*, *Sundeep Iyer*, *Reedy C. Swanson*, *Thomas P. Schmidt*, and *Sara Solow.**

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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, and *Ari Cuenin*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Pamela Jo Bondi* of Florida, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Joshua D. Hawley* of Missouri, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, and *Patrick Morrisey* of West Virginia; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Andrew J. Ekonomou*, *Jordan Sekulow*, *Craig L. Parshall*, *Matthew R. Clark*, *Benjamin P. Sisney*, *Edward L. White III*, *Erik M. Zimmerman*, *Francis J. Manion*, and *Geoffrey R. Surtees*; for the American Civil Rights Union by *Kenneth A. Klukowski*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for Citizens United et al. by *William J. Olson*, *Herbert W. Titus*, *Robert J. Olson*, *Jeremiah L. Morgan*, and *Joseph W. Miller*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for the Foundation for Moral Law by *John Eidsmoe* and *Matthew J. Clark*; for the Great Lakes Justice Center by *William Wagner* and *Erin Elizabeth Mersino*; for the Immigration Reform Law Institute by *Christopher J. Hajec*, *Julie B. Axelrod*, and *Michael M. Hethmon*; for the Liberty, Life, and Law Foundation by *Deborah J. Dewart*; for National Security Experts by *David Yerushalmi* and *Robert Joseph Muise*; for the Southeastern Legal Foundation by *William S. Consovoy*, *J. Michael Connolly*, and *Kimberly S. Hermann*; and for the Zionist Organization of America by *Elizabeth Berney.*

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, *Anisha S. Dasgupta*, Deputy Solicitor General, and *Zainab A. Chaudhry*, Assistant Solicitor 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 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, *Maura Healey* of Massachusetts, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Ellen F. Rosen-*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vet-

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blum of Oregon, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert Ferguson* of Wisconsin; for Chicago et al. by *Benna Ruth Solomon*, *Ryan P. Poscablo*, *Brian Neff*, *Michael N. Feuer*, *Zachary W. Carter*, and *Andrew W. Worseck*; for the American-Arab Anti-Discrimination Committee by *Christopher J. Wright*, *E. Austin Bonner*, *Abed A. Ayoub*, and *Anton C. Hajjar*; for the American Bar Association by *Hilarie Bass*, *Danielle Spinelli*, and *Kevin M. Lamb*; for the American Council on Education et al. by *Chad Golder*, *Brad D. Brian*, and *Michael R. Doyen*; for the American Jewish Committee by *Adam S. Lurie*, *Vijaya R. Palaniswamy*, *Caitlin K. Potratz*, *John W. Akin*, *Stephen A. Cobb*, and *Marc D. Stern*; for the Anti-Defamation League et al. by *John B. Harris* and *Caren Decter*; for the Association of American Medical Colleges et al. by *Joshua David Rogaczewski* and *Frank R. Trinity*; for the Association of Art Museum Directors et al. by *Sharon Katz*; for the Cato Institute by *David Y. Livshiz*, *Daniel Braun*, *Peter Jaffe*, and *Lauren Kaplin*; for Certain Immigrant Rights Organizations by *Alan C. Turner* and *Harrison Frahn*; for Colleges et al. by *Thomas J. Perrelli* and *Lindsay C. Harrison*; for Constitutional Law Scholars by *Ilya Somin*, *pro se*, *Barry R. Levy*, *H. Thomas Watson*, and *Kirk C. Jenkins*; for Constitutional Law Scholars by *Roberta A. Kaplan* and *Joshua Matz*; for Episcopal Bishops by *Jake Ewart* and *Michael R. Scott*; for Federal Courts Scholars by *Matthew S. Hellman* and *Sarah M. Konsky*; for Former Executive Branch Officials by *Robert M. Loeb*, *Kelsi Brown Corkran*, *Thomas M. Bondy*, and *Matthew L. Bush*; for Former National Security Officials by *Harold Hongju Koh*, *William J. Murphy*, *John J. Connolly*, *Phillip Spector*, and *Jonathan Freiman*; for the Freedom From Religion Foundation by *Rebecca S. Markert*; for Immigration Equality et al. by *Eric J. Gorman*, *Matthew E. Sloan*, *Jennifer H. Berman*, *Noelle M. Reed*, *Richard A. Schwartz*, *Allison B. Holcombe*, *Alyssa J. Clover*, and *Sarah Grossnickle*; for Immigration Law Professors et al. by *Robert A. Wiygul* and *Mark A. Aronchick*; for Immigration Law Scholars on the Text and Structure of the Immigration and Nationality Act by *Fatima Marouf* and *Deborah Anker*; for Interfaith Group of Religious and Interreligious Organizations by *Joseph R. Palmore*, *Marc A. Hearron*, and *Jennifer K. Brown*; for International Law Scholars et al. by *Aaron X. Fellmeth*, *Bruce V. Spiva*, and *Elisabeth C. Frost*; for the Japanese American Citizens League by *Walter D. Dellinger*, *George T. Framp-*

ting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry "would be detrimental to the interests

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ton, Jr., and *Joseph N. Roth*; for Labor Organizations by *Barbara J. Chisholm*, *Kristin M. García*, *Nicole G. Berner*, *Deborah L. Smith*, *Judith Rivlin*, *David J. Strom*, *Alice O'Brien*, *Emma Leheny*, *Lubna A. Alam*, *Ava Barbour*, *Mario Martínez*, and *Nicholas Clark*; for the Massachusetts Technology Leadership Council, Inc., by *Christopher Escobedo Hart* and *Daniel L. McFadden*; for Members of Congress by *Elizabeth B. Wydra*, *Brianne J. Gorod*, *David H. Gans*, *Peter Karanjia*, *Geoffrey Brounell*, *Victor A. Kovner*, and *Raymond H. Brescia*; for the Muslim Justice League et al. by *Benjamin G. Shatz*; for the NAACP Legal Defense & Educational Fund, Inc., by *Ajmel Quereshi*, *Christopher Kemmitt*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, and *Jin Hee Lee*; for the National Asian Pacific American Bar Association et al. by *James W. Kim*, *Navdeep Singh*, *Meredith S. H. Higashi*, *Rachana Pathak*, and *Albert Giang*; for the National Association of Muslim Lawyers et al. by *Adeel A. Mangi*, *Michael F. Buchanan*, and *Michael R. McDonald*; for the National Immigrant Justice Center et al. by *Robert N. Hochman* and *Charles Roth*; for the National League of Cities et al. by *Stuart Banner* and *Lisa E. Soronen*; for New York University by *Steven E. Obus* and *Terrance J. Nolan*; for the Pars Equality Center et al. by *Lisa S. Blatt*, *John A. Freedman*, *R. Stanton Jones*, *Nancy L. Perkins*, *Ronald A. Schechter*, *Robert N. Weiner*, *Kristen Clarke*, *Jon Greenbaum*, *Cyrus Mehri*, *Joanna K. Wasik*, and *Susan S. Hu*; for PEN America et al. by *Robert Corn-Revere* and *Robert D. Balin*; for Plaintiffs in *International Refugee Assistance Project* v. *Trump* by *Omar C. Jadwat*, *Lee Gelernt*, *Hina Shamsi*, *Karen C. Tumlin*, *Nicholas Espíritu*, *Melissa S. Keaney*, *Esther Sung*, *Marielena Hincapié*, *Justin B. Cox*, *David Rocah*, *Deborah A. Jeon*, *Sonia Kumar*, *Linda Evarts*, *Mariko Hirose*, *Cecillia D. Wang*, *Cody H. Wofsy*, *David Cole*, *Daniel Mach*, and *Heather L. Weaver*; for Plaintiffs in *Iranian Alliances Across Borders* v. *Trump* by *Richard B. Katskee*, *Eric Rothschild*, *Sirine Shebaya*, *Mark H. Lynch*, *Mark W. Mosier*, and *Jose E. Arvelo*; for Professors of Federal Courts Jurisprudence et al. by *Meir Feder*, *Rasha Gerges Shields*, *Rajeev Muttreja*, and *Judith Resnik*, *Burt Neuborne*, and *Lucas Guttentag*, all *pro se*; for Retired Generals of the U. S. Armed Forces et al. by *Donald Francis Donovan*, *Carl J. Micarelli*, and *Hardy Vieux*; for the Roderick & Solange MacArthur Justice Center by *Amir H. Ali*; for Scholars of Immigration Law by *Peter Margulies*, and *Alan E. Schoenfeld* and *Shoba Sivaprasad Wadhia*, both *pro se*; for the

of the United States." 8 U. S. C. § 1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proc-

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Tahirih Justice Center et al. by *Scott L. Winkelman*; for the United States Conference of Catholic Bishops et al. by *Theodore J. Boutrous, Jr.*, *Ethan D. Dettmer*, *Joshua S. Lipshutz*, *Anthony R. Picarello, Jr.*, and *Jeffrey Hunter Moon*; and for U. S. Companies by *Andrew J. Pincus* and *Paul W. Hughes*; for David Boyle by *Mr. Boyle, pro se*; for Mickey Edwards et al. by *Tadhg Dooley* and *Benjamin M. Daniels*; for Khizr Khan by *Dan Jackson*; for Karen Korematsu et al. by *Pratik A. Shah*, *Robert S. Chang*, *Eric K. Yamamoto*, *Robert L. Rusky*, *Dale Minami*, *Peter Irons*, *Leigh-Ann K. Miyasato*, *Robert A. Johnson*, *Jessica M. Weisel*, and *Rodney L. Kawakami*; for Evan McMullin et al. by *John B. Bellinger III*, *Elliott C. Mogul*, and *R. Reeves Anderson*; for Janet Napolitano et al. by *Michael J. Gottlieb* and *J. Wells Harrell*; for William Webster et al. by *Richard D. Bernstein*; for Eblal Zakzok et al. by *Robert A. Atkins*, *Andrew J. Ehrlich*, *Steven C. Herzog*, *Faiza Patel*, *Michael Price*, *Lena F. Masri*, and *Carolyn Homer*; and for 36 Appellate Lawyers by *Charles A. Bird*, *Richard A. Derevan*, *Jon B. Eisenberg*, *Kathryn E. Karcher*, *Wendy Cole Lascher*, *Robin Meadow*, *Susan Alexander*, *Robert Bacon*, *Charles Bonneau*, *Orly Degani*, *Jay-Allen Eisen*, *David Ettinger*, *Dennis Fischer*, *Paul Fogel*, *Cliff Gardner*, *Robert Gersetin*, *Howard Goodfriend*, *Mark Alan Hart*, *Laurie Hepler*, *Steven Hirsch*, *Charity Kenyon*, *Todd Lundell*, *Erick Multhaup*, *Bradley Pauley*, *Barbara Ravitz*, *Kent Richland*, *Amitai Schwartz*, *Elisabeth Semel*, *Charles Sevilla*, *Catherine Smith*, *Cindy Tobisman*, *Michael Traynor*, and *Douglas Young*.

Briefs of *amici curiae* were filed for the Alliance Defending Freedom by *David A. Cortman*, *Rory T. Gray*, *Kristen K. Waggoner*, and *Jonathan A. Scruggs*; for the Becket Fund for Religious Liberty by *Eric C. Rassbach*, *Mark L. Rienzi*, *Diana M. Verm*, and *Joseph C. Davis*; for the Christian Legal Society et al. by *Kimberlee Wood Colby*; and for Scholars of Mormon History & Law by *Anna-Rose Mathieson*.

lamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

I

A

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO–1). EO–1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. § 3(a). Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. § 3(c). The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government's request to stay that order. *Washington* v. *Trump*, 847 F. 3d 1151 (2017) (*per curiam*).

In response, the President revoked EO–1, replacing it with Executive Order No. 13780, which again directed a worldwide review. 82 Fed. Reg. 13209 (2017) (EO–2). Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO–2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO–1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. §§ 2(c), 3(a). The order explained that those countries had been selected because each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." § 1(d). The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. *International Refugee Assistance Project* (*IRAP*) v. *Trump*, 857 F. 3d 554 (CA4 2017); *Hawaii* v. *Trump*, 859 F. 3d 741 (CA9 2017) (*per curiam*). This Court granted certiorari and stayed the injunctions—allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a "credible claim of a bona fide relationship" with a person or entity in the United States. *Trump* v. *IRAP*, 582 U. S. 571, 582 (2017) (*per curiam*). The temporary restrictions in EO–2 expired before this Court took any action, and we vacated the lower court decisions as moot. *Trump* v. *IRAP*, 583 U. S. 912 (2017); *Trump* v. *Hawaii*, 583 U. S. 941 (2017).

On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present "public-safety threats." § 1(a). To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO–2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies, developed a "baseline" for the information required from foreign governments

to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. § 1(c). The baseline included three components. The first, "identity-management information," focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government's receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States. *Ibid.*

DHS collected and evaluated data regarding all foreign governments. § 1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as "at risk" of similarly failing to meet the baseline. § 1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. § 1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. *Ibid.*

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries ex-

cept Iraq. §§ 1(g), (h). She also concluded that although Somalia generally satisfied the information-sharing component of the baseline standards, its "identity-management deficiencies" and "significant terrorist presence" presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. § 1(i). As for Iraq, the Acting Secretary found that entry limitations on its nationals were not warranted given the close cooperative relationship between the U. S. and Iraqi Governments and Iraq's commitment to combating ISIS. § 1(g).

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary's recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§ 1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information"; "elicit improved identity-management and information-sharing protocols and practices from foreign governments"; and otherwise "advance [the] foreign policy, national security, and counterterrorism objectives" of the United States. Proclamation § 1(h)(i). The President explained that these restrictions would be the "most likely to encourage cooperation" while "protect[ing] the United States until such time as improvements occur." *Ibid.*

The Proclamation imposed a range of restrictions that vary based on the "distinct circumstances" in each of the eight countries. *Ibid.* For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. §§ 2(b)(ii), (d)(ii), (e)(ii). For countries that have information-sharing deficiencies but are nonetheless "valuable counterterrorism partner[s]" (Chad, Libya, and Yemen), it restricts entry of nationals

seeking immigrant visas and nonimmigrant business or tourist visas. §§ 2(a)(i), (c)(i), (g)(i). Because Somalia generally satisfies the baseline standards but was found to present special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. § 2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas. § 2(f)(ii).

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. § 3(b). It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. § 3(c)(i); see also § 3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. § 4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

B

Plaintiffs in this case are the State of Hawaii, three individuals (Dr. Ismail Elshikh, John Doe #1, and John Doe #2), and the Muslim Association of Hawaii. The State operates the University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U. S. citizens or lawful permanent resi-

dents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii.

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. The court concluded that the Proclamation violated two provisions of the INA: § 1182(f), because the President did not make sufficient findings that the entry of the covered foreign nationals would be detrimental to the national interest, and § 1152(a)(1)(A), because the policy discriminates against immigrant visa applicants on the basis of nationality. 265 F. Supp. 3d 1140, 1155–1159 (Haw. 2017). The Government requested expedited briefing and sought a stay pending appeal. The Court of Appeals for the Ninth Circuit granted a partial stay, permitting enforcement of the Proclamation with respect to foreign nationals who lack a bona fide relationship with the United States. This Court then stayed the injunction in full pending disposition of the Government's appeal. 583 U. S. 1009 (2017).

The Court of Appeals affirmed. The court first held that the Proclamation exceeds the President's authority under § 1182(f). In its view, that provision authorizes only a "temporary" suspension of entry in response to "exigencies" that "Congress would be ill-equipped to address." 878 F. 3d 662, 684, 688 (2017). The court further reasoned that the Proclamation "conflicts with the INA's finely reticulated regulatory scheme" by addressing "matters of immigration already passed upon by Congress." *Id.*, at 685, 690. The Ninth

Circuit then turned to § 1152(a)(1)(A) and determined that the entry restrictions also contravene the prohibition on nationality-based discrimination in the issuance of immigrant visas. The court did not reach plaintiffs' Establishment Clause claim.

We granted certiorari. 583 U. S. 1099 (2018).

II

Before addressing the merits of plaintiffs' statutory claims, we consider whether we have authority to do so. The Government argues that plaintiffs' challenge to the Proclamation under the INA is not justiciable. Relying on the doctrine of consular nonreviewability, the Government contends that because aliens have no "claim of right" to enter the United States, and because exclusion of aliens is "a fundamental act of sovereignty" by the political branches, review of an exclusion decision "is not within the province of any court, unless expressly authorized by law." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542–543 (1950). According to the Government, that principle barring review is reflected in the INA, which sets forth a comprehensive framework for review of orders of removal, but authorizes judicial review only for aliens physically present in the United States. See Brief for Petitioners 19–20 (citing 8 U. S. C. § 1252).

The justiciability of plaintiffs' challenge under the INA presents a difficult question. The Government made similar arguments that no judicial review was available in *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155 (1993). The Court in that case, however, went on to consider on the merits a statutory claim like the one before us without addressing the issue of reviewability. The Government does not argue that the doctrine of consular nonreviewability goes to the Court's jurisdiction, see Tr. of Oral Arg. 13, nor does it point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs' claims, see *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013)

(requiring Congress to "clearly state[ ]" that a statutory provision is jurisdictional). As a result, we may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis.

III

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. See, *e. g.*, 8 U. S. C. §§ 1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, § 1182(f), enables the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."[1]

Plaintiffs argue that the Proclamation is not a valid exercise of the President's authority under the INA. In their view, § 1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA—8 U. S. C. § 1152(a)(1)(A)—because it discriminates on the basis of nationality in the issuance of immigrant visas.

By its plain language, § 1182(f) grants the President broad discretion to suspend the entry of aliens into the United

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[1] The President also invoked his power under 8 U. S. C. § 1185(a)(1), which grants the President authority to adopt "reasonable rules, regulations, and orders" governing entry or removal of aliens, "subject to such limitations and exceptions as [he] may prescribe." Because this provision "substantially overlap[s]" with § 1182(f), we agree with the Government that we "need not resolve . . . the precise relationship between the two statutes" in evaluating the validity of the Proclamation. Brief for Petitioners 32–33.

States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.

A

The text of § 1182(f) states:

> "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that § 1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale*, 509 U. S., at 187 (finding it "perfectly clear" that the President could "establish a naval blockade" to prevent illegal migrants from entering the United States); see also *Abourezk* v. *Reagan*, 785 F. 2d 1043, 1049, n. 2 (CADC 1986) (describing the "sweeping proclamation power" in § 1182(f) as enabling the President to supplement the other grounds of inadmissibility in the INA).

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in § 1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United States." Proclamation § 1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore "craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur." *Ibid.*[2]

Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President's stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas.

Such arguments are grounded on the premise that § 1182(f) not only requires the President to *make* a finding

[2] The Proclamation states that it does not disclose every ground for the country-specific restrictions because "[d]escribing all of those reasons publicly . . . would cause serious damage to the national security of the United States, and many such descriptions are classified." § 1(j).

that entry "would be detrimental to the interests of the United States," but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. See *Webster* v. *Doe*, 486 U. S. 592, 600 (1988) (concluding that a statute authorizing the CIA Director to terminate an employee when the Director "shall deem such termination necessary or advisable in the interests of the United States" forecloses "any meaningful judicial standard of review"). But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained. The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under § 1182(f). Contrast Presidential Proclamation No. 6958, 3 CFR 133 (1996) (President Clinton) (explaining in one sentence why suspending entry of members of the Sudanese Government and armed forces "is in the foreign policy interests of the United States"); Presidential Proclamation No. 4865, 3 CFR 50–51 (1981) (President Reagan) (explaining in five sentences why measures to curtail "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" are "necessary").

Moreover, plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. "Whether the President's chosen method" of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his [§ 1182(f)] authority." *Sale*, 509 U. S., at 187–188. And when the President adopts "a preventive measure . . . in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical

conclusions." *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 35 (2010).

The Proclamation also comports with the remaining textual limits in § 1182(f). We agree with plaintiffs that the word "suspend" often connotes a "defer[ral] till later," Webster's Third New International Dictionary 2303 (1966). But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f) authorizes the President to suspend entry "for such period as he shall deem necessary." It follows that when a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition. See, *e. g.*, Presidential Proclamation No. 5829, 3 CFR 88 (1988) (President Reagan) (suspending the entry of certain Panamanian nationals "until such time as . . . democracy has been restored in Panama"); Presidential Proclamation No. 8693, 3 CFR 86–87 (2011) (President Obama) (suspending the entry of individuals subject to a travel restriction under United Nations Security Council resolutions "until such time as the Secretary of State determines that [the suspension] is no longer necessary"). In fact, not one of the 43 suspension orders issued prior to this litigation has specified a precise end date.

Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations. Proclamation Preamble, and § 1(h); see *ibid.* (explaining that the aim is to "relax[ ] or remove[ ]" the entry restrictions "as soon as possible"). To that end, the Proclamation establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated. §§ 4(a), (b). Indeed, after the initial review period, the President determined that Chad had made sufficient im-

provements to its identity-management protocols, and he accordingly lifted the entry suspension on its nationals. See Proclamation No. 9723, 83 Fed. Reg. 15937.

Finally, the Proclamation properly identifies a "class of aliens"—nationals of select countries—whose entry is suspended. Plaintiffs argue that "class" must refer to a well-defined group of individuals who share a common "characteristic" apart from nationality. Brief for Respondents 42. But the text of § 1182(f), of course, does not say that, and the word "class" comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be "overbroad." *Id.*, at 42. But that simply amounts to an unspoken tailoring requirement found nowhere in Congress's grant of authority to suspend entry of not only "any class of aliens" but "all aliens."

In short, the language of § 1182(f) is clear, and the Proclamation does not exceed any textual limit on the President's authority.

B

Confronted with this "facially broad grant of power," 878 F. 3d, at 688, plaintiffs focus their attention on statutory structure and legislative purpose. They seek support in, first, the immigration scheme reflected in the INA as a whole, and, second, the legislative history of § 1182(f) and historical practice. Neither argument justifies departing from the clear text of the statute.

1

Plaintiffs' structural argument starts with the premise that § 1182(f) does not give the President authority to countermand Congress's considered policy judgments. The President, they say, may supplement the INA, but he cannot supplant it. And in their view, the Proclamation falls in the latter category because Congress has already specified a two-part solution to the problem of aliens seeking entry from countries that do not share sufficient information with the

United States. First, Congress designed an individualized vetting system that places the burden on the alien to prove his admissibility. See § 1361. Second, instead of banning the entry of nationals from particular countries, Congress sought to encourage information sharing through a Visa Waiver Program offering fast-track admission for countries that cooperate with the United States. See § 1187.

We may assume that § 1182(f) does not allow the President to expressly override particular provisions of the INA. But plaintiffs have not identified any conflict between the statute and the Proclamation that would implicitly bar the President from addressing deficiencies in the Nation's vetting system.

To the contrary, the Proclamation supports Congress's individualized approach for determining admissibility. The INA sets forth various inadmissibility grounds based on connections to terrorism and criminal history, but those provisions can only work when the consular officer has sufficient (and sufficiently reliable) information to make that determination. The Proclamation promotes the effectiveness of the vetting process by helping to ensure the availability of such information.

Plaintiffs suggest that the entry restrictions are unnecessary because consular officers can simply deny visas in individual cases when an alien fails to carry his burden of proving admissibility—for example, by failing to produce certified records regarding his criminal history. Brief for Respondents 48. But that misses the point: A critical finding of the Proclamation is that the failure of certain countries to provide reliable information prevents the Government from accurately determining whether an alien is inadmissible or poses a threat. Proclamation § 1(h). Unless consular officers are expected to apply categorical rules and deny entry from those countries across the board, fraudulent or unreliable documentation may thwart their review in individual cases. And at any rate, the INA certainly does not *require* that systemic problems such as the lack of reliable informa-

tion be addressed only in a progression of case-by-case admissibility determinations. One of the key objectives of the Proclamation is to encourage foreign governments to improve their practices, thus facilitating the Government's vetting process overall. *Ibid.*

Nor is there a conflict between the Proclamation and the Visa Waiver Program. The Program allows travel without a visa for short-term visitors from 38 countries that have entered into a "rigorous security partnership" with the United States. DHS, U. S. Visa Waiver Program (Apr. 6, 2016), http://www.dhs.gov/visa-waiver-program (as last visited June 25, 2018). Eligibility for that partnership involves "broad and consequential assessments of [the country's] foreign security standards and operations." *Ibid.* A foreign government must (among other things) undergo a comprehensive evaluation of its "counterterrorism, law enforcement, immigration enforcement, passport security, and border management capabilities," often including "operational site inspections of airports, seaports, land borders, and passport production and issuance facilities." *Ibid.*

Congress's decision to authorize a benefit for "many of America's closest allies," *ibid.*, did not implicitly foreclose the Executive from imposing tighter restrictions on nationals of certain high-risk countries. The Visa Waiver Program creates a special exemption for citizens of countries that maintain exemplary security standards and offer "reciprocal [travel] privileges" to United States citizens. 8 U. S. C. § 1187(a)(2)(A). But in establishing a select partnership covering less than 20% of the countries in the world, Congress did not address what requirements should govern the entry of nationals from the vast majority of countries that fall short of that gold standard—particularly those nations presenting heightened terrorism concerns. Nor did Congress attempt to determine—as the multi-agency review process did—whether those high-risk countries provide a minimum baseline of information to adequately vet their na-

tionals. Once again, this is not a situation where "Congress has stepped into the space and solved the exact problem." Tr. of Oral Arg. 53.

Although plaintiffs claim that their reading preserves for the President a flexible power to "supplement" the INA, their understanding of the President's authority is remarkably cramped: He may suspend entry by classes of aliens "similar in nature" to the existing categories of inadmissibility—but not too similar—or only in response to "some exigent circumstance" that Congress did not already touch on in the INA. Brief for Respondents 31, 36, 50; see also Tr. of Oral Arg. 57 ("Presidents have wide berth in this area . . . if there's any sort of emergency."). In any event, no Congress that wanted to confer on the President only a residual authority to address emergency situations would ever use language of the sort in § 1182(f). Fairly read, the provision vests authority in the President to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA—including in response to circumstances that might affect the vetting system or other "interests of the United States."

Because plaintiffs do not point to any contradiction with another provision of the INA, the President has not exceeded his authority under § 1182(f).

2

Plaintiffs seek to locate additional limitations on the scope of § 1182(f) in the statutory background and legislative history. Given the clarity of the text, we need not consider such extra-textual evidence. See *State Farm Fire & Casualty Co.* v. *United States ex rel. Rigsby*, 580 U. S. 26, 36–37 (2016). At any rate, plaintiffs' evidence supports the plain meaning of the provision.

Drawing on legislative debates over § 1182(f), plaintiffs suggest that the President's suspension power should be limited to exigencies where it would be difficult for Congress

to react promptly. Precursor provisions enacted during the First and Second World Wars confined the President's exclusion authority to times of "war" and "national emergency." See Act of May 22, 1918, § 1(a), 40 Stat. 559; Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252. When Congress enacted § 1182(f) in 1952, plaintiffs note, it borrowed "nearly verbatim" from those predecessor statutes, and one of the bill's sponsors affirmed that the provision would apply only during a time of crisis. According to plaintiffs, it therefore follows that Congress sought to delegate only a similarly tailored suspension power in § 1182(f). Brief for Respondents 39–40.

If anything, the drafting history suggests the opposite. In borrowing "nearly verbatim" from the pre-existing statute, Congress made one critical alteration—it removed the national emergency standard that plaintiffs now seek to reintroduce in another form. Weighing Congress's conscious departure from its wartime statutes against an isolated floor statement, the departure is far more probative. See *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 307 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."). When Congress wishes to condition an exercise of executive authority on the President's finding of an exigency or crisis, it knows how to say just that. See, *e. g.*, 16 U. S. C. § 824*o*–1(b); 42 U. S. C. § 5192; 50 U. S. C. §§ 1701, 1702. Here, Congress instead chose to condition the President's exercise of the suspension authority on a different finding: that the entry of an alien or class of aliens would be "detrimental to the interests of the United States."

Plaintiffs also strive to infer limitations from executive practice. By their count, every previous suspension order under § 1182(f) can be slotted into one of two categories. The vast majority targeted discrete groups of foreign nationals engaging in conduct "deemed harmful by the immigration laws." And the remaining entry restrictions that focused on entire nationalities—namely, President Carter's response to the Iran hostage crisis and President Reagan's suspension

of immigration from Cuba—were, in their view, designed as a response to diplomatic emergencies "that the immigration laws do not address." Brief for Respondents 40–41.

Even if we were willing to confine expansive language in light of its past applications, the historical evidence is more equivocal than plaintiffs acknowledge. Presidents have repeatedly suspended entry not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U. S. foreign policy interests. See, *e. g.*, Exec. Order No. 13662, 3 CFR 233 (2014) (President Obama) (suspending entry of Russian nationals working in the financial services, energy, mining, engineering, or defense sectors, in light of the Russian Federation's "annexation of Crimea and its use of force in Ukraine"); Presidential Proclamation No. 6958, 3 CFR 133 (1997) (President Clinton) (suspending entry of Sudanese governmental and military personnel, citing "foreign policy interests of the United States" based on Sudan's refusal to comply with United Nations resolution). And while some of these reprisals were directed at subsets of aliens from the countries at issue, others broadly suspended entry on the basis of nationality due to ongoing diplomatic disputes. For example, President Reagan invoked § 1182(f) to suspend entry "as immigrants" by almost all Cuban nationals, to apply pressure on the Cuban Government. Presidential Proclamation No. 5517, 3 CFR 102 (1986). Plaintiffs try to fit this latter order within their carveout for emergency action, but the proclamation was based in part on Cuba's decision to breach an immigration agreement some 15 months earlier.

More significantly, plaintiffs' argument about historical practice is a double-edged sword. The more ad hoc their account of executive action—to fit the history into their theory—the harder it becomes to see such a refined delegation in a statute that grants the President sweeping authority to decide whether to suspend entry, whose entry to suspend, and for how long.

C

Plaintiffs' final statutory argument is that the President's entry suspension violates § 1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." They contend that we should interpret the provision as prohibiting nationality-based discrimination throughout the *entire* immigration process, despite the reference in § 1152(a)(1)(A) to the act of visa issuance alone. Specifically, plaintiffs argue that § 1152(a)(1)(A) applies to the predicate question of a visa applicant's eligibility for admission and the subsequent question whether the holder of a visa may in fact enter the country. Any other conclusion, they say, would allow the President to circumvent the protections against discrimination enshrined in § 1152(a)(1)(A).

As an initial matter, this argument challenges only the validity of the entry restrictions on *immigrant* travel. Section 1152(a)(1)(A) is expressly limited to the issuance of "immigrant visa[s]" while § 1182(f) allows the President to suspend entry of "immigrants or nonimmigrants." At a minimum, then, plaintiffs' reading would not affect any of the limitations on nonimmigrant travel in the Proclamation.

In any event, we reject plaintiffs' interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA.[3]

[3] The Act is rife with examples distinguishing between the two concepts. See, *e. g.*, 8 U. S. C. § 1101(a)(4) ("The term 'application for admission' has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa."); § 1182(a) ("ineligible to receive visas and ineligible to be admitted"); § 1182(a)(3)(D)(iii) ("establishes to the satisfaction of the consular officer when applying for a visa . . . or to the satisfaction of the Attorney General when applying for admission"); § 1182(h)(1)(A)(i) ("alien's application for a visa, admission, or adjustment of status"); § 1187 (permitting entry without a visa); § 1361 (establishing burden of proof for when a person "makes

Section 1182 defines the pool of individuals who are admissible to the United States. Its restrictions come into play at two points in the process of gaining entry (or admission)[4] into the United States. First, any alien who is inadmissible under § 1182 (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as "ineligible to receive a visa." 8 U. S. C. § 1201(g). Second, even if a consular officer issues a visa, entry into the United States is not guaranteed. As every visa application explains, a visa does not entitle an alien to enter the United States "if, upon arrival," an immigration officer determines that the applicant is "inadmissible under this chapter, or any other provision of law"—including § 1182(f). § 1201(h).

Sections 1182(f) and 1152(a)(1)(A) thus operate in different spheres: Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once § 1182 sets the boundaries of admissibility into the United States, § 1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. The distinction between admissibility—to which § 1152(a)(1)(A) does not apply—and visa issuance—to which it does—is apparent from the text of the provision, which specifies only that its protections apply to the "issuance" of "immigrant visa[s]," without mentioning admissibility or entry. Had Congress instead intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end. See, *e. g.*, §§ 1182(a)(3)(C)(ii), (iii) (providing that certain aliens "*shall not be excludable or subject to restrictions or conditions on entry* . . . because of the alien's past, current, or expected

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application for a visa . . . , or makes application for admission, or otherwise attempts to enter the United States").

[4] The concepts of entry and admission—but not issuance of a visa—are used interchangeably in the INA. See § 1101(a)(13)(A) (defining "admission" as the "lawful entry of the alien into the United States").

beliefs, statements, or associations" (emphasis added)). "The fact that [Congress] did not adopt [a] readily available and apparent alternative strongly supports" the conclusion that § 1152(a)(1)(A) does not limit the President's delegated authority under § 1182(f). *Knight* v. *Commissioner*, 552 U. S. 181, 188 (2008).

Common sense and historical practice confirm as much. Section 1152(a)(1)(A) has never been treated as a constraint on the criteria for admissibility in § 1182. Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality. As noted, President Reagan relied on § 1182(f) to suspend entry "as immigrants by all Cuban nationals," subject to exceptions. Proclamation No. 5517, 51 Fed. Reg. 30470 (1986). Likewise, President Carter invoked § 1185(a)(1) to deny and revoke visas to all Iranian nationals. See Exec. Order No. 12172, 3 CFR 461 (1979), as amended by Exec. Order No. 12206, 3 CFR 249 (1980); Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, Vol. 1, Apr. 7, 1980, pp. 611–612 (1980); see also n. 1, *supra*.

On plaintiffs' reading, those orders were beyond the President's authority. The entry restrictions in the Proclamation on North Korea (which plaintiffs do not challenge in this litigation) would also be unlawful. Nor would the President be permitted to suspend entry from particular foreign states in response to an epidemic confined to a single region, or a verified terrorist threat involving nationals of a specific foreign nation, or even if the United States were on the brink of war.

In a reprise of their § 1182(f) argument, plaintiffs attempt to soften their position by falling back on an implicit exception for Presidential actions that are "closely drawn" to address "specific fast-breaking exigencies." Brief for Respondents 60–61. Yet the absence of any textual basis for such an exception more likely indicates that Congress did not intend for § 1152(a)(1)(A) to limit the President's flexible authority to suspend entry based on foreign policy interests. In addition, plaintiffs' proposed exigency test would require

courts, rather than the President, to determine whether a foreign government's conduct rises to the level that would trigger a supposed implicit exception to a federal statute. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 491 (1999) (explaining that even if the Executive "disclose[d] its . . . reasons for deeming nationals of a particular country a special threat," courts would be "unable to assess their adequacy"). The text of § 1152(a)(1)(A) offers no standards that would enable courts to assess, for example, whether the situation in North Korea justifies entry restrictions while the terrorist threat in Yemen does not.

* * *

The Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs' primary contention below and in their briefing before this Court was that the Proclamation violated the statute.

IV

A

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. Because we have an obligation to assure ourselves of jurisdiction under Article III, we begin by addressing the question whether plaintiffs have standing to bring their constitutional challenge.

Federal courts have authority under the Constitution to decide legal questions only in the course of resolving "Cases" or "Controversies." Art. III, § 2. One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue. Standing requires more than just a "keen interest in the issue." *Hollingsworth* v. *Perry*, 570 U. S. 693, 700 (2013). It requires allegations—and, eventually, proof—that the plaintiff "personal[ly]" suffered a concrete and particularized injury in connection with the conduct about which

he complains. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 339 (2016). In a case arising from an alleged violation of the Establishment Clause, a plaintiff must show, as in other cases, that he is "directly affected by the laws and practices against which [his] complaints are directed." *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 224, n. 9 (1963). That is an issue here because the entry restrictions apply not to plaintiffs themselves but to others seeking to enter the United States.

Plaintiffs first argue that they have standing on the ground that the Proclamation "establishes a disfavored faith" and violates "their own right to be free from federal [religious] establishments." Brief for Respondents 27–28 (emphasis deleted). They describe such injury as "spiritual and dignitary." *Id.*, at 29.

We need not decide whether the claimed dignitary interest establishes an adequate ground for standing. The three individual plaintiffs assert another, more concrete injury: the alleged real-world effect that the Proclamation has had in keeping them separated from certain relatives who seek to enter the country. See *ibid.*; *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. 433, 439 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint."). We agree that a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. This Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals. See *Kerry* v. *Din*, 576 U. S. 86, 101 (2015) (plurality opinion); *id.*, at 102 (KENNEDY, J., concurring in judgment); *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972). Likewise, one of our prior stay orders in this litigation recognized that an American individual who has "a bona fide relationship with a particular person seeking to enter the country . . . can legitimately

claim concrete hardship if that person is excluded." *Trump* v. *IRAP*, 582 U. S., at 583.

The Government responds that plaintiffs' Establishment Clause claims are not justiciable because the Clause does not give them a legally protected interest in the admission of particular foreign nationals. But that argument—which depends upon the scope of plaintiffs' Establishment Clause rights—concerns the merits rather than the justiciability of plaintiffs' claims. We therefore conclude that the individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause.

B

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were "foreordained." Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. Brief for Respondents 69–73.

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candi-

date on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." App. 158. That statement remained on his campaign website until May 2017. *Id.*, at 130–131. Then-candidate Trump also stated that "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country." *Id.*, at 120–121, 159. Shortly after being elected, when asked whether violence in Europe had affected his plans to "ban Muslim immigration," the President replied, "You know my plans. All along, I've been proven to be right." *Id.*, at 123.

One week after his inauguration, the President issued EO–1. In a television interview, one of the President's campaign advisers explained that when the President "first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" *Id.*, at 125. The adviser said he assembled a group of Members of Congress and lawyers that "focused on, instead of religion, danger. . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country." *Id.*, at 229.

Plaintiffs also note that after issuing EO–2 to replace EO–1, the President expressed regret that his prior order had been "watered down" and called for a "much tougher version" of his "Travel Ban." Shortly before the release of the Proclamation, he stated that the "travel ban . . . should be far larger, tougher, and more specific," but "stupidly that would not be politically correct." *Id.*, at 132–133. More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President's deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that "the President has been talking about these security issues for years now,

from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." *IRAP* v. *Trump*, 883 F. 3d 233, 267 (CA4 2018).

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island, that "happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens." 6 Papers of George Washington 285 (D. Twohig ed. 1996). President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that "America would fight with her whole strength for your right to have here your own church," declaring that "[t]his concept is indeed a part of America." Public Papers of the Presidents, Dwight D. Eisenhower, June 28, 1957, p. 509 (1957). And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that "[t]he face of terror is not the true faith of Islam," and that America is "a great country because we share the same values of respect and dignity and human worth." Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 17, 2001, p. 1121 (2001). Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not

whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs' challenge inform our standard of review.

C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977); see *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."). Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications . . . defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive." *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976).

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. In *Kleindienst* v. *Mandel*, the Attorney General denied admission to a Belgian journalist and self-described "revolutionary Marxist," Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U. S., at 756–757. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional "right to receive information" was implicated. *Id.*, at 764–765. But we limited our review to whether the Executive gave a "facially legitimate and bona fide" reason for its action. *Id.*, at 769. Given the authority of the political branches over admission, we held that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the asserted constitutional interests of U. S. citizens. *Id.*, at 770.

The principal dissent suggests that *Mandel* has no bearing on this case, *post*, at 740–741, and n. 5 (opinion of SOTOMAYOR, J.) (hereinafter the dissent), but our opinions have reaffirmed and applied its deferential standard of review across different contexts and constitutional claims. In *Din*, JUSTICE KENNEDY reiterated that "respect for the political branches' broad power over the creation and administration of the immigration system" meant that the Government need provide only a statutory citation to explain a visa denial. 576 U. S., at 106 (opinion concurring in judgment). Likewise in *Fiallo*, we applied *Mandel* to a "broad congressional policy" giving immigration preferences to mothers of illegitimate children. 430 U. S., at 795. Even though the statute created a "categorical" entry classification that discriminated on the basis of sex and legitimacy, *post*, at 740–741, n. 5, the Court

concluded that "it is not the judicial role in cases of this sort to probe and test the justifications" of immigration policies. 430 U. S., at 799 (citing *Mandel*, 408 U. S., at 770). Lower courts have similarly applied *Mandel* to broad executive action. See *Rajah* v. *Mukasey*, 544 F. 3d 427, 433, 438–439 (CA2 2008) (upholding National Security Entry-Exit Registration System instituted after September 11, 2001).

Mandel's narrow standard of review "has particular force" in admission and immigration cases that overlap with "the area of national security." *Din*, 576 U. S., at 104 (KENNEDY, J., concurring in judgment). For one, "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs. *Ziglar* v. *Abbasi*, 582 U. S. 120, 142 (2017) (internal quotation marks omitted). For another, "when it comes to collecting evidence and drawing inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Humanitarian Law Project*, 561 U. S., at 34.

The upshot of our cases in this context is clear: "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained. *Mathews*, 426 U. S., at 81–82. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. See Tr. of Oral Arg. 16–17, 25–27 (describing *Mandel* as "the starting point" of the analysis). For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Govern-

ment's stated objective to protect the country and improve vetting processes. See *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 179 (1980). As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.[5]

D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group." *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973). In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 448–450 (1985) (internal quotation marks omitted). And in another case, this Court

[5] The dissent finds "perplexing" the application of rational basis review in this context. *Post*, at 741. But what is far more problematic is the dissent's assumption that courts should review immigration policies, diplomatic sanctions, and military actions under the *de novo* "reasonable observer" inquiry applicable to cases involving holiday displays and graduation ceremonies. The dissent criticizes application of a more constrained standard of review as "throw[ing] the Establishment Clause out the window." *Post*, at 742, n. 6. But as the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals. See Part IV–C, *supra*. The dissent can cite no authority for its proposition that the more free-ranging inquiry it proposes is appropriate in the national security and foreign affairs context.

overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Romer* v. *Evans*, 517 U. S. 620, 632, 635 (1996).

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. See 8 U. S. C. § 1187(a)(12)(A) (identifying Syria and state sponsors of terrorism such as Iran as "countr[ies] or area[s] of concern" for purposes of administering the Visa Waiver Program); Dept. of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016) (designating Libya, Somalia, and Yemen as additional countries of concern); see also *Rajah*, 544 F. 3d, at 433, n. 3

(describing how nonimmigrant aliens from Iran, Libya, Somalia, Syria, and Yemen were covered by the National Security Entry-Exit Registration System).

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it "stands apart . . . in the degree to which [it] lacks command and control of its territory." Proclamation § 2(h)(i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U. S. and Iraqi Governments and the country's key role in combating terrorism in the region. § 1(g). It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

The dissent likewise doubts the thoroughness of the multi-agency review because a recent Freedom of Information Act request shows that the final DHS report "was a mere 17 pages." *Post*, at 746. Yet a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it. See 5 U. S. C. § 552(b)(5) (exempting deliberative materials from FOIA disclosure).

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests.

But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948); see also *Regan* v. *Wald*, 468 U. S. 222, 242–243 (1984) (declining invitation to conduct an "independent foreign policy analysis"). While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs." *Humanitarian Law Project*, 561 U. S., at 33–34.[6]

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks," Proclamation Preamble, and § 1(h), and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated, §§ 4(a), (b). In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya's ongoing engagement with the State Department and the

[6] The dissent recycles much of plaintiffs' § 1182(f) argument to assert that "Congress has already erected a statutory scheme that fulfills" the President's stated concern about deficient vetting. *Post*, at 746–748. But for the reasons set forth earlier, Congress has not in any sense "stepped into the space and solved the exact problem." Tr. of Oral Arg. 53. Neither the existing inadmissibility grounds nor the narrow Visa Waiver Program address the failure of certain high-risk countries to provide a minimum baseline of reliable information. See Part III–B–1, *supra*.

steps Libya is taking "to improve its practices." Proclamation No. 9723, 83 Fed. Reg. 15939.

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. See, *e. g.*, §§2(b)–(c), (g), (h) (permitting student and exchange visitors from Iran, while restricting only business and tourist nonimmigrant entry for nationals of Libya and Yemen, and imposing no restrictions on nonimmigrant entry for Somali nationals). These carveouts for nonimmigrant visas are substantial: Over the last three fiscal years—before the Proclamation was in effect—the majority of visas issued to nationals from the covered countries were nonimmigrant visas. Brief for Petitioners 57. The Proclamation also exempts permanent residents and individuals who have been granted asylum. §§3(b)(i), (vi).

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). On its face, this program is similar to the humanitarian exceptions set forth in President Carter's order during the Iran hostage crisis. See Exec. Order No. 12206, 3 CFR 249; Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, at 611–612 (1980) (outlining exceptions). The Proclamation also directs DHS and the State Depart-

ment to issue guidance elaborating upon the circumstances that would justify a waiver.[7]

Finally, the dissent invokes *Korematsu* v. *United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. See *post*, at 752–754. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution." 323 U. S., at 248 (Jackson, J., dissenting).

* * *

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

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[7] JUSTICE BREYER focuses on only one aspect of our consideration—the waiver program and other exemptions in the Proclamation. Citing selective statistics, anecdotal evidence, and a declaration from unrelated litigation, JUSTICE BREYER suggests that not enough individuals are receiving waivers or exemptions. *Post*, at 723–728 (dissenting opinion). Yet even if such an inquiry were appropriate under rational basis review, the evidence he cites provides "but a piece of the picture," *post*, at 726, and does not affect our analysis.

V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 32 (2008). The case now returns to the lower courts for such further proceedings as may be appropriate. Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

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 KENNEDY, concurring.

I join the Court's opinion in full.

There may be some common ground between the opinions in this case, in that the Court does acknowledge that in some instances, governmental action may be subject to judicial review to determine whether or not it is "inexplicable by anything but animus," *Romer* v. *Evans*, 517 U. S. 620, 632 (1996), which in this case would be animosity to a religion. Whether judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today's decision, is a matter to be addressed in the first instance on remand. And even if further proceedings are permitted, it would be necessary to determine that any discovery and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive.

In all events, it is appropriate to make this further observation. There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights

it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

JUSTICE THOMAS, concurring.

I join the Court's opinion, which highlights just a few of the many problems with the plaintiffs' claims. There are several more. Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. See *Webster* v. *Doe*, 486 U. S. 592, 600 (1988). Nor could it, since the President has *inherent* authority to exclude aliens from the country. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542–543 (1950); accord, *Sessions* v. *Dimaya*, 584 U. S. 148, 217–218 (2018) (THOMAS, J., dissenting). Further, the Establishment Clause does not create an individual right to be free from all laws that a "reasonable observer" views as religious or antireligious. See *Town of Greece* v. *Galloway*, 572 U. S. 565, 609 (2014) (THOMAS, J., concurring in part and concurring in judgment); *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 52–53 (2004) (THOMAS, J., concurring in judgment). The plaintiffs cannot raise any other First Amendment claim, since the al-

leged religious discrimination in this case was directed at aliens abroad. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 265 (1990). And, even on its own terms, the plaintiffs' proffered evidence of anti-Muslim discrimination is unpersuasive.

Merits aside, I write separately to address the remedy that the plaintiffs sought and obtained in this case. The District Court imposed an injunction that barred the Government from enforcing the President's Proclamation against anyone, not just the plaintiffs. Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called "universal" or "nationwide" injunctions—have become increasingly common.[1] District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.

I

If district courts have any authority to issue universal injunctions, that authority must come from a statute or the

[1] "Nationwide injunctions" is perhaps the more common term. But I use the term "universal injunctions" in this opinion because it is more precise. These injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth. An injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide.

Constitution. See *Missouri* v. *Jenkins*, 515 U. S. 70, 124 (1995) (THOMAS, J., concurring). No statute expressly grants district courts the power to issue universal injunctions.[2] So the only possible bases for these injunctions are a generic statute that authorizes equitable relief or the courts' inherent constitutional authority. Neither of those sources would permit a form of injunctive relief that is "[in]consistent with our history and traditions." *Ibid.*

A

This Court has never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies. Rather, it has read such statutes as constrained by "the body of law which had been transplanted to this country from the English Court of Chancery" in 1789. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945). As Justice Story explained, this Court's "settled doctrine" under such statutes is that "the remedies in equity are to be administered . . . according to the practice of courts of equity in [England]." *Boyle* v. *Zacharie & Turner*, 6 Pet. 648, 658 (1832). More recently, this Court reiterated that broad statutory grants of equitable authority give federal courts " 'an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.' " *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 318 (1999) (Scalia, J., for the Court) (quoting *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 568 (1939)).

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[2] Even if Congress someday enacted a statute that clearly and expressly authorized universal injunctions, courts would need to consider whether that statute complies with the limits that Article III places on the authority of federal courts. See *infra*, at 718–719.

B

The same is true of the courts' inherent constitutional authority to grant equitable relief, assuming any such authority exists. See *Jenkins*, 515 U. S., at 124 (THOMAS, J., concurring). This authority is also limited by the traditional rules of equity that existed at the founding.

The scope of the federal courts' equitable authority under the Constitution was a point of contention at the founding, and the "more limited construction" of that power prevailed. *Id.*, at 126. The founding generation viewed equity "with suspicion." *Id.*, at 128. Several Anti-Federalists criticized the Constitution's extension of the federal judicial power to "Case[s] in . . . Equity," Art. III, § 2, as "giv[ing] the judge a discretionary power." Letters from The Federal Farmer No. XV (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315, 322 (H. Storing ed. 1981). That discretionary power, the Anti-Federalists alleged, would allow courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." Essays of Brutus No. XI (Jan. 31, 1788), in *id.*, at 417, 419–420. The Federalists responded to this concern by emphasizing the limited nature of equity. Hamilton explained that the judiciary would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 471 (C. Rossiter ed. 1961) (Federalist). Although the purpose of a court of equity was "to give relief in extraordinary cases, which are exceptions to general rules," "the principles by which that relief is governed are now reduced to a regular system." *Id.*, No. 83, at 505, and n. (emphasis deleted).

The Federalists' explanation was consistent with how equity worked in 18th-century England. English courts of equity applied established rules not only when they decided the merits, but also when they fashioned remedies. Like other aspects of equity, "the system of relief administered

by a court of equity" had been reduced "into a regular science." 3 W. Blackstone, Commentaries on the Laws of England 440–441 (1768) (Blackstone). As early as 1768, Blackstone could state that the "remedy a suitor is entitled to expect" could be determined "as readily and with as much precision, in a court of equity as in a court of law." *Id.*, at 441. Although courts of equity exercised remedial "discretion," that discretion allowed them to deny or tailor a remedy despite a demonstrated violation of a right, not to expand a remedy beyond its traditional scope. See G. Keeton, An Introduction to Equity 117–118 (1938).

In short, whether the authority comes from a statute or the Constitution, district courts' authority to provide equitable relief is meaningfully constrained. This authority must comply with longstanding principles of equity that predate this country's founding.

II

Universal injunctions do not seem to comply with those principles. These injunctions are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently. And they appear to conflict with several traditional rules of equity, as well as the original understanding of the judicial role.

Equity originated in England as a means for the Crown to dispense justice by exercising its sovereign authority. See Adams, The Origin of English Equity, 16 Colum. L. Rev. 87, 91 (1916). Petitions for equitable relief were referred to the Chancellor, who oversaw cases in equity. See 1 S. Symons, Pomeroy's Equity Jurisprudence § 33 (5th ed. 1941) (Pomeroy); G. McDowell, Equity and the Constitution 24 (1982). The Chancellor's equitable jurisdiction was based on the "reserve of justice in the king." F. Maitland, Equity 3 (rev. 2d ed. 1936); see also 1 Pomeroy § 33, at 38 (describing the Chancellor's equitable authority as an "extraordinary jurisdiction—that of *Grace*—by delegation" from the King). Equity allowed the sovereign to afford discretionary relief to

parties where relief would not have been available under the "rigors of the common law." *Jenkins*, *supra*, at 127 (opinion of THOMAS, J.).

The English system of equity did not contemplate universal injunctions. As an agent of the King, the Chancellor had no authority to enjoin him. See Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 425 (2017) (Bray). The Chancellor could not give "any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee." 3 Blackstone 428. The Attorney General could be sued in Chancery, but not in cases that "'immediately concerned'" the interests of the Crown. Bray 425 (citing 1 E. Daniell, The Practice of the High Court of Chancery 138 (2d ed. 1845)). American courts inherited this tradition. See J. Story, Commentaries on Equity Pleadings § 69 (1838) (Story).

Moreover, as a general rule, American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental. Injunctions barring public nuisances were an example. While these injunctions benefited third parties, that benefit was merely a consequence of providing relief to the plaintiff. Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 702 (2004) (Woolhandler & Nelson); see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 564 (1852) (explaining that a private "injury makes [a public nuisance] a private nuisance to the injured party").

True, one of the recognized bases for an exercise of equitable power was the avoidance of "multiplicity of suits." Bray 426; accord, 1 Pomeroy § 243. Courts would employ "bills of peace" to consider and resolve a number of suits in a single proceeding. *Id.*, § 246. And some authorities stated that these suits could be filed by one plaintiff on behalf of a number of others. *Id.*, § 251. But the "general rule" was that

"all persons materially interested . . . in the subject-matter of a suit, are to be made *parties* to it . . . , however numerous they may be, so that there may be a complete decree, which shall bind them all." Story § 72, at 61 (emphasis added). And, in all events, these "proto-class action[s]" were limited to a small group of similarly situated plaintiffs having some right in common. Bray 426–427; see also Story § 120, at 100 (explaining that such suits were "always" based on "a common interest or a common right").

American courts' tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power. For most of our history, courts understood judicial power as "fundamentall[y] the power to render judgments in individual cases." *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. 453, 488 (2018) (THOMAS, J., concurring). They did not believe that courts could make federal policy, and they did not view judicial review in terms of "striking down" laws or regulations. See *id.*, at 488–489. Misuses of judicial power, Hamilton reassured the people of New York, could not threaten "the general liberty of the people" because courts, at most, adjudicate the rights of "individual[s]." Federalist No. 78, at 466.

The judiciary's limited role was also reflected in this Court's decisions about who could sue to vindicate certain rights. See *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 344–346 (2016) (THOMAS, J., concurring). A plaintiff could not bring a suit vindicating public rights—*i. e.*, rights held by the community at large—without a showing of some specific injury to himself. *Id.*, at 345–346. And a plaintiff could not sue to vindicate the private rights of someone else. See Woolhandler & Nelson 715–716. Such claims were considered to be beyond the authority of courts. *Id.*, at 711–717.

This Court has long respected these traditional limits on equity and judicial power. See, *e. g.*, *Scott* v. *Donald*, 165 U. S. 107, 115 (1897) (rejecting an injunction based on the theory that the plaintiff "so represents [a] class" whose rights were infringed by a statute as "too conjectural to fur-

nish a safe basis upon which a court of equity ought to grant an injunction"). Take, for example, this Court's decision in *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923). There, a taxpayer sought to enjoin the enforcement of an appropriation statute. The Court noted that this kind of dispute "is essentially a matter of public and not of individual concern." *Id.*, at 487. A general interest in enjoining implementation of an illegal law, this Court explained, provides "no basis . . . for an appeal to the preventive powers of a court of equity." *Ibid.* Courts can review the constitutionality of an act only when "a justiciable issue" requires it to decide whether to "disregard an unconstitutional enactment." *Id.*, at 488. If the statute is unconstitutional, then courts enjoin "not the execution of the statute, but the acts of the official." *Ibid.* Courts cannot issue an injunction based on a mere allegation "that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional." *Ibid.* "To do so would be not to decide a judicial controversy." *Id.*, at 488–489.

By the latter half of the 20th century, however, some jurists began to conceive of the judicial role in terms of resolving general questions of legality, instead of addressing those questions only insofar as they are necessary to resolve individual cases and controversies. See Bray 451. That is when what appears to be "the first [universal] injunction in the United States" emerged. *Id.*, at 438. In *Wirtz* v. *Baldor Elec. Co.*, 337 F. 2d 518 (CADC 1963), the Court of Appeals for the District of Columbia Circuit addressed a lawsuit challenging the Secretary of Labor's determination of the prevailing minimum wage for a particular industry. *Id.*, at 520. The D. C. Circuit concluded that the Secretary's determination was unsupported but remanded for the District Court to assess whether any of the plaintiffs had standing to challenge it. *Id.*, at 521–535. The D. C. Circuit also addressed the question of remedy, explaining that if a plaintiff had standing to sue then "the District Court should enjoin . . .

the Secretary's determination with respect to the *entire industry*." *Id.*, at 535 (emphasis added). To justify this broad relief, the D. C. Circuit explained that executive officers should honor judicial decisions "in all cases of essentially [the same] character." *Id.*, at 534. And it noted that, once a court has decided an issue, it "would ordinarily give the same relief to any individual who comes to it with an essentially similar cause of action." *Ibid.* The D. C. Circuit added that the case was "clearly a proceeding in which those who have standing are here to vindicate the public interest in having congressional enactments properly interpreted and applied." *Id.*, at 534–535.

Universal injunctions remained rare in the decades following *Wirtz*. See Bray 440–445. But recently, they have exploded in popularity. See *id.*, at 457–459. Some scholars have criticized the trend. See generally *id.*, at 457–465; Morley, Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts, 97 B. U. L. Rev. 615, 633–653 (2017); Morley, De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases, 39 Harv. J. L. & Pub. Pol'y 487, 521–538 (2016).

No persuasive defense has yet been offered for the practice. Defenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did, and that universal injunctions give the Judiciary a powerful tool to check the Executive Branch. See Amdur & Hausman, Nationwide Injunctions and Nationwide Harm, 131 Harv. L. Rev. Forum 49, 51, 54 (2017); Malveaux, Class Actions, Civil Rights, and the National Injunction, 131 Harv. L. Rev. Forum 56, 57, 60–62 (2017). But these arguments do not explain how these injunctions are consistent with the historical limits on equity and judicial power. They at best "boi[l] down to a policy judgment" about how powers ought to be allocated among our three branches of government. *Perez* v. *Mortgage*

Bankers Assn., 575 U. S. 92, 132 (2015) (THOMAS, J., concurring in judgment). But the people already made that choice when they ratified the Constitution.

* * *

In sum, universal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. See 8 U. S. C. § 1182(f) (requiring "find[ings]" that persons denied entry "would be detrimental to the interests of the United States"); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993) (First Amendment); *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617 (2018) (same); *post*, at 729–731 (SOTOMAYOR, J., dissenting). If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, *i. e.*, about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.

In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation's general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take

account of their Proclamation-granted status when considering the Proclamation's lawfulness. The Solicitor General asked us to consider the Proclamation "as" it is "written" and "as" it is "applied," waivers and exemptions included. Tr. of Oral Arg. 38. He warned us against considering the Proclamation's lawfulness "on the hypothetical situation that [the Proclamation] is what it isn't," *ibid.*, while telling us that its waiver and exemption provisions mean what they say: The Proclamation does not exclude individuals from the United States "if they meet the criteria" for a waiver or exemption, *id.*, at 33.

On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened. For one thing, the Proclamation then resembles more closely the two important Presidential precedents on point, President Carter's Iran order and President Reagan's Cuba proclamation, both of which contained similar categories of persons authorized to obtain case-by-case exemptions. *Ante*, at 709; Exec. Order No. 12172, 3 CFR 461 (1979), as amended by Exec. Order No. 12206, 3 CFR 249 (1980); Presidential Proclamation No. 5517, 3 CFR 102 (1986). For another thing, the Proclamation then follows more closely the basic statutory scheme, which provides for strict case-by-case scrutiny of applications. It would deviate from that system, not across the board, but where circumstances may require that deviation.

Further, since the case-by-case exemptions and waivers apply without regard to the individual's religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat. And that fact would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States

(under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is *not* applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. For one thing, the relevant precedents—those of Presidents Carter and Reagan—would bear far less resemblance to the present Proclamation. Indeed, one might ask, if those two Presidents thought a case-by-case exemption system appropriate, what is different about present circumstances that would justify that system's absence?

For another thing, the relevant statute requires that there be "find[ings]" that the grant of visas to excluded persons would be "detrimental to the interests of the United States." § 1182(f). Yet there would be no such findings in respect to those for whom the Proclamation itself provides case-by-case examination (followed by the grant of a visa in appropriate cases).

And, perhaps most importantly, if the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a "Muslim ban" rather than a "security-based" ban becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, denying visas to Muslims who meet the Proclamation's own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility, *i. e.*, that the Government is not applying the Proclamation as written. The Proclamation provides that the Secretary of State and the Secretary of Homeland Security "shall coordinate to adopt guidance" for consular officers to follow when deciding whether to grant a waiver. § 3(c)(ii). Yet, to my knowledge, no guidance has issued. The only

potentially relevant document I have found consists of a set of State Department answers to certain Frequently Asked Questions, but this document simply restates the Proclamation in plain language for visa applicants. It does not provide guidance for consular officers as to how they are to exercise their discretion. See Dept. of State, FAQs on the Presidential Proclamation, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/2017-12-04-Presidential-Proclamation.html (all Internet materials as last visited June 25, 2018).

An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation's first month, two waivers were approved out of 6,555 eligible applicants. Letter from M. Waters, Assistant Secretary Legislative Affairs, to Sen. Van Hollen (Feb. 22, 2018). In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. Reply Brief 17. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats.

Amici have suggested that there are numerous applicants who could meet the waiver criteria. For instance, the Proclamation anticipates waivers for those with "significant business or professional obligations" in the United States, § 3(c)(iv)(C), and *amici* identify many scholars who would seem to qualify. Brief for Colleges and Universities as *Amici Curiae* 25–27; Brief for American Council on Education et al. as *Amici Curiae* 20 (identifying more than 2,100 scholars from covered countries); see also Brief for Massachusetts Technology Leadership Council, Inc., as *Amicus Curiae*

14–15 (identifying technology and business leaders from covered countries). The Proclamation also anticipates waivers for those with a "close family member (*e. g.*, a spouse, child, or parent)" in the United States, § 3(c)(iv)(D), and *amici* identify many such individuals affected by the Proclamation. Brief for Labor Organizations as *Amici Curiae* 15–18 (identifying children and other relatives of U. S. citizens). The Pars Equality Center identified 1,000 individuals—including parents and children of U. S. citizens—who sought and were denied entry under the Proclamation, hundreds of whom seem to meet the waiver criteria. See Brief for Pars Equality Center et al. as *Amici Curiae* 12–28.

Other data suggest the same. The Proclamation does not apply to asylum seekers or refugees. §§ 3(b)(vi), 6(e). Yet few refugees have been admitted since the Proclamation took effect. While more than 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018. Dept. of State, Bureau of Population, Refugees, and Migration, Interactive Reporting, Refugee Processing Center, http://ireports.wrapsnet.org. Similarly few refugees have been admitted since January from Iran (3), Libya (1), Yemen (0), and Somalia (122). *Ibid.*

The Proclamation also exempts individuals applying for several types of nonimmigrant visas: lawful permanent residents, parolees, those with certain travel documents, dual nationals of noncovered countries, and representatives of governments or international organizations. §§ 3(b)(i)–(v). It places no restrictions on the vast majority of student and exchange visitors, covering only those from Syria, which provided 8 percent of student and exchange visitors from the five countries in 2016. §§ 2(b)–(h); see Dept. of State, Report of the Visa Office 2016, Table XVII Nonimmigrant Visas Issued Fiscal Year 2016 (Visa Report 2016 Table XVII). Visitors from Somalia are eligible for any type of nonimmigrant visa, subject to "additional scrutiny." § 2(h)(ii). If nonim-

migrant visa applications under the Proclamation resemble those in 2016, 16 percent of visa applicants would be eligible for exemptions. See Visa Report 2016 Table XVII.

In practice, however, only 258 student visas were issued to applicants from Iran (189), Libya (29), Yemen (40), and Somalia (0) in the first three months of 2018. See Dept. of State, Nonimmigrant Visa Issuances by Nationality, Jan., Feb., and Mar. 2018. This is less than a quarter of the volume needed to be on track for 2016 student visa levels. And only 40 nonimmigrant visas have been issued to Somali nationals, a decrease of 65 percent from 2016. *Ibid.*; see Visa Report 2016 Table XVII. While this is but a piece of the picture, it does not provide grounds for confidence.

Anecdotal evidence further heightens these concerns. For example, one *amicus* identified a child with cerebral palsy in Yemen. The war had prevented her from receiving her medication, she could no longer move or speak, and her doctors said she would not survive in Yemen. Her visa application was denied. Her family received a form with a check mark in the box unambiguously confirming that "'a waiver will not be granted in your case.'" Letter from L. Blatt to S. Harris, Clerk of Court (May 1, 2018). But after the child's case was highlighted in an *amicus* brief before this Court, the family received an update from the consular officer who had initially denied the waiver. It turns out, according to the officer, that she had all along determined that the waiver criteria were met. But, the officer explained, she could not relay that information at the time because the waiver required review from a supervisor, who had since approved it. The officer said that the family's case was now in administrative processing and that she was attaching a "'revised refusal letter indicating the approval of the waiver.'" *Ibid.* The new form did not actually approve the waiver (in fact, the form contains no box saying "granted"). But a different box was now checked, reading: "'The consular officer is reviewing your eligibility for a waiver under

the Proclamation. . . . This can be a lengthy process, and until the consular officer can make an individualized determination of [the relevant] factors, your visa application will remain refused under Section 212(f) [of the Proclamation].'" *Ibid.* One is left to wonder why this second box, indicating continuing review, had not been checked at the outset if in fact the child's case had remained under consideration all along. Though this is but one incident and the child was admitted after considerable international attention in this case, it provides yet more reason to believe that waivers are not being processed in an ordinary way.

Finally, in a pending case in the Eastern District of New York, a consular official has filed a sworn affidavit asserting that he and other officials do not, in fact, have discretion to grant waivers. According to the affidavit, consular officers "were not allowed to exercise that discretion" and "the waiver [process] is merely 'window dressing.'" See Decl. of Christopher Richardson in *Alharbi* v. *Miller*, No. 1:18–cv–2435, Doc. 24–2 (June 1, 2018), pp. 3–4. Another report similarly indicates that the U. S. Embassy in Djibouti, which processes visa applications for citizens of Yemen, received instructions to grant waivers "only in rare cases of imminent danger," with one consular officer reportedly telling an applicant that "'[e]ven for infants, we would need to see some evidence of a congenital heart defect or another medical issue of that degree of difficulty that . . . would likely lead to the child's developmental harm or death.'" Center for Constitutional Rights and the Rule of Law Clinic, Yale Law School, Window Dressing the Muslim Ban: Reports of Waivers and Mass Denials From Yemeni-American Families Stuck in Limbo 18 (2018).

Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that

the Proclamation does not rest upon a "Muslim ban," and the assistance in deciding the issue that answers to the "exemption and waiver" questions may provide, I would send this case back to the District Court for further proceedings. And I would leave the injunction in effect while the matter is litigated. Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in JUSTICE SOTOMAYOR's opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the

Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

I

Plaintiffs challenge the Proclamation on various grounds, both statutory and constitutional. Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a "prudential rule of avoiding constitutional questions." *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 8 (1993). But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one. Whatever the merits of plaintiffs' complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause's guarantee of religious neutrality.

A

The Establishment Clause forbids government policies "respecting an establishment of religion." U. S. Const., Amdt. 1. The "clearest command" of the Establishment Clause is that the government cannot favor or disfavor one religion over another. *Larson* v. *Valente*, 456 U. S. 228, 244 (1982); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion"); *Edwards* v. *Aguillard*, 482 U. S. 578, 593 (1987) ("The Establishment Clause . . . forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma" (internal quotation marks omitted)); *Lynch* v. *Donnelly*, 465 U. S. 668, 673 (1984) (noting that the Establishment Clause "forbids hostility toward any [religion]," because "such hostility would bring us into 'war with our national tradition as embodied in the First Amendmen[t]' "); *Epperson* v. *Arkansas*, 393 U. S. 97, 106 (1968)

("[T]he State may not adopt programs or practices . . . which aid or oppose any religion. This prohibition is absolute" (citation and internal quotation marks omitted)). Consistent with that clear command, this Court has long acknowledged that governmental actions that favor one religion "inevitabl[y]" foster "the hatred, disrespect and even contempt of those who [hold] contrary beliefs." *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962). That is so, this Court has held, because such acts send messages to members of minority faiths "'that they are outsiders, not full members of the political community.'" *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 309 (2000). To guard against this serious harm, the Framers mandated a strict "principle of denominational neutrality." *Larson*, 456 U. S., at 246; *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 703 (1994) (recognizing the role of courts in "safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion").

"When the government acts with the ostensible and predominant purpose" of disfavoring a particular religion, "it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 860 (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. See *id.*, at 862, 866; accord, *Town of Greece* v. *Galloway*, 572 U. S. 565, 587 (2014) (plurality opinion).

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding "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" the decisionmaker. *Lukumi*, 508 U. S., at 540 (opinion of KENNEDY, J.); *McCreary*, 545 U. S., at 862 (courts must evaluate "text, legislative history, and implementation . . . , or comparable official act" (internal quotation marks omitted)). At the same time, however, courts must take care not to engage in "any judicial psychoanalysis of a drafter's heart of hearts." *Id.*, at 862.

B

1

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, *ante*, at 699–701, that highly abridged account does not tell even half of the story. See Brief for The Roderick & Solange MacArthur Justice Center as *Amicus Curiae* 5–31 (outlining President Trump's public statements expressing animus toward Islam). The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States." App. 119. That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

> "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others,

> there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing '25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad' and 51% of those polled 'agreed that Muslims in America should have the choice of being governed according to Shariah.' Shariah authorizes such atrocities as murder against nonbelievers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.
>
> "Mr. Trum[p] stated, 'Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.'—Donald J. Trump." *Id.*, at 158; see also *id.*, at 130–131.

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt "did the same thing" with respect to the internment of Japanese Americans during World War II. *Id.*, at 120. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to "rethink [his] position" on "banning Muslims from entering the country." *Ibid.* He answered, "No." *Ibid.* A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's. *Id.*, at 163–164. In March 2016, he expressed his belief that "Islam hates us. . . . [W]e can't allow people coming into this country who have this

hatred of the United States . . . [a]nd of people that are not Muslim." *Id.*, at 120–121. That same month, Trump asserted that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." *Id.*, at 121. He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims' lack of "assimilation" and their commitment to "sharia law." *Ibid.*; *id.*, at 164. A day later, he opined that Muslims "do not respect us at all" and "don't respect a lot of the things that are happening throughout not only our country, but they don't respect other things." *Ibid.*

As Trump's Presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries "where there's a proven history of terrorism." *Id.*, at 121. He also described the proposal as rooted in the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." *Id.*, at 121–122. Asked in July 2016 whether he was "pull[ing] back from" his pledged Muslim ban, Trump responded, "I actually don't think it's a rollback. In fact, you could say it's an expansion." *Id.*, at 122–123. He then explained that he used different terminology because "[p]eople were so upset when [he] used the word Muslim." *Id.*, at 123.

A month before the 2016 election, Trump reiterated that his proposed "Muslim ban" had "morphed into a[n] extreme vetting from certain areas of the world." *Ibid.* Then, on December 21, 2016, President-elect Trump was asked whether he would "rethink" his previous "plans to create a Muslim registry or ban Muslim immigration." *Ibid.* He replied: "You know my plans. All along, I've proven to be right." *Ibid.*

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769, 82 Fed. Reg. 8977 (2017) (EO–1), entitled "Protecting the Nation From

Foreign Terrorist Entry Into the United States." As he signed it, President Trump read the title, looked up, and said "We all know what that means." App. 124. That same day, President Trump explained to the media that, under EO–1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, "[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible." *Id.*, at 125. Considering that past policy "very unfair," President Trump explained that EO–1 was designed "to help" the Christians in Syria. *Ibid.* The following day, one of President Trump's key advisers candidly drew the connection between EO–1 and the "Muslim ban" that the President had pledged to implement if elected. *Ibid.* According to that adviser, "[W]hen [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" *Ibid.*

On February 3, 2017, the United States District Court for the Western District of Washington enjoined the enforcement of EO–1. See *Washington* v. *Trump*, 2017 WL 462040, *3. The Ninth Circuit denied the Government's request to stay that injunction. *Washington* v. *Trump*, 847 F. 3d 1151, 1169 (2017) (*per curiam*). Rather than appeal the Ninth Circuit's decision, the Government declined to continue defending EO–1 in court and instead announced that the President intended to issue a new executive order to replace EO–1.

On March 6, 2017, President Trump issued that new executive order, which, like its predecessor, imposed temporary entry and refugee bans. See Exec. Order No. 13780, 82 Fed. Reg. 13209 (EO–2). One of the President's senior advisers publicly explained that EO–2 would "have the same basic policy outcome" as EO–1, and that any changes would address "very technical issues that were brought up by the

court." App. 127. After EO–2 was issued, the White House Press Secretary told reporters that, by issuing EO–2, President Trump "continue[d] to deliver on . . . his most significant campaign promises." *Id.*, at 130. That statement was consistent with President Trump's own declaration that "I keep my campaign promises, and our citizens will be very happy when they see the result." *Id.*, at 127–128.

Before EO–2 took effect, Federal District Courts in Hawaii and Maryland enjoined the order's travel and refugee bans. See *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227, 1239 (Haw. 2017); *International Refugee Assistance Project* (*IRAP*) v. *Trump*, 241 F. Supp. 3d 539, 566 (Md. 2017). The Fourth and Ninth Circuits upheld those injunctions in substantial part. *IRAP* v. *Trump*, 857 F. 3d 554, 606 (CA4 2017) (en banc); *Hawaii* v. *Trump*, 859 F. 3d 741, 789 (CA9 2017) (*per curiam*). In June 2017, this Court granted the Government's petition for certiorari and issued a *per curiam* opinion partially staying the District Courts' injunctions pending further review. In particular, the Court allowed EO–2's travel ban to take effect except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump* v. *IRAP*, 582 U. S. 571, 582 (2017).

While litigation over EO–2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO–2 was just a "watered down version of the first one" and had been "'tailor[ed]' at the behest of 'the lawyers.'" App. 131. He further added that he would prefer "to go back to the first [executive order] and go all the way" and reiterated his belief that it was "'very hard' for Muslims to assimilate into Western culture." *Id.*, at 131–132. During a rally in April 2017, President Trump recited the lyrics to a song called "The Snake," a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees

entering the country. *Id.*, at 132, 163. And in June 2017, the President stated on Twitter that the Justice Department had submitted a "watered down, politically correct version" of the "original Travel Ban" "to S[upreme] C[ourt]."[1] *Id.*, at 132. The President went on to tweet: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" *Id.*, at 132–133. He added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" *Id.*, at 133. Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing's massacre of Muslims in the Philippines: "Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!" *IRAP* v. *Trump*, 883 F. 3d 233, 267 (CA4 2018) (*IRAP II*) (en banc) (alterations in original).

In September 2017, President Trump tweeted that "[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" App. 133. Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (Proclamation), which restricts entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump "retweeted" three anti-Muslim videos, entitled "Muslim Destroys a Statue of Virgin Mary!", "Islamist mob pushes teenage boy off roof and beats him to death!", and "Muslim migrant beats up Dutch boy on crutches!"[2] *IRAP II*,

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[1] According to the White House, President Trump's statements on Twitter are "official statements." App. 133.

[2] The content of these videos is highly inflammatory, and their titles are arguably misleading. For instance, the person depicted in the video entitled "Muslim migrant beats up Dutch boy on crutches!" was reportedly not a "migrant," and his religion is not publicly known. See Brief for

883 F. 3d, at 267. Those videos were initially tweeted by a British political party whose mission is to oppose "all alien and destructive politic[al] or religious doctrines, including . . . Islam." *Ibid.* When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the "President has been talking about these security issues for years now, from the campaign trail to the White House," and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." *Ibid.*

2

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. *Ante,* at 701–702. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. *McCreary*, 545 U. S., at 862–863 (internal quotation marks omitted). The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that "Islam hates us," App. 399, warned that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country," *id.*, at 121, promised to

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Plaintiffs in *IRAP* v. *Trump* as *Amici Curiae* 12, n. 4; P. Baker & E. Sullivan, Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them, N. Y. Times, Nov. 29, 2017 ("[A]ccording to local officials, both boys are Dutch"), https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html (all Internet materials as last visited June 25, 2018).

enact a "total and complete shutdown of Muslims entering the United States," *id.*, at 119, and instructed one of his advisers to find a "lega[l]" way to enact a Muslim ban, *id.*, at 125.[3] The President continued to make similar statements well after his inauguration, as detailed above, see *supra*, at 733–737.

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam.[4] Instead, he has continued to make remarks

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[3] The Government urges us to disregard the President's campaign statements. Brief for Petitioners 66–67. But nothing in our precedent supports that blinkered approach. To the contrary, courts must consider "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." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 540 (1993) (opinion of KENNEDY, J.). Moreover, President Trump and his advisers have repeatedly acknowledged that the Proclamation and its predecessors are an outgrowth of the President's campaign statements. For example, just last November, the White House Deputy Press Secretary reminded the media that the Proclamation addresses "issues" the President has been talking about "for years," including on "the campaign trail." *IRAP II*, 883 F. 3d 233, 267 (CA4 2018). In any case, as the Fourth Circuit correctly recognized, even without relying on any of the President's campaign statements, a reasonable observer would conclude that the Proclamation was enacted for the impermissible purpose of disfavoring Muslims. *Id.*, at 266, 268.

[4] At oral argument, the Solicitor General asserted that President Trump "made crystal-clear on September 25 that he had no intention of imposing the Muslim ban" and "has praised Islam as one of the great countries [*sic*] of the world." Tr. of Oral Arg. 81. Because the record contained no evidence of any such statement made on September 25th, however, the Solicitor General clarified after oral argument that he actually intended to refer to President Trump's statement during a television interview on January 25, 2017. Letter from N. Francisco, Solicitor General, to S. Harris, Clerk of Court (May 1, 2018); Reply Brief 28, n. 8. During that interview, the President was asked whether EO–1 was "the Muslim ban," and answered, "no it's not the Muslim ban." See Transcript: ABC News Anchor David Muir Interviews President Trump, ABC News, Jan. 25, 2017, http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602. But that lone asser-

that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump's failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President's lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. See *United States* v. *Fordice*, 505 U. S. 717, 746–747 (1992) ("[G]iven an initially tainted policy, it is eminently reasonable to make the [Government] bear the risk of nonpersuasion with respect to intent at some future time, both because the [Government] has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time" (citation omitted)). Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. Cf. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617, 639 (2018) ("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"). It should find the same here.

Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: The words of the

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tion hardly qualifies as a disavowal of the President's comments about Islam—some of which were spoken after January 25, 2017. Moreover, it strains credulity to say that President Trump's January 25th statement makes "crystal-clear" that he never intended to impose a Muslim ban given that, until May 2017, the President's website displayed the statement regarding his campaign promise to ban Muslims from entering the country.

President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

II

Rather than defend the President's problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim.

The majority begins its constitutional analysis by noting that this Court, at times, "has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen." *Ante*, at 703 (citing *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972)). As the majority notes, *Mandel* held that when the Executive Branch provides "a facially legitimate and bona fide reason" for denying a visa, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification." *Id.*, at 770. In his controlling concurrence in *Kerry* v. *Din*, 576 U. S. 86 (2015), JUSTICE KENNEDY applied *Mandel*'s holding and elaborated that courts can "'look behind' the Government's exclusion of" a foreign national if there is "an affirmative showing of bad faith on the part of the consular officer who denied [the] visa." *Din*, 576 U. S., at 105 (opinion concurring in judgment). The extent to which *Mandel* and *Din* apply at all to this case is unsettled, and there is good reason to think they do not.[5] Indeed, even the Government

[5] *Mandel* and *Din* are readily distinguishable from this case for a number of reasons. First, *Mandel* and *Din* each involved a constitutional challenge to an Executive Branch decision to exclude a single foreign national under a specific statutory ground of inadmissibility. *Mandel*, 408 U. S., at 767; *Din*, 576 U. S., at 102. Here, by contrast, President Trump is not exercising his discretionary authority to determine the admission or exclusion of a particular foreign national. He promulgated an executive order affecting millions of individuals on a categorical basis. Second,

agreed at oral argument that where the Court confronts a situation involving "all kinds of denigrating comments about" a particular religion and a subsequent policy that is designed with the purpose of disfavoring that religion but that "dot[s] all the i's and . . . cross[es] all the t's," *Mandel* would not "pu[t] an end to judicial review of that set of facts." Tr. of Oral Arg. 16.

In light of the Government's suggestion "that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order," the majority rightly declines to apply *Mandel*'s "narrow standard of review" and "assume[s] that we may look behind the face of the Proclamation." *Ante*, at 704. In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. *Ante*, at 704–705. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. See, *e. g.*, *McCreary*, 545 U. S., at 860–863; *Larson*, 456 U. S., at 246; *Presbyterian Church in*

Mandel and *Din* did not purport to establish the framework for adjudicating cases (like this one) involving claims that the Executive Branch violated the Establishment Clause by acting pursuant to an unconstitutional purpose. Applying *Mandel*'s narrow standard of review to such a claim would run contrary to this Court's repeated admonition that "[f]acial neutrality is not determinative" in the Establishment Clause context. *Lukumi*, 508 U. S., at 534. Likewise, the majority's passing invocation of *Fiallo* v. *Bell*, 430 U. S. 787 (1977), is misplaced. *Fiallo*, unlike this case, addressed a constitutional challenge to a statute enacted by Congress, not an order of the President. *Id.*, at 791. *Fiallo*'s application of *Mandel* says little about whether *Mandel*'s narrow standard of review applies to the unilateral executive proclamation promulgated under the circumstances of this case. Finally, even assuming that *Mandel* and *Din* apply here, they would not preclude us from looking behind the face of the Proclamation because plaintiffs have made "an affirmative showing of bad faith," *Din*, 576 U. S., at 105 (opinion of KENNEDY, J.), by the President who, among other things, instructed his subordinates to find a "lega[l]" way to enact a Muslim ban, App. 125; see *supra*, at 731–737.

U. S. v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449–452 (1969); see also *Colorado Christian Univ.* v. *Weaver*, 534 F. 3d 1245, 1266 (CA10 2008) (McConnell, J.) (noting that, under Supreme Court precedent, laws "involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause" (citations omitted)).[6] As explained above,

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[6] The majority chides as "problematic" the importation of Establishment Clause jurisprudence "in the national security and foreign affairs context." *Ante*, at 706, n. 5. As the majority sees it, this Court's Establishment Clause precedents do not apply to cases involving "immigration policies, diplomatic sanctions, and military actions." *Ibid.* But just because the Court has not confronted the precise situation at hand does not render these cases (or the principles they announced) inapplicable. Moreover, the majority's complaint regarding the lack of direct authority is a puzzling charge, given that the majority itself fails to cite any "authority for its proposition" that a more probing review is inappropriate in a case like this one, where United States citizens allege that the Executive has violated the Establishment Clause by issuing a sweeping executive order motivated by animus. *Ibid.*, see *supra*, at 740–741, and n. 5. In any event, even if there is no prior case directly on point, it is clear from our precedent that "[w]hatever power the United States Constitution envisions for the Executive" in the context of national security and foreign affairs, "it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). This Court's Establishment Clause precedents require that, if a reasonable observer would understand an executive action to be driven by discriminatory animus, the action be invalidated. See *McCreary*, 545 U. S., at 860. That reasonable-observer inquiry includes consideration of the Government's asserted justifications for its actions. The Government's invocation of a national-security justification, however, does not mean that the Court should close its eyes to other relevant information. Deference is different from unquestioning acceptance. Thus, what is "far more problematic" in this case is the majority's apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national-security concern. *Ante*, at 706, n. 5.

the Proclamation is plainly unconstitutional under that heightened standard. See *supra*, at 737–740.

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is "'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it'" that the policy is "'inexplicable by anything but animus.'" *Ante*, at 706 (quoting *Romer* v. *Evans*, 517 U. S. 620, 632, 635 (1996)); see also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 448 (1985) (recognizing that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting "mere negative attitudes, or fear" toward a disfavored group). The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. *IRAP II*, 883 F. 3d, at 352 (Harris, J., concurring) (explaining that the Proclamation contravenes the bedrock principle "that the government may not act on the basis of *animus* toward a disfavored religious minority" (emphasis in original)).

The majority insists that the Proclamation furthers two interrelated national-security interests: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." *Ante*, at 706. But the Court offers insufficient support for its view "that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility." *Ibid.*; see also *ante*, at 706–710, and n. 7. Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is

nothing more than a "'religious gerrymander.'" *Lukumi*, 508 U. S., at 535.

The majority first emphasizes that the Proclamation "says nothing about religion." *Ante*, at 706. Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. Given the record here, including all the President's statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO–1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start "talking territory instead of Muslim," App. 123, precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation's otherwise clear targeting of Muslims. The Proclamation's effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. A prior sanctions order already restricts entry of North Korean nationals, see Exec. Order No. 13810, 82 Fed. Reg. 44705, and the Proclamation targets only a handful of Venezuelan Government officials and their immediate family members, 82 Fed. Reg. 45166. As such, the President's inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the Proclamation.

The majority next contends that the Proclamation "reflects the results of a worldwide review process undertaken by multiple Cabinet officials." *Ante*, at 707. At the outset, there is some evidence that at least one of the individuals involved in that process may have exhibited bias against Muslims. As noted by one group of *amici*, the Trump administration appointed Frank Wuco to help enforce the President's travel bans and lead the multiagency review process. See Brief

for Plaintiffs in *IRAP* v. *Trump* as *Amici Curiae* 13–14, and n. 10. According to *amici*, Wuco has purportedly made several suspect public statements about Islam: He has "publicly declared that it was a 'great idea' to 'stop the visa application process into this country from Muslim nations in a blanket type of policy,'" "that Muslim populations 'living under other-than-Muslim rule' will 'necessarily' turn to violence, that Islam prescribes 'violence and warfare against unbelievers,' and that Muslims 'by-and-large . . . resist assimilation.'" *Id.*, at 14.

But, even setting aside those comments, the worldwide review does little to break the clear connection between the Proclamation and the President's anti-Muslim statements. For "[n]o matter how many officials affix their names to it, the Proclamation rests on a rotten foundation." Brief for Constitutional Law Scholars as *Amici Curiae* 7 (filed Apr. 2, 2018); see *supra*, at 731–737. The President campaigned on a promise to implement a "total and complete shutdown of Muslims" entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus.

Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. See *IRAP II*, 883 F. 3d, at 268 ("[T]he Government chose not to make the review publicly available" even in redacted form); *IRAP* v. *Trump*, No. 17–2231 (CA4), Doc. 126 (Letter from S. Swingle, Counsel for Defendants-Appellants, to P. Connor, Clerk of the United States Court of Appeals for the Fourth Circuit (Nov. 24, 2017)) (resisting Fourth Circuit's request that the Government supplement the record with the reports referenced in the Proclamation). Furthermore, evidence of which we can take judicial notice indicates that the multi-agency review process could not have been very thorough. Ongoing litigation under the Freedom of Information Act

shows that the September 2017 report the Government produced after its review process was a mere 17 pages. See *Brennan Center for Justice* v. *United States Dept. of State*, No. 17–cv–7520 (SDNY), Doc. 31–1, pp. 2–3. That the Government's analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President's proclaimed national-security rationale.

Beyond that, Congress has already addressed the national-security concerns supposedly undergirding the Proclamation through an "extensive and complex" framework governing "immigration and alien status." *Arizona* v. *United States*, 567 U. S. 387, 395 (2012).[7] The Immigration and Nationality Act sets forth, in painstaking detail, a reticulated scheme regulating the admission of individuals to the United States. Generally, admission to the United States requires a valid visa or other travel document. 8 U. S. C. §§ 1181, 1182(a)(7)(A)(i)(I), 1182(a)(7)(B)(i)(II). To obtain a visa, an applicant must produce "certified cop[ies]" of documents proving her identity, background, and criminal history. §§ 1202(b), 1202(d). An applicant also must undergo an in-person interview with a State Department consular officer. §§ 1201(a)(1), 1202(h)(1), 22 CFR §§ 42.62(a)–(b) (2017); see also 8 U. S. C. §§ 1202(h)(2)(D), 1202(h)(2)(F) (requiring in-person interview if the individual "is a national of a country officially designated by the Secretary of State as a state sponsor of terrorism" or is "a member of a group or section that . . . poses a security threat to the United States"). "Any alien who . . . has engaged in a terrorist activity," "in-

[7] It is important to note, particularly given the nature of this case, that many consider "using the term 'alien' to refer to other human beings" to be "offensive and demeaning." *Flores* v. *United States Citizenship & Immigration Servs.*, 718 F. 3d 548, 551–552, n. 1 (CA6 2013). I use the term here only where necessary "to be consistent with the statutory language" that Congress has chosen and "to avoid any confusion in replacing a legal term of art with a more appropriate term." *Ibid.*

cited terrorist activity," or been a representative, member, or endorser of a terrorist organization, or who "is likely to engage after entry in any terrorist activity," § 1182(a)(3)(B), or who has committed one or more of the many crimes enumerated in the statute is inadmissible and therefore ineligible to receive a visa. See § 1182(a)(2)(A) (crime of moral turpitude or drug offense); § 1182(a)(2)(C) (drug trafficking or benefiting from a relative who recently trafficked drugs); § 1182(a)(2)(D) (prostitution or "unlawful commercialized vice"); § 1182(a)(2)(H) (human trafficking); § 1182(a)(3) ("[s]ecurity and related grounds").

In addition to vetting rigorously any individuals seeking admission to the United States, the Government also rigorously vets the information-sharing and identity-management systems of other countries, as evidenced by the Visa Waiver Program, which permits certain nationals from a select group of countries to skip the ordinary visa-application process. See § 1187. To determine which countries are eligible for the Visa Waiver Program, the Government considers whether they can satisfy numerous criteria—*e. g.*, using electronic, fraud-resistant passports, § 1187(a)(3)(B), 24-hour reporting of lost or stolen passports, § 1187(c)(2)(D), and not providing a safe haven for terrorists, § 1187(a)(12)(D)(iii). The Secretary of Homeland Security, in consultation with the Secretary of State, also must determine that a country's inclusion in the program will not compromise "the law enforcement and security interests of the United States." § 1187(c)(2)(C). Eligibility for the program is reassessed on an annual basis. See §§ 1187(a)(12)(D)(iii), 1187(c)(12)(A). As a result of a recent review, for example, the Executive decided in 2016 to remove from the program dual nationals of Iraq, Syria, Iran, and Sudan. See Brief for Former National Security Officials as *Amici Curiae* 27.

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation.

Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. The Government also offers no evidence that this current vetting scheme, which involves a highly searching consideration of individuals required to obtain visas for entry into the United States and a highly searching consideration of which countries are eligible for inclusion in the Visa Waiver Program, is inadequate to achieve the Proclamation's proclaimed objectives of "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their [vetting and information-sharing] practices." *Ante,* at 706.

For many of these reasons, several former national-security officials from both political parties—including former Secretary of State Madeleine Albright, former State Department Legal Adviser John Bellinger III, former Central Intelligence Agency Director John Brennan, and former Director of National Intelligence James Clapper—have advised that the Proclamation and its predecessor orders "do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests." Brief for Former National Security Officials as *Amici Curiae* 15 (boldface deleted).

Moreover, the Proclamation purports to mitigate national-security risks by excluding nationals of countries that provide insufficient information to vet their nationals. 82 Fed. Reg. 45164. Yet, as plaintiffs explain, the Proclamation broadly denies immigrant visas to all nationals of those countries, including those whose admission would likely not implicate these information deficiencies (*e. g.*, infants, or nationals of countries included in the Proclamation who are long-term residents of and traveling from a country not covered by the Proclamation). See Brief for Respondents 72. In addition, the Proclamation permits certain nationals from the countries named in the Proclamation to obtain nonimmigrant

visas, which undermines the Government's assertion that it does not already have the capacity and sufficient information to vet these individuals adequately. See 82 Fed. Reg. 45165–45169.

Equally unavailing is the majority's reliance on the Proclamation's waiver program. *Ante*, at 709–710, and n. 7. As several *amici* thoroughly explain, there is reason to suspect that the Proclamation's waiver program is nothing more than a sham. See Brief for Pars Equality Center et al. as *Amici Curiae* 11, 13–28 (explaining that "waivers under the Proclamation are vanishingly rare" and reporting numerous stories of deserving applicants denied waivers). The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security. See *ante*, at 723–728 (BREYER, J., dissenting) (outlining evidence suggesting "that the Government is not applying the Proclamation as written," that "waivers are not being processed in an ordinary way," and that consular and other officials "do not, in fact, have discretion to grant waivers").

In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

III

As the foregoing analysis makes clear, plaintiffs are likely to succeed on the merits of their Establishment Clause claim. To obtain a preliminary injunction, however, plaintiffs must also show that they are "likely to suffer irreparable harm in the absence of preliminary relief," that "the balance of equities tips in [their] favor," and that "an injunction is in the

public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). Plaintiffs readily clear those remaining hurdles.

First, plaintiffs have shown a likelihood of irreparable harm in the absence of an injunction. As the District Court found, plaintiffs have adduced substantial evidence showing that the Proclamation will result in "a multitude of harms that are not compensable with monetary damages and that are irreparable—among them, prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the [Muslim] Association." 265 F. Supp. 3d 1140, 1159 (Haw. 2017).

Second, plaintiffs have demonstrated that the balance of the equities tips in their favor. Against plaintiffs' concrete allegations of serious harm, the Government advances only nebulous national-security concerns. Although national security is unquestionably an issue of paramount public importance, it is not "a talisman" that the Government can use "to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar* v. *Abbasi*, 582 U. S. 120, 143 (2017). That is especially true here, because, as noted, the Government's other statutory tools, including the existing rigorous individualized vetting process, already address the Proclamation's purported national-security concerns. See *supra*, at 746–749.

Finally, plaintiffs and their *amici* have convincingly established that "an injunction is in the public interest." *Winter*, 555 U. S., at 20. As explained by the scores of *amici* who have filed briefs in support of plaintiffs, the Proclamation has deleterious effects on our higher education system;[8] national

[8] See Brief for American Council on Education et al. as *Amici Curiae*; Brief for Colleges and Universities as *Amici Curiae*; Brief for New York University as *Amicus Curiae*.

security;[9] healthcare;[10] artistic culture;[11] and the Nation's technology industry and overall economy.[12] Accordingly, the Court of Appeals correctly affirmed, in part, the District Court's preliminary injunction.[13]

IV

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance. That constitutional promise is why, "[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." *Town of Greece* v. *Galloway*, 572 U. S., at 615 (KAGAN, J., dissenting). Instead of vindicating those principles, today's decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court's precedent, repeats tragic mistakes of the

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[9] See Brief for Retired Generals and Admirals of the U. S. Armed Forces as *Amici Curiae*; Brief for Former National Security Officials as *Amici Curiae*.

[10] See Brief for Association of American Medical Colleges as *Amicus Curiae*.

[11] See Brief for Association of Art Museum Directors et al. as *Amici Curiae*.

[12] See Brief for U. S. Companies as *Amici Curiae*; Brief for Massachusetts Technology Leadership Council, Inc., as *Amicus Curiae*.

[13] Because the majority concludes that plaintiffs have failed to show a likelihood of success on the merits, it takes no position on "the propriety of the nationwide scope of the injunction issued by the District Court." *Ante*, at 711. The District Court did not abuse its discretion by granting nationwide relief. Given the nature of the Establishment Clause violation and the unique circumstances of this case, the imposition of a nationwide injunction was "'necessary to provide complete relief to the plaintiffs.'" *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 765 (1994); 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, not by the geographical extent of the plaintiff class").

past, and denies countless individuals the fundamental right of religious liberty.

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*, 584 U. S. 617, which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. See *id.*, at 638–639 ("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' " (quoting *Lukumi*, 508 U. S., at 547)); *Masterpiece*, 584 U. S., at 640 (KAGAN, J., concurring) ("[S]tate actors cannot show hostility to religious views; rather, they must give those views 'neutral and respectful consideration' "). Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," *id.*, at 639, the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, *id.*, at 634–636, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country " 'that they are outsiders, not full members of the political community.' " *Santa Fe*, 530 U. S., at 309.

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Kore-*

matsu v. *United States*, 323 U. S. 214 (1944). See Brief for Japanese American Citizens League as *Amicus Curiae*. In *Korematsu*, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 275 (1995) (GINSBURG, J., dissenting). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. See Brief for Japanese American Citizens League as *Amicus Curiae* 12–14. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States. See *Korematsu*, 323 U. S., at 236–240 (Murphy, J., dissenting). As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. Compare *Korematsu* v. *United States*, 584 F. Supp. 1406, 1418–1419 (ND Cal. 1984) (discussing information the Government knowingly omitted from report presented to the courts justifying the executive order); Brief for Japanese American Citizens League as *Amicus Curiae* 17–19, with *IRAP II*, 883 F. 3d, at 268; Brief for Karen Korematsu et al. as *Amici Curiae* 35–36, and n. 5 (noting that the Government "has gone to great lengths to shield [the Secretary of Homeland Security's] report from view"). And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Although a majority of the Court in *Korematsu* was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that "it is essential that there be definite limits to [the government's] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea

of military necessity that has neither substance nor support." 323 U. S., at 234 (dissenting opinion). Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be "a far more subtle blow to liberty than the promulgation of the order itself," for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure. *Id.*, at 245–246.

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. See, *e. g.*, Civil Liberties Act of 1988, 50 U. S. C. App. § 4211 *et seq.* (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*); Non-Detention Act of 1971, 18 U. S. C. § 4001(a) (forbidding the imprisonment or detention by the United States of any citizen absent an Act of Congress). Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as "gravely wrong the day it was decided." *Ante*, at 710 (citing *Korematsu*, 323 U. S., at 248 (Jackson, J., dissenting)). This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another. *Ante*, at 710.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.

Syllabus

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.

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

No. 16–1140. Argued March 20, 2018—Decided June 26, 2018

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) was enacted to regulate crisis pregnancy centers—pro-life centers that offer pregnancy-related services. The FACT Act requires clinics that primarily serve pregnant women to provide certain notices. Clinics that are licensed must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Its stated purpose is to make sure that state residents know their rights and what healthcare services are available to them. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services. Its stated purpose is to ensure that pregnant women know when they are receiving healthcare from licensed professionals. Petitioners—two crisis pregnancy centers, one licensed and one unlicensed, and an organization of crisis pregnancy centers—filed suit. They alleged that both the licensed and the unlicensed notices abridge the freedom of speech protected by the First Amendment. The District Court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed. Holding that petitioners could not show a likelihood of success on the merits, the court concluded that the licensed notice survived a lower level of scrutiny applicable to regulations of "professional speech," and that the unlicensed notice satisfied any level of scrutiny.

Held:

1. The licensed notice likely violates the First Amendment. Pp. 765–775.

(a) Content-based laws "target speech based on its communicative content" and "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163. The licensed notice is a content-based regulation. By compelling petitioners to speak a particular message, it "alters the content of [their] speech." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795. For example, one of the state-sponsored services that the licensed notice requires petitioners to advertise is abortion—the very practice that petitioners are devoted to opposing. P. 766.

(b) Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates "professional speech." But this Court has never recognized "professional speech" as a separate category of speech subject to different rules. Speech is not unprotected merely because it is uttered by professionals. The Court has afforded less protection for professional speech in two circumstances—where a law requires professionals to disclose factual, noncontroversial information in their "commercial speech," see, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651, and where States regulate professional conduct that incidentally involves speech, see, *e. g.*, *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456. Neither line of precedents is implicated here. Pp. 766–773.

(1) Unlike the rule in *Zauderer*, the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which . . . services will be available," 471 U. S., at 651. California's notice requires covered clinics to disclose information about *state*-sponsored services—including abortion, hardly an "uncontroversial" topic. Accordingly, *Zauderer* has no application here. Pp. 768–769.

(2) Nor is the licensed notice a regulation of professional conduct that incidentally burdens speech. The Court's precedents have long drawn a line between speech and conduct. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, for example, the joint opinion rejected a free-speech challenge to an informed-consent law requiring physicians to "give a woman certain information as part of obtaining her consent to an abortion," *id.*, at 884. But the licensed notice is neither an informed-consent requirement nor any other regulation of professional conduct. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. And many other facilities providing the exact same services, such as general practice clinics, are not subject to the requirement. Pp. 769–770.

(3) Outside of these two contexts, the Court's precedents have long protected the First Amendment rights of professionals. The Court has applied strict scrutiny to content-based laws regulating the noncommercial speech of lawyers, see *Reed*, *supra*, at 167, professional fundraisers, see *Riley*, *supra*, at 798, and organizations providing specialized advice on international law, see *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 27–28. And it has stressed the danger of content-based regulations "in the fields of medicine and public health, where information can save lives." *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552,

566. Such dangers are also present in the context of professional speech, where content-based regulation poses the same "risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information," *Turner Broadcasting Systems, Inc.* v. *FCC*, 512 U. S. 622, 641. When the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen* v. *Coakley*, 573 U. S. 464, 476. Professional speech is also a difficult category to define with precision. See *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 791. If States could choose the protection that speech receives simply by requiring a license, they would have a powerful tool to impose "invidious discrimination of disfavored subjects." *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 423, n. 19. Pp. 771–773.

(c) Although neither California nor the Ninth Circuit has advanced a persuasive reason to apply different rules to professional speech, the Court need not foreclose the possibility that some such reason exists because the licensed notice cannot survive even intermediate scrutiny. Assuming that California's interest in providing low-income women with information about state-sponsored service is substantial, the licensed notice is not sufficiently drawn to promote it. The notice is "wildly underinclusive," *Entertainment Merchants Assn.*, *supra*, at 802, because it applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services" while excluding several other types of clinics that also serve low-income women and could educate them about the State's services. California could also inform the women about its services "without burdening a speaker with unwanted speech," *Riley*, *supra*, at 800, most obviously through a public-information campaign. Petitioners are thus likely to succeed on the merits of their challenge. Pp. 773–775.

2. The unlicensed notice unduly burdens protected speech. It is unnecessary to decide whether *Zauderer*'s standard applies here, for even under *Zauderer*, a disclosure requirement cannot be "unjustified or unduly burdensome." 471 U. S., at 651. Disclosures must remedy a harm that is "potentially real not purely hypothetical," *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 146, and can extend "no broader than reasonably necessary," *In re R. M. J.*, 455 U. S. 191, 203. California has not demonstrated any justification for the unlicensed notice that is more than "purely hypothetical." The only justification put forward by the state legislature was ensuring that pregnant women know when they are re-

ceiving medical care from licensed professionals, but California denied that the justification for the law was that women did not know what kind of facility they are entering when they go to a crisis pregnancy center. Even if the State had presented a nonhypothetical justification, the FACT Act unduly burdens protected speech. It imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from the State's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers: those that primarily provide pregnancy-related services, but not those that provide, *e. g.*, nonprescription birth control. Such speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell*, *supra*, at 580. For these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies. Pp. 776–779.

839 F. 3d 823, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. KENNEDY, J., filed a concurring opinion, in which ROBERTS, C. J., and ALITO and GORSUCH, JJ., joined, *post*, p. 779. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 780.

Michael P. Farris argued the cause for petitioners. With him on the briefs were *David A. Cortman*, *Kristen K. Waggoner*, *Kevin H. Theriot*, *James A. Campbell*, *Denise M. Harle*, *Elissa M. Graves*, *John C. Eastman*, *Anne O'Connor*, and *Dean R. Broyles.*

Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* in support of neither party. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Assistant Attorney General Mooppan*, *Jonathan C. Bond*, *Douglas N. Letter*, and *Mark R. Freeman.*

Joshua A. Klein, Deputy Solicitor General of California, argued the cause for respondents. With him on the brief for state respondents were *Xavier Becerra*, Attorney General, *pro se*, *Edward C. DuMont*, Solicitor General, *Janill L. Richards*, Principal Deputy Solicitor General, and *Kathleen*

Counsel

Vermazen Radez, *Anthony R. Hakl*, and *Jonathan M. Eisenberg*, Deputy Attorneys General. *Thomas D. Bunton* and *Darin L. Wessel* filed a brief for respondent Thomas E. Montgomery.*

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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, and *Heather Gebelin Hacker* and *Beth Klusmann*, Assistant Solicitors General, by *M. Stephen Pitt*, General Counsel to Governor of Kentucky, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Michael DeWine* of Ohio, *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 the Alpha Center by *Harold J. Cassidy* and *Joseph R. Zakhary*; for the American Association of Pro-Life Obstetricians and Gynecologists et al. by *Steven H. Aden*; for the American Center for Law & Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Andrew J. Ekonomou*, *Jordan Sekulow*, *Walter M. Weber*, *Francis J. Manion*, *Geoffrey R. Surtees*, *Edward L. White III*, and *Erik M. Zimmerman*; for C12 Group et al. by *Michael Lee Francisco*; for Care Net by *John J. Bursch*; for the Cato Institute by *Ilya Shapiro*; for the Charlotte Lozier Institute et al. by *Dorinda C. Bordlee* and *Nikolas T. Nikas*; for the Conservative Legal Defense and Education Fund et al. by *Herbert W. Titus*, *William J. Olson*, *Jeremiah L. Morgan*, *Robert J. Olson*, and *Joseph W. Miller*; for First Resort, Inc., by *Mark L. Rienzi*, *Eric C. Rassbach*, *Joseph C. Davis*, *Kelly S. Biggins*, *W. Scott Hastings*, *Carl Scherz*, and *Andrew Buttaro*; for the Foundation for Moral Law by *John A. Eidsmoe* and *Matthew J. Clark*; for Freedom X et al. by *William J. Becker, Jr.*, and *Mitchell Keiter*; for Heartbeat International, Inc., by *James C. Rutten*, *Adam P. Barry*, and *Danielle M. White*; for Human Coalition by *Jonathan D. Christman*; for the Institute for Justice by *Robert J. McNamara*, *Paul M. Sherman*, and *Paul V. Avelar*; for Jews for Religious Liberty by *Howard N. Slugh* and *Andrew Pepper*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for Legal Scholars by *Kelly J. Shackelford* and *Kenneth A. Klukowski*; for Massachusetts Citizens for Life et al. by *Dwight G. Duncan*; for Mountain Right to Life et al. for *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Mary E. Mc-*

JUSTICE THOMAS delivered the opinion of the Court.

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) re-

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Alister; for the National Association of Evangelicals et al. by *Frederick W. Claybrook, Jr.*, *Steven W. Fitschen*, and *James A. Davids*; for Operation Outcry et al. by *Catherine W. Short*; for Pregnancy Care Centers in Texas by *Linda Boston Schlueter*; for the Scharpen Foundation, Inc., et al. by *Robert H. Tyler*; for Twenty-three Illinois Pregnancy Care Centers by *Noel W. Sterett*, *Whitman H. Brisky*, *Thomas Brejcha, Jr.*, and *Thomas G. Olp*; for the United States Conference of Catholic Bishops et al. by *Gene C. Schaerr*, *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, *Michael F. Moses*, *Hillary Byrnes*, *Lisa J. Gilden*, *Sherri C. Strand*, *James W. Erwin*, *Kim Colby*, *Abba Cohen*, and *David Zwiebel*; for 13 Women et al. by *Andrea Picciotti-Bayer*; for 41 Family Policy Organizations by *David French*; for 144 Members of Congress by *Patrick Strawbridge*; and for David Boyle by *Mr. Boyle, pro se.*

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 *Judith N. Vale*, Senior Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Russell A. Suzuki* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Gurbir S. Grewal* of New Jersey, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the City and County of San Francisco et al. by *Dennis J. Herrera*, *Christine Van Aken*, *Mollie M. Lee*, *Suzanne Sangree*, *Zachary W. Carter*, *James R. Williams*, *Michael N. Feuer*, *James P. Clark*, *Blithe Smith Bock*, and *Shaun Dabby Jacobs*; for the American Academy of Pediatrics et al. by *Simona G. Strauss*; for the American Medical Association by *Leonard A. Nelson*; for Black Women for Wellness et al. by *Thomas Bennigson* and *Seth E. Mermin*; for the California Women's Law Center by *Lois D. Thompson*; for Compassion & Choices by *Darin M. Sands*, *Peter D. Hawkes*, and *Kevin Diaz*; for Equal Rights Advocates et al. by *Sanford Jay Rosen*, *Gay Crosthwait Grunfeld*, and *Devin W. Mauney*; for Legal Ethicists for *Albert Giang*; for Members of Congress by *Brianne J. Gorod*, *Elizabeth B. Wydra*, *David H. Gans*, and *Ashwin P. Phatak*; for the National League of Cities et al. by *John M. Baker*, *Katherine M. Swenson*,

quires clinics that primarily serve pregnant women to provide certain notices. Cal. Health & Safety Code Ann. §123470 *et seq.* (West 2018). Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services. The question in this case is whether these notice requirements violate the First Amendment.

I

A

The California State Legislature enacted the FACT Act to regulate crisis pregnancy centers. Crisis pregnancy centers—according to a report commissioned by the California State Assembly, App. 86—are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." Watters et al., Pregnancy Resource Centers: Ensuring Access and Accuracy of Information 4 (2011). "[U]nfortunately," the author of the FACT Act stated, "there are nearly 200 licensed and unlicensed" crisis pregnancy centers in California. App. 84. These centers "aim to discourage and prevent women from seeking abortions." *Id.*, at 85. The author of the FACT Act observed that crisis pregnancy centers "are commonly affiliated with, or run by organizations whose stated goal" is to oppose abortion—including "the National Institute of Family and Life Advocates," one of the petitioners here. *Ibid.* To address this perceived problem, the FACT Act imposes two

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and *Lisa Soronen*; for Planned Parenthood Federation of America et al. by *Alan E. Schoenfeld, Charles C. Bridge*, and *Kimberly A. Parker*; for Public Citizen, Inc., by *Scott L. Nelson, Allison M. Zieve*, and *Julie A. Murray*; for Social Science Researchers by *Steven A. Zalesin*; and for 51 Reproductive Rights Organizations et al. by *Julie Rikelman, Autumn Katz, Fatima Goss Graves, Gretchen Borchelt, Sunu Chandy*, and *Heather Shumaker*.

notice requirements on facilities that provide pregnancy-related services—one for licensed facilities and one for unlicensed facilities.

1

The first notice requirement applies to "licensed covered facilit[ies]." Cal. Health & Safety Code Ann. § 123471(a). To fall under the definition of "licensed covered facility," a clinic must be a licensed primary care or specialty clinic or qualify as an intermittent clinic under California law. *Ibid.* (citing §§ 1204, 1206(h)). A licensed covered facility also must have the "primary purpose" of "providing family planning or pregnancy-related services." § 123471(a). And it must satisfy at least two of the following six requirements:

> "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> "(2) The facility provides, or offers counseling about, contraception or contraceptive methods.
>
> "(3) The facility offers pregnancy testing or pregnancy diagnosis.
>
> "(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> "(5) The facility offers abortion services.
>
> "(6) The facility has staff or volunteers who collect health information from clients." *Ibid.*

The FACT Act exempts several categories of clinics that would otherwise qualify as licensed covered facilities. Clinics operated by the United States or a federal agency are excluded, as are clinics that are "enrolled as a Medi-Cal provider" and participate in "the Family Planning, Access, Care, and Treatment Program" (Family PACT program). § 123471(c). To participate in the Family PACT program, a clinic must provide "the full scope of family planning . . . services specified for the program," Cal. Welf. & Inst. Code

Ann. § 24005(c) (West 2018), including sterilization and emergency contraceptive pills, §§ 24007(a)(1), (2).

If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site. Cal. Health & Safety Code Ann. § 123472(a)(1). The notice states that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Ibid.* This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in. § 123472(a)(2). The notice must be in English and any additional languages identified by state law. § 123472(a). In some counties, that means the notice must be spelled out in 13 different languages. See State of Cal., Dept. of Health Care Services, Frequency of Threshold Language Speakers in the Medi-Cal Population by County for Jan. 2015, pp. 4–5 (Sept. 2016) (identifying the required languages for Los Angeles County as English, Spanish, Armenian, Mandarin, Cantonese, Korean, Vietnamese, Farsi, Tagalog, Russian, Cambodian, Other Chinese, and Arabic).

The stated purpose of the FACT Act, including its licensed-notice requirement, is to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." 2015 Cal. Legis. Serv., ch. 700, § 2 (A. B. 775) (West) (Cal. Legis. Serv.). The legislature posited that "thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." § 1(b). Citing the "time sensitive" nature of pregnancy-related decisions, § 1(c), the legislature concluded that requiring licensed facilities to inform patients them-

selves would be "[t]he most effective" way to convey this information, § 1(d).

2

The second notice requirement in the FACT Act applies to "unlicensed covered facilit[ies]." § 123471(b). To fall under the definition of "unlicensed covered facility," a facility must not be licensed by the State, not have a licensed medical provider on staff or under contract, and have the "primary purpose" of "providing pregnancy-related services." *Ibid.* An unlicensed covered facility also must satisfy at least two of the following four requirements:

> "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> "(2) The facility offers pregnancy testing or pregnancy diagnosis.
>
> "(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> "(4) The facility has staff or volunteers who collect health information from clients." *Ibid.*

Clinics operated by the United States and licensed primary care clinics enrolled in Medi-Cal and Family PACT are excluded. § 123471(c).

Unlicensed covered facilities must provide a government-drafted notice stating that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." Cal. Health & Safety Code Ann. § 123472(b)(1). This notice must be provided on site and in all advertising materials. §§ 123472(b)(2), (3). On site, the notice must be posted "conspicuously" at the entrance of the facility and in at least one waiting area. § 123472(b)(2). It must be "at least 8.5 inches by 11 inches and written in no less than 48-point type." *Ibid.* In advertisements, the notice must be in the same size or larger font than the sur-

rounding text, or otherwise set off in a way that draws attention to it. § 123472(b)(3). Like the licensed notice, the unlicensed notice must be in English and any additional languages specified by state law. § 123471(b). Its stated purpose is to ensure "that pregnant women in California know when they are getting medical care from licensed professionals." Cal. Legis. Serv. § 1(e).

B

After the Governor of California signed the FACT Act, petitioners—a licensed pregnancy center, an unlicensed pregnancy center, and an organization composed of crisis pregnancy centers—filed this suit. Petitioners alleged that the licensed and unlicensed notices abridge the freedom of speech protected by the First Amendment. The District Court denied their motion for a preliminary injunction.

The Court of Appeals for the Ninth Circuit affirmed. *National Institute of Family and Life Advocates* v. *Harris*, 839 F. 3d 823, 845 (2016). After concluding that petitioners' challenge to the FACT Act was ripe,[1] *id.*, at 833, the Ninth Circuit held that petitioners could not show a likelihood of success on the merits. It concluded that the licensed notice survives the "lower level of scrutiny" that applies to regulations of "professional speech." *Id.*, at 833–842. And it concluded that the unlicensed notice satisfies any level of scrutiny. See *id.*, at 843–844.

We granted certiorari to review the Ninth Circuit's decision. 583 U. S. 972 (2017). We reverse with respect to both notice requirements.

II

We first address the licensed notice.[2]

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[1] We agree with the Ninth Circuit's ripeness determination.

[2] Petitioners raise serious concerns that both the licensed and unlicensed notices discriminate based on viewpoint. Because the notices are unconstitutional either way, as explained below, we need not reach that issue.

A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163 (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.* This stringent standard reflects the fundamental principle that governments have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ibid.* (quoting *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972)).

The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices "alte[r] the content of [their] speech." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988); accord, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642 (1994); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256 (1974). Here, for example, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing. By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly "alters the content" of petitioners' speech. *Riley*, *supra*, at 795.

B

Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that

the notice regulates "professional speech." 839 F. 3d, at 839. Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules. See, *e. g.*, *King* v. *Governor of New Jersey*, 767 F. 3d 216, 232 (CA3 2014); *Pickup* v. *Brown*, 740 F. 3d 1208, 1227–1229 (CA9 2014); *Moore-King* v. *County of Chesterfield*, 708 F. 3d 560, 568–570 (CA4 2014). These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime." *Id.*, at 569; see also *King*, *supra*, at 232; *Pickup*, *supra*, at 1230. "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," *King*, *supra*, at 232, or that is "within the confines of [the] professional relationship," *Pickup*, *supra*, at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. See *King*, *supra*, at 232; *Pickup*, *supra*, at 1053–1056; *Moore-King*, *supra*, at 569.

But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection." *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 804 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). And it has been especially reluctant to "exemp[t] a category of speech from the normal prohibition on content-based restrictions." *United States* v. *Alvarez*, 567 U. S. 709, 722 (2012) (plurality opinion). This Court's precedents do not permit governments to impose content-based restrictions on speech without "'persuasive evidence . . . of a long (if heretofore unrecognized) tradition'" to that effect. *Ibid.* (quoting *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792 (2011)).

This Court's precedents do not recognize such a tradition for a category called "professional speech." This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 250 (2010); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978). Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. See, *e. g.*, *id.*, at 456; *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 884 (1992) (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). But neither line of precedents is implicated here.

1

This Court's precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts. In *Zauderer*, for example, this Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. 471 U. S., at 650–653. Noting that the disclosure requirement governed only "commercial advertising" and required the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available," the Court explained that such requirements should be upheld unless they are "unjustified or unduly burdensome." *Id.*, at 651.

The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which . . . services will be available." *Ibid.*; see also *Hurley*

v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995) (explaining that *Zauderer* does not apply outside of these circumstances). The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an "uncontroversial" topic. Accordingly, *Zauderer* has no application here.

2

In addition to disclosure requirements under *Zauderer*, this Court has upheld regulations of professional conduct that incidentally burden speech. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 567 (2011), and professionals are no exception to this rule, see *Ohralik*, *supra*, at 456. Longstanding torts for professional malpractice, for example, "fall within the traditional purview of state regulation of professional conduct." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963); but cf. *id.*, at 439 ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"). While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it, see, *e. g.*, *Sorrell*, *supra*, at 567; *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949), and the line is "'long familiar to the bar,'" *United States* v. *Stevens*, 559 U. S. 460, 468 (2010) (quoting *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (KENNEDY, J., concurring in judgment)).

In *Planned Parenthood of Southeastern Pa.* v. *Casey*, for example, this Court upheld a law requiring physicians to obtain informed consent before they could perform an abortion. 505 U. S., at 884 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). Pennsylvania law required physicians to inform their patients of "the nature of the procedure, the

health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.' " *Id.*, at 881. The law also required physicians to inform patients of the availability of printed materials from the State, which provided information about the child and various forms of assistance. *Ibid.*

The joint opinion in *Casey* rejected a free-speech challenge to this informed-consent requirement. *Id.*, at 884. It described the Pennsylvania law as "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion," which "for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure." *Ibid.* The joint opinion explained that the law regulated speech only "as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State." *Ibid.* (emphasis added). Indeed, the requirement that a doctor obtain informed consent to perform an operation is "firmly entrenched in American tort law." *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 269 (1990); see, *e. g.*, *Schloendorff* v. *Society of N. Y. Hospital*, 211 N. Y. 125, 129–130, 105 N. E. 92, 93 (1914) (Cardozo, J.) (explaining that "a surgeon who performs an operation without his patient's consent commits an assault").

The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. If a covered facility does provide medical procedures, the notice provides no information about the risks or benefits of those procedures. Tellingly, many facilities that provide the exact same services as covered facilities—such as general practice clinics, see § 123471(a)—are not required to provide the licensed notice. The licensed notice regulates speech as speech.

Outside of the two contexts discussed above—disclosures under *Zauderer* and professional conduct—this Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, see *Reed*, 576 U. S., at 167 (discussing *Button*, *supra*, at 438); *In re Primus*, 436 U. S. 412, 432 (1978); professional fundraisers, see *Riley*, 487 U. S., at 798; and organizations that provided specialized advice about international law, see *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 27–28 (2010). And the Court emphasized that the lawyer's statements in *Zauderer* would have been "fully protected" if they were made in a context other than advertising. 471 U. S., at 637, n. 7. Moreover, this Court has stressed the danger of content-based regulations "in the fields of medicine and public health, where information can save lives." *Sorrell*, *supra*, at 566.

The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting*, 512 U. S., at 641. Take medicine, for example. "Doctors help patients make deeply personal decisions, and their candor is crucial." *Wollschlaeger* v. *Governor of Florida*, 848 F. 3d 1293, 1328 (CA11 2017) (en banc) (W. Pryor, J., concurring). Throughout history, governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities:

> "For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construc-

> tion project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS." Berg, Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice, 74 B. U. L. Rev. 201, 201–202 (1994) (footnotes omitted).

Further, when the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen* v. *Coakley*, 573 U. S. 464, 476 (2014). Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

"Professional speech" is also a difficult category to define with precision. See *Entertainment Merchants Assn.*, 564 U. S., at 791. As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others. See Smolla, Professional Speech and the First Amendment, 119 W. Va. L. Rev. 67, 68 (2016). One Court of Appeals has even applied it to fortunetellers. See *Moore-King*, 708 F. 3d, at 569. All that is required to make something a "profession," according to these courts, is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose "invidious discrimination of disfavored subjects." *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 423–424, n. 19 (1993); see also *Riley*, *supra*, at 796 ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection" (citing *Bigelow* v. *Virginia*, 421 U. S. 809, 826 (1975))).

C

In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.

If California's goal is to educate low-income women about the services it provides, then the licensed notice is "wildly underinclusive." *Entertainment Merchants Assn.*, *supra*, at 802. The notice applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services" and that provide two of six categories of specific services. § 123471(a). Other clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women and could educate them about the State's services. According to the legislative record, California has "nearly 1,000 community clinics"—including "federally designated community health centers, migrant health centers, rural health centers, and frontier health centers"—that "serv[e] more than 5.6 million patients . . . annually through over 17 million patient encounters." App. 58. But most of those clinics are excluded from the licensed-notice requirement without explanation. Such "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entertainment Merchants Assn.*, *supra*, at 802.

The FACT Act also excludes, without explanation, federal clinics and Family PACT providers from the licensed-notice requirement. California notes that those clinics can enroll women in California's programs themselves, but California's stated interest is informing women that these services exist in the first place. California has identified no evidence that the exempted clinics are more likely to provide this information than the covered clinics. In fact, the exempted clinics have long been able to enroll women in California's programs, but the FACT Act was premised on the notion that "thousands of women remain unaware of [them]." Cal. Legis. Serv. § 1(b). If the goal is to maximize women's awareness of these programs, then it would seem that California would ensure that the places that can immediately enroll women also provide this information. The FACT Act's

exemption for these clinics, which serve many women who are pregnant or could become pregnant in the future, demonstrates the disconnect between its stated purpose and its actual scope. Yet "[p]recision . . . must be the touchstone" when it comes to regulations of speech, which "so closely touc[h] our most precious freedoms." *Button*, 371 U. S., at 438.

Further, California could inform low-income women about its services "without burdening a speaker with unwanted speech." *Riley*, 487 U. S., at 800. Most obviously, it could inform the women itself with a public-information campaign. See *ibid.* (concluding that a compelled disclosure was unconstitutional because the government could "itself publish the . . . disclosure"). California could even post the information on public property near crisis pregnancy centers. California argues that it has already tried an advertising campaign, and that many women who are eligible for publicly funded healthcare have not enrolled. But California has identified no evidence to that effect. And regardless, a "tepid response" does not prove that an advertising campaign is not a sufficient alternative. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 816 (2000). Here, for example, individuals might not have enrolled in California's services because they do not want them, or because California spent insufficient resources on the advertising campaign. Either way, California cannot co-opt the licensed facilities to deliver its message for it. "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, *supra*, at 795; accord, *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 747 (2011).

In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice. Contrary to the suggestion in the dissent, *post*, at 782–783 (opinion of BREYER, J.), we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.

III

We next address the unlicensed notice. The parties dispute whether the unlicensed notice is subject to deferential review under *Zauderer*.[3] We need not decide whether the *Zauderer* standard applies to the unlicensed notice. Even under *Zauderer*, a disclosure requirement cannot be "unjustified or unduly burdensome." 471 U. S., at 651. Our precedents require disclosures to remedy a harm that is "potentially real, not purely hypothetical," *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 146 (1994), and to extend "no broader than reasonably necessary," *In re R. M. J.*, 455 U. S. 191, 203 (1982); accord, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772, n. 24 (1976); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 384 (1977); cf. *Zauderer*, 471 U. S., at 649 (rejecting "broad prophylactic rules" in this area). Otherwise, they risk "chilling protected . . . speech." *Id.*, at 651. Importantly, California has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome. See *Ibanez*, 512 U. S., at 146. It has not met its burden.

We need not decide what type of state interest is sufficient to sustain a disclosure requirement like the unlicensed notice. California has not demonstrated any justification for the unlicensed notice that is more than "purely hypothetical." *Ibid.* The only justification that the California Legislature put forward was ensuring that "pregnant women in California know when they are getting medical care from licensed professionals." Cal. Legis. Serv. § 1(e). At oral argument, however, California denied that the justification for the FACT Act was that women "go into [crisis pregnancy centers] and they don't realize what they are."

[3] Other than a conclusory assertion that the unlicensed notice satisfies any standard of review, see Brief for Respondents 19, California does not explain how the unlicensed notice could satisfy any standard other than *Zauderer*.

Tr. of Oral Arg. 44–45. Indeed, California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals. The services that trigger the unlicensed notice—such as having "volunteers who collect health information from clients," "advertis[ing] . . . pregnancy options counseling," and offering over-the-counter "pregnancy testing," § 123471(b)—do not require a medical license. And California already makes it a crime for individuals without a medical license to practice medicine. See Cal. Bus. & Prof. Code Ann. § 2052. At this preliminary stage of the litigation, we agree that petitioners are likely to prevail on the question whether California has proved a justification for the unlicensed notice.[4]

Even if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech. The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers. While the licensed notice applies to facilities that provide "family planning" services and "contraception or contraceptive methods," § 123471(a), the California Legislature dropped these triggering conditions for the unlicensed notice. The unlicensed notice applies only to facilities that primarily provide "pregnancy-related" services. § 123471(b). Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed. This Court's precedents are deeply skeptical of laws that

[4] Nothing in our opinion should be read to foreclose the possibility that California will gather enough evidence in later stages of this litigation.

"distinguis[h] among different speakers, allowing speech by some but not others." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 340 (2010). Speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell*, 564 U. S., at 580.

The application of the unlicensed notice to advertisements demonstrates just how burdensome it is. The notice applies to all "print and digital advertising materials" by an unlicensed covered facility. § 123472(b). These materials must include a government-drafted statement that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." § 123472(b)(1). An unlicensed facility must call attention to the notice, instead of its own message, by some method such as larger text or contrasting type or color. See §§ 123472(b)(2)–(3). This scripted language must be posted in English and as many other languages as California chooses to require. As California conceded at oral argument, a billboard for an unlicensed facility that says "Choose Life" would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility's own message. More likely, the "detail required" by the unlicensed notice "effectively rules out" the possibility of having such a billboard in the first place. *Ibanez*, *supra*, at 146.

For all these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies. California has offered no justification that the notice plausibly furthers. It targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech. Taking all these circumstances together, we conclude that the unlicensed notice is unjustified and unduly burdensome under *Zauderer*. We express no view on the

legality of a similar disclosure requirement that is better supported or less burdensome.

IV

We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment. 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 KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE ALITO, and JUSTICE GORSUCH join, concurring.

I join the Court's opinion in all respects.

This separate writing seeks to underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern. See *ante*, at 765, n. 2. The Court, in my view, is correct not to reach this question. It was not sufficiently developed, and the rationale for the Court's decision today suffices to resolve the case. And had the Court's analysis been confined to viewpoint discrimination, some legislators might have inferred that if the law were reenacted with a broader base and broader coverage it then would be upheld.

It does appear that viewpoint discrimination is inherent in the design and structure of this Act. This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. And the history of the Act's passage and its underinclusive application suggest a real

possibility that these individuals were targeted because of their beliefs.

The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking." App. 38–39. But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." *Wooley* v. *Maynard*, 430 U. S. 705, 715 (1977). It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.

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

The petitioners ask us to consider whether two sections of a California statute violate the First Amendment. The first section requires licensed medical facilities (that provide women with assistance involving pregnancy or family planning) to tell those women where they might obtain help, including financial help, with comprehensive family planning services, prenatal care, and abortion. The second requires *un*licensed facilities offering somewhat similar services to make clear that they are unlicensed. In my view both statutory sections are likely constitutional, and I dissent from the Court's contrary conclusions.

I

The first statutory section applies to licensed medical facilities dealing with pregnancy and which also provide specific

services such as prenatal care, contraception counseling, pregnancy diagnosis, or abortion-related services. Cal. Health & Safety Code Ann. §§ 123471(a), 1204, 1206(h) (West 2018) (covering "primary care clinics" that serve low-income women); Cal. Code Regs., tit. 22, § 75026 (2018) ("primary care clinics" are medical facilities that provide "services for the care and treatment of patients for whom the clinic accepts responsibility" with the "direction or supervision" of each "service" undertaken "by a person licensed, certified or registered to provide such service").

The statute requires these facilities to post a notice in their waiting rooms telling their patients:

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." § 123472(a)(1).

The petitioners here, a group of covered medical facilities that object to abortion for religious reasons, brought this case seeking an injunction against enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act on the ground that it violates the First Amendment on its face. The District Court denied a preliminary injunction, and the Court of Appeals affirmed. The majority now reverses the Court of Appeals on the ground that the petitioners have shown a likelihood of success on the merits, *i. e.*, that the statute likely violates the petitioners' free speech rights and is unconstitutional on its face.

A

Before turning to the specific law before us, I focus upon the general interpretation of the First Amendment that the majority says it applies. It applies heightened scrutiny to

the Act because the Act, in its view, is "content based." *Ante,* at 766. "By compelling individuals to speak a particular message," it adds, "such notices 'alte[r] the content of [their] speech.'" *Ibid.* (quoting *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988); alteration in original). "As a general matter," the majority concludes, such laws are "'presumptively unconstitutional'" and are subject to "stringent" review. *Ante*, at 766.

The majority recognizes exceptions to this general rule: It excepts laws that "require professionals to disclose factual, noncontroversial information in their 'commercial speech,'" *provided that* the disclosure "relates to the services that [the regulated entities] provide." *Ante,* at 768–769. It also excepts laws that "regulate professional conduct" *and* only "incidentally burden speech." *Ibid.*

This constitutional approach threatens to create serious problems. Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered "content based," for virtually every disclosure law requires individuals "to speak a particular message." See *Reed* v. *Town of Gilbert*, 576 U. S. 155, 177–178 (2015) (BREYER, J., concurring in judgment) (listing regulations that inevitably involve content discrimination, ranging from securities disclosures to signs at petting zoos). Thus, the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.

Many ordinary disclosure laws would fall outside the majority's exceptions for disclosures related to the professional's own services or conduct. These include numerous commonly found disclosure requirements relating to the

medical profession. See, *e. g.*, Cal. Veh. Code Ann. § 27363.5 (West 2014) (requiring hospitals to tell parents about child seatbelts); Cal. Health & Safety Code Ann. § 123222.2 (requiring hospitals to ask incoming patients if they would like the facility to give their family information about patients' rights and responsibilities); N. C. Gen. Stat. Ann. § 131E–79.2 (2017) (requiring hospitals to tell parents of newborns about pertussis disease and the available vaccine). These also include numerous disclosure requirements found in other areas. See, *e. g.*, N. Y. C. Rules & Regs., tit. 1, § 27–01 (2018) (requiring signs by elevators showing stair locations); San Francisco Dept. of Health, Director's Rules & Regs., Garbage and Refuse (July 8, 2010) (requiring property owners to inform tenants about garbage disposal procedures).

The majority, at the end of Part II of its opinion, perhaps recognizing this problem, adds a general disclaimer. It says that it does not "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." *Ante*, at 775. But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification. The majority, for example, does not explain why the Act here, which is justified in part by health and safety considerations, does not fall within its "health" category. *Ante*, at 773; see also *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 882–884 (1992) (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (reasoning that disclosures related to fetal development and childbirth are related to the health of a woman seeking an abortion). Nor does the majority opinion offer any reasoned basis that might help apply its disclaimer for distinguishing lawful from unlawful disclosures. In the absence of a reasoned explanation of the disclaimer's meaning and rationale, the disclaimer is unlikely to withdraw the invitation to litigation that the majority's general broad "content-based" test issues. That test invites courts around the Nation to apply

an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle.

Notably, the majority says nothing about limiting its language to the kind of instance where the Court has traditionally found the First Amendment wary of content-based laws, namely, in cases of viewpoint discrimination. "Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint." *Reed*, 576 U. S., at 174 (ALITO, J., concurring). Accordingly, "[l]imiting speech based on its 'topic' or 'subject' " can favor "those who do not want to disturb the status quo." *Ibid.* But the mine run of disclosure requirements do nothing of that sort. They simply alert the public about child seatbelt laws, the location of stairways, and the process to have their garbage collected, among other things.

Precedent does not require a test such as the majority's. Rather, in saying the Act is not a longstanding health and safety law, the Court substitutes its own approach—without a defining standard—for an approach that was reasonably clear. Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner* v. *New York*, 198 U. S. 45 (1905), ordinary economic and social legislation has been thought to raise little constitutional concern. As Justice Brandeis wrote, typically this Court's function in such cases "is only to determine the reasonableness of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 286–287 (1932) (dissenting opinion); see *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 486–488 (1955) (adopting the approach of Justice Brandeis).

The Court has taken this same respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue. See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985) (upholding reasonable disclosure requirements for attorneys); *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 252–253 (2010) (same); cf. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 563–564 (1980) (applying intermediate scrutiny to other restrictions on commercial speech); *In re R. M. J.*, 455 U. S. 191, 203 (1982) (no First Amendment protection for misleading or deceptive commercial speech). But see *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011) (striking down regulation of pharmaceutical drug-related information).

Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession. The Court took the view that a State may condition the practice of medicine on any number of requirements, and physicians, in exchange for following those reasonable requirements, could receive a license to practice medicine from the State. Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions. See, *e. g.*, *Dent* v. *West Virginia*, 129 U. S. 114 (1889) (upholding medical licensing requirements); *Hawker* v. *New York*, 170 U. S. 189 (1898) (same); *Collins* v. *Texas*, 223 U. S. 288, 297–298 (1912) (recognizing the "right of the State to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"); *Lambert* v. *Yellowley*, 272 U. S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the States"); *Graves* v. *Minnesota*, 272 U. S. 425, 429 (1926) (statutes "regulating the practice of medicine" involve "very different considera-

tions" from those applicable to "trades [such as] locomotive engineers and barbers"); *Semler* v. *Oregon Bd. of Dental Examiners*, 294 U. S. 608, 612 (1935) (upholding state regulation of dentistry given the "vital interest of public health"). In the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.

The Court, in justification, refers to widely accepted First Amendment goals, such as the need to protect the Nation from laws that "'suppress unpopular ideas or information'" or inhibit the "'marketplace of ideas in which truth will ultimately prevail.'" *Ante*, at 771–772; see *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). The concurrence highlights similar First Amendment interests. *Ante*, at 780. I, too, value this role that the First Amendment plays—in an appropriate case. But here, the majority enunciates a general test that reaches far beyond the area where this Court has examined laws closely in the service of those goals. And in suggesting that heightened scrutiny applies to much economic and social legislation, the majority pays those First Amendment goals a serious disservice through dilution. Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.

B

Still, what about this specific case? The disclosure at issue here concerns speech related to abortion. It involves health, differing moral values, and differing points of view. Thus, rather than set forth broad, new, First Amendment principles, I believe that we should focus more directly upon precedent more closely related to the case at hand. This Court has more than once considered disclosure laws relating to reproductive health. Though those rules or holdings

have changed over time, they should govern our disposition of this case.

I begin with *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983). In that case the Court considered a city ordinance requiring a doctor to tell a woman contemplating an abortion about the

> "status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth[, and] 'the particular risks associated with her own pregnancy and the abortion technique to be employed.'" *Id.*, at 442 (quoting Akron Codified Ordinances § 1870.06(C) (1978)).

The ordinance further required a doctor to tell such a woman that "'the unborn child is a human life from the moment of conception.'" *Akron*, *supra*, at 444 (quoting Akron Codified Ordinances § 1870.06(B)(3)).

The plaintiffs claimed that this ordinance violated a woman's constitutional right to obtain an abortion. And this Court agreed. The Court stated that laws providing for a woman's "informed consent" to an abortion were normally valid, for they helped to protect a woman's health. *Akron*, 462 U. S., at 443–444. Still, the Court held that the law at issue went "beyond permissible limits" because "much of the information required [was] designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.*, at 444. In the Court's view, the city had placed unreasonable "'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'" *Id.*, at 445 (quoting *Whalen* v. *Roe*, 429 U. S. 589, 604, n. 33 (1977); alteration in original).

Several years later, in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), the

Court considered a Pennsylvania statute that "prescribe[d] in detail the method for securing 'informed consent'" to an abortion. *Id.*, at 760. The statute required the doctor to tell the patient about health risks associated with abortion, possibly available benefits for prenatal care, childbirth, and neonatal care, and agencies offering alternatives to abortion. *Id.*, at 760–761. In particular it required the doctor to give the patient printed materials that, among other things, said:

> "'"There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion."'" *Id.*, at 761 (quoting 18 Pa. Cons. Stat. § 3208(a)(1) (1982)).

The Court, as in *Akron*, held that the statute's information requirements violated the Constitution. They were designed "'not to inform the woman's consent but rather to persuade her to withhold it altogether.'" *Thornburgh*, *supra*, at 762 (quoting *Akron*, *supra*, at 444). In the Court's view, insistence on telling the patient about the availability of "medical assistance benefits" if she decided against an abortion was a "poorly disguised elemen[t] of discouragement for the abortion decision," and the law was the "antithesis of informed consent." *Thornburgh*, *supra*, at 763–764.

These cases, however, whatever support they may have given to the majority's view, are no longer good law. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, the Court again considered a state law that required doctors to provide information to a woman deciding whether to proceed with an abortion. That law required the doctor to tell the woman about the nature of the abortion procedure, the health risks of abortion and of childbirth, the

"'probable gestational age of the unborn child,'" and the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion). *Id.*, at 881 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (quoting 18 Pa. Cons. Stat. § 3205 (1990)).

This time a joint opinion of the Court, in judging whether the State could impose these informational requirements, asked whether doing so imposed an "undue burden" upon women seeking an abortion. *Casey*, 505 U. S., at 882–883. It held that it did not. *Ibid.* Hence the statute was constitutional. *Id.*, at 874 (plurality opinion). The joint opinion stated that the statutory requirements amounted to "reasonable measure[s] to ensure an informed choice, one which might cause the woman to choose childbirth over abortion." *Id.*, at 883. And it "overruled" portions of the two cases, *Akron* and *Thornburgh*, that might indicate the contrary. 505 U. S., at 882.

In respect to overruling the earlier cases, it wrote:

> "To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled." *Ibid.*

The joint opinion specifically discussed the First Amendment, the constitutional provision now directly before us. It concluded that the statute did not violate the First Amendment. It wrote:

> "All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the

> physician's First Amendment rights not to speak are implicated, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen* v. *Roe*, 429 U. S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Id.*, at 884.

Thus, the Court considered the State's statutory requirements, including the requirement that the doctor must inform his patient about where she could learn how to have the newborn child adopted (if carried to term) and how she could find related financial assistance. *Id.*, at 881. To repeat the point, the Court then held that the State's requirements did *not* violate either the Constitution's protection of free speech or its protection of a woman's right to choose to have an abortion.

C

Taking *Casey* as controlling, the law's demand for evenhandedness requires a different answer than that perhaps suggested by *Akron* and *Thornburgh*. If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context. After all, the rule of law embodies evenhandedness, and "what is sauce for the goose is normally sauce for the gander." *Heffernan* v. *City of Paterson*, 578 U. S. 266, 272 (2016).

1

The majority tries to distinguish *Casey* as concerning a regulation of professional conduct that only incidentally bur-

dened speech. *Ante,* at 769–770. *Casey,* in its view, applies only when obtaining "informed consent" to a medical procedure is directly at issue.

This distinction, however, lacks moral, practical, and legal force. The individuals at issue here are all medical personnel engaging in activities that directly affect a woman's health—not significantly different from the doctors at issue in *Casey.* After all, the statute here applies only to "primary care clinics," which provide "services for the care and treatment of patients for whom the clinic accepts responsibility." Cal. Code Regs., tit. 22, § 75026(a); see Cal. Health & Safety Code Ann. §§ 123471(a), 1204, 1206(h). And the persons responsible for patients at those clinics are all persons "licensed, certified or registered to provide" pregnancy-related medical services. Cal. Code Regs., tit. 22, § 75026(c). The petitioners have not, either here or in the District Court, provided any example of a covered clinic that is not operated by licensed doctors or what the statute specifies are equivalent professionals. See, *e. g.*, App. to Pet. for Cert. 92a (identifying two obstetrician/gynecologists, a radiologist, an anesthesiologist, a certified nurse midwife, a nurse practitioner, 10 nurses, and two registered diagnostic medical sonographers on staff).

The Act requires these medical professionals to disclose information about the possibility of abortion (including potential financial help) that is as likely helpful to granting "informed consent" as is information about the possibility of adoption and childbirth (including potential financial help). That is why I find it impossible to drive any meaningful legal wedge between the law, as interpreted in *Casey*, and the law as it should be applied in this case. If the law in *Casey* regulated speech "only 'as part of the *practice* of medicine,'" *ante,* at 770 (quoting *Casey*, *supra,* at 884), so too here.

The majority contends that the disclosure here is unrelated to a "medical procedure," unlike that in *Casey,* and so the State has no reason to inform a woman about alterna-

tives to childbirth (or, presumably, the health risks of childbirth). *Ante*, at 770. Really? No one doubts that choosing an abortion is a medical procedure that involves certain health risks. See *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 618 (2016) (identifying the mortality rate in Texas as 1 in 120,000 to 144,000 abortions). But the same is true of carrying a child to term and giving birth. That is why prenatal care often involves testing for anemia, infections, measles, chicken pox, genetic disorders, diabetes, pneumonia, urinary tract infections, preeclampsia, and hosts of other medical conditions. Childbirth itself, directly or through pain management, risks harms of various kinds, some connected with caesarean or surgery-related deliveries, some related to more ordinary methods of delivery. Indeed, nationwide "childbirth is 14 times more likely than abortion to result in" the woman's death. *Ibid.* Health considerations do not favor disclosure of alternatives and risks associated with the latter but not those associated with the former.

In any case, informed consent principles apply more broadly than only to discrete "medical procedures." Prescription drug labels warn patients of risks even though taking prescription drugs may not be considered a "medical procedure." 21 CFR § 201.56 (2017). In California, clinics that screen for breast cancer must post a sign in their offices notifying patients that, if they are diagnosed with breast cancer, their doctor must provide "a written summary of alternative efficacious methods of treatment," a notification that does not relate to the *screening* procedure at issue. Cal. Health & Safety Code Ann. § 109277. If even these disclosures fall outside the majority's cramped view of *Casey* and informed consent, it undoubtedly would invalidate the many other disclosures that are routine in the medical context as well. *Supra*, at 782–783.

The majority also finds it "[t]ellin[g]" that general practice clinics—*i. e.*, paid clinics—are not required to provide the licensed notice. *Ante*, at 770. But the lack-of-information

problem that the statute seeks to ameliorate is a problem that the State explains is commonly found among low-income women. See Brief for State Respondents 5–6. That those with low income might lack the time to become fully informed and that this circumstance might prove disproportionately correlated with income is not intuitively surprising. Nor is it surprising that those with low income, whatever they choose in respect to pregnancy, might find information about financial assistance particularly useful. There is "nothing inherently suspect" about this distinction, *McCullen* v. *Coakley*, 573 U. S. 464, 483 (2014), which, is not "based on the content of [the advocacy] each group offers," *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658–659 (1994), but upon the patients the group generally serves and the needs of that population.

2

Separately, finding no First Amendment infirmity in the licensed notice is consistent with earlier Court rulings. For instance, in *Zauderer* we upheld a requirement that attorneys disclose in their advertisements that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful. 471 U. S., at 650. We refused to apply heightened scrutiny, instead asking whether the disclosure requirements were "reasonably related to the State's interest in preventing deception of consumers." *Id.*, at 651.

The majority concludes that *Zauderer* does not apply because the disclosure "in no way relates to the services that licensed clinics provide." *Ante*, at 769. But information about state resources for family planning, prenatal care, and abortion *is* related to the services that licensed clinics provide. These clinics provide counseling about contraception (which is a family planning service), ultrasounds or pregnancy testing (which is prenatal care), or abortion. Cal. Health & Safety Code Ann. §123471(a). The required disclosure is related to the clinic's services because it provides

information about state resources for the very same services. A patient who knows that she can receive free prenatal care from the State may well prefer to forgo the prenatal care offered at one of the clinics here. And for those interested in family planning and abortion services, information about such alternatives is relevant information to patients offered prenatal care, just as *Casey* considered information about adoption to be relevant to the abortion decision.

Regardless, *Zauderer* is not so limited. *Zauderer* turned on the "material differences between disclosure requirements and outright prohibitions on speech." 471 U. S., at 650. A disclosure requirement does not prevent speakers "from conveying information to the public," but "only require[s] them to provide somewhat more information than they might otherwise be inclined to present." *Ibid.* Where a State's requirement to speak "purely factual and uncontroversial information" does not attempt "to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,' " it does not warrant heightened scrutiny. *Id.*, at 651 (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943)).

In *Zauderer*, the Court emphasized the reason that the First Amendment protects commercial speech at all: "the value to consumers of the information such speech provides." 471 U. S., at 651. For that reason, a professional's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Ibid.* But this rationale is not in any way tied to advertisements about a professional's own services. For instance, it applies equally to a law that requires doctors, when discharging a child under eight years of age, to "provide to and discuss with the parents . . . information on the current law requiring child passenger restraint systems, safety belts, and the transportation of children in rear seats." Cal. Veh. Code Ann. § 27363.5(a). Even though child seatbelt laws do not

directly relate to the doctor's own services, telling parents about such laws does nothing to undermine the flow of factual information. Whether the context is advertising the professional's own services or other commercial speech, a doctor's First Amendment interest in not providing factual information to patients is the same: minimal, because his professional speech is protected precisely because of its informational value to patients. There is no reason to subject such laws to heightened scrutiny.

Accordingly, the majority's reliance on cases that prohibit rather than require speech is misplaced. *Ante*, at 771–773. I agree that "'in the fields of medicine and public heath, . . . information can save lives,'" but the licensed disclosure *serves* that informational interest by requiring clinics to notify patients of the availability of state resources for family planning services, prenatal care, and abortion, which—unlike the majority's examples of normative statements, *ante*, at 772—is truthful and nonmisleading information. Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other. Similarly, the majority highlights an interest that often underlies our decisions in respect to speech prohibitions—the marketplace of ideas. But that marketplace is fostered, not hindered, by providing information to patients to enable them to make fully informed medical decisions in respect to their pregnancies.

Of course, one might take the majority's decision to mean that speech about abortion is special, that it involves in this case not only professional medical matters, but also views based on deeply held religious and moral beliefs about the nature of the practice. To that extent, arguably, the speech here is different from that at issue in *Zauderer*. But assum-

ing that is so, the law's insistence upon treating like cases alike should lead us to reject the petitioners' arguments that I have discussed. This insistence, the need for evenhandedness, should prove particularly weighty in a case involving abortion rights. That is because Americans hold strong, and differing, views about the matter. Some Americans believe that abortion involves the death of a live and innocent human being. Others believe that the ability to choose an abortion is "central to personal dignity and autonomy," *Casey*, 505 U. S., at 851, and note that the failure to allow women to choose an abortion involves the deaths of innocent women. We have previously noted that we cannot try to adjudicate who is right and who is wrong in this moral debate. But we can do our best to interpret American constitutional law so that it applies fairly within a Nation whose citizens strongly hold these different points of view. That is one reason why it is particularly important to interpret the First Amendment so that it applies evenhandedly as between those who disagree so strongly. For this reason too a Constitution that allows States to insist that medical providers tell women about the possibility of adoption should also allow States similarly to insist that medical providers tell women about the possibility of abortion.

D

It is particularly unfortunate that the majority, through application of so broad and obscure a standard, see *supra*, at 781–786, declines to reach remaining arguments that the Act discriminates on the basis of viewpoint. *Ante*, at 765, n. 2. The petitioners argue that it unconstitutionally discriminates on the basis of viewpoint because it primarily covers facilities with supporters, organizers, and employees who are likely to hold strong pro-life views. They contend that the statute does not cover facilities likely to hold neutral or prochoice views, because it exempts facilities that enroll patients in publicly funded programs that include abortion. In doing so, they say, the statute unnecessarily imposes a dis-

proportionate burden upon facilities with pro-life views, the very facilities most likely to find the statute's references to abortion morally abhorrent. Brief for Petitioners 31–37.

The problem with this argument lies in the record. Numerous *amicus* briefs advance the argument. See, *e. g.*, Brief for Scharpen Foundation, Inc., et al. as *Amici Curiae* 6–10; Brief for American Center for Law & Justice et al. as *Amici Curiae* 7–13. Some add that women who use facilities that are exempt from the statute's requirements (because they enroll patients in two California state-run medical programs that provide abortions) may still need the information provided by the disclosure, Brief for CATO Institute as *Amicus Curiae* 15, a point the majority adopts in concluding that the Act is underinclusive, *ante*, at 774–775. But the key question is whether these exempt clinics are significantly more likely than are the pro-life clinics to tell or to have told their pregnant patients about the existence of these programs—in the absence of any statutory compulsion. If so, it may make sense—in terms of the statute's informational objective—to exempt them, namely, if there is no need to cover them. See FACT Act § 1(d) (suggesting in general terms that this is so). But, if there are not good reasons to exempt these clinics from coverage, *i. e.*, if, for example, they too frequently do not tell their patients about the availability of abortion services, the petitioners' claim of viewpoint discrimination becomes much stronger.

The petitioners, however, did not develop this point in the record below. They simply stated in their complaint that the Act exempts "facilities which provide abortion services, freeing them from the Act's disclosure requirements, while leaving pro-life facilities subject to them." App. to Pet. for Cert. 104a. And in the District Court they relied solely on the allegations of their complaint, provided no supporting declarations, and contended that discovery was unnecessary. *Id.*, at 47a, 50a, 68a. The District Court concluded that the reason for the Act's exemptions was that those clinics "pro-

vide the entire spectrum of services required of the notice," and that absent discovery, "there is no evidence to suggest the Act burdens only" pro-life conduct. *Id.*, at 68a. Similarly, the petitioners pressed the claim in the Court of Appeals. *Id.*, at 20a–22a. But they did not supplement the record. Consequently, that court reached the same conclusion. Given the absence of evidence in the record before the lower courts, the "viewpoint discrimination" claim could not justify the issuance of a preliminary injunction.

II

The second statutory provision covers pregnancy-related facilities that provide women with certain medical-type services (such as obstetric ultrasounds or sonograms, pregnancy diagnosis, counseling about pregnancy options, or prenatal care), are not licensed as medical facilities by the State, and do not have a licensed medical provider on site. Cal. Health & Safety Code Ann. § 123471(b)(1). The statute says that such a facility must disclose that it is not "licensed as a medical facility." § 123472(b). And it must make this disclosure in a posted notice and in advertising. *Ibid.*

The majority does not question that the State's interest (ensuring that "'pregnant women in California know when they are getting medical care from licensed professionals'") is the type of informational interest that *Zauderer* encompasses. *Ante*, at 765, 776. Nor could it. In *Riley*, 487 U. S. 781, the Court noted that the First Amendment would permit a requirement for "professional fundraisers to disclose their professional status"—nearly identical to the unlicensed disclosure at issue here. *Id.*, at 799, and n. 11; see also *id.*, at 804 (Scalia, J., concurring in part and concurring in judgment) (noting that this requirement was not aimed at combating deception). Such informational interests have long justified regulations in the medical context. See, *e. g.*, *Dent*, 129 U. S., at 122 (upholding medical licensing requirements that "tend to secure [a State's citizens] against the conse-

quences of ignorance and incapacity, as well as of deception and fraud"); *Semler*, 294 U. S., at 611 (upholding state dentistry regulation that "afford[ed] protection against ignorance, incapacity and imposition").

Nevertheless, the majority concludes that the State's interest is "'purely hypothetical'" because unlicensed clinics provide innocuous services that do not require a medical license. *Ante*, at 776. To do so, it applies a searching standard of review based on our precedents that deal with speech *restrictions*, not *disclosures*. *Ibid.* (citing, *e. g.*, *In re R. M. J.*, 455 U. S., at 203; *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772, n. 24 (1976); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 384 (1977); and *Zauderer*, 471 U. S., at 649 (portion of opinion considering speech restrictions, not disclosures)). This approach is incompatible with *Zauderer*. See *Zauderer*, *supra*, at 651 (upholding attorney disclosure requirements where "reasonably related to the State's interest"); *Milavetz*, 559 U. S., at 250–253 (same).

There is no basis for finding the State's interest "hypothetical." The legislature heard that information-related delays in qualified healthcare negatively affect women seeking to terminate their pregnancies as well as women carrying their pregnancies to term, with delays in qualified prenatal care causing life-long health problems for infants. Reproductive FACT Act: Hearing on Assembly B. 775 before the Senate Health Committee, 2015 Cal. Leg. Sess. Even without such testimony, it is "self-evident" that patients might think they are receiving qualified medical care when they enter facilities that collect health information, perform obstetric ultrasounds or sonograms, diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care. *Milavetz*, *supra*, at 251. The State's conclusion to that effect is certainly reasonable.

The majority also suggests that the Act applies too broadly, namely, to all unlicensed facilities "no matter what

the facilities say on site or in their advertisements." *Ante*, at 777. But the Court has long held that a law is not unreasonable merely because it is overinclusive. For instance, in *Semler* the Court upheld as reasonable a state law that prohibited licensed dentists from advertising that their skills were superior to those of other dentists. 294 U. S., at 609. A dentist complained that he was, in fact, better than other dentists. *Id.*, at 610. Yet the Court held that "[i]n framing its policy, the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners." *Id.*, at 612. To the contrary, "[t]he legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement." *Id.*, at 613.

Relatedly, the majority suggests that the Act is suspect because it covers some speakers but not others. *Ante*, at 777–778. I agree that a law's exemptions can reveal viewpoint discrimination (although the majority does not reach this point). "'[A]n exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people."'" *McCullen*, 573 U. S., at 483 (quoting *City of Ladue* v. *Gilleo*, 512 U. S. 43, 51 (1994)). Such speaker-based laws warrant heightened scrutiny "when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broadcasting System, Inc.*, 512 U. S., at 658. Accordingly, where a law's exemptions "facilitate speech on only one side of the abortion debate," there is a "clear form of viewpoint discrimination." *McCullen*, *supra*, at 485.

There is no cause for such concern here. The Act does not, on its face, distinguish between facilities that favor

pro-life and those that favor pro-choice points of view. Nor is there any convincing evidence before us or in the courts below that discrimination was the purpose or the effect of the statute. Notably, California does not single out pregnancy-related facilities for this type of disclosure requirement. See, *e. g.*, Cal. Bus. & Prof. Code Ann. § 2053.6 (West 2012) (unlicensed providers of alternative health services must disclose that "he or she is not a licensed physician" and "the services to be provided are not licensed by the state"). And it is unremarkable that the State excluded the provision of family planning and contraceptive services as triggering conditions. *Ante*, at 777. After all, the State was seeking to ensure that "pregnant women in California know when they are getting medical care from licensed professionals," and pregnant women generally do not need contraceptive services.

Finally, the majority concludes that the Act is overly burdensome. *Ante*, at 778. I agree that "unduly burdensome disclosure requirements might offend the First Amendment." *Zauderer*, *supra*, at 651. But these and similar claims are claims that the statute could be applied unconstitutionally, not that it is unconstitutional on its face. Compare *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 14 (1988) (a facial overbreadth challenge must show "from actual fact" that a "substantial number of instances exist in which the Law cannot be applied constitutionally"), with *Chicago* v. *Morales*, 527 U. S. 41, 74 (1999) (Scalia, J., dissenting) (an as-applied challenge asks whether "the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case"). And it will be open to the petitioners to make these claims if and when the State threatens to enforce the statute in this way. But facial relief is inappropriate here, where the petitioners "fail" even "to describe [these] instances of arguable overbreadth of the contested law," *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449–450, n. 6 (2008), where

"[n]o record was made in this respect," and where the petitioners thus have not shown "from actual fact" that a "substantial number of instances exist in which the Law cannot be applied constitutionally," *New York State Club Assn.*, *supra*, at 14.

For instance, the majority highlights that the statute requires facilities to write their "medical license" disclaimers in 13 languages. *Ante,* at 778. As I understand the Act, it would require disclosure in no more than two languages—English and Spanish—in the vast majority of California's 58 counties. The exception is Los Angeles County, where, given the large number of different-language speaking groups, expression in many languages may prove necessary to communicate the message to those whom that message will help. Whether the requirement of 13 different languages goes too far and is unnecessarily burdensome in light of the need to secure the statutory objectives is a matter that concerns Los Angeles County alone, and it is a proper subject for a Los Angeles-based as-applied challenge in light of whatever facts a plaintiff finds relevant. At most, such facts might show a need for fewer languages, not invalidation of the statute.

* * *

For these reasons I would not hold the California statute unconstitutional on its face, I would not require the District Court to issue a preliminary injunction forbidding its enforcement, and I respectfully dissent from the majority's contrary conclusions.

Syllabus

FLORIDA *v.* GEORGIA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 142, Orig. Argued January 8, 2018—Decided June 27, 2018

This original action concerns the proper apportionment of water from an interstate river basin. Three rivers form the heart of the Basin. The Chattahoochee and Flint Rivers begin near Atlanta, flow south through Georgia, and ultimately converge at Lake Seminole, just north of Florida, where the Apalachicola River begins and flows 106 miles south into the Gulf of Mexico. In 2013, Florida, the downstream State, sued Georgia, the upstream State, asking the Court to issue a decree equitably apportioning the Basin's waters. The Court agreed to exercise its original jurisdiction and appointed a Special Master. The United States declined to waive its sovereign immunity from suit in the case. After conducting lengthy evidentiary proceedings, the Master submitted a Report recommending that the Court dismiss Florida's complaint. That recommendation, the parties agree, turns on a single issue—namely, whether Florida met its initial burden in respect to redressability. The Master concluded that Florida failed to make the requisite showing because it did not present clear and convincing evidence that its injuries could be redressed by a decree capping Georgia's upstream water consumption if the decree does not also bind the Army Corps of Engineers. Florida has filed exceptions to the Master's Report.

Held:

1. The Special Master applied too strict a standard in concluding that Florida failed to meet its initial burden of demonstrating that the Court can eventually fashion an effective equitable decree. Pp. 814–823.

(a) Where, as here, the Court is asked to resolve an interstate water dispute raising questions beyond the interpretation of specific language of an interstate compact, the doctrine of equitable apportionment applies. In this realm, several related but more specific sets of principles guide the Court's review. First, both Georgia and Florida possess "an equal right to make a *reasonable use* of the waters of" the Flint River. *United States* v. *Willow River Power Co.*, 324 U. S. 499, 505. Second, when confronted with competing claims to interstate water, the Court's "effort always is to secure an equitable apportionment without quibbling over formulas." *New Jersey* v. *New York*, 283 U. S. 336, 343. Third, in light of the sovereign status and "equal dignity" of States, a complaining State's burden is "much greater" than the burden ordinarily shouldered by a private party seeking an injunction. *Connecticut* v.

Massachusetts, 282 U. S. 660, 669. Among other things, it must demonstrate, by "'clear and convincing evidence,'" that it has suffered a "'threatened invasion of rights'" that is "'of serious magnitude.'" *Washington* v. *Oregon*, 297 U. S. 517, 522. And to the extent the Court has addressed the "initial burden" a State bears in respect to redressability, the Court has said that "it should be clear that [the complaining] State has not merely some technical right, but also a right with a corresponding benefit" as a precondition to any equitable apportionment. *Kansas* v. *Colorado*, 206 U. S. 46, 102, 109. An effort to shape a decree cannot be "a vain thing." *Foster* v. *Mansfield, C. & L. M. R. Co.*, 146 U. S. 88, 101. Finally, because equitable apportionment is "'flexible,'" not "formulaic," this Court will seek to "arrive at a '"just and equitable" apportionment' of an interstate stream" by "consider[ing] '*all relevant factors*,'" *South Carolina* v. *North Carolina*, 558 U. S. 256, 271, including, *inter alia*, "'physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former,'" *Colorado* v. *New Mexico*, 459 U. S. 176, 183. Because all relevant factors must be weighed, extensive and specific factual findings are essential for the Court to properly apply the doctrine of equitable apportionment. See *Nebraska* v. *Wyoming*, 325 U. S. 589, 618. Pp. 814–819.

(b) The Special Master applied too strict a standard when he determined that the Court would not be able to fashion an appropriate equitable decree. The Master referred to this as a "threshold" showing. But it is "threshold" only in the sense that the Master has not yet determined key remedy-related matters, including the approximate amount of water that must flow into the Apalachicola River in order for Florida to receive a significant benefit from a cap on Georgia's use of Flint River waters. Unless and until the Special Master makes the findings of fact necessary to determine the nature and scope of likely harm caused by the absence of water and the amount of additional water necessary to ameliorate that harm significantly, the complaining State should not have to prove with specificity the details of an eventually workable decree by "clear and convincing" evidence. Rather, the complaining State should have to show that, applying the principles of "flexibility" and "approximation," it is likely to prove possible to fashion such a decree. To require "clear and convincing evidence" about the workability of a decree before the Court or a Special Master has a view about likely harms and likely amelioration is, at least in this case, to put the cart before the horse. Pp. 820–823.

Syllabus

2. The Court reserves judgment as to the ultimate disposition of this case, addressing here only the narrow "threshold" question the Master addressed below—namely, whether Florida has shown that its "injur[ies can] effectively be redressed by limiting Georgia's consumptive use of water from the Basin without a decree binding the Corps." Report 30–31. Florida has made a legally sufficient showing as to the possibility of fashioning an effective remedial decree. Pp. 823–841.

(a) The Report makes several key assumptions. First, the Master assumed Florida has suffered harm as a result of decreased water flow into the Apalachicola River. Second, the Master further assumed that Florida has shown that Georgia, contrary to equitable principles, has taken too much water from the Flint River. Third, the Master assumed that Georgia's inequitable use of the water injured Florida. At this stage of the proceeding and in light of these assumptions, Florida made a sufficient showing that the extra water that would result from its proposed consumption cap would both lead to increased streamflow in Florida's Apalachicola River and significantly redress the economic and ecological harm that Florida has alleged. In addition, the United States has made clear that the Corps will cooperate in helping to implement any determinations and obligations the Court sets forth in a final decree in this case. While the Corps must take account of a variety of circumstances and statutory obligations when it allocates water, it cannot now be said that an effort to shape a decree here will prove "a vain thing," *Foster*, *supra*, at 101, since the record indicates that, if necessary and with the help of the United States, the Special Master, and the parties, the Court should be able to fashion a decree. Pp. 824–839.

(b) Further findings, however, are needed on all of these evidentiary issues. Florida will be entitled to a decree only if it is shown that "the benefits of the [apportionment] substantially outweigh the harm that might result." *Colorado*, 459 U. S., at 187. On remand, before fashioning a remedy, the Special Master must address several evidentiary questions that are assumed or found plausible here. Pp. 839–841.

Case remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, KAGAN, and GORSUCH, JJ., joined, *post*, p. 843.

Gregory G. Garre argued the cause for plaintiff. With him on the briefs were *Pamela Jo Bondi*, Attorney General of Florida, *Amit Agarwal*, Solicitor General, *Jonathan L.*

Williams, Deputy Solicitor General, *Jonathan Glogau*, Special Counsel, *Philip J. Perry*, *Jamie L. Wine*, *Claudia M. O'Brien*, *Abid R. Qureshi*, *Benjamin W. Snyder*, *Frederick L. Aschauer*, *Paul N. Singarella*, *Christopher M. Kise*, *James A. McKee*, and *Matthew Z. Leopold*.

Craig S. Primis argued the cause for defendant. With him on the brief were *Christopher M. Carr*, Attorney General of Georgia, *Sarah Hawkins Warren*, Solicitor General, *Christopher Landau*, *K. Winn Allen*, *Devora W. Allon*, and *Andrew Pruitt*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* supporting overruling plaintiff's Exception 2C. With him on the brief were *Acting Solicitor General Walls*, *Deputy Assistant Attorney General Grant*, *Ann O'Connell*, and *Michael T. Gray*.*

JUSTICE BREYER delivered the opinion of the Court.

This case concerns the proper apportionment of the water of an interstate river basin. Florida, a downstream State, brought this lawsuit against Georgia, an upstream State, claiming that Georgia has denied it an equitable share of the basin's waters. We found that the dispute lies within our original jurisdiction, and we appointed a Special Master to take evidence and make recommendations.

After lengthy evidentiary proceedings, the Special Master submitted a report in which he recommends that the Court deny Florida's request for relief on the ground that "Florida has not proven by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters of the Basin." Report of Special Master 3. The

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*Briefs of *amici curiae* were filed for the State of Colorado by *Cynthia H. Coffman*, Attorney General of Colorado, *Frederick R. Yarger*, Solicitor General, *Glenn E. Roper*, Deputy Solicitor General, *Karen M. Kwon*, First Assistant Attorney General, and *Scott Steinbrecher*, Assistant Solicitor General; and for the Atlanta Regional Commission et al. by *Chilton Davis Varner*, *Patricia T. Barmeyer*, and *Lewis B. Jones*.

case is before us on Florida's exceptions to the Special Master's Report.

In light of our examination of the Report and relevant portions of the record, we remand the case to the Master for further findings and such further proceedings as the Master believes helpful.

I

A

This original action arises out of a dispute over the division of water from an interstate river basin known as the Apalachicola-Chattahoochee-Flint River Basin. The Basin drains an area of more than 20,000 square miles across the southeastern United States. Three interstate rivers form the heart of the Basin and are central to this case. They are the Chattahoochee River, the Flint River, and the Apalachicola River. It is easiest to think of these three rivers as forming the capital letter "Y," with each branch starting at a different point in northeastern Georgia near Atlanta and the stem running through the Florida Panhandle and emptying into Apalachicola Bay in the Gulf of Mexico. See Appendix, *infra*.

The Chattahoochee River is the western branch of this Y-shaped river system. It runs from the foothills of Georgia's Blue Ridge Mountains, through most of Georgia, down to Lake Seminole, just north of Florida. The United States Army Corps of Engineers operates several dams and reservoirs along the Chattahoochee where it both stores water and controls the amount of water that flows downstream to Florida in accordance with the terms of its recently revised Master Water Control Manual (Master Manual). As we shall discuss in more detail, Part IV, *infra*, the Corps' operations are important to the resolution of this case.

The Flint River, the eastern branch of the "Y," runs from just south of Atlanta down to the same lake, namely, Lake Seminole. Unlike the Chattahoochee, there are no dams

along the Flint River; it flows unimpeded through southern Georgia's farmland, where the greatest share of the Basin's water is consumed by agricultural irrigation.

After water from the Flint and Chattahoochee Rivers mixes at Lake Seminole, the mixed water (now forming the stem of the Y) continues its southward journey. At the southern end of Lake Seminole, it flows through the Woodruff Dam—a dam also controlled by the Corps. The mixed waters then change their name. They are called the Apalachicola River, and under that name they flow 106 miles through the Florida Panhandle and finally empty into the Gulf of Mexico. There, the fresh water of the Apalachicola River mixes with the Gulf's saltwater, forming Apalachicola Bay, which the United Nations, the United States, and the State of Florida have all recognized as one of the Northern Hemisphere's most productive estuaries. In total, the Apalachicola River accounts for 35% of the fresh water that flows along Florida's western coast. See Joint Exh. 168, p. 39.

B

Florida and Georgia have long disputed the apportionment of the Basin's waters. Florida contends that Georgia is consuming more than its equitable share of Flint River water. It adds that, were Georgia to consume less water from the Flint River, more water would flow into Lake Seminole, pass through the Woodruff Dam and subsequently flow down the Apalachicola River (the Y's stem) and into Apalachicola Bay. The additional water that would result from a cap on Georgia's consumption would, Florida argues, help (among other things) to recover and maintain its oyster industry, which collapsed following a drought in 2012. Georgia believes that it should not have to cut back on its Flint River water consumption because, in its view, it consumes no more than its equitable share.

"This Court has recognized for more than a century its inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams

between States." *Kansas* v. *Nebraska*, 574 U. S. 445, 454 (2015). But we have long noted our "preference" that States "settle their controversies by 'mutual accommodation and agreement.'" *Arizona* v. *California*, 373 U. S. 546, 564 (1963) (quoting *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943) (*Kansas II*)); see also *id.*, at 392 ("[Interstate] controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution"); *Kansas* v. *Nebraska*, *supra*, at 449 (describing codification of Republican River Compact); *Montana* v. *Wyoming*, 563 U. S. 368, 372 (2011) (interpreting Yellowstone River Compact); *Kansas* v. *Colorado*, 543 U. S. 86 (2004) (resolving dispute over Arkansas River Compact).

We recognize that Florida and Georgia (sometimes with the help of the Federal Government) have long tried to do so. But so far they have failed.

In 1992, for example, the States signed a memorandum of agreement in which they "committed to a process for cooperative management and development" of the three-river Basin and agreed to "participate fully as equal partners" in a "comprehensive, basin-wide study" of its waters. Joint Exh. 004, at 1. Five years later, the States signed—and Congress approved—a compact, the Apalachicola-Chattahoochee-Flint River Basin Compact, in which they agreed

> "to develop an allocation formula for equitably apportioning the surface waters of the ACF Basin among the states while protecting the water quality, ecology and biodiversity of the ACF." 111 Stat. 2222–2223.

But five years of negotiations under the Compact proved fruitless, and in 2003, the Compact expired.

More than a decade later, in 2014, Congress again recognized the need for an equitable apportionment of Basin waters. See Water Resources Reform and Development Act of 2014, Pub. L. 113–121, § 1051(a), 128 Stat. 1259. But once again, despite drought, expanding city populations, and a dramatic increase in acreage devoted to agricultural irriga-

tion, no agreement has been reached. The "last effort to reach an amicable resolution of this complex equitable apportionment proceeding" in 2017 was "unsuccessful." Report 24. The States instead have come to this Court.

II

A

In 2013, Florida, the downstream State, sought to sue Georgia, the upstream State, asking us to exercise our "original and exclusive jurisdiction" and issue a decree equitably apportioning the waters of the Basin. 28 U. S. C. § 1251(a); see U. S. Const., Art. III, § 2; see also this Court's Rule 17. In its complaint, Florida alleged that Georgia's consumption of Flint River water "reduce[s] the amount of water flowing to the Apalachicola River at all times," and noted that "the effects are especially apparent during the low flow summer and fall periods." Complaint 9, ¶21; see also *id.*, at 17, ¶49 (complaining that the impact of Georgia's water consumption "is significant, particularly during dry periods"). In addition, Florida alleged that "[a]s Georgia's upstream storage and consumption grows over time, low flow events will become more frequent and increase in severity, diminishing the likelihood that key species will survive and precluding any chance of recovery over the long term." *Id.*, at 20, ¶59. To remedy these harms, Florida seeks a cap on Georgia's consumption of water from the Flint River. *Id.*, at 21.

Georgia filed a brief in opposition, arguing that Florida failed to allege an injury sufficient to warrant this Court's exercise of original jurisdiction. See State of Georgia's Opposition to Florida's Motion for Leave To File a Complaint 31 ("Florida has not pleaded facts plausibly suggesting that it will be able to establish clear and convincing evidence that it suffers substantial injury as a result of Georgia's consumption of water"). At our request, the United States filed a brief in which it told us that "Florida has pleaded an interstate water dispute of sufficient importance to warrant this

Court's exercise of its original jurisdiction, and no other judicial forum is suitable for resolving the overall controversy." Brief for United States as *Amicus Curiae* 12 (Sept. 18, 2014). But, the United States also warned that "[p]ractical considerations . . . weigh against the Court's resolution of Florida's claims before the Corps has completed its process of updating the Master Manual for the federal projects in the ACF Basin." *Ibid.* It suggested that the Court could "grant Florida leave to file, but stay or provide for tailoring of any further proceedings until the Corps has issued the revised Master Manual" in March 2017, *id.*, at 13 (which Florida has now done, see Brief for United States as *Amicus Curiae* 3, n. 1, 10–12).

We subsequently agreed to exercise our original jurisdiction and appointed a Special Master "with authority to . . . direct subsequent proceedings," "take such evidence as may be introduced and such as he may deem it necessary to call for," and "submit Reports as he may deem appropriate." 574 U. S. 1021 (2014).

At the outset, the United States declined to waive its sovereign immunity from suit in this case. And shortly thereafter, Georgia asked the Special Master to dismiss the case on the grounds that the United States was a necessary party but could not be forced to intervene. See Fed. Rule Civ. Proc. 19(b). The Master concluded that the motion to dismiss Florida's complaint should be denied. The Master reasoned that a decree binding the Corps might not prove necessary. Order on State of Georgia's Motion To Dismiss 14–15 (June 19, 2015). Rather, the Master concluded that "the few facts before me at this stage of the proceeding support the conclusion that" a cap on Georgia's Flint River water consumption could, at least in principle, redress Florida's injuries either by increasing the amount of water that flows into Florida's Apalachicola River or by "render[ing] periods of reduced flow releases [into the Apalachicola River] fewer and further between because of the increased reser-

voir levels that would result from Georgia's reduced consumption." *Id.*, at 14, and n. 5. The Special Master pointed out that Florida would have to show that "a consumption cap is justified and will afford adequate relief." *Id.*, at 13.

B

The Master then held lengthy discovery and evidentiary proceedings. See Brief for Georgia 11; *post*, at 864 (THOMAS, J., dissenting) ("During their 18 months of discovery, the parties produced 7.2 million pages of documents"). Ultimately, the Master submitted a 70-page Report to this Court in February 2017. He recommended that the Court dismiss Florida's complaint. In particular, despite the very large factual record amassed and "the extensive testimony bearing on numerous issues," the Special Master stated:

> "I have concluded that there is a *single*, discrete issue that resolves this case: *even assuming* that Florida has sustained injury as a result of unreasonable upstream water use by Georgia, can Florida's injury effectively be redressed by limiting Georgia's consumptive use of water from the Basin without a decree binding the [Army] Corps [of Engineers]? I conclude that Florida has not proven that its injury can be remedied without such a decree. The evidence does not provide sufficient certainty that an effective remedy is available without the presence of the Corps as a party in this case." Report 30–31 (emphasis added).

For present purposes, we note that Florida and Georgia agree that the Master's recommendation "turned on a 'single, discrete issue'—whether Florida had shown that a cap on Georgia's consumption would redress its injury if the decree did not bind the Corps as well." Florida Brief in Support of Exceptions 23–24; see also Georgia's Reply to Florida's Exceptions 23 ("The Special Master reserved ruling on any issue other than effective redress"); Brief for United States as *Amicus Curiae* 19–20 (Aug. 7, 2017) (same).

In reviewing this determination, we do not agree with the dissent's view that the Master applied the "ordinary balance-of-harms test" that our equitable apportionment cases require. *Post*, at 855 (opinion of THOMAS, J.); see also Part III–A, *infra* (describing equitable apportionment doctrine). As we shall explain, the dissent's assertion that "the balance of harms cannot tip in Florida's favor" is, at best, premature. *Post*, at 877. That judgment may eventually prove right or it may prove wrong. Here, as we just said, we consider only the "single" and "threshold" question of "redressability" upon which the Master rested his conclusion and which the parties have now argued here. In determining precisely what we now review, we rely upon (and do not go beyond) the Report's specific and key statements, which include the following:

- "*As a threshold matter*, equitable apportionment is only available to a state that has suffered 'real and substantial injury' as a result of proposed or actual upstream water use" and "*the injury must be redressable by the Court.*" Report 24 (emphasis added).
- "Florida points to real harm and, at the very least, likely misuse of resources by Georgia. There is little question that Florida has suffered harm from decreased flows in the [Apalachicola] River," including "an unprecedented collapse of its oyster fisheries in 2012." *Id.*, at 31.
- "Much more could be said and would need to be said on these [and other] issues . . . ." *Id.*, at 34.
- "I need only address the *narrow question* of which party bears the burden of proving injury and *redressability.*" *Id.*, at 28–29 (emphasis added).
- "Florida bears the burden to prove that the proposed remedy will provide redress for Florida's injury." *Id.*, at 30.
- "Florida has not proven by clear and convincing evidence that *any additional streamflow* in the Flint River or

in the Chattahoochee River would be released from Jim Woodruff Dam into the Apalachicola River *at a time that would provide a material benefit to Florida (i. e., during dry periods)*, thereby alleviating Florida's injury." *Id.*, at 47 (emphasis added).

- "Florida has provided no evidence that a decree in this case could provide an effective remedy during normal (*i. e.*, non-drought) periods." *Id.*, at 68.
- "[T]he Corps can *likely* offset increased streamflow in the Flint River by storing additional water in its reservoirs along the Chattahoochee River during dry periods [and so] . . . [t]here is no *guarantee* that the Corps will exercise its discretion to release or hold back water at any particular time." *Id.*, at 69 (emphasis added).
- "[W]ithout the Corps as a party, the Court cannot order the Corps to take any particular action." *Id.*, at 69–70.

C

Florida has filed exceptions to the Special Master's Report. Florida first challenges the legal standard the Master applied in resolving what the Master called the "threshold" question whether Florida had "proven . . . that its injury can be redressed by an order equitably apportioning the waters of the Basin." *Id.*, at 24, 3. The Master wrote that Florida must meet a "clear and convincing evidence" evidentiary burden. *Id.*, at 3. Second, Florida argues that, in any event, its showing in respect to redressability was sufficient. We consider each of these exceptions in turn.

III

A

We note at the outset that our role in resolving disputes between sovereign States under our original jurisdiction "significantly differs from the one the Court undertakes in suits between private parties." *Kansas* v. *Nebraska*, 574 U. S., at 453 (internal quotation marks and alterations omit-

ted). "In this singular sphere," we have observed, "'the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.'" *Id.*, at 454 (quoting *Kentucky* v. *Dennison*, 24 How. 66, 98 (1861)). We must approach interstate disputes "in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone." *Virginia* v. *West Virginia*, 220 U. S. 1, 27 (1911) (Holmes, J.).

Where, as here, the Court is asked to resolve an interstate water dispute raising questions beyond the interpretation of specific language of an interstate compact, the doctrine of equitable apportionment governs our inquiry. See *Colorado* v. *New Mexico*, 459 U. S. 176, 183 (1982) (*Colorado I*); *Virginia* v. *Maryland*, 540 U. S. 56, 74, n. 9 (2003) ("Federal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river"). In this realm, we have kept in mind several related but more specific sets of principles.

First, as the Special Master pointed out, "the relevant guiding principle in this case" is a simple one. Report 26–27. Given the laws of the States, both Georgia and Florida possess "'an equal right to make a *reasonable use* of the waters of the stream'"—which, in this case, is the Flint River. *Id.*, at 26 (quoting *United States* v. *Willow River Power Co.*, 324 U. S. 499, 505 (1945)); see also *Colorado I*, *supra*, at 184 ("Our prior cases clearly establish that equitable apportionment will only protect those rights to water that are 'reasonably required and applied.' . . . [W]asteful or inefficient uses will not be protected (quoting *Wyoming* v. *Colorado*, 259 U. S. 419, 484 (1922))); *Idaho ex rel. Evans* v. *Oregon*, 462 U. S. 1017, 1025 (1983) (*Idaho II*) ("States have

an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States"); *Nebraska* v. *Wyoming*, 325 U. S. 589, 618 (1945); *Kansas II*, 320 U. S., at 394; *Washington* v. *Oregon*, 297 U. S. 517, 522, 527–528 (1936); *New Jersey* v. *New York*, 283 U. S. 336, 342–343 (1931); *North Dakota* v. *Minnesota*, 263 U. S. 365, 372 (1923) (reaffirming that an upstream State may not "burden his lower neighbor with more than is reasonable"); *Kansas* v. *Colorado*, 206 U. S. 46, 102 (1907) (*Kansas I*); *Tyler* v. *Wilkinson*, 24 F. Cas. 472, 474 (No. 14,312) (CC RI 1827) (Story, J.) (setting forth the principle of "reasonable use").

Second, our prior decisions emphasize that, when we are confronted with competing claims to interstate water, the Court's "effort always is to secure an equitable apportionment without quibbling over formulas." *New Jersey* v. *New York*, 283 U. S., at 343 (Holmes, J.). Where "[b]oth States have real and substantial interests in the River," those interests "must be reconciled as best they may be." *Id.*, at 342–343. We have added that "[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree." *Idaho II*, 462 U. S., at 1026; see also *ibid.* ("Reliance on reasonable predictions of future conditions is necessary"); *Colorado* v. *New Mexico*, 467 U. S. 310, 322 (1984) (*Colorado II*) (requiring "absolute precision in forecasts . . . would be unrealistic"); *North Dakota* v. *Minnesota*, *supra*, at 386 (emphasizing the need to "draw inferences as to the probabilities"); *Kansas I*, *supra*, at 97–98.

Third, in light of the sovereign status and "equal dignity" of States, a complaining State must bear a burden that is "much greater" than the burden ordinarily shouldered by a private party seeking an injunction. *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669 (1931); see *Kansas II*, *supra*, at 392 ("The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have

jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule" (footnote omitted)). In particular, "'[b]efore this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another,'" the complaining State must demonstrate that it has suffered a "'threatened invasion of rights'" that is "'of serious magnitude.'" *Washington* v. *Oregon*, *supra*, at 522 (quoting *New York* v. *New Jersey*, 256 U. S. 296, 309 (1921)). The State must make that showing by "'clear and convincing evidence.'" *Washington* v. *Oregon*, *supra*, at 522 (quoting *New York* v. *New Jersey*, *supra*, at 309); see also *Idaho II*, *supra*, at 1027 ("A State seeking equitable apportionment under our original jurisdiction must prove by clear and convincing evidence some real and substantial injury or damage"); *Colorado I*, *supra*, at 187–188, n. 13 ("[A] state seeking to prevent or enjoin [an upstream] diversion by another State" must "bear the *initial burden* of showing that a diversion by [the upstream State] will cause substantial injury to [the downstream State's] interests" (emphasis added)).

In addition, to the extent the Court has addressed the "initial burden" a State bears in respect to redressability, our prior decisions make clear that, as a general matter, "[t]o constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Massachusetts* v. *Missouri*, 308 U. S. 1, 15 (1939); see also *Wyoming* v. *Oklahoma*, 502 U. S. 437, 447, 452 (1992) (same); *Maryland* v. *Louisiana*, 451 U. S. 725, 735–736 (1981). More specifically, we have said that "it should be

clear that [the complaining] state has not merely some technical right, but also a right with a corresponding benefit" as a precondition to any equitable apportionment. *Kansas I*, *supra*, at 109. An effort to shape a decree cannot be "a vain thing." *Foster* v. *Mansfield, C. & L. M. R. Co.*, 146 U. S. 88, 101 (1892). A State "will not be granted [relief] against something merely feared as liable to occur at some indefinite time in the future," *Connecticut* v. *Massachusetts*, *supra*, at 674, or when there is "no other or better purpose [at stake] than to vindicate a barren right," *Washington* v. *Oregon*, 297 U. S., at 523. Cf. *Idaho II*, *supra*, at 1026 (assessing whether "the formulation of a workable decree is impossible").

Fourth, in an interstate water matter, where a complaining State meets its "initial burden of showing 'real or substantial injury,'" *Colorado II*, *supra*, at 317 (quoting *Colorado I*, 459 U. S., at 188, n. 13), this Court, recalling that equitable apportionment is "'flexible,'" not "formulaic," will seek to "arrive at a '"just and equitable" apportionment' of an interstate stream" by "consider[ing] '*all relevant factors*.'" *South Carolina* v. *North Carolina*, 558 U. S. 256, 271 (2010) (quoting *Colorado I*, 459 U. S., at 183); see also *id.*, at 190 ("Whether [relief] should be permitted will turn on an examination of all factors relevant to a just apportionment"); *Kansas II*, 320 U. S., at 393–394 ("[I]n determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, *all* the factors which create equities in favor of one State or the other *must* be weighed" (emphasis added)). These factors include (but are not limited to):

> "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to down-

stream areas if a limitation is imposed on the former." *Nebraska* v. *Wyoming*, 325 U. S., at 618.

Because "*all the factors* which create equities in favor of one State or the other *must* be weighed," *Kansas II*, *supra*, at 394 (emphasis added), extensive and "*specific* factual findings" are essential for the Court to properly apply the doctrine of equitable apportionment. *Colorado I*, *supra*, at 189–190 (emphasis added). And given the complexity of many water-division cases, the need to secure equitable solutions, the need to respect the sovereign status of the States, and the importance of finding flexible solutions to multifactor problems, we typically appoint a Special Master and benefit from detailed factual findings.

Without the full range of factual findings, we have said, the Court may lack an adequate basis on which to make "the delicate adjustment of interests" that the law requires. *Nebraska* v. *Wyoming*, *supra*, at 618; *Washington* v. *Oregon*, 297 U. S., at 519, 523–524 (emphasizing that "the Master's Report, which finds the facts fully"); see also *Colorado I*, *supra*, at 183, 189–190 (remanding "with instructions to the Special Master to make further findings of fact"); *Colorado II*, 467 U. S., at 312–315 (explaining that because "the Master's report [was] unclear," the Court remanded to the Special Master "for additional factual findings on five specific issues" even after "a lengthy trial at which both States presented extensive evidence" in order "to assist this Court in balancing the benefit and harm"); *Texas* v. *New Mexico*, 462 U. S. 554, 575–576, and n. 21 (1983) ("[W]e return this case to the Special Master for determination of the unresolved issues framed in his pretrial order"); 3 A. Kelley, Water and Water Rights § 45.02(c), p. 45–14 (3d ed. 2018) ("If the factual findings in the report are insufficient for the Court to decide whether the master correctly applied the doctrine of equitable apportionment, the Court may refer the case back to the master for additional findings").

B

Applying the principles just described, we conclude that the Special Master applied too strict a standard when he determined that the Court would not be able to fashion an appropriate equitable decree. See Report 3 ("Florida has not proven by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters of the Basin"); see also *id.*, at 31 ("The evidence does not provide sufficient certainty that an effective remedy is available without the presence of the Corps as a party in this case").

The Special Master referred to the relevant showing that Florida must make in this respect as a "threshold" showing. *Id.*, at 24. We agree that the matter is "threshold" in one particular sense—namely, the sense that the Master has not yet determined several key remedy-related matters, including the approximate amount of water that must flow into the Apalachicola River in order for Florida to receive a significant benefit from a cap on Georgia's use of Flint River waters. See *infra*, at 833. The Master also wrote that Florida had failed to show "with sufficient certainty that the Corps must (or will choose to) operate its projects so as to permit *all* additional flows in the Flint River" or "*the entire marginal increase* in streamflow" to reach Florida "without any substantial delay." Report 48 (emphasis added); see also *id.*, at 24, 70 (similar). He added that there "is no *guarantee*" that the Corps will exercise its relevant discretion. *Id.*, at 69 (emphasis added). And he said that Florida must show the existence of a workable remedy by "clear and convincing evidence." *Id.*, at 3; see also, *e. g.*, *id.*, at 28–29, 47, 51, 69–70.

We believe the Master's standard, as indicated by these statements, is too strict. In our view, unless and until the Special Master makes the findings of fact necessary to determine the nature and scope of likely harm caused by the absence of water and the amount of additional water necessary

to ameliorate that harm significantly, the complaining State should not have to prove with specificity the details of an eventually workable decree by "clear and convincing" evidence. Rather, the complaining State should have to show that, applying the principles of "flexibility" and "approximation" we discussed above, it is likely to prove possible to fashion such a decree. See *supra*, at 818–819.

To require more definite proof at the outset may well (at least on some occasions) make little sense. Suppose, for example, downstream State A claims that upstream State B wastes at least 10,000 cubic feet per second (cfs) of water. And suppose further that no decree could enforce a 10,000 cfs consumption cap but that it may well prove possible to enforce a lesser requirement. If so, we would have to know at least approximately how much water will significantly ameliorate State A's water problem *before* we could know whether it is possible to shape a workable decree. And the workability of decrees themselves, approximate as they may be, may depend upon more precise findings in respect to the nature and scope of the range of likely harms and likely benefits that a Special Master finds are actually likely to exist. To require "clear and convincing evidence" about the workability of a decree before the Court or a Special Master has a view about likely harms and likely amelioration is, at least in this case, to put the cart before the horse. And that, we fear, is what the Master's statements, with their apparent references to a "clear and convincing" evidence standard in respect to "redressability" (where that refers to the availability of an eventual decree) have done here. Cf. *post*, at 860–863.

That is also why our cases, while referring to the use of a "clear and convincing" evidentiary standard in respect to an initial showing of "invasion of rights" and "substantial injury," have never referred to that standard in respect to a showing of "remedy" or "redressability." See *Nebraska* v. *Wyoming*, 515 U. S. 1, 8 (1995) (repeating that as a threshold

matter, a "'threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence'" without addressing the required initial burden in respect to remedy (quoting *New York* v. *New Jersey*, 256 U. S., at 309)); *Colorado II*, *supra*, at 317 (describing the "initial burden" a State bears to show "'real or substantial injury'" (quoting *Colorado I*, 459 U. S., at 187–188, n. 13)); *Idaho II*, 462 U. S., at 1027; *Colorado I*, *supra*, at 187–188, and n. 13 ("[A] State seeking to prevent or enjoin [an upstream] diversion by another State" must "bear *the initial burden* of showing that a diversion by [the upstream State] will cause substantial injury to [the downstream State's] interests" (emphasis added)); *Washington* v. *Oregon*, 297 U. S., at 522; *Connecticut* v. *Massachusetts*, 282 U. S., at 672; *New Jersey* v. *New York*, 283 U. S., at 344–345; *Kansas II*, 320 U. S., at 393–394. The dissent does not dispute this. See *post*, at 856.

As discussed, *supra*, at 817–818, our prior decisions have said that the "right" a complaining State asserts must be more than "merely some technical right" and must be "a right with *a corresponding benefit*," *Kansas I*, 206 U. S., at 109 (emphasis added)—an effort to shape an equitable apportionment decree cannot be "a vain thing," *Foster*, 146 U. S., at 101. See also *Idaho II*, *supra*, at 1026 (assessing whether "the formulation of a workable decree is impossible"); *Washington* v. *Oregon*, *supra*, at 523. But these statements apply to the general *availability* of judicial relief—not to the *details* of a final decree or to the workability of a decree that will depend on those details. Cf. *Idaho ex rel. Evans* v. *Oregon* 444 U. S. 380, 392 (1980) (*Idaho I*) (explaining that the question whether a State's proposed remedy will have an "appreciable effect" is a question that "goes to the merits" of the equitable apportionment inquiry). And, of course, to insist upon the use of such a strict standard, in respect to an *eventual* decree, runs directly contrary to the statements in, and holdings of, cases to which we have referred when dis-

cussing the need for "approximation" and "flexibility." See *supra*, at 818–819.

IV

We next address Florida's exceptions to the Master's evidentiary determinations. In doing so, we recognize that the record in this case is long. It addresses a number of highly technical matters on a range of subjects—from biology to hydrology to the workings of the Corps' newly revised Master Manual governing the organization's complex operations in the Basin. Insofar as the Special Master made findings of fact, those findings "deserve respect and a tacit presumption of correctness." *Colorado II*, 467 U. S., at 317. But at the end of the day, "the ultimate responsibility for deciding what are correct findings of fact remains with us." *Ibid.* We have therefore read those portions of the record to which the parties, *amici*, or the Master refer, along with several other portions that we have found potentially relevant. Our "independent examination of the record," *Kansas* v. *Missouri*, 322 U. S. 213, 232 (1944), leads us to conclude that, at this stage, Florida has met its "initial burden" in respect to remedy. But, we also believe that a remand is necessary to conduct the equitable-balancing inquiry. Cf. *Colorado I*, *supra*, at 183–190.

We reserve judgment as to the ultimate disposition of this case, addressing here only the narrow "threshold" question the Master addressed below—namely, whether Florida has shown that its "injur[ies can] effectively be redressed by limiting Georgia's consumptive use of water from the Basin without a decree binding the Corps." Report 30–31. This dispositive threshold question leads us, in turn, to focus upon five subsidiary questions:

First, has Florida suffered harm as a result of decreased water flow into the Apalachicola River? (The Special Master assumed "yes.")

Second, has Florida shown that Georgia, contrary to equitable principles, has taken too much water from the Flint

River (the eastern branch of the Y-shaped river system)? (Again, the Special Master assumed "yes.")

Third, if so, has Georgia's inequitable use of Basin waters injured Florida? (The Special Master assumed "yes.")

Fourth, if so, would an equity-based cap on Georgia's use of the Flint River lead to a significant increase in streamflow from the Flint River into Florida's Apalachicola River (the stem of the Y)? (This is the basic question before us.)

Fifth, if so, would the amount of extra water that reaches the Apalachicola River significantly redress the economic and ecological harm that Florida has suffered? (This question is mostly for remand.)

As our parentheticals suggest, the Special Master assumed that the answer to the first three questions was "yes." The fourth question is the question before us now. And the fifth question is partly for us now and partly for the Master to answer on remand.

A

The Report indicates that the Special Master assumed the answer to the first question is "yes." The Report says that the Special Master reached his conclusion on the "single, discrete issue that resolves this case" by "*assuming* that Florida has sustained injury." *Id.*, at 30 (emphasis added); see also *id.*, at 2 (repeating Georgia's argument that "without an order binding the Corps, Florida will not be assured any relief—*assuming it has suffered any injury at all*—by a decree entered in this proceeding because the Corps has the ability to impound water in various reservoirs that it maintains in the Basin" (emphasis added)); *id.*, at 65 ("[e]ven if there were evidence of harm from other than low-flow conditions . . . ").

At the same time, the Report states that "Florida points to real harm." *Id.*, at 31. And the Master specified that there is "little question that Florida has suffered harm *from decreased flows* in the [Apalachicola] River." *Ibid.* (em-

phasis added). That harm—caused (at least in part) by increased salinity—includes "an unprecedented collapse of [Florida's] oyster fisheries in 2012." *Ibid.*; see *id.*, at 32 (stating that "the evidence presented tends to show that increased salinity . . . led to the collapse" of Apalachicola Bay's oysters and "greatly harmed the oystermen of the Apalachicola Region, threatening their longterm sustainability"). Cf. *New Jersey* v. *New York*, 283 U. S., at 343, 345 (finding redressable harm to oysters caused by diminished water flow and increased salinity). The harms of reduced streamflow may extend to other species in the Apalachicola Region, including in the river and its flood plain, which, as the Master noted, "is home to the highest species density of amphibians and reptiles in all of North America, and supports hundreds of endangered or threatened animal and plant species," including three "endangered" or "threatened" mussel species, the "[t]hreatened Gulf sturgeon," and the largest stand of tupelo trees—of Tupelo Honey fame—in the world. Report 7–8; see also Joint Exh. 168, at 193, 195–196.

B

The Master also appears to have assumed the answer to the second question is "yes." The Report reached its key conclusion that Florida's (assumed) injuries cannot "effectively be redressed" by "*assuming* that Florida has sustained injury as a result of *unreasonable upstream water use by Georgia*." Report 30 (emphasis added). But, at the same time, the Master acknowledged that "Florida points to real harm and, at the very least, *likely* misuse of resources by Georgia." *Id.*, at 31 (emphasis added). And the Report "provide[s] the Court a brief descriptive background regarding . . . the unreasonableness of Georgia's consumptive water use." *Ibid.*; see, *e. g.*, *id.*, at 32 ("Georgia's upstream agricultural water use has been—and continues to be—largely unrestrained"); *id.*, at 33 ("Despite early warnings of oncoming

drought, Georgi[a] . . . chose not to declare a drought in 2011—apparently hoping for the best, and clearly not wishing to incur the cost of preventative action"); *id.*, at 34 ("Georgia's position—practically, politically, and legally—can be summarized as follows: Georgia's agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin").

C

In respect to the third question, the Master again assumed the answer "yes." In particular, the Report "assume[s]" that "Florida has sustained injury *as a result of* unreasonable upstream water use by Georgia." *Id.*, at 30 (emphasis added). And as relevant to each of the first three questions, the Master added that "[m]uch more could be said and would need to be said about" Florida's injuries, the reasonableness of Georgia's water consumption, and "other issues, such as causation," if the case proceeds. *Id.*, at 34. As we have explained, our prior equitable apportionment decisions make clear that "*all factors* which create equities in favor of one State or the other *must be weighed*." *Kansas II*, 320 U. S., at 393–394 (emphasis added). Thus, a remand is necessary to consider each of the relevant factors, including those upon which the dissent focuses. See *infra*, at 835–836; *Nebraska* v. *Wyoming*, 325 U. S., at 618; cf. *Colorado II*, 467 U. S., at 323–324.

D

We now turn to the fourth question, the basic question before us. Would an equity-based cap on Georgia's use of the Flint River lead to a significant increase in streamflow from the Flint River into Florida's Apalachicola River (the stem of the Y)? The answer depends upon (1) the amount of extra water that would flow into *Lake Seminole* as a result of a cap on Georgia's Flint River water consumption; and (2) the amount of water that could actually flow through

the Corps-controlled Woodruff Dam at Lake Seminole's southern end and into *Florida's Apalachicola River*.

1

The record shows that Florida's proposed cap on Georgia's water consumption could result in the release of considerable extra water into Lake Seminole. Florida's expert, Dr. David Sunding, testified that the cap would limit the average amount of water that Georgia could use annually and also reduce the amount of water that Georgia could use during drought years, which could "materially reduce [Georgia's] depletions of river flows . . . by 1,500 to over 2,000 cubic feet per second (cfs) in peak summer months of drought years." Updated Pre-Filed Direct Testimony (PFDT) of Sunding ¶8; see also *id.*, ¶¶88–90. Dr. Sunding added that it would cost Georgia roughly $35 million annually (less than 0.2% of Georgia's annual budget) to reduce streamflow depletions by 2,000 cfs. *Id.*, ¶113, Table 4. Georgia's expert, Dr. Robert Stavins, disputed these conclusions. See Direct Testimony of Stavins ¶¶4, 90, 136; see also Brief for Georgia 18. The Master did not make specific findings of fact regarding this aspect of Florida's proposed remedy. Rather than expressly making any findings, the Master apparently "accept[ed] Florida's estimates of the increased streamflow that would result from a consumption cap." Report 67, n. 43. At this stage, we shall do the same.

And as we shall later discuss, the record suggests that an increase in streamflow of 1,500 to 2,000 cfs is reasonably likely to benefit Florida significantly. See *infra*, at 834–835 (citing record evidence of benefits); see also Updated PFDT of J. David Allan ¶¶3d, 26, 67 (Allan) (discussing ecological benefits of increasing streamflow by 300 to 500 cfs); 10 Tr. 2629:7–15 (Kondolf) (detailing benefits of increasing streamflow into the Apalachicola River from 5,000 to 7,000 cfs); 3 *id.*, at 591:6–593:4, 596:17–598:1 (Allan).

The key question, however, is whether the 1,500 to 2,000 cfs of extra water that will flow into Lake Seminole from the Flint River as a result of a cap on Georgia's water consumption will flow beyond Lake Seminole, through the Woodruff Dam, and into the Apalachicola River at the relevant times. That is where the Army Corps of Engineers enters the picture. And it is where Florida disagrees with the Special Master and with Georgia. The Special Master and Georgia believe that—at any relevant time—the Corps might "offset" any extra Flint River water that flows into Lake Seminole by simultaneously reducing the amount of water that flows into that lake from the Chattahoochee River. See Report 48–53. Thus, if the 1,500 to 2,000 cfs of *extra* water that would reach Lake Seminole from the Flint as a result of Florida's proposed consumption cap, the question is whether and to what extent the Corps will "offset" that extra streamflow by releasing 1,500 to 2,000 cfs *less* water into Lake Seminole from its upstream Chattahoochee reservoirs.

Of course, the Corps might, under certain circumstances, be authorized to "offset" extra streamflow from the Flint River. As the Special Master wrote, "[t]here is no guarantee that the Corps will exercise its discretion to release or hold back water at a particular time." *Id.*, at 69. But as the United States has explained, increased streamflow into Lake Seminole (that is, increased Basin Inflow) "would generally benefit the ACF system by delaying the onset of drought operations, by allowing the Corps to meet the 5000 cfs minimum flow longer during extended drought, and by quickening the resumption of normal operations after drought." Brief for United States as *Amicus Curiae* 28 (Aug. 7, 2017). And our reading of the record convinces us it is highly unlikely that the Corps will always reduce the flow in this way; it leads us to believe that, acting in accordance with its own revised Master Manual, the Corps is likely to permit, and in some cases may be *required* to ensure

that, material amounts of additional Flint water to flow through the Woodruff Dam and into the Apalachicola River. At the very least, we believe that more proceedings are necessary to reach a definitive determination.

As an initial matter, the Master Manual makes clear that the amount of water the Corps will release turns in part on the amount of water stored in the Corps' Chattahoochee reservoirs. See U. S. Army Corps of Engineers, Master Manual, Apalachicola-Chattahoochee-Flint River Basin, Florida and Georgia, App. A, pp. 7–4 to 7–5, 7–7. More specifically, the amount of water storage in those reservoirs dictates whether the Corps is conducting one of two possible types of "operations"—namely, "drought operations" or "nondrought operations." These are technical terms. See *id.*, at 7–14 to 7–16. The term "drought operations" need not correspond to dry periods, nor need the term "nondrought operations" refer to wet periods. Rather their applicability depends in part upon the amount of water that is stored behind the Corps' Chattahoochee dams. As the United States explained, "[t]he term 'drought operations' refers to more conservative operations that [the Corps conducts, which] are intended to enable the Corps to preserve water and operate its reservoir projects more effectively as drought conditions arise." Brief for United States as *Amicus Curiae* 9 (Aug. 7, 2017). We therefore must clearly distinguish what the record tells us about the amount of extra water that could flow into Florida as a result of a consumption cap during each of these two distinct types of Corps operations.

a

Nondrought Operations

When the Corps is conducting "nondrought operations," the Master Manual requires the Corps to release into Florida all or some of any extra water that flows from the Flint River into Lake Seminole, where it will then flow through the Woodruff Dam. See App. to Brief for United States as

Amicus Curiae 2a (Aug. 7, 2017) (detailing Corps operational protocol). As the United States has explained, when the total streamflow into Lake Seminole is between 5,000 and 10,000 cfs during "nondrought operations," the following facts are true:

> "[A]ny additional basin inflow . . . would generally be passed straight through to Florida. If, for example, the conservation measures advocated by Florida as part of a consumption cap actually resulted in an increased flow in the Flint River of 2,000 cfs, *see* Pre-Filed Direct Testimony of David Sunding, Ph. D. at 44, Table 4, then flows into Florida would also increase by roughly that amount." United States Post-Trial Brief 12–13 (Dec. 15, 2016).
>
> See also Brief for United States as *Amicus Curiae* 18 (Aug. 7, 2017) (reaffirming that under these circumstances "flows in the Apalachicola would increase by the amount of increased Flint River flows" including during summer months).

As far as we can tell, under the Corps' current operational protocol, the Corps may remain in "nondrought operations" even during the driest summer months of the driest years. For example, in 2007 the Corps conducted "nondrought operations" not only during late autumn, winter, and spring months, but also during the hottest summer and early autumn months "when streamflow is at its lowest." See Direct Testimony of Phillip Bedient ¶¶48–53 (Bedient) (stating that "[i]f 2007's Basin Inflow were repeated today and Drought Operations were not triggered," the Corps would have had 92 days of "nondrought operations," including 19 days "during summer and fall months, when streamflow was at its lowest" on which 100% of extra water resulting from a consumption cap would reach Florida). We note that these 19 days fell during a period of severe drought in which no extra water (let alone 2,000 cfs of extra water) was flowing into Lake Seminole. And, unsurprisingly, the same trend ap-

pears to be true in dry summer months of other years: All or some of the extra water that would result from a consumption cap would also pass through to Florida. See, *e. g.*, Ga. Exh. 949 (reporting streamflow data indicating several days in 2009 on which extra Flint River water would have passed through to Florida); Joint Exh. 128 (providing link to U. S. Geological Survey data indicating a similar trend based on streamflow into the Apalachicola River, including in 2016 and 2017).

b

Drought Operations

The Corps' "drought operations" are different. Again, whether the Corps must initiate drought operations is not a matter of discretion; it depends, as we have said, upon the total amount of water the Corps has stored behind the dams it controls along the Chattahoochee River. The Master Manual requires that, when the total amount of water stored in pools behind the Corps' Chattahoochee dams drops below a certain level, the Corps must reduce the amount of water it releases from the Woodruff Dam to 5,000 cfs, or, in instances of extreme low water levels in the storage pools, to 4,500 cfs. Master Manual App. A, at 7–14 to 7–16. Accordingly, if additional water were to flow into Lake Seminole from the Flint River while the Corps is in *drought operations*, the Corps, pursuant to its Master Manual, must reduce the flow of its controlled upstream Chattahoochee water in order to maintain a defined water level in the pools behind its Chattahoochee dams, and no more than 4,500 cfs or 5,000 cfs can flow beyond the Woodruff Dam regardless. Brief for United States as *Amicus Curiae* 7.

But even then, as we just said, the Corps must make certain that at least 4,500 cfs and more often 5,000 cfs flows though the Woodruff Dam. And, if more water flows from the Flint into Lake Seminole, and if the Corps uses that water to keep the water level high in its Chattahoochee reservoirs, then there will be fewer days in which the Corps is conducting either "drought operations" or "extreme drought

operations." Instead, there will be more "nondrought operations" days where the Corps must pass most or all additional streamflow that exceeds 5,000 cfs through the Woodruff (because there will be more days, given the added Flint water, when its upstream Chattahoochee reservoirs are sufficiently high). The United States adds that "a cap on Georgia's consumption" could, among other things, generate increased streamflow that

> "would provide a cushion during low-flow periods, so that it would be possible to maintain a flow rate of *greater than* 5,000 cfs for a longer period of time without any alteration of the Corps' operations." United States Post-Trial Brief 18–19 (Dec. 15, 2016) (emphasis added).
>
> See also Brief for United States as *Amicus Curiae* 18 (Aug. 7, 2017) (same).

We repeat this point with an example for purposes of clarity. Assume the following: (1) that it is August 13 and the Corps is conducting "drought operations"; (2) that as a result of a cap on Georgia's consumption, 2,000 cfs more water flows down the Flint and into Lake Seminole; and (3) that, consistent with the Master Manual, 5,000 cfs will flow from Lake Seminole, through the Woodruff Dam, and into Florida's Apalachicola River. On these three assumptions in all likelihood, as the dissent points out, *no extra water* will flow into Florida.

But (and this "but" is key), the extra 2,000 cfs of water that flows into Lake Seminole on August 13 as a result of a cap on Georgia's from the Flint River water consumption will allow the Corps to store more water behind its upstream Chattahoochee dams (while still complying with the Master Manual's minimum release requirements). And that fact means that the Corps is likely to remain in "drought operations" for fewer days because whether the Corps remains in "drought operations" depends upon the water level behind the Chattahoochee dams. And the fewer days the Corps conducts "drought operations," the more days the Corps,

consistent with its Master Manual, will allow all (or some) of the 2,000 cfs extra water that would result from a consumption cap to flow through the Woodruff Dam and into Florida's Apalachicola River. Again, record evidence makes clear that this is not a fanciful possibility. For example, Florida points to record evidence that suggests a consumption cap could have prevented the Corps from entering drought operations in 2011–2012 without departing from the terms of its Master Manual. See, *e. g.*, Florida Brief in Support of Exceptions 48–49, and n. 12 (citing record evidence, including Ga. Exh. 924 and Fla. Exh. 811, that the Special Master did not address suggesting that Florida's proposed consumption cap could have helped the Corps to "avoi[d] drought operations entirely" in 2011–2012 without departing from the Master Manual's requirements).

The upshot is that, even when the Corps conducts its operations in accordance with the Master Manual, Florida's proposed consumption cap would likely mean more water in the Apalachicola—as much as 2,000 cfs more water when the Corps is conducting normal or "nondrought operations," which could take place in dry periods, including the driest days of summer, and 500 cfs more on days when the Corps is conducting "drought operations." And a cap would likely allow the Corps to conduct "nondrought operations" (*i. e.*, reservoirs-sufficiently-full operations) more often as well.

3

We cannot agree with the dissent's efforts to deny these conclusions. To begin with, the dissent says that our conclusion "depends on the premise that, during droughts, the natural streamflow into Florida is between '5,000 and 10,000 cubic feet per second.'" *Post*, at 869. If the dissent means by "droughts" simply dry days, or summer days, then it is obviously wrong, for pursuant to the Corps' Master Manual, the Corps must allow all or some of the 2,000 cfs extra water that would flow into Lake Seminole to continue through the

Woodruff Dam into Florida during dry summer days when the Corps is *not* conducting "drought operations." This was true, as the dissent concedes, even during 19 summer days in 2007, which was among the driest years in the Basin's history. Or, does the dissent mean by "droughts" days on which the Corps is conducting "drought operations"? If so, then we agree that on such days, the Corps will normally allow no more than 5,000 cfs to flow into Florida. But, for the reasons just stated in the last few paragraphs, Florida's proposed consumption cap—which could result in as much as 2,000 extra cubic feet of water per second flowing from the Flint into Lake Seminole—will mean (consistent with the testimony of the very Georgia expert that the dissent so frequently quotes) that there will be significantly fewer such days.

Is there a mistake then in the "concrete example" the dissent offers to support its point? See *post*, at 871–872. Invoking a hypothetical posed by Georgia's expert, the dissent says:

> "[I]f the natural flows in the Apalachicola River were 2,600 cubic feet per second, then the Corps would release 2,400 cubic feet per second from its [Chattahoochee] reservoirs. . . . And if a cap on Georgia[']s Flint River consumption] increased the River's natural flow to 4,100 cubic feet per second, the Corps would release 900 cubic feet per second. . . . In either case, the total flow on the Apalachicola River would remain the same: 5,000 cubic feet per second. Thus, so long as the natural flows remain significantly less than 5,000 cubic feet per second, a cap on Georgia would only decrease the amount of water that the Corps releases from storage; it would not increase the overall amount of water flowing into the Apalachicola River." *Ibid.* (citing Bedient ¶¶45–47).

If, however, a consumption cap causes 1,500 cfs extra water (from the Flint) to flow into Lake Seminole (as we

assume Florida's proposed cap would), under the dissent's example, the Corps will *reduce* (or "offset") the amount of water it releases from its upstream Chattahoochee dams from 2,400 cfs to 900 cfs. That is because 2,400 cfs minus 900 cfs is 1,500 cfs. What happens to that 1,500 cfs extra water?

When the Corps is in drought operations, the answer according to the Master Manual is that the Corps must store that water in its upstream Chattahoochee reservoirs. And with that 1,500 cfs extra water each day, the water levels in those reservoirs will rise (or, at a minimum, deplete less rapidly) and allow the Corps to resume "nondrought operations" more quickly. The United States repeats precisely this point—namely, when more water flows into Lake Seminole, it benefits Florida by "quickening the [Corps'] resumption of normal [*i. e.*, 'nondrought'] operations." Brief for United States as *Amicus Curiae* 28 (Aug. 7, 2017). (That extra water also means that there will be more days when 5,000 cfs, rather than 4,500 cfs, flows from Lake Seminole into the Apalachicola River.) And it means, as no one denies, that on days when the Corps conducts "nondrought operations" (which, as Georgia's own expert report shows, occur even during dry summer months), more water will reach Florida when Florida needs it.

What about the dissent's point that Georgia's expert, Dr. Bedient, said that the extra 2,000 cfs would mean more water for Florida "only 19 days 'during the summer and fall months when streamflow was at its lowest' "? *Post,* at 871. Dr. Bedient's exact words, as the dissent points out, were that in " 'dry years (*e. g.*, 2007 and 2011), . . . even significant changes in Georgia's consumptive use would lead to virtually no change in state-line flows during the low-flow months (*e. g.*, June, July, August, September).' " Bedient ¶78.

At this point, in our view, the dissent has pointed to record evidence with which other record evidence conflicts. It seems from record evidence, from the statements of the United States, from geological data, and from laws of me-

chanics, that 2,000 cfs extra water flowing into Lake Seminole when, in the dissent's words, "drought operations were not in effect" would have to mean more water in Florida. *Post*, at 871. And the dissent does not dispute that some of these days are in the summer. *Ibid.* Our own check of the record reinforces the point. In particular, data from the U. S. Geological Survey's website, which the parties entered into the record at Joint Exh. 128, indicates that between May 2016 and August 2016, streamflow into the Apalachicola River was above 6,000 cfs each day with the exception of two days: August 30, 2016, and August 31, 2016. Nothing in the record suggests that the Corps was in drought operations during these days, and so it appears that under these conditions, any additional streamflow resulting from a cap on Georgia's Flint River consumption would pass through into Florida. However, without explicit findings, it is neither possible nor prudent for us in the first instance to read through this voluminous record and discover who is right on this matter of how much extra water there will be, when, and how much Florida would benefit from the extra water that there might be. That is why we are sending this case back for more findings.

Finally, while the dissent suggests that "[i]t is incredibly odd to conclude that a Special Master's merits determination is 'premature' after a full trial," *post*, at 858, this Court has repeatedly concluded that remand is "appropriate" to resolve certain issues in an equitable apportionment case even where, as here, there has already been a "lengthy trial at which both States presented extensive evidence," *Colorado II*, 467 U. S., at 313. See also *Wyoming* v. *Colorado*, 259 U. S., at 455–456 (explaining that "the evidence was taken" over the course of two years and presented to the Court two years later and that "[t]he case has been argued at bar three times" including because of the "importance of some of the questions involved"). Moreover, we note that adequate fact-

finding is especially important where, as here, no interstate compact guides our inquiry or sets forth a congressionally ratified water allocation formula. When such a compact exists, as it often does, our effort is relatively simple and focuses upon "declar[ing] rights under the Compact and enforc[ing] its terms." *Kansas* v. *Nebraska*, 574 U. S., at 455 (citing *Texas* v. *New Mexico*, 462 U. S., at 567); *id.*, at 567–568 ("If there is a compact, it is a law of the United States, . . . and our first and last order of business is interpreting the compact"). Here, no compact guides our inquiry and it would appear to be important that we approach this complex controversy with the care and thoroughness that our precedent requires.

E

Our final question is this: Would the amount of extra water that reaches the Apalachicola significantly redress the economic and ecological harm that Florida has suffered? There is evidence indicating that the answer to the question is in the affirmative. See, *e. g.*, Allan ¶¶3d, 26, 67 ("Even relatively modest increases in flows—on the order of 300 to 500 cfs during key periods of the year—could reduce harm to the [Apalachicola Region's] ecosystem and halt the cycle that is leading to irreversible harm" while "[g]reater increases could make even more dramatic improvements"); Updated PFDT of Patricia Glibert ¶¶5, 28–32, 58–60, and Table 1, Figs. 10, 19b; *supra*, at 827 (citing record evidence of benefits); see also 10 Tr. 2629:7–15 (Kondolf) (detailing benefits of increasing streamflow from 5,000 to 7,000 cfs); 3 *id.*, at 591:6–593:4, 596:17–598:1 (Allan). But the Master's Report does not explicitly answer this question. We consequently must remand the case to find the answer to this question (and others).

* * *

In sum, in respect to the evidentiary questions at issue, the Master assumed that: (1) Florida has likely suffered harm as

a result of decreased water flow into the Apalachicola River; (2) Florida has made some showing that Georgia, contrary to equitable principles, has taken too much water from the Flint River; and (3) Georgia's inequitable use of the water may have injured Florida, but more findings are needed. And in light of the Master's assumptions, we conclude that: (4) An equity-based cap on Georgia's use of the Flint River would likely lead to a material increase in streamflow from the Flint River into Florida's Apalachicola River; and (5) the amount of extra water that reaches the Apalachicola may significantly redress the economic and ecological harm that Florida has suffered. Further findings, however, are needed on all of these evidentiary issues on remand.

We add the following: The United States has made clear that the Corps will work to accommodate any determinations or obligations the Court sets forth if a final decree equitably apportioning the Basin's waters proves justified in this case. It states in its brief here that if a decree results "in more water flowing to Florida . . . under existing Corps protocols, then the Corps would likely not need to change its operations." Brief for United States as *Amicus Curiae* 28 (Aug. 7, 2017). It has added that, in any event, a decree "would necessarily form part of the constellation of laws to be considered by the Corps when deciding how best to operate the federal projects." *Id.*, at 32. And in issuing its revised Master Manual, the Corps stated that it would "review any final decision from the U. S. Supreme Court and consider any operational adjustments that are appropriate in light of that decision, including modifications to the then-existing [Master Manual], if applicable." Record of Decision 18. The United States has "continually asserted its preparedness to implement, in accordance with federal law, any [agreed-upon] comprehensive water allocation formula." *Id.*, at 4; see also Joint Exh. 124, at 6–35. And, of course, the Administrative Procedure Act requires the Corps to make decisions that are

reasonable, *i. e.*, not "arbitrary, capricious, an abuse of discretion," or "in excess of [the Corps'] statutory jurisdiction." 5 U. S. C. § 706(2).

We recognize that the Corps must take account of a variety of circumstances and statutory obligations when it allocates water. New circumstances may require the Corps to revise its Master Manual or devote more water from the Chattahoochee River to other uses. But given the considerations we have set forth, we cannot agree with the Special Master that the Corps' "inheren[t] discretio[n]" renders effective relief impermissibly "uncertain" or that meaningful relief is otherwise precluded. Report 56, n. 38. We cannot now say that Florida has "merely some technical right" without "a corresponding benefit," *Kansas I*, 206 U. S., at 109, or that an effort to shape a decree will prove "a vain thing." *Foster*, 146 U. S., at 101. Ordinarily "[u]ncertainties about the future" do not "provide a basis for declining to fashion a decree." See *Idaho II*, 462 U. S., at 1026. And in this case, the record leads us to believe that, if necessary and with the help of the United States, the Special Master, and the parties, we should be able to fashion one.

V

We keep in mind what our prior decisions make clear: "'The difficulties of drafting and enforcing a decree'" do not necessarily provide a convincing "'justification for us to refuse to perform the important function entrusted to us by the Constitution.'" *Idaho I*, 444 U. S., at 390, n. 7 (quoting *Nebraska* v. *Wyoming*, 325 U. S., at 616); see also *Idaho II*, *supra*, at 1027 ("Although the computation is complicated and somewhat technical, that fact does not prevent the issuance of an equitable decree"). For this reason and the others we have discussed, we agree with Florida that it has made a legally sufficient showing as to the possibility of fashioning an effective remedial decree.

We repeat, however, that Florida will be entitled to a decree only if it is shown that "the benefits of the [apportionment] substantially outweigh the harm that might result." *Colorado I*, 459 U. S., at 187. In assessing whether that showing has been made, the Master may find it necessary to address in the first instance many of the evidentiary and legal questions the answers to which we have here assumed or found plausible enough to allow us to resolve the threshold remedial question. In order to determine whether Florida can eventually prove its right to cap Georgia's use of Flint River waters, it may find it necessary for the Special Master to make more specific factual findings and definitive recommendations regarding such questions as: To what extent does Georgia take too much water from the Flint River? To what extent has Florida sustained injuries as a result? To what extent would a cap on Georgia's water consumption increase the amount of water that flows from the Flint River into Lake Seminole? To what extent (under the Corps' revised Master Manual or under reasonable modifications that could be made to that Manual) would additional water resulting from a cap on Georgia's water consumption result in additional streamflow in the Apalachicola River? To what extent would that additional streamflow into the Apalachicola River ameliorate Florida's injuries? The Special Master may make other factual findings he believes necessary and hold hearings (or take additional evidence) as he believes necessary. Cf. *Colorado I*, 459 U. S., at 190, n. 14.

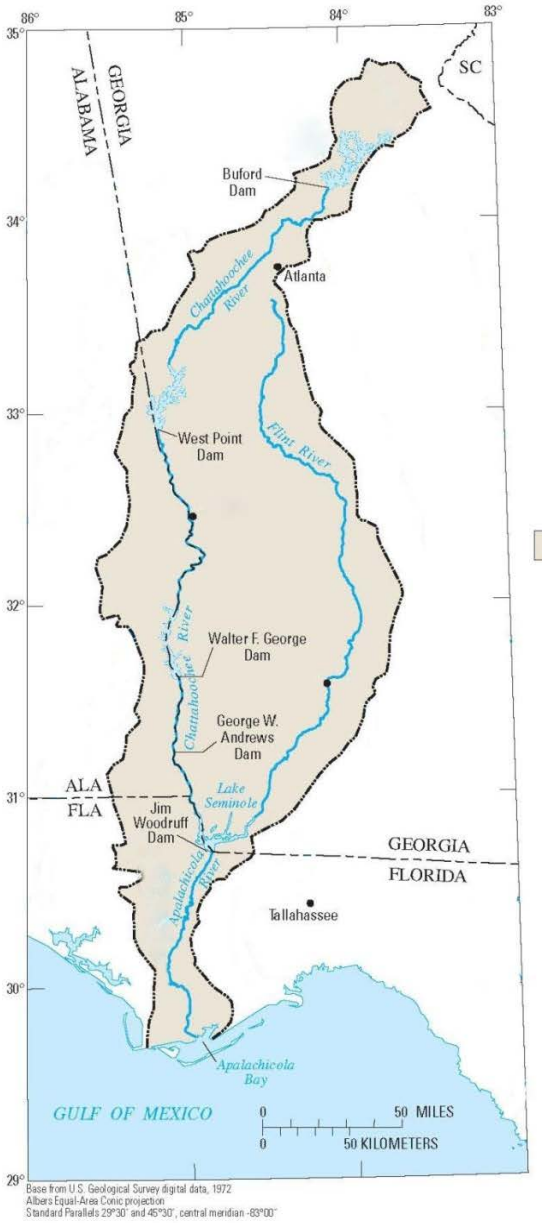
Consistent with the principles that guide our inquiry in this context, answers need not be "mathematically precise or based on definite present and future conditions." *Idaho II*, 462 U. S., at 1026. Approximation and reasonable estimates may prove "necessary to protect the equitable rights of a State." *Ibid.* And the answers may change over time. Cf. *New Jersey* v. *New York*, 347 U. S. 995, 996–1005 (1954); *New Jersey* v. *New York*, 283 U. S., at 344–346. Flexibility and approximation are often the keys to success in our ef-

forts to resolve water disputes between sovereign States that neither Congress nor "the legislature of either State" has been able to resolve. *Virginia* v. *West Virginia*, 220 U. S., at 27.

We consequently do not dismiss this case. Rather, we remand the case to the Special Master for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX


86°
85°
84°
83°
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34°
33°
32°
31°
30°
29°
GEORGIA
ALABAMA
SC
Buford Dam
Atlanta
Chattahoochee River
West Point Dam
Flint River
Walter F. George Dam
George W. Andrews Dam
ALA
FLA
Lake Seminole
Jim Woodruff Dam
GEORGIA
FLORIDA
Apalachicola River
Tallahassee
Apalachicola Bay
GULF OF MEXICO
0
50 MILES
0
50 KILOMETERS
Base from U.S. Geological Survey digital data, 1972
Albers Equal-Area Conic projection
Standard Parallels 29°30' and 45°30', central meridian -83°00'

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

Florida asks this Court to cap Georgia's use of water in the Apalachicola-Chattahoochee-Flint River Basin (Basin). Florida claims that such a cap would allow additional water to flow into the Apalachicola River and Bay, which would benefit Florida by alleviating certain ecological harms. To prevail under our precedents, Florida must present clear and convincing evidence that its proposed cap will benefit Florida more than it harms Georgia. See *Colorado* v. *New Mexico*, 459 U. S. 176, 187 (1982) (*Colorado I*). The Special Master applied this balance-of-harms standard and, after presiding over a 1-month trial involving 40 witnesses and more than 2,000 exhibits, found that Florida had not met its burden. Because that finding is well supported by the evidence, I would have overruled Florida's objections to the Special Master's Report (Report) and denied Florida's request for relief. I respectfully dissent.

I

The Court's recitation of the facts focuses on the geography of the relevant rivers and the failed compact negotiations between Florida and Georgia, but does not provide any details about the respective interests of Florida and Georgia or the extensive operations of the United States Army Corps of Engineers (Corps). See *ante*, at 807–810. Because these missing details are crucial to determining whether equitable relief is warranted, I will supply them.

A

This case concerns Georgia's use of water in the Basin. Spanning Georgia, Alabama, and Florida, the Basin consists of three rivers—the Chattahoochee, the Flint, and the Apalachicola. The Chattahoochee River starts in northern Georgia, just north of Atlanta, and flows southwest along the Alabama-Georgia border until it reaches Florida. The Flint

River starts east of the Chattahoochee, just south of Atlanta, and flows south until it reaches Florida. The Chattahoochee and Flint Rivers meet at the border of Florida, forming Lake Seminole. From Lake Seminole, the Apalachicola River flows south through the Florida Panhandle and into the Gulf of Mexico at Apalachicola Bay.

Both Georgia and Florida depend on Basin water. The Chattahoochee River supplies most of the water for metropolitan Atlanta. And the Flint River supplies most of the water for southern Georgia's large agricultural industry. In Florida, the Apalachicola River sustains a unique ecosystem that is home to a number of species, including mussels, sturgeon, and tupelo trees. Flows from the Apalachicola River (or River) also support the Apalachicola Bay (or Bay) ecosystem—one of the most productive estuaries in the Northern Hemisphere. The Apalachicola Bay's low-salinity and high-nutrient waters make it an extraordinarily productive habitat for oysters and other sea life.

Although both Georgia and Florida depend on the Basin, the Florida portion of the Basin is significantly less populated and productive. The Georgia portion has a population of more than 5 million and accounts for around $283 billion in gross regional product per year. Direct Testimony of Robert Stavins 2, 16 (Stavins). The Florida portion, by contrast, has a population of fewer than 100,000 people and generates around $2 billion in gross regional product per year. *Id.*, at 17. In relative terms, Georgia accounts for 98% of the population and 99% of the economic production. *Ibid.*

B

Florida and Georgia are not the only stakeholders in the Basin. The United States, through the Corps, operates five dams and four reservoirs on the Chattahoochee River. Only the three northernmost dams can store significant amounts of water. The two dams that are farthest south on the Chattahoochee—the George W. Andrews Dam and the Jim Wood-

ruff Dam—cannot store an appreciable amount of water. The Corps does not operate any dams on the Flint River, which flows unimpeded until it reaches the Jim Woodruff Dam at Lake Seminole.

The Corps operates its dams as a unit. It must do so in a way that achieves its congressionally authorized purposes, such as facilitating navigation, generating hydroelectric power, protecting the national defense, promoting recreation, maintaining the commercial value of riparian lands, and protecting the water supply for the surrounding metropolitan Atlanta area. See H. R. Doc. No. 342, 76th Cong., 1st Sess., 77 (1939); River and Harbor Act of 1945, 59 Stat. 17; *In re MDL–1824 Tri-State Water Rights Litigation*, 644 F. 3d 1160, 1167 (CA11 2011). The Corps also must ensure compliance with other federal laws, including laws governing the conservation of fish and wildlife, the quality of water, and the protection of threatened and endangered species. See, *e. g.*, Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.*; Flood Control Act of 1944, 33 U. S. C. § 701 *et seq.*; Water Supply Act of 1958, 43 U. S. C. § 390b.

Given these numerous demands, the Corps has long relied on water-control manuals to guide its operations of the dams. The current manual dictates the minimum amount of water that the Corps must provide to the Apalachicola River under various conditions. Three variables affect that minimum amount of water: the time of year, the amount of water in the Corps' storage reservoirs, and the amount of additional water entering the Basin.

The manual is very complex, spanning 1,190 pages, but only a few provisions are relevant here. The manual provides that, as a general rule, most additional water that enters the Basin will pass through to Florida via the Apalachicola River. But, in certain circumstances, the Corps will artificially increase or decrease the amount of water that passes through to ensure that 5,000 cubic feet per second flows into the Apalachicola River. For example, if the natu-

ral streamflow entering the Basin (Basin inflow) is less than 5,000 cubic feet per second, then the Corps will artificially augment the flow by releasing additional water from its reservoirs. Or, if the amount of water in the Corps' reservoirs falls below a certain amount, the Corps will trigger what it calls "drought operations." During drought operations, no matter how much water is entering the Basin, the Corps will generally release only 5,000 cubic feet per second into the Apalachicola River until its reservoirs are completely replenished.[1]

The Corps' current manual reflects many lessons that it has learned over the past decade. In March 2006, for example, the Corps created an interim operating plan, which set high flow requirements to protect endangered species in the Apalachicola River. Direct Testimony of Wei Zeng 44–45 (Zeng). But those high flow requirements prevented the Corps from saving enough water during droughts to refill its reservoirs, putting all its other projects at risk. *Id.*, at 45. So the Corps switched to more storage-friendly rules. *Id.*, at 45–46. In December 2006, the Corps modified its operating plan to require a portion of the water entering the Basin to be devoted to refilling the Corps' reservoirs. *Id.*, at 46. When this modification proved insufficient, the Corps created special rules for droughts, which saved even more water by decreasing the minimum flow into the Apalachicola River. *Id.*, at 46–47. Later, the Corps altered its operations to save still more water, by increasing the amount it could dedicate to refilling its reservoirs during nondroughts and lowering the threshold for triggering the special drought rules. *Id.*, at 47; Brief for United States as *Amicus Curiae* 11 (Brief

[1] If the amount of water in the Corps' reservoirs falls to critically low levels, then the Corps will release only 4,500 cubic feet per second into the Apalachicola River. These extreme drought operations have not been triggered in recent droughts. See Direct Testimony of Phillip Bedient 14 (Bedient) (showing that flows remained around 5,000 cubic feet per second during the 2011 and 2012 droughts).

for United States). The Corps' current manual is a product of this decade of trial and error.

The current manual also reflects decades of litigation. The Corps' first manual went into effect in 1958, and the Corps did not propose a new one until 1989. As soon as it did, Alabama sued. Florida, Georgia, and other stakeholders eventually sued as well. For its part, Florida alleged that the Corps' operations under the proposed manual and subsequent interim operating plans violated the Endangered Species Act by injuring mussels and sturgeon, as well as non-covered species like oysters and tupelo trees.[2] The various lawsuits were eventually consolidated in the Middle District of Florida. Twenty years after Alabama first sued, the District Court ruled for Alabama but against Florida. The United States Court of Appeals for the Eleventh Circuit reversed with respect to Alabama. *In re MDL–1824 Tri-State Water Rights Litigation*, *supra*, at 1192, 1205. And Florida's case became moot in 2012, once the Corps issued the immediate predecessor to its current manual.

II

A

Soon after the litigation against the Corps ended, Florida sought leave to file this lawsuit against Georgia, requesting an equitable apportionment of Basin water. This Court granted Florida leave to file its complaint in 2014. Florida's complaint alleged that Georgia was consuming more than its fair share of water in the Basin, causing economic and ecological harms to Florida. Florida sought relief only against Georgia and disclaimed seeking any "affirmative relief against the United States . . . with respect to the Corps'

[2] The U. S. Fish and Wildlife Service did not agree. It concluded that the minimum flows in the proposed manual and interim operating plans were sufficient to protect endangered species in the Apalachicola River. Zeng 46–47.

operation of the federally authorized dam and reservoir system." Complaint ¶15. The United States could not be joined as a party because it declined to waive its sovereign immunity.

Georgia moved to dismiss Florida's complaint for failure to join the United States as a necessary party. Florida opposed the motion, arguing that the United States was not necessary because Florida "'ha[d] no quarrel' with the Corps' operation of dams, and [its] lawsuit is not seeking to impose a 'minimum flow' regime on the Corps." Florida Brief in Opposition to Motion To Dismiss 26. Florida reiterated that it "is not seeking any relief whatsoever with respect to the operations of the dams" and is "not seeking any relief asking the Corps to control the dams or pull the levers in any specific way." Tr. of Oral Arg. on Motion To Dismiss 27. Florida conceded that "if [the Special Master] conclude[s] after a trial that caps on [Georgia's] consumption will not redress Florida's harm, then Florida will not have proved its case." *Id.*, at 29.

Based on Florida's concessions, the Special Master denied Georgia's motion to dismiss. The Special Master recognized that Florida had "disclaimed any intention to seek a decree" binding the Corps in order to "sideste[p] the need to join the United States as a party." Order on Motion To Dismiss, p. 12. The Special Master warned Florida that this strategy was a "'two edged sword.'" *Id.*, at 13. "Having voluntarily narrowed its requested relief and shouldered the burden of proving that the requested relief is appropriate," the Special Master explained, "Florida's claim will live or die based on whether Florida can show that a consumption cap [on Georgia alone] is justified and will afford adequate relief." *Ibid.*

B

The parties proceeded to trial. Florida sought to cap Georgia's use of Basin water at its current levels through at least 2050. See Florida Pre-trial Brief 5; Updated Pre-Filed Direct Testimony (PFDT) of Dr. George M. Hornberger 58

(Hornberger). And, during drought years, Florida sought to reduce Georgia's use of Basin water by between 1,500 and 2,000 cubic feet per second. See Florida Pre-trial Brief 5; Hornberger 58; Updated PFDT of David Sunding 42 (Sunding); Florida Post-Trial Brief 18.

To support its proposed caps, Florida first presented testimony about how much additional water it would receive during droughts. According to Florida's evidence, Georgia is currently using enough water during droughts to decrease streamflow on the Apalachicola River by around 4,000 cubic feet per second. See Hornberger 2. Florida proposed cutting that amount by half. One of its experts opined that, by implementing several conservation measures, Georgia could increase flows in the Apalachicola River during droughts by 1,500 to 2,000 cubic feet per second. See Sunding 3; Hornberger 4. Florida estimated that these measures would cost Georgia an additional $35.2 million per year. Sunding 44.

Florida next presented evidence about how this additional water would benefit various species in the Apalachicola River. It argued that additional flows could benefit mussels, which need consistent flows of at least 6,000 cubic feet per second in the summer; sturgeon, which need consistent flows of at least 7,000 cubic feet per second in the summer; and tupelo trees, which need consistent flows of at least 14,100 cubic feet per second in the summer. See Updated PFDT of J. David Allan 23–24, 26, 32–33, 41, 44–45 (Allan). Additional flows could also benefit the oysters in the Apalachicola Bay by lowering its salinity. See Updated PFDT of J. Wilson White 48 (White); PFDT of Marcia Greenblatt 15. All of Florida's evidence about these species, however, addressed the benefits of additional water during droughts. See Report 63. Florida presented no evidence of any benefits during nondroughts.

Finally, Florida attempted to prove that the additional water would actually reach Florida when it needs the water—*i. e.*, during droughts. To do this, Florida needed to show that the Corps would deviate from its normal operating

protocols, which specify that the Corps will generally release only 5,000 cubic feet per second during droughts. Florida relied on Dr. Peter Shanahan to make this showing. Dr. Shanahan testified that "the Corps would not . . . hold back water and thwart the additional flow benefits [that] Florida would receive from Georgia['s] conservation efforts." Updated PFDT of Dr. Peter Shanahan 1 (Nov. 15, 2016). He reasoned that the Corps would either choose to release the additional water in its discretion or be compelled to release the additional water because its upstream dams have limited storage capacity and it does not operate any dams on the Flint River. *Id.*, at 17–27.

In its defense, Georgia presented evidence that its current use has only a negligible impact on the amount of water that Florida receives through the Apalachicola River. Georgia's experts showed that the State's water use amounted to just 4% of Basin flows in an average year and 8% of Basin flows in a dry year, leaving anywhere from 92% to 96% of Basin water for Florida. See Stavins 16–18; Bedient 44–45. According to Georgia's experts, the primary factor that dictates flows in the Apalachicola River is precipitation, not consumption. See Direct Testimony of Charles A. Menzie 15.

Georgia's experts also testified that Georgia's water use was entirely reasonable. Metropolitan Atlanta had taken substantial steps to conserve water, reducing its consumption to levels that even Florida's expert admitted demonstrated effective water conservation. Direct Testimony of Peter Mayer 2; see also *id.*, at 18 (showing that Florida's Basin residents used more water per capita than residents in metropolitan Atlanta). And, instead of Florida's estimate of 4,000 cubic feet per second, Georgia estimated that its water use had never decreased streamflow by more than 2,000 cubic feet per second, and only rarely by more than 1,400 cubic feet per second. See Zeng 2, 7.

Georgia also presented evidence that Florida's proposed caps would cost Georgia significantly more than they would

benefit Florida. Georgia's economic expert estimated that Florida's proposed caps would impose costs of more than "$2.1 billion for municipal and industrial water users and $335 million for Georgia farmers . . . every single year." Stavins 2. Georgia's expert also testified that Florida's expert had dramatically lowered his initial evaluation of the costs to Georgia, which was initially $191 million. *Id.*, at 31; see also 11 Trial Tr. 2787. That change apparently occurred because Florida's expert narrowed his definition of "cost" to exclude anything but additional, direct governmental expenditures. See *id.*, at 2791. But regardless of the precise cost, Georgia's expert testified that it would be inequitable to impose it on Georgia. "Georgia has 5 times the land area, 56 times the population, 80 times the number of employees, and 129 times the [gross regional product] of . . . Florida. [Yet it] consumes only 4 percent of the total waters available in the . . . Basin in an average year, and only 8 percent of the total waters available in the . . . Basin in a dry year, leaving the rest for Florida's use." Stavins 2. Further, Florida's own expert estimated that a cap on Georgia would produce only minimal benefits for Florida: Cutting Georgia's water use in half would increase the oyster biomass in Apalachicola Bay by less than 0.6% in most instances, and only 1.2% during the worst droughts. White 50–51. These additional oysters would be worth only a few hundred thousand dollars. Stavins 51–52.

Finally, Georgia rebutted Florida's assertion that, despite the Corps' operations, Florida would actually receive the additional water that a cap on Georgia would create during droughts. Using models that accounted for the Corps' prior operations, Georgia's expert on the Corps, Dr. Philip Bedient, testified that Florida would receive only 5,000 cubic feet per second during droughts, no matter how much additional water was created by a cap on Georgia and regardless of whether that water flowed into the Flint or the Chattahoochee River. See Bedient 23–26, 28–30. The United States

filed an *amicus* brief to the same effect. It confirmed that, during droughts, "[t]he Corps expects . . . that Apalachicola River flows would be very similar with or without a consumption cap [on Georgia]." Post-Trial Brief 17–18 (United States Post-Trial Brief).[3]

C

All told, the trial lasted one month. After hearing the witnesses and reviewing the evidence, the Special Master recommended ruling against Florida. Report 70. The Special Master found that Florida likely had proved harm to its oysters,[4] and assumed that Georgia was using too much water for agricultural purposes.[5] *Id.*, at 31–34. But the Special Master did not decide whether Georgia's agricultural water use caused the harm to Florida's oysters. *Id.*, at 34. Instead, he concluded that Florida had failed to prove that a cap on Georgia would appreciably benefit it given the Corps' operations in the Basin. *Id.*, at 3, 31–34.

Citing this Court's precedents requiring States to prove an appreciable benefit before they can obtain an equitable apportionment that interferes with established uses, the Special Master concluded that Florida could not prove that its injury was "redressable by the Court." See *id.*, at 24 (citing, *inter alia*, *Idaho ex rel. Evans* v. *Oregon*, 444 U. S. 380, 392 (1980) (*Idaho I*); *Washington* v. *Oregon*, 297 U. S. 517, 523 (1936)); Report 30 (same); see also *id.*, at 27 (citing *New Jersey* v. *New York*, 283 U. S. 336, 342–345 (1931); *Colo-*

[3] The United States has made similar representations to this Court. See, *e. g.*, Brief for United States 26–29 (explaining that the Corps "would not generally expect" flows into Florida to increase during droughts, even if Florida convinced this Court to cap Georgia's water use).

[4] The Special Master noted that Florida's alleged injuries to mussels, sturgeon, and tupelo trees were "less compelling." Report 64, n. 42.

[5] As for Georgia's municipal and industrial water use, the Special Master concluded that it was "less clear" that these uses were "unreasonable," given that Georgia had "taken significant steps to conserve water in the Atlanta metropolitan region." *Id.*, at 34, n. 28.

rado I, 459 U. S., at 187). According to the Special Master, Florida "ha[d] not proven by clear and convincing evidence that any additional streamflow in the Flint River or in the Chattahoochee River would be released from Jim Woodruff Dam into the Apalachicola River at a time that would provide a material benefit to Florida (*i. e.*, during dry periods)." Report 47. The Special Master also found that "Florida ha[d] not met its requirement to show by clear and convincing evidence that its injury can be redressed by increased flows during non-drought conditions" because its "trial presentation did not address the benefits of increased flows during 'normal' periods" and Georgia's evidence showed "an absence of any significant benefit to Florida." *Id.*, at 63–65.

III

Before delving into the parties' arguments, it is helpful to have a basic understanding of the rules that govern this Court's equitable-apportionment jurisprudence—or at least what used to be the rules before the Court's opinion muddled them beyond recognition.

First, in equitable-apportionment cases, as in all cases, this Court requires the complaining party to prove standing. *Maryland* v. *Louisiana*, 451 U. S. 725, 735–736 (1981); *Wyoming* v. *Oklahoma*, 502 U. S. 437, 447, 452 (1992); see also 3 A. Kelley, Water and Water Rights § 45.02(b), p. 45–12 (3d ed. 2018) (Kelley) (noting that standing is a justiciability requirement for equitable-apportionment cases). To prove standing, a complaining State must demonstrate that it has "'suffered a wrong through the action of the other State . . . which is susceptible of judicial enforcement according to the acceptable principles of the common law or equity systems of jurisprudence.'" *Maryland*, *supra*, at 735–736; *Wyoming*, *supra*, at 452.

Second, this Court requires the State seeking an apportionment to show by clear and convincing evidence a "threatened invasion of rights . . . of serious magnitude." *New*

York v. *New Jersey*, 256 U. S. 296, 309 (1921); accord, *Colorado I*, *supra*, at 187, n. 13; Kelley § 45.04. Our precedents do not clarify whether this requirement goes to the case's justiciability, the merits of the complaining State's claim, or the propriety of affording injunctive relief. See Kelley §45.04. But they are clear that such a showing must be made to obtain relief. See *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669 (1931).

Third, the State seeking an apportionment must "demonstrat[e] by clear and convincing evidence that the benefits of the [apportionment] substantially outweigh the harm that might result." *Colorado I*, *supra*, at 187; accord, *Colorado* v. *New Mexico*, 467 U. S. 310, 316–317 (1984) (*Colorado II*); Kelley § 45.06, at 45–34 to 45–35. Since this Court's first equitable-apportionment case, this balance-of-harms test has been the basic merits inquiry that decides whether a State is entitled to an apportionment. See *id.*, § 45.06(c)(1), at 45–39 to 45–40 ("Harm-benefit comparison goes back to the Court's first equitable apportionment case, *Kansas* v. *Colorado*[, 206 U. S. 46, 113–114 (1907) (*Kansas I*)]"). As part of the balance-of-harms test, this Court has required the State seeking an apportionment to prove that it would appreciably benefit from the apportionment—otherwise, the State could not possibly prevail in the balance-of-harms analysis. *Idaho I*, *supra*, at 392; *Washington*, *supra*, at 523; see also Kelley § 45.06(c)(1), at 45–39 (explaining that this appreciable-benefit requirement is part of the "harm-benefit" balance).

Fourth, if the State seeking an apportionment makes all these showings, this Court must craft an equitable-apportionment decree. Our precedents hold that a State should not be denied a remedy merely because calculating the appropriate apportionment is difficult. See *Idaho ex rel. Evans* v. *Oregon*, 462 U. S. 1017, 1026 (1983) (*Idaho II*). Reasonable predictions about future conditions are sufficient. *Ibid.*

This case is about the third rule: the balance-of-harms analysis and, specifically, its appreciable-benefit requirement. The Special Master found that Florida had not proved that its requested cap on Georgia's water use would appreciably benefit it, since Florida could not prove that it would receive more water when it needed it. That this case is about the third rule is important. Throughout its opinion, the Court mushes the requirements from our precedents together, merging cases and principles from one area with cases and principles from another—sometimes in the same sentence. But our precedents are not so convoluted. They articulate clear rules, and the Special Master correctly applied one of them when making his recommendation in this case. He did not err by failing to apply the unrecognizable mishmash of principles set out in the Court's opinion.

IV

Florida raises three objections to the Special Master's Report. First, it argues that the Special Master required it to satisfy a legal standard that was too demanding. Second, Florida argues that it should prevail under the correct standard because, if this Court enters an equitable-apportionment decree, the Corps will likely allow more water to flow into Florida during droughts. And third, even if the Corps does not release more water into Florida during droughts, Florida argues that a cap on Georgia would still benefit it during nondroughts. None of these arguments has merit.

A

Florida's first objection fails because the Special Master applied the correct legal standard. A careful reading of his Report demonstrates that he applied the ordinary balance-of-harms test dictated by this Court's precedents. He did not, as the Court implies, deny Florida relief because calculating an appropriate apportionment was too difficult or be-

cause Florida failed to satisfy the "threshold" redressability requirement for Article III standing. And even if the Special Master did apply the wrong standard, his misstep would not justify a remand because his findings are plainly correct and establish that Georgia should prevail under the balance-of-harms test.

1

The Special Master applied the balance-of-harms test from this Court's precedents. A State seeking an equitable apportionment that interferes with established uses must "demonstrat[e] by clear and convincing evidence that the benefits of the [apportionment] substantially outweigh the harm that might result." *Colorado I*, 459 U. S., at 187; accord, *Colorado II*, *supra*, at 316–317. This heavy burden reflects the need for "judicial caution" before granting equitable apportionments, which "involve the interests of quasi-sovereigns, present complicated and delicate questions, and . . . necessitate expert administration." *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943) (*Kansas II*); accord, *Colorado II*, 467 U. S., at 316 (explaining that the clear-and-convincing-evidence burden "appropriately balance[s] the unique interests involved in water rights disputes between sovereigns"). It also reflects "this Court's long-held view that the proposed diverter should bear most, if not all, of the risks of erroneous decision" because the benefits he claims for proposed future uses are usually "'speculative and remote'" while the costs of disrupting established uses are "'typically certain and immediate.'" *Ibid.* (quoting *Colorado I*, *supra*, at 187).

As part of the balance-of-harms analysis, this Court has repeatedly held that the State seeking to divert water from existing uses must show that it will obtain some appreciable benefit from an equitable apportionment. See, *e. g.*, *Idaho I*, 444 U. S., at 392; *New Jersey*, 283 U. S., at 345. This appreciable-benefit requirement reflects the fact that a minimal benefit cannot outweigh the heavy costs that inevitably accompany equitable-apportionment decrees. See *Colorado I*, *supra*, at 187 ("[T]he equities supporting the [status quo]

will usually be compelling"); *Kansas II*, *supra*, at 393 (expressing "great and serious caution" over granting equitable apportionments because they "interfer[e] with the action of a State"). Put another way, the Court will not "bring distress and even ruin to a long-established [water use] for no other or better purpose than to vindicate a barren right." *Washington*, 297 U. S., at 523; see also *Kansas I*, 206 U. S., at 109 ("[B]efore, at the instance of a sister state, [a State's water use] is destroyed or materially interfered with, it should be clear that such sister state has not merely some technical right, but also a right with a corresponding benefit"). Such an action would run contrary to "the high equity that moves the conscience of the court in giving judgment between states." *Washington*, 297 U. S., at 523.

For example, in *Washington* v. *Oregon*—a case with facts strikingly similar to this one—the Court refused to cap Oregon's water use because it "'would materially injure Oregon users without a compensating benefit to Washington users.'" *Ibid.* In that case, Washington complained about "temporary dams" that Oregon residents had erected to irrigate their crops during "seasons of [water] shortage." *Id.*, at 522. Removing the dams, however, would mean that, "[d]uring the period of water shortage, only a small quantity of water would go by" and "would be quickly absorbed and lost in the deep gravel beneath the channel." *Id.*, at 522–523. Because a cap on Oregon would not benefit Washington by supplying water when it most needed it, the Court declined to grant Washington's requested relief. *Id.*, at 520–523.

The Special Master applied this appreciable-benefit requirement. As he explained, Florida "ha[d] not proven by clear and convincing evidence" that the Corps would release any additional water "at a time that would provide a material benefit to Florida (*i. e.*, during dry periods)." Report 47; see also *id.*, at 47–48 ("[T]he Corps' operation[s] . . . rende[r] any potential benefit to Florida from increased streamflow in the Flint River uncertain and speculative"). The Special Master likewise found "an absence of any significant

benefit to Florida" during nondrought conditions. *Id.*, at 65; see also *id.*, at 69 ("Florida has not shown that it would benefit from increased pass-through operations under normal conditions"); *id.*, at 62–63 ("[T]he potential benefits to Florida of increased flows . . . when the Corps is not in drought operations are uncertain, rendering the efficacy of any relief speculative"). Tellingly, the Special Master relied exclusively on this Court's precedents applying the appreciable-benefit requirement. See *id.*, at 24 (citing, *inter alia*, *Idaho I*, *supra*, at 392; *Washington*, *supra*, at 523); Report 30 (same); *id.*, at 27 (citing *New Jersey*, *supra*, at 345; *Colorado I*, *supra*, at 187). And Florida agreed that it had to present proof of some benefit. See, *e. g.*, Florida's Post-Trial Response Brief 63 (conceding that it had to "prove that additional flows from a . . . reduction in Georgia's consumption will result in meaningful benefits to the Bay and River"). In short, the Special Master correctly applied our precedents and required Florida to show that it would obtain some appreciable benefit from an equitable-apportionment decree.

2

The Court does not disagree that Florida failed to prove an appreciable benefit. Instead, it simply asserts that a decision on that question is "premature." *Ante*, at 813. It is incredibly odd to conclude that a Special Master's merits determination is "premature" after a *full trial*. The Court can draw that strange conclusion only by conflating the rules that govern our equitable-apportionment jurisprudence and then faulting the Special Master for misapplying two rules that he never applied.

The Court criticizes the Special Master for applying "too strict a standard" when deciding the "'threshold'" question whether the Court would be "able to fashion an appropriate equitable decree." *Ante*, at 820. Although the Court's reasoning is far from clear, it appears to mean one of two things. The Court either means that the Special Master erred by denying relief on the ground that it was too difficult to calcu-

late the appropriate apportionment—the fourth rule mentioned above. Or the Court means that the Special Master erred by denying relief on the ground that Florida could not prove Article III standing—the first rule mentioned above. But the Special Master did not deny relief for either of these two reasons.

a

Both the Court and Florida suggest that the Special Master contravened this Court's statement in *Idaho II* that "'[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree.'" *Ante*, at 816, 839 (quoting *Idaho II*, 462 U. S., at 1026); see also *ante*, at 818, 822 (suggesting that the Special Master violated *Idaho II* by concluding that "'the formulation of a workable decree is impossible'"); Brief for Plaintiff 30–31. But the Special Master nowhere contradicted this rule.

The rule from *Idaho II* is a rule about fashioning an appropriate remedy when the complaining State has prevailed on the merits. In *Idaho II*, the Special Master concluded that he could not determine Idaho's entitlement to fish "for any past or future year" because "several unknown variables" made it too difficult to decide how many fish would be available to harvest at any given time. Special Master's Report, O. T. 1982, No. 67, Orig., p. 30. The Special Master rejected Idaho's proposed formula for calculating its entitlement because he could not understand the predictive models or mathematics involved in applying it. *Id.*, at 40–42. Before this Court, Idaho objected to the Special Master's conclusion, arguing that its proposed formula relied on procedures "that are either being currently employed by defendants or which involve simple mathematical computations." Brief for Plaintiffs in O. T. 1982, No. 67, Orig., p. 82. The Court accepted Idaho's argument, noting that a decree need not "always be mathematically precise or based on definite present and future conditions" and that "Idaho's proposed formula for apportioning the fish is one possible basis for a decree." *Idaho II*, 462 U. S., at 1026. "Uncertainties about the fu-

ture," the Court explained, "do not provide a basis for declining to fashion a decree." *Ibid.*

Unlike the Special Master in *Idaho II*, the Special Master in this case did not conclude that it was too difficult to calculate the amount of water that Florida should receive. As the Court acknowledges, *ante*, at 827, the Special Master assumed it was feasible to impose Florida's requested cap on Georgia's water use and "accept[ed] Florida's estimates of the increased streamflow that would result from a consumption cap." Report 67, n. 43; see *id.*, at 34–35. But even if a cap on Georgia generated the additional water that Florida claimed it would (1,500 to 2,000 cubic feet per second), the Special Master concluded that it would not appreciably benefit Florida because it would not be passed through when Florida needed it. See *id.*, at 47–48, 62–65, 69. That is why the Special Master cited the appreciable-benefit rule from *Idaho I*, 444 U. S., at 392, and *Washington*, 297 U. S., at 523. He did not fail to make reasonable predictions in shaping a remedy or otherwise contravene the rule from *Idaho II*.

b

Florida alternatively contends that the Special Master applied the "redressability" requirement of Article III standing. See Brief for Plaintiff 29–32. At some points, the Court appears to agree with this characterization, as it describes the appreciable-benefit rule as an Article III standing requirement. See *ante*, at 817–818 (quoting the Article III standing rule from *Wyoming* v. *Oklahoma*, 502 U. S., at 447, 452, *Maryland* v. *Louisiana*, 451 U. S., at 735–736, and *Massachusetts* v. *Missouri*, 308 U. S. 1, 15 (1939), and describing the appreciable-benefit rule from *Kansas I* and *Washington* as a "[m]ore specifi[c]" articulation of that rule). This argument is incorrect.

As explained, the Special Master applied the ordinary balance-of-harms analysis and found that Florida had not

demonstrated an appreciable benefit from a cap on Georgia's use. Tellingly, the Special Master relied exclusively on cases conducting the balance-of-harms analysis. His Report does not cite any standing cases, or even mention "standing" or "Article III." Neither do any of the pre-trial or post-trial briefs that the parties filed. True, the Special Master's Report sometimes describes the appreciable-benefit requirement as a question of "redressability"—a word that is also associated with Article III standing. But the Special Master was merely following the parties' lead, as they phrased the appreciable-benefit requirement in terms of "redress" throughout the litigation. See Tr. of Oral Arg. on Motion To Dismiss 29 (Florida admitting that it must show "that caps on consumption will . . . redress [its] harms" to "prov[e] its case"); Florida Pre-Trial Brief 37–39 (describing how a consumption cap "can redress Florida's worsening injuries" and "significantly benefit Florida's ecology"); Georgia Post-Trial Brief 80–88 (describing the appreciable-benefit aspect of the balance-of-harms test as a "redress" requirement); Georgia's Post-Trial Response Brief 3, 7 (same); see also United States Post-Trial Brief 19 (taking no position "on whether Florida has proved that a consumption cap would produce enough additional [B]asin inflow at the right times to *redress* Florida's alleged harm and justify the cost of imposing a consumption cap" (emphasis added)). That the parties and the Special Master adopted this shorthand does not change the Special Master's analysis, which focused squarely on the appreciable-benefit requirement.[6]

[6] The Court places great weight on the fact that the Special Master referred to redressability as a "'threshold'" requirement. See *ante*, at 813–814, 820, 823. But showing an appreciable benefit *is* a "threshold" requirement for prevailing under the balance-of-harms test, as a State that cannot show an appreciable benefit obviously cannot show that the balance of harms tilts in its favor. In other words, the Court need not engage in a full-scale balancing of benefits and harms if the party that bears the burden of proof has nothing to place on its side of the scale; it

c

Because the Court wrongly assumes that the Special Master denied relief on the basis rejected in *Idaho II* or for lack of Article III standing, it faults the Special Master for imposing the higher burden of proof that governs the merits—*i. e.*, "'clear and convincing evidence.'" See *ante*, at 820–823.[7] Of course, the far simpler explanation for why the Special Master applied the merits standard is that he was, in fact, making a decision about the merits, not about remedies or standing.

The Court also appears to fault the Special Master for addressing the appreciable-benefit requirement without first making several preliminary findings. The Court asserts that Special Masters must make specific factual determinations in every case about the harm that the complaining State suffered, the exact amount of water needed to remedy that harm, and a host of other factors. See *ante*, at 817–821.

The Court's suggested order of operations, which it appears to invent out of thin air, would fundamentally transform our equitable-apportionment jurisprudence. It will require States to litigate (and this Court to resolve) a host of complex factual questions, even where the State seeking the apportionment is obviously not entitled to relief because it cannot show an appreciable benefit—a requirement that Florida agrees is necessary for it to prevail, see Florida Post-Trial Response Brief 63 (agreeing it must "prove that addi-

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can reject that type of case at the "threshold." That the Special Master used the word "threshold" does not suggest that he was doing anything other than applying the ordinary balance-of-harms test.

[7] In faulting the Special Master for requiring clear and convincing evidence, the Court combines the rule from *Idaho II* with the balance-of-harms test from *Kansas I*, *Washington*, and *Idaho I*. See *ante*, at 822–823. The Court reconciles these precedents as follows: "[T]hese [cases] apply to the general *availability* of judicial relief—not to the *details* of a final decree or to the workability of a decree that will depend on those details." *Ibid.* I do not understand this sentence, and I pity the litigants and Special Masters who will be forced to decipher it.

tional flows from a . . . reduction in Georgia's consumption will result in meaningful benefits to the Bay and River"); Tr. of Oral Arg. on Motion To Dismiss 29 (admitting it must show "that caps on consumption will . . . redress [its] harms" to "prov[e] its case"). In no other area of the law do we require unnecessary findings and conclusions when a key element of the plaintiff's case is missing. And we have not applied this rule in equitable-apportionment cases either. See, *e. g.*, *Idaho II*, 462 U. S., at 1027–1029 (denying relief, despite the Special Master's erroneous ruling on the requested remedy, because his findings also supported the conclusion that Idaho could not show injury and thus was not entitled to relief on the merits). The inefficiencies that this would create, and the costs it would impose on States, are obvious. Yet the Court faults the Special Master for resolving the dispositive question in this case first, without jumping through a series of unnecessary hoops. This is precisely the opposite of what Special Masters should be doing and what this Court should be encouraging.

3

Even if the Court is correct that the Special Master denied Florida relief for some reason other than the merits, there is no reason to send this case back for a do-over. As the Court acknowledges, " 'the ultimate responsibility for deciding what are correct findings of fact remains with us.' " *Ante*, at 823 (quoting *Colorado II*, 467 U. S., at 317). We must bring our independent judgment to bear based upon "our own independent examination of the record." *Kansas* v. *Missouri*, 322 U. S. 213, 232 (1944). An independent examination of the record confirms that the Special Master was correct to find that the Corps would not change its operations during droughts if this Court capped Georgia's water use and thus Florida would not benefit from a cap during droughts. See Part IV–B–1, *infra*. The Special Master also was correct to find that Florida presented no evidence of a benefit during nondroughts. See Part IV–B–2, *infra*. Those findings

support a judgment in Georgia's favor under the traditional balance-of-harms analysis.

It makes little sense to send this case back to the Special Master so that he can amend his Report to say "appreciable benefit" instead of "redress" and then send this case right back to this Court.[8] That pointless exercise will only needlessly prolong this litigation. The Court's subtle suggestion that Florida could present "additional evidence" on remand, *ante*, at 840, is not a satisfactory response. During their 18 months of discovery, the parties produced 7.2 million pages of documents, served 130 third-party subpoenas, issued more than 30 expert reports, and conducted nearly 100 depositions, including 29 expert depositions. Florida thus had a more-than-ample opportunity to gather its evidence and then present it at a 1-month trial. Giving Florida another bite at the apple will likely yield no additional evidence, but it will be unfair to Georgia, which has already spent the time and resources to defeat the case that Florida chose to present. In short, we have all the evidence we need to decide this case now. We should have done so.

B

Florida's second and third objections—which challenge the Special Master's finding that Florida had not met its burden under the balance-of-harms test—also fail. As explained, a State seeking to interfere with established uses must prove its case by clear and convincing evidence—a "much greater" burden than the one normally imposed in civil cases. *Connecticut*, 282 U. S., at 669. To meet this burden, Florida

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[8] The Court concedes that Florida cannot prevail in this case unless it proves, by clear and convincing evidence, that it would obtain an appreciable benefit from an equitable apportionment. See *ante*, at 822 (noting that the appreciable-benefit test "'goes to the merits' of the equitable apportionment inquiry"); *ante*, at 823 (noting "a remand is necessary to conduct the equitable-balancing inquiry"); *ante*, at 840 (noting that Florida must ultimately prevail in the balance-of-harms test).

must present enough evidence to leave this Court with an "abiding conviction that the truth of its factual contentions are 'highly probable'" and to "instantly til[t] the evidentiary scales in the affirmative when weighed against the evidence . . . offered in opposition." *Colorado II*, *supra*, at 316. As the Special Master found, Florida has not met this burden. The evidence demonstrates that, if this Court imposed Florida's proposed cap on Georgia, Florida would not receive an appreciable amount of additional water during droughts. And Florida would not benefit from the additional water that it received during nondroughts.

1

Florida did not demonstrate that, if this Court caps Georgia's water use, Florida would receive a meaningful amount of additional water during droughts. For Florida to receive more water, the Corps must change its current operating procedures. But the Corps is not a party, and it would not be bound by any decree issued by this Court. Because Florida cannot ask this Court to require the Corps to change its existing operations, it must prove by clear and convincing evidence that the Corps will voluntarily make the necessary changes. Florida cannot do so. The United States' representations in this litigation and the Corps' history and practice in the Basin all reveal that the Corps will not change its existing practices, even if this Court caps Georgia's water use.

Throughout this litigation, the United States has consistently maintained that the Corps "would not generally expect" to release more water into Florida during droughts, even if Florida convinced this Court to cap Georgia's use. Brief for United States 28; see also United States Post-Trial Brief 17–18 ("The Corps expects [during drought operations] that Apalachicola River flows would be very similar with or without a consumption cap until enough water is stored to return the system to normal operations"). This is because

"[B]asin inflow . . . has historically not been the primary factor in the Corps' decisionmaking process for making additional releases above 5,000 [cubic feet per second] during drought operations." Brief for United States 28. The Corps' "overriding" priorities during droughts are preserving enough water "to comply with the [Endangered Species Act] while avoiding catastrophic depletion of storage and refilling [its] reservoirs as rapidly as possible." *Id.*, at 27. Deviations are made only "as needed to serve congressionally authorized project purposes" or "in emergency circumstances." *Ibid.* Since a general need to provide more water to Florida does not fall within either exception, the additional water that would flow into the Basin would not translate into additional flows for Florida. See *id.*, at 29.

The United States' representations are consistent with the Corps' historical practice. During droughts, the amount of water entering the Basin is almost always insufficient to meet the Corps' minimum-flow requirement of 5,000 cubic feet per second. See Bedient 24–27. Thus, a cap on Georgia would simply decrease the amount of water that the Corps must release from storage; it would not increase the amount of water flowing into the Apalachicola River. *Id.*, at 21, 25–26. And once drought operations are triggered, the Corps limits its releases to around 5,000 cubic feet per second regardless of the amount of water entering the Basin. See United States Post-Trial Brief 9; Brief for United States 24–28. Indeed, during past drought operations, even when Basin inflow varied by tens of thousands of cubic feet per second, the measured flow from Jim Woodruff Dam into the Apalachicola River has consistently remained around 5,000 cubic feet per second. See Bedient 23, 62–63.[9] Further,

[9] It makes no difference whether the additional water generated by a cap on Georgia would enter the Flint River. Contra, Brief for Plaintiff 26, 38–39. If additional water entered the Flint River during droughts, the Corps would release less water from its upstream reservoirs on the Chattahoochee River to maintain a consistent flow of around 5,000 cubic

the models presented by Georgia's expert showed that, if Florida's proposed caps had been in place during the drought years of 2007 and 2012, Florida would not have received appreciable additional flows when the water was most needed. Cutting Georgia's use in half would have produced additional flows for only 14 to 19 days in the summer and fall of 2007, and would not have produced any additional flows during the summer or fall of 2012. *Id.*, at 27–30; see also *id.*, at 38 (showing the same for 2011).

Florida argues that the Corps might exercise its discretion to ensure that additional water reaches Florida during droughts. Brief for Plaintiff 40–44. But Florida supports this claim with nothing more than speculation. See *Colorado II*, 467 U. S., at 320 (explaining that a State cannot carry its burden in an equitable-apportionment action except "with specific evidence" and that "[m]ere assertions . . . will not do"). All available evidence suggests that the Corps would not exercise its discretion to release more water into the Apalachicola River during droughts.

Before this Court, the United States expressly rejected Florida's contention that "the Corps is likely to exercise its authority within existing operational protocols to provide Florida with additional flows produced by a cap on Georgia's consumption." Brief for United States 23. Basin inflows, it explained, simply do not dictate how much water the Corps releases into the Apalachicola River. *Ibid.* And the Corps could not make discretionary releases "that [are] not specifically provided for in the [water-control manual], not specifically authorized by Congress or mandated by general statute, [and not] required by a court order directed to the Corps," without raising "significant and difficult question[s]" about whether it had exceeded its authority. *Id.*, at 29.

Florida also suggests that the Corps might amend its water-control manual in response to an equitable decree from

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feet per second from the Jim Woodruff Dam at Lake Seminole. See Bedient 24–26; Brief for United States 24–25.

this Court. Florida's only support for this argument is a statement from the Corps that it will "'take . . . into account'" this Court's decision. Brief for Plaintiff 44 (quoting Record of Decision Adopting Proposed Action Alternative for Implementation of Updated Apalachicola-Chattahoochee-Flint River Basin Master Manual 18 (Mar. 30, 2017)). But this vague statement was not a promise that the Corps will change its procedures, and there are a host of reasons to doubt that the Corps would voluntarily change its procedures just because this Court capped Georgia's use.

For one, the Corps has already tried procedures that passed more water to Florida during droughts. The results were dreadful: Reservoir storage plummeted to dangerously low levels, putting all of the Corps' authorized project purposes at risk. Zeng 45–46. Since that time, the Corps' operating protocols have become increasingly protective of reservoir storage, particularly during droughts. As the Corps explained, it intends to pursue "'a more proactive approach to conserve reservoir storage as drier conditions develop in the [B]asin'" because the "[s]torage of water during drought operations is critically important to retain sufficient water in the system." Brief for United States 11.

For another, the last time the Corps attempted to change its water-control manual, it required more than two decades of litigation and administrative review to finalize those changes. Indeed, the main reason that the United States chose not to participate in this case is because it wanted "to avoid being bound by a decree that could directly affect the Corps operations before the Corps had a chance to finally complete its process of updating the [water-control manual]." *Id.*, at 32. Given this, there is no reason to think that the Corps will volunteer to undertake the process of updating its manual again—especially so soon after it completed this arduous task.

Florida's speculation is even more suspect in view of the changes that the Corps would have to make to benefit Florida during droughts. To even propose a new water-control

manual, the Corps must "examin[e] . . . the congressionally authorized purposes," "determin[e] . . . how providing additional flows will impact those purposes [and] other laws," and "supplemen[t] documentation of environmental impacts as required by [the National Environmental Policy Act]." *Id.*, at 31. Providing more water to Florida does not help the Corps satisfy any of these legal requirements. It is not one of the congressionally authorized purposes, see *id.*, at 29, 31–32, and, by dropping its lawsuit against the Corps, Florida now accepts that a minimum flow of 5,000 cubic feet per second is sufficient to comply with the Endangered Species Act. Florida cannot claim that the law requires the Corps to provide it with more water. And the idea that the Corps will change its operating protocols to serve an unauthorized purpose when doing so could jeopardize its authorized purposes is simply not plausible.

Taking a different tack, the Court suggests that additional water will pass through to Florida even if the Corps does not change its manual. Specifically, the Court concludes that the additional water will pass through to Florida during droughts so long as the Corps does not enter drought operations. See *ante*, at 829–831. According to the Court, the Corps will allow additional water to pass through to Florida whenever the natural flow of the Apalachicola River is between 5,000 and 10,000 cubic feet per second during normal or "nondrought" operations. See *ante*, at 829–830.

The Court's conclusion depends on the premise that, during droughts, the natural streamflow into Florida is "between 5,000 and 10,000" cubic feet per second. *Ibid.* That premise is false.[10] During droughts, the natural streamflow

[10] The Court contends that I have confused "droughts" and "drought operations." See *ante*, at 833–834. I have not, but the Court has. During droughts—periods in which there is a "lack of rain," 4 Oxford English Dictionary 1076 (2d ed. 1989)—the amount of water that naturally flows into the Basin rivers usually falls below 5,000 cubic feet per second, particularly in the summer and fall months. See *infra*, at 871–873. Since the Corps must ensure that the Apalachicola River always receives at least

in the Apalachicola River is usually less than 5,000 cubic feet per second. *Supra*, at 866; see also Bedient 23 (showing that Basin inflow in 2012 was generally below 5,000 cubic feet per second between June and December); *id.*, at 27 (same for 2007). To maintain a minimum flow of 5,000 cubic feet per second during droughts, the Corps must artificially augment the River's natural flow—even when the Corps is in nondrought operations. *Id.*, at 21.[11] For instance, during the 2011 drought (when the Corps was in nondrought operations), "Basin Inflow was below 5,000 [cubic feet per second] for most of th[e] period [between June and December], and the Corps was 'augmenting' streamflow by releasing water

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5,000 cubic feet per second, the Corps augments the natural streamflow during droughts—even when the Corps is not in drought operations. Bedient 21. Thus, any additional water that a cap on Georgia generates during droughts would only increase streamflow into the Apalachicola River if it caused the natural streamflow to exceed 5,000 cubic feet per second. If the additional water increased streamflow to some amount less than that, then it would not increase flows in the Apalachicola River; it would simply decrease the amount of water that the Corps must release from its reservoirs. See *ibid.* Thus, as Georgia's expert explained, "reducing Georgia's consumptive use would only lead to additional . . . flow into Florida under specific and limited circumstances. First, the Corps cannot be in Drought Operations or [Extreme Drought Operations]. Second, *Basin Inflow cannot be below 5,000 [cubic feet per second], even if the Corps is in normal operations*." *Id.*, at 26 (emphasis added).

[11] The Court contends that additional water from a cap on Georgia likely would have passed through to Florida in the summer of 2009. See *ante*, at 830–831. But this evidence is irrelevant. As Florida's own expert testified, "[t]he year 2009 was a relatively wet year." Hornberger 49; accord, Bedient 45. And Florida has only asked this Court to reduce Georgia's consumption by 1,500 to 2,000 cubic feet per second during "severe drought years," which 2009 was not. Hornberger 58.

The Court also contends that additional water from a cap on Georgia likely would have passed through to Florida in the summers of 2016 and 2017. See *ante*, at 830–831, 836. The Court's data was generated simultaneously with or after most of the testimony in this case, so the experts do not speak to it. But even considering the data that the Court has found, I suspect that 2016 and 2017 are not "severe drought years" either and, thus, are irrelevant.

from the reservoirs to satisfy the 5,000 [cubic feet per second] minimum." *Id.*, at 15; see also *id.*, at 27 (same for 2007). Once the Corps adds enough water to reach 5,000 cubic feet per second, however, it generally adds no more than that. *Id.*, at 21. To give a concrete example, if the natural flows in the Apalachicola River were 2,600 cubic feet per second, then the Corps would release 2,400 cubic feet per second from its reservoirs. See *id.*, at 25–26. And if a cap on Georgia increased the River's natural flow to 4,100 cubic feet per second, the Corps would release 900 cubic feet per second. See *ibid.* In either case, the total flow on the Apalachicola River would remain the same: 5,000 cubic feet per second. Thus, so long as the natural flows remain significantly less than 5,000 cubic feet per second, a cap on Georgia would only decrease the amount of water that the Corps releases from storage; it would not increase the overall amount of water flowing into the Apalachicola River.

For this reason, even when the Corps is in nondrought operations, a cap on Georgia would generally not increase flows to Florida. Georgia's expert proved that fact with evidence about past droughts where drought operations were not in effect. Using data from the 2007 drought, Georgia's expert concluded that the additional water from a cap on Georgia would be passed through to Florida almost entirely during the winter and spring months "when water in the [Basin] would be relatively plentiful." *Id.*, at 28. Florida would receive the additional water from a cap on Georgia only 19 days "during the summer and fall months, when streamflow was at its lowest." *Ibid.*; accord, *id.*, at 40. Data from the 2011 drought showed similar results. See *id.*, at 37 ("[During] dry years (*e. g.*, 2007 and 2011), . . . even significant changes in Georgia's consumptive use would lead to virtually no change in state-line flows during the low-flow months (*e. g.*, June, July, August, September)").[12] Florida

[12] The Court claims that "Florida's proposed consumption cap . . . will mean (consistent with the testimony of the very Georgia expert that the dissent so frequently quotes) that there will be significantly fewer such

has not shown that these infrequent and sporadic additional flows during droughts would appreciably benefit it.[13]

The Court hypothesizes that a cap on Georgia could benefit Florida by decreasing the length of drought operations and by increasing the number of days that the Corps can meet its minimum-flow requirements of 5,000 cubic feet per second (during normal drought operations) and 4,500 cubic feet per second (during extreme drought operations). *Ante*, at 828, 831–833. The Court cites the United States' assertion in its brief that increased Basin inflows "'would generally benefit the [Basin] system by delaying the onset of drought operations, by allowing the Corps to meet the 5000 [cubic feet per second] minimum flow longer during extended drought, and by quickening the resumption of normal operations.'" *Ante*, at 828 (quoting Brief for United States 28); see also *ante*, at 832 (quoting a similar statement in the United States Post-Trial Brief 18–19). Of course, statements in briefs are not evidence. And, as the United States recognizes in the very next sentence, Florida would have to show that these "benefits are of sufficient quantity to justify relief in this case." Brief for United States as *Amicus Curiae* 28 (Aug. 7, 2017); see also United States Post-Trial Brief 19 (Dec. 15, 2016) (taking "no position on whether Florida has proven that a consumption cap would produce enough additional [B]asin inflow at the right times to redress Florida's alleged harm and justify the cost of imposing a consumption cap").

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days [of drought operations]." *Ante*, at 834. I assume that the "Georgia expert" in this sentence is Dr. Philip Bedient. But I am aware of no testimony from Dr. Bedient that supports the Court's assertion, and the Court cites none.

[13] If the Corps had been in drought operations, the results would not have differed much, demonstrating that whether the Corps is in drought or nondrought operations is not dispositive. Had the Corps been in drought operations during 2007, for instance, Florida would have received the additional water from a cap on Georgia during 14 days in the summer and fall—a difference of only five days as compared to nondrought operations. Bedient 28.

Florida offered no proof that a cap on Georgia would produce any appreciable benefit of this kind. And the evidence presented at trial suggests that these proposed benefits are wholly speculative. As explained above, the benefits to Florida from a cap on Georgia do not meaningfully change, regardless of whether the Corps enters drought operations. And there is no evidence that the Corps has had trouble meeting its minimum-flow requirements during recent droughts, when Georgia's use remained uncapped. Even during the severe droughts of 2011 and 2012, the Corps consistently maintained flows of 5,000 cubic feet per second, never entered extreme drought operations, and never reduced flows on the Apalachicola River to 4,500 cubic feet per second. See Bedient 14. And the Corps is even more unlikely to run out of water during future droughts, given that its current manual is more proactive in conserving water during droughts. See Brief for United States 11–12.

In sum, Florida has not shown that it is "'highly probable'" that a cap on Georgia will result in meaningful additional flows in the Apalachicola River during droughts. *Colorado II*, 467 U. S., at 316. It is thus not entitled to an equitable apportionment on this basis.

2

Because Florida will not receive additional water during droughts, it argues that it will benefit from additional water during nondroughts. As the Special Master correctly found, however, Florida presented no evidence to support such an assertion. That is because no such evidence exists. Florida would not benefit from additional water during nondroughts, because flows on the Apalachicola River during nondroughts are already plentiful.

The Court does not contend that Florida would benefit from additional water during nondroughts, and Florida all but conceded the point below. When framing its case before the Special Master, Florida requested only that the Court

order Georgia to reduce its water use during droughts; Florida did not ask the Court to reduce Georgia's current water use during nondroughts. See Florida Pre-trial Brief 5; Hornberger 58. Consistent with this request, Florida's evidence focused exclusively on the harms that it suffered during droughts. Florida's hydrology expert testified extensively about droughts. See *id.*, at 2–3, 15–26, 41–46, 49–50. He testified that the Basin usually receives "a rather good amount of rainfall," so "major problems arise" only during "the low rainfall years." *Id.*, at 13. That is why he limited his testimony to the "impacts of [Georgia's] consumption during drought." *Id.*, at 15; see also *id.*, at 20–22.

Florida's other experts followed this drought-centric approach. For instance, one of Florida's experts on the harm to Florida's oysters connected that harm to "severe drought," which "reduced the discharge of fresh water from the Apalachicola River." Updated PFDT of David Kimbro 14. Florida's expert on the harm to sturgeon, mussels, and tupelo trees in the Apalachicola River similarly emphasized "dry periods of episodically dry years." Allan 17; see also *id.*, at 25–27 (emphasizing the effects of sustained flows below 6,000 cubic feet per second). As one Florida expert put it, "[t]he discussions that [he] had, especially with the biologists and the hydrologists, were largely almost exclusively focused on dry years" and he "c[ould]n't think of any" "issues [that] other experts raised about average or wet-year problems." 11 Trial Tr. 2811.

The other evidence presented at trial leaves little doubt that Florida would not benefit from additional water during nondroughts. For starters, when the Basin is not experiencing a drought, water is plentiful. Florida's expert testified that "[a]verage rainfall in the portion of the . . . Basin above [Lake Seminole] is 51.5 inches per year, a rather good amount of rainfall." Hornberger 13. As a result, average monthly flows in the Apalachicola River are nearly 20,000 cubic feet per second. Direct Testimony of Sorab Panday 30 (Panday). More than 95% of the time, Apalachicola River

flows exceed 6,000 cubic feet per second. Brief for United States 12. And it is not unusual for flows in the Apalachicola River to exceed 50,000 cubic feet per second in the wetter months. See Panday 30. Even during drought years, flows in nonsummer months are relatively high. For instance, in the severe drought year of 2012, flow in the late winter and early spring regularly exceeded 10,000 cubic feet per second. See Bedient 29.

Almost all of the additional water generated by a cap on Georgia would reach Florida during these high flow periods, when it would provide no benefit to Florida. See *id.*, at 27–30. Take, for instance, the oysters in Apalachicola Bay—the only harm to Florida that the Special Master found in this case. See Report 31–32. Florida's own experts testified that, even if Georgia cut its agricultural water use in half during droughts, the resulting increase in Apalachicola River flows would have a negligible effect during nondroughts. During years of normal rainfall and the wetter months of drought years, the effect of additional flows on the Bay's salinity is less than one part per thousand. See 7 Trial Tr. 1768–1775. This immeasurable effect on the Bay's salinity would have no appreciable impact on oyster biomass. See White 50–51 (showing a less than 0.6% impact on oyster biomass, except in drier months and drought years).

Assuming Florida's claims of harm to mussels, sturgeon, and tupelo trees have merit—something the Special Master never found—the harm to those species also would not be remedied by increased flows during nondroughts. Florida's expert on these species opined that significant harm to mussels occurs when flows drop below a threshold of 6,000 cubic feet per second for more than seven consecutive days between June 1 and September 30, Allan 33; that significant harm to sturgeons occurs when flows drop below a threshold of 7,000 cubic feet per second for more than 60 total days between May 1 and September 30, *id.*, at 41; and that significant harm to tupelo trees occurs when flows drop below a threshold of 14,100 cubic feet per second for more than 90

consecutive days between March 20 and September 22, *id.*, at 33, 41, 44–45. Accepting these statements as true, passing more water through to Florida during nondroughts would not do these species any good. All would still suffer the same harms during the summers of drought years when flows remain fixed at 5,000 cubic feet per second because of the Corps' operations.

If we contrast the *de minimis* benefits that Florida might receive from small amounts of additional water during nondroughts with the massive harms that Georgia would suffer if this Court cut its water use in half during droughts, it is clear who should prevail in this case. Florida's expert estimated that a cap on Georgia would have an "[i]ncremental [f]iscal [c]ost" of $35.2 million per year. Sunding 44. This figure included only additional costs that would require "the [Georgia] legislature . . . to appropriate money." 11 Trial Tr. 2791. The real cost of such a cap, which includes nongovernmental costs like welfare losses, would range anywhere from $191 million, *id.*, at 2787; Stavins 31, to more than $2 billion per year, *id.*, at 2. And the cap would trigger resulting losses in Georgia's gross regional product and employment, totaling around $322 million and 4,173 jobs annually. *Id.*, at 40. Regardless of the measure used, this harm dwarfs the value of Florida's entire fishing industry in Apalachicola Bay, which produces annual revenues of $11.7 million. *Id.*, at 16. And it greatly outweighs the value of the additional oysters that a cap on Georgia's use might produce—*i. e.*, no more than a few hundred thousand dollars. *Id.*, at 52. Imposing an enormously high cost on one State so that another State can achieve a hollow victory is "not the high equity that moves the conscience of the court in giving judgment between states." *Washington*, 297 U. S., at 523.

* * *

In the final analysis, Florida has not shown that it will appreciably benefit from a cap on Georgia's water use. Ab-

sent such a showing, the balance of harms cannot tip in Florida's favor. Accordingly, I would have overruled Florida's objections to the Special Master's Report and denied Florida's request for relief. I respectfully dissent.

Syllabus

JANUS *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

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

No. 16–1466. Argued February 26, 2018—Decided June 27, 2018

Illinois law permits public employees to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees, even those who do not join. Only the union may engage in collective bargaining; individual employees may not be represented by another agent or negotiate directly with their employer. Nonmembers are required to pay what is generally called an "agency fee," *i. e.*, a percentage of the full union dues. Under *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 235–236, this fee may cover union expenditures attributable to those activities "germane" to the union's collective-bargaining activities (chargeable expenditures), but may not cover the union's political and ideological projects (nonchargeable expenditures). The union sets the agency fee annually and then sends nonmembers a notice explaining the basis for the fee and the breakdown of expenditures. Here it was 78.06% of full union dues.

Petitioner Mark Janus is a state employee whose unit is represented by a public-sector union (Union), one of the respondents. He refused to join the Union because he opposes many of its positions, including those taken in collective bargaining. Illinois' Governor, similarly opposed to many of these positions, filed suit challenging the constitutionality of the state law authorizing agency fees. The state attorney general, another respondent, intervened to defend the law, while Janus moved to intervene on the Governor's side. The District Court dismissed the Governor's challenge for lack of standing, but it simultaneously allowed Janus to file his own complaint challenging the constitutionality of agency fees. The District Court granted respondents' motion to dismiss on the ground that the claim was foreclosed by *Abood*. The Seventh Circuit affirmed.

Held:

1. The District Court had jurisdiction over petitioner's suit. Petitioner was undisputedly injured in fact by Illinois' agency-fee scheme and his injuries can be redressed by a favorable court decision. For jurisdictional purposes, the court permissibly treated his amended com-

plaint in intervention as the operative complaint in a new lawsuit. *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157, distinguished. Pp. 890–891.

2. The State's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. *Abood* erred in concluding otherwise, and *stare decisis* cannot support it. *Abood* is therefore overruled. Pp. 891–929.

(a) *Abood*'s holding is inconsistent with standard First Amendment principles. Pp. 891–901.

(1) Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns. *E. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633. That includes compelling a person to subsidize the speech of other private speakers. *E. g.*, *Knox* v. *Service Employees*, 567 U. S. 298, 309. In *Knox* and *Harris* v. *Quinn*, 573 U. S. 616, the Court applied an "exacting" scrutiny standard in judging the constitutionality of agency fees rather than the more traditional strict scrutiny. Even under the more permissive standard, Illinois' scheme cannot survive. Pp. 891–895.

(2) Neither of *Abood*'s two justifications for agency fees passes muster under this standard. First, agency fees cannot be upheld on the ground that they promote an interest in "labor peace." The *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded: Exclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked. To the contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was decided, it is thus now undeniable that "labor peace" can readily be achieved through less restrictive means than the assessment of agency fees.

Second, avoiding "the risk of 'free riders,'" *Abood*, *supra*, at 224, is not a compelling state interest. Free-rider "arguments . . . are generally insufficient to overcome First Amendment objections," *Knox*, *supra*, at 311, and the statutory requirement that unions represent members and nonmembers alike does not justify different treatment. As is evident in non-agency-fee jurisdictions, unions are quite willing to represent nonmembers in the absence of agency fees. And their duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative. In any event, States can avoid free riders through less restrictive means than the imposition of agency fees. Pp. 895–901.

(b) Respondents' alternative justifications for *Abood* are similarly unavailing. Pp. 901–909.

(1) The Union claims that *Abood* is supported by the First Amendment's original meaning. But neither founding-era evidence nor dictum in *Connick* v. *Myers*, 461 U. S. 138, 143, supports the view that the First Amendment was originally understood to allow States to force public employees to subsidize a private third party. If anything, the opposite is true. Pp. 902–905.

(2) Nor does *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, provide a basis for *Abood*. *Abood* was not based on *Pickering*, and for good reasons. First, *Pickering*'s framework was developed for use in cases involving "one employee's speech and its impact on that employee's public responsibilities," *United States* v. *Treasury Employees*, 513 U. S. 454, 467, while *Abood* and other agency-fee cases involve a blanket requirement that all employees subsidize private speech with which they may not agree. Second, *Pickering*'s framework was designed to determine whether a public employee's speech interferes with the effective operation of a government office, not what happens when the government compels speech or speech subsidies in support of third parties. Third, the categorization schemes of *Pickering* and *Abood* do not line up. For example, under *Abood*, nonmembers cannot be charged for speech that concerns political or ideological issues; but under *Pickering*, an employee's free speech interests on such issues could be overcome if outweighed by the employer's interests. Pp. 905–909.

(c) Even under some form of *Pickering*, Illinois' agency-fee arrangement would not survive. Pp. 909–916.

(1) Respondents compare union speech in collective bargaining and grievance proceedings to speech "pursuant to [an employee's] official duties," *Garcetti* v. *Ceballos*, 547 U. S. 410, 421, which the State may require of its employees. But in those situations, the employee's words are really the words of the employer, whereas here the union is speaking on behalf of the employees. *Garcetti* therefore does not apply. Pp. 909–910.

(2) Nor does the union speech at issue cover only matters of private concern, which the State may also generally regulate under *Pickering*. To the contrary, union speech covers critically important and public matters such as the State's budget crisis, taxes, and collective bargaining issues related to education, child welfare, healthcare, and minority rights. Pp. 910–914.

(3) The government's proffered interests must therefore justify the heavy burden of agency fees on nonmembers' First Amendment

interests. They do not. The state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders—clearly do not, as explained earlier. And the new interests asserted in *Harris* and here—bargaining with an adequately funded agent and improving the efficiency of the work force—do not suffice either. Experience shows that unions can be effective even without agency fees. Pp. 914–916.

(d) *Stare decisis* does not require retention of *Abood*. An analysis of several important factors that should be taken into account in deciding whether to overrule a past decision supports this conclusion. Pp. 916–929.

(1) *Abood* was poorly reasoned, and those arguing for retaining it have recast its reasoning, which further undermines its *stare decisis* effect, *e. g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363. *Abood* relied on *Railway Employes* v. *Hanson*, 351 U. S. 225, and *Machinists* v. *Street*, 367 U. S. 740, both of which involved private-sector collective-bargaining agreements where the government merely authorized agency fees. *Abood* did not appreciate the very different First Amendment question that arises when a State *requires* its employees to pay agency fees. *Abood* also judged the constitutionality of public-sector agency fees using *Hanson*'s deferential standard, which is inappropriate in deciding free speech issues. Nor did *Abood* take into account the difference between the effects of agency fees in public- and private-sector collective bargaining, anticipate administrative problems with classifying union expenses as chargeable or nonchargeable, foresee practical problems faced by nonmembers wishing to challenge those decisions, or understand the inherently political nature of public-sector bargaining. Pp. 917–921.

(2) *Abood*'s lack of workability also weighs against it. Its line between chargeable and nonchargeable expenditures has proved to be impossible to draw with precision, as even respondents recognize. See, *e. g.*, *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519. What is more, a nonmember objecting to union chargeability determinations will have much trouble determining the accuracy of the union's reported expenditures, which are often expressed in extremely broad and vague terms. Pp. 921–924.

(3) Developments since *Abood*, both factual and legal, have "eroded" the decision's "underpinnings" and left it an outlier among the Court's First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521. *Abood* relied on an assumption that "the principle of exclusive representation in the public sector is dependent on a union or agency shop," *Harris*, 573 U. S., at 638, but experience has shown otherwise. It was also decided when public-sector unionism was a relatively new phe-

nomenon. Today, however, public-sector union membership has surpassed that in the private sector, and that ascendency corresponds with a parallel increase in public spending. *Abood* is also an anomaly in the Court's First Amendment jurisprudence, where exacting scrutiny, if not a more demanding standard, generally applies. Overruling *Abood* will also end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition), see, *e. g.*, *Elrod* v. *Burns*, 427 U. S. 347. Pp. 924–926.

(4) Reliance on *Abood* does not carry decisive weight. The uncertain status of *Abood*, known to unions for years; the lack of clarity it provides; the short-term nature of collective-bargaining agreements; and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain undermine the force of reliance. Pp. 926–929.

3. For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. Pp. 929–930.

851 F. 3d 746, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 930. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 931.

William L. Messenger argued the cause for petitioner. With him on the briefs were *Aaron B. Solem*, *Dan K. Webb*, *Joseph J. Torres*, *Jacob H. Huebert*, and *Jeffrey M. Schwab.*

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Deputy Solicitor General Wall*, *Nicholas C. Geale*, and *Arthur F. Rosenfeld.*

David L. Franklin, Solicitor General of Illinois, argued the cause for state respondents. With him on the brief were *Lisa Madigan*, Attorney General, *pro se*, *Brett E. Legner*, Deputy Solicitor General, and *Frank H. Bieszczat*, *Jane*

Counsel

Flanagan, *Sarah A. Hunger*, *Richard S. Huszagh*, *Lindsay Beyer Payne*, and *Andrew Tonelli*, Assistant Attorneys General.

David C. Frederick argued the cause for respondent AFSCME Council 31. With him on the brief were *Derek T. Ho*, *John M. West*, *Judith E. Rivlin*, and *Teague P. Paterson*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *Aaron D. Lindstrom*, Solicitor General, and *Kathryn M. Dalzell*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Joshua D. Hawley* of Missouri, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Patrick Morrisey* of West Virginia, and *Brad Schimel* of Wisconsin; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for the Atlantic Legal Foundation by *Martin S. Kaufman*; for the Becket Fund for Religious Liberty by *Eric Baxter*, *Eric Rassbach*, *Adèle Auxier Keim*, and *Joseph C. Davis*; for the Buckeye Institute for Public Policy Solutions et al. by *John J. Park, Jr.*, *Robert Alt*, and *Kimberly S. Hermann*; for California Public-School Teachers by *Michael A. Carvin*, *Anthony J. Dick*, *William D. Coglianese*, *Terence J. Pell*, and *Michael E. Rosman*; for the Cato Institute et al. by *Ilya Shapiro*, *Karen R. Harned*, and *Luke Wake*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Center on National Labor Policy, Inc., et al. by *Michael E. Avakian*, *Michael J. Lotito*, and *Brendan J. Fitzgerald*; for the Competitive Enterprise Institute by *Andrew M. Grossman*, *Randal J. Meyer*, and *Sam Kazman*; for Employees of the State of Minnesota Court System by *J. Michael Connolly* and *Thomas R. McCarthy*; for the Freedom Foundation et al. by *James G. Abernathy*; for the James Madison Center for Free Speech by *James Bopp, Jr.*, and *Richard E. Coleson*; for the James Madison Institute by *Joshua M. Hawkes* and *Joseph W. Jacquot*; for the Landmark Legal Foundation by *Richard P. Hutchison*; for the Mackinac Center for Public Policy by *Patrick J. Wright*; for the Pacific Legal Foundation et al. by *Deborah J. La Fetra*; for The Rutherford Institute by *D. Alicia Hickok* and *John W. Whitehead*; for the 1851 Center for Constitutional Law by *Christopher P. Finney*; for Jason R. Barclay et al. by *David L. Applegate*;

JUSTICE ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly

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for Rebecca Friedrichs et al. by *James G. Abernathy* and *David M. S. Dewhirst*; for Gregory J. Hartnett et al. by *Nathan J. McGrath*; and for Jane Ladley et al. by *Mr. McGrath*.

Briefs of *amici curiae* urging affirmance were filed for the State of California by *Xavier Becerra*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Thomas S. Patterson*, Senior Assistant Attorney General, *Aimee Feinberg* and *Samuel P. Siegel*, Deputy Solicitors General, and *Alexandra Robert Gordon*, Deputy Attorney General; for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Anisha S. Dasgupta*, Deputy Solicitor General, and *Philip V. Tisne*, Assistant Solicitor General, and by the Attorneys General of their respective jurisdictions as follows: *Jahna Lindemuth* of Alaska, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *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 City of New York by *Zachary W. Carter* and *Richard Dearing*; for the American Civil Liberties Union by *David D. Cole* and *Amanda W. Shanor*; for the American Federation of Government Employees by *Jeffrey A. Lamken*, *Michael G. Pattillo, Jr.*, *Eric R. Nitz*, *Justin B. Weiner*, *David A. Borer*, and *Andres M. Grajales*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, *James B. Coppess*, and *Matthew J. Ginsburg*; for the American Federation of Teachers by *Kevin K. Russell*, *Erica Oleszczuk Evans*, *Rhonda Weingarten*, *David J. Strom*, and *Mark Richard*; for the Chabot Las-Positas Faculty Association et al. by *Robert J. Bezemek*; for Child Protective Service Workers et al. by *J. Carl Cecere*; for Constitutional Law Scholars by *Andrew J. Pincus*; for Crown Building Maintenance Co. & Crown Energy Services, Inc., et al. by *Michael P. Abate*; for Economists et al. by *Dan Jackson*; for Faith in Public Life et al. by *Eric Alan Isaacson*; for Fifteen Unions et al. by *Gregg McLean Adam*, *Gary M. Messing*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *David T. Goldberg*; for the Human Rights Campaign et al. by *Steven E. Fineman*, *Jason L. Licht-*

object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by

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man, *Laura B. Heiman*, *Sharon McGowan*, and *Gregory R. Nevins*; for the International Association of Fire Fighters by *Thomas A. Woodley* and *Megan K. Mechak*; for the International Association of Machinists and Aerospace Workers, AFL–CIO, by *Mark Schneider*; for the International Brotherhood of Teamsters by *Stephen P. Berzon*, *Scott A. Kronland*, and *Bradley Raymond*; for Labor Law Professors et al. by *Charlotte Garden*; for the Laborers' International Union of North America by *Theodore T. Green*, *Lisa W. Pau*, and *Laurence E. Gold*; for Los Angeles County's Department of Health Services et al. by *Nicole G. Berner*, *Mary C. Wickham*, *Salvatore J. Russo*, *Daniel Rosenthal*, and *Walter Kamiat*; for the National Conference on Public Employee Retirement Systems by *Robert D. Klausner*, *Arthur Liou*, and *Mollie Simons*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Kristen L. Hollar*, *Risa L. Lieberwitz*, and *Aaron Nisenson*; for the National Fraternal Order of Police by *Joel A. D'Alba* and *Larry H. James*; for the National Women's Law Center et al. by *Matthew S. Hellman*, *David A. Strauss*, *Sarah M. Konsky*, *Fatima Goss Graves*, *Emily J. Martin*, *Sunu Chandy*, *Vanita Gupta*, and *Michael Zubrensky*; for the New York City Municipal Labor Committee by *Alan M. Klinger*, *David J. Kahne*, and *Harry Greenberg*; for the New York City Sergeants Benevolent Association by *Stephen P. Younger* and *Jonathan D. Schenker*; for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve*; for Republican Current and Former State and Local Officeholders by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for the United States Conference of Catholic Bishops by *Anthony R. Picarello, Jr.*; for 24 Past Presidents of the D. C. Bar by *John W. Nields, Jr.*, and *Philip J. Levitz*; for Gov. Steve Bullock by *Deepak Gupta* and *Matthew W. H. Wessler*; for Cynthia L. Estlund et al. by *Samuel Estreicher*, *pro se*, and *Richard J. Brean*; for Eric Garcetti et al. by *Donald B. Verrilli, Jr.*; for Rasheedah Gray et al. by *Catherine K. Ruckelshaus*; for Benjamin I. Sachs by *Joseph M. Sellers*; for Eugene Volokh et al. by *Gregory Silbert* and *Adam B. Banks*; for Sen. Sheldon Whitehouse et al. by *Peter Karanjia*; and for Gov. Tom Wolfe et al. by *Samuel R. Bagenstos*, *Denise J. Smyler*, *Joshua Civin*, *Matthew Ruyak*, and *James R. Williams*.

Briefs of *amici curiae* were filed for Certified Public Accountants by *Virginia A. Seitz*; for Corporate Law Professors by *Anna-Rose Mathieson*; and for Charles Fried et al. by *Seth P. Waxman*, *Christopher E. Babbitt*, and *Albinas J. Prizgintas*.

compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, §315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative. See §§315/6(a), (c).

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours[,] and other conditions of employment." §315/6(c). And this authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and nondiscrimination policies. §315/4; see §315/6(c); see generally, *e. g.*, *Illinois Dept. of*

Central Management Servs. v. *AFSCME, Council 31*, No. S–CB–16–017 etc., 33 PERI ¶67 (ILRB Dec. 13, 2016) (Board Decision).

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. §§315/6(c)–(d), 315/10(a)(4); see *Matthews* v. *Chicago Transit Authority*, 2016 IL 117638, 51 N. E. 3d 753, 782; accord, *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678, 683–684 (1944). Protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike. §315/6(d).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. 431 U. S., at 235; see *id.*, at 235–236. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours[,] and conditions of employment." §315/6(e); see also §315/3(g). Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." §315/3(g); see §315/6(e).

Applying this standard, a union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," § 315/6(e); this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. See *ibid.*; App. to Pet. for Cert. 37a; see also *Harris* v. *Quinn*, 573 U. S. 616, 636–638 (2014) (describing this process). Nonmembers need not be asked, and they are not required to consent before the fees are deducted.

After the amount of the agency fee is fixed each year, the union must send nonmembers what is known as a *Hudson* notice. See *Teachers* v. *Hudson*, 475 U. S. 292 (1986). This notice is supposed to provide nonmembers with "an adequate explanation of the basis for the [agency] fee." *Id.*, at 310. If nonmembers "suspect that a union has improperly put certain expenses in the [chargeable] category," they may challenge that determination. *Harris*, *supra*, at 637.

As illustrated by the record in this case, unions charge nonmembers, not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities. See App. to Pet. for Cert. 28a–39a. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." *Id.*, at 28a–32a. The total chargeable amount for nonmembers was 78.06% of full union dues. *Id.*, at 34a.

B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. *Id.*, at 10a. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). *Ibid.* Janus

refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. *Id.*, at 10a, 18a. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." *Id.*, at 18a. Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." *Ibid.* Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee of $44.58 per month, *id.*, at 14a—which would amount to about $535 per year.

Janus's concern about Illinois' current financial situation is shared by the Governor of the State, and it was the Governor who initially challenged the statute authorizing the imposition of agency fees. The Governor commenced an action in federal court, asking that the law be declared unconstitutional, and the Illinois attorney general (a respondent here) intervened to defend the law. App. 41. Janus and two other state employees also moved to intervene—but on the Governor's side. *Id.*, at 60.

Respondents moved to dismiss the Governor's challenge for lack of standing, contending that the agency fees did not cause him any personal injury. *E. g.*, *id.*, at 48–49. The District Court agreed that the Governor could not maintain the lawsuit, but it held that petitioner and the other individuals who had moved to intervene had standing because the agency fees unquestionably injured them. Accordingly, "in the interest of judicial economy," the court dismissed the Governor as a plaintiff, while simultaneously allowing petitioner and the other employees to file their own complaint. *Id.*, at 112. They did so, and the case proceeded on the basis of this new complaint.

The amended complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." App. to Pet. for Cert. 23a. Respondents moved to

dismiss the amended complaint, correctly recognizing that the claim it asserted was foreclosed by *Abood*. The District Court granted the motion, *id.*, at 7a, and the Court of Appeals for the Seventh Circuit affirmed, 851 F. 3d 746 (2017).

Janus then sought review in this Court, asking us to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional. We granted certiorari to consider this important question. 582 U. S. 966 (2017).

II

Before reaching this question, however, we must consider a threshold issue. Respondents contend that the District Court lacked jurisdiction under Article III of the Constitution because petitioner "moved to intervene in [the Governor's] jurisdictionally defective lawsuit." Union Brief in Opposition 11; see also *id.*, at 13–17; State Brief in Opposition 6; Brief for Union Respondent i, 16–17; Brief for State Respondents 14, n. 1. This argument is clearly wrong.

It rests on the faulty premise that petitioner intervened in the action brought by the Governor, but that is not what happened. The District Court did not grant petitioner's motion to intervene in that lawsuit. Instead, the court essentially treated petitioner's amended complaint as the operative complaint in a new lawsuit. App. 110–112. And when the case is viewed in that way, any Article III issue vanishes. As the District Court recognized—and as respondents concede—petitioner was injured in fact by Illinois' agency-fee scheme, and his injuries can be redressed by a favorable court decision. *Ibid.*; see Record 2312–2313, 2322–2323. Therefore, he clearly has Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). It is true that the District Court docketed petitioner's complaint under the number originally assigned to the Governor's complaint, instead of giving it a new number of its own. But Article III jurisdiction does not turn on such trivialities.

The sole decision on which respondents rely, *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157 (1914), actually works against them. That case concerned a statute permitting creditors of a government contractor to bring suit on a bond between 6 and 12 months after the completion of the work. *Id.*, at 162. One creditor filed suit before the 6-month starting date, but another intervened within the 6-to-12-month window. The Court held that "[t]he intervention [did] not cure th[e] vice in the original [prematurely filed] suit," but the Court also contemplated treating "intervention . . . as an original suit" in a case in which the intervenor met the requirements that a plaintiff must satisfy—*e. g.*, filing a separate complaint and properly serving the defendants. *Id.*, at 163–164. Because that is what petitioner did here, we may reach the merits of the question presented.

III

In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, 431 U. S., at 232, but in more recent cases we have recognized that this holding is "something of an anomaly," *Knox* v. *Service Employees*, 567 U. S. 298, 311 (2012), and that *Abood*'s "analysis is questionable on several grounds," *Harris*, 573 U. S., at 635; see *id.*, at 635–638 (discussing flaws in *Abood*'s reasoning). We have therefore refused to extend *Abood* to situations where it does not squarely control, see *Harris*, *supra*, at 645–647, while leaving for another day the question whether *Abood* should be overruled, *Harris*, *supra*, at 646, n. 19, n. 19); see *Knox*, *supra*, at 310–311.

We now address that question. We first consider whether *Abood*'s holding is consistent with standard First Amendment principles.

A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the free-

dom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977); see *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796–797 (1988); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–257 (1974); accord, *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 9 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec.*, *supra*, at 12 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*" *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) (emphasis added).

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, see, *e. g.*, *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), and it furthers the search for truth, see, *e. g.*, *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940). Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Barnette*, *supra*, at 633; see also *Riley*, *supra*, at 796–797 (rejecting "deferential test" for compelled speech claims).

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox*, *supra*, at 309; *United States* v. *United Foods*, *Inc.*, 533 U. S. 405, 410 (2001); *Abood*, *supra*, at 222, 234–235. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted); see also *Hudson*, 475 U. S., at 305, n. 15. We have therefore recognized that a "'significant impingement on First Amendment rights'" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, *supra*, at 310–311 (quoting *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455 (1984)).

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox*, *supra*; *Harris*, *supra*; *Friedrichs* v. *California Teachers Assn.*, 578 U. S. 1 (2016) (*per curiam*) (affirming decision below by equally divided Court).

In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. 567 U. S., at 309–310, 321–322. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, *e. g.*, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980), prior precedent in that area, specifically *United Foods*, *supra*, had applied what we characterized as "exacting" scrutiny, *Knox*, 567 U. S., at 310, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid.* (internal quotation marks and alterations omitted).

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny." 573 U. S., at 651. But we questioned whether that test provides sufficient protection for free speech rights, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech." *Id.*, at 648.

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a

government employer could reasonably believe that the exaction of agency fees serves its interests. See *post*, at 934 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This form of minimal scrutiny is foreign to our free speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In the remainder of this part of our opinion (Parts III–B and III–C), we will apply this standard to the justifications for agency fees adopted by the Court in *Abood*. Then, in Parts IV and V, we will turn to alternative rationales proffered by respondents and their *amici*.

B

In *Abood*, the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace," 431 U. S., at 224. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.*, at 220–221. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." *Id.*, at 220. And a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]." *Id.*, at 221.

We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*'s fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the em-

ployees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. *Harris*, *supra*, at 649.

The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U. S. C. §§ 7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members.[1] The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U. S. C. §§ 1203(a), 1209(c), and about 400,000 are union members.[2] Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees.[3] Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris*, *supra*, at 648–649 (internal quotation marks omitted).

C

In addition to the promotion of "labor peace," *Abood* cited "the risk of 'free riders' " as justification for agency fees, 431 U. S., at 224. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union

[1] See Bureau of Labor Statistics (BLS), Labor Force Statistics From the Current Population Survey (Table 42) (2017), https://www.bls.gov/cps/tables.htm (all Internet materials as visited June 26, 2018).

[2] See Union Membership and Coverage Database From the Current Population Survey (Jan. 21, 2018), http://www.unionstats.com.

[3] See National Conference of State Legislatures, Right-to-Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx#chart; see also, *e. g.*, Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

representation without shouldering the costs. Brief for Union Respondent 34–36; Brief for State Respondents 41–45; see, *e. g.*, Brief for International Brotherhood of Teamsters as *Amicus Curiae* 3–5.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Knox*, 567 U. S., at 311. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for." *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.[4]

[4] The collective-action problem cited by the dissent, *post*, at 936, is not specific to the agency-fee context. And contrary to the dissent's suggestion, it is often not practical for an entity that lobbies or advocates on

Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represen[t] the interests of all public employees in the unit," whether or not they are union members. § 315/6(d); see, *e. g.*, Brief for State Respondents 40–41, 45; *post*, at 936–937 (KAGAN, J., dissenting). Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought.[5] Why is this so?

Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See § 315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good

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behalf of the members of a group to tailor its message so that only its members benefit from its efforts. Consider how effective it would be for a group that advocates on behalf of, say, seniors, to argue that a new measure should apply only to its dues-paying members.

[5] In order to obtain that status, a union must petition to be recognized and campaign to win majority approval. Ill. Comp. Stat., ch. 5, § 315/9(a); see, *e. g.*, *County of Du Page* v. *Illinois Labor Relations Bd.*, 231 Ill. 2d 593, 597–600, 900 N. E. 2d 1095, 1098–1099 (2008). And unions eagerly seek this support. See, *e. g.*, Brief for Employees of State of Minnesota Court System as *Amici Curiae* 9–17.

faith with only that union. §315/7. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union. *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401 (1950).

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, see §315/6(c), and having dues and fees deducted directly from employee wages, §§315/6(e)–(f). The collective-bargaining agreement in this case guarantees a long list of additional privileges. See App. 138–143.

These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members." Brief for State Respondents 41; see *Cintron* v. *AFSCME, Council 31*, No. S–CB–16–032, p. 1, 34 PERI ¶105 (ILRB Dec. 13, 2017) (union may not intentionally direct "animosity" toward nonmembers based on their "dissident union practices"); accord, *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 271 (2009); *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967).

What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers, see *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202–203 (1944), but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. See *id.*, at 198–199, 202 (analogizing a private-sector union's fair-representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); cf. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 69 (2006) (recognizing that govern-

ment may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive"). To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. §315/6(b). Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 58, n. 19 (1974); see *Stahulak* v. *Chicago*, 184 Ill. 2d 176, 180–181, 703 N. E. 2d 44, 46–47 (1998); *Mahoney* v. *Chicago*, 293 Ill. App. 3d 69, 73–74, 687 N. E. 2d 132, 135–137 (1997) (union has "'discretion to refuse to process'" a grievance, provided it does not act "arbitrar[ily]" or "in bad faith" (emphasis deleted)).

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris*, 573 U. S., at 648–649 (internal quotation marks omitted). Individual nonmembers could be required to pay

for that service or could be denied union representation altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra*, at 886–887. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly. *Steele*, *supra*, at 198.

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox*, 567 U. S., at 311, 321. We therefore hold that agency fees cannot be upheld on free-rider grounds.

IV

Implicitly acknowledging the weakness of *Abood*'s own reasoning, proponents of agency fees have come forward

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[6] There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E. g.*, Cal. Govt. Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

with alternative justifications for the decision, and we now address these arguments.

A

The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees. Brief for Union Respondent 2–3, 17–20.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have "*no* [free speech] rights." *Id.*, at 1. Cf., *e. g.*, Brief for National Treasury Employees Union as *Amicus Curiae* in *Garcetti* v. *Ceballos*, O. T. 2005, No. 04–473, p. 7 (arguing for "broa[d]" public-employee First Amendment rights); Brief for AFL–CIO as *Amicus Curiae* in No. 04–473 (similar).

It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. See Brief for Union Respondent 47–57. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), and its progeny would fall. Yet *Pickering*, as we will discuss, is now the foundation for respondents' chief defense of *Abood*. And indeed, *Abood* itself would have to go if public employees have no free speech rights, since *Abood* holds that the First Amendment prohibits the exaction of agency fees for political or ideological purposes. 431 U. S., at 234–235 (finding it "clear" that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"). Our political patronage cases would be doomed. See, *e. g.*, *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990); *Branti* v. *Finkel*, 445 U. S. 507 (1980); *Elrod* v. *Burns*, 427 U. S. 347 (1976). Also imperiled would be older precedents like *Wieman* v. *Updegraff*, 344 U. S. 183

(1952) (loyalty oaths), *Shelton* v. *Tucker*, 364 U. S. 479 (1960) (disclosure of memberships and contributions), and *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967) (subversive speech). Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. See Tr. of Oral Arg. 56–57. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. See *Ex parte Curtis*, 106 U. S. 371, 372–373 (1882). The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using "'contemptuous or disrespectful words against the President'" and other officials, and an 1801 directive limiting electioneering by top government employees. Brief for Union Respondent 3. But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. Indeed, more recently this Court has upheld similar restrictions even while recognizing that government employees possess First Amendment rights. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348, 353 (1980) (upholding military restriction on speech that threatened troop readiness); *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 556–557 (1973) (upholding limits on public employees' political activities).

Ultimately, the Union relies, not on founding-era evidence, but on dictum from a 1983 opinion of this Court stating that,

"[f]or most of th[e 20th] century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick* v. *Myers*, 461 U. S. 138, 143; see Brief for Union Respondent 2, 17. Even on its own terms, this dictum about 20th-century views does not purport to describe how the First Amendment was understood in 1791. And a careful examination of the decisions by this Court that *Connick* cited to support its dictum, see 461 U. S., at 144, reveals that none of them rested on the facile premise that public employees are unprotected by the First Amendment. Instead, they considered (much as we do today) whether particular speech restrictions were "necessary to protect" fundamental government interests. *Curtis*, *supra*, at 374.

The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid-20th century. The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.[7] Thus, the Union can-

[7] Indeed, under common law, "collective bargaining was unlawful," *Teamsters* v. *Terry*, 494 U. S. 558, 565–566 (1990) (plurality opinion); see N. Citrine, Trade Union Law 4–7, 9–10 (2d ed. 1960); Notes, Legality of Trade Unions at Common Law, 25 Harv. L. Rev. 465, 466 (1912), and into the 20th century, every individual employee had the "liberty of contract" to "sell his labor upon such terms as he deem[ed] proper," *Adair* v. *United States*, 208 U. S. 161, 174–175 (1908); see R. Morris, Government and Labor in Early America 208, 529 (1946). So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this

not point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as "'sinful and tyrannical,'" *supra*, at 893, and others expressed similar views.[8]

In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

B

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering*, 391 U. S. 563, which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti* v. *Ceballos*, 547 U. S. 410, 421–422 (2006), or if it involved a matter of only private concern, see *Connick*, *supra*, at 146–149. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'" *Harris*, 573 U. S., at 653

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only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law.

[8] See, *e. g.*, Ellsworth, The Landholder, VII (1787), in Essays on the Constitution of the United States 167–171 (P. Ford ed. 1892); Webster, On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions From Office, in A Collection of Essays and Fugitiv[e] Writings 151–153 (1790).

(quoting *Pickering*, *supra*, at 568). *Pickering* was the centerpiece of the defense of *Abood* in *Harris*, see 573 U. S., at 673–676 (KAGAN, J., dissenting), and we found the argument unpersuasive, see *id.*, at 652–655. The intervening years have not improved its appeal.

1

As we pointed out in *Harris*, *Abood* was not based on *Pickering*. 573 U. S., at 652, and n. 26. The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U. S., at 230, n. 27. That aside has no bearing on the agency-fee issue here.[9]

Respondents' reliance on *Pickering* is thus "an effort to find a new justification for the decision in *Abood*." *Harris*, *supra*, at 652. And we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions. See, *e. g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 348–349, 363 (2010) (rejecting efforts to recast *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990)); see also *Citizens United*, *supra*, at 382–385 (ROBERTS, C. J., concurring). We see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.

2

Even if that were attempted, the shoe would be a painful fit for at least three reasons.

[9] Justice Powell's separate opinion did invoke *Pickering* in a relevant sense, but he did so only to acknowledge the State's relatively greater interest in regulating speech when it acts as employer than when it acts as sovereign. *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 259 (1977) (opinion concurring in judgment). In the very next sentence, he explained that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny." *Ibid.* (internal quotation marks omitted). That is the test we apply today.

First, the *Pickering* framework was developed for use in a very different context—in cases that involve "one employee's speech and its impact on that employee's public responsibilities." *United States* v. *Treasury Employees*, 513 U. S. 454, 467 (1995). This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation. See 513 U. S., at 466–468, and n. 11. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." *Id.*, at 468. Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, *id.*, at 466, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights, see *id.*, at 475–476, n. 21; accord, *id.*, at 482–483 (O'Connor, J., concurring in judgment in part and dissenting in part). The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public

concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, *post*, at 943–944, the dissent denies the obvious.

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti*, 547 U. S., at 421–422, 425–426. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. 461 U. S., at 148. As a result, we held, the district attorney could fire her for making those comments. *Id.*, at 154. Now, suppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases' categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood*, a public employer is flatly prohibited from permitting nonmembers to be charged for this speech, but under *Pickering*, the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. See Tr. of Oral Arg. 47, 65. Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

For all these reasons, *Pickering* is a poor fit indeed.

V

Even if we were to apply some form of *Pickering*, Illinois' agency-fee arrangement would not survive.

A

Respondents begin by suggesting that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti*, *i. e.*, as speech "pursuant to [an employee's] official duties," 547 U. S., at 421. Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of their employers. There are laws that protect pub-

lic employees from being compelled to say things that they reasonably believe to be untrue or improper, see *id.*, at 425–426, but in general when public employees are performing their job duties, their speech may be controlled by their employer. Trying to fit union speech into this framework, respondents now suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech. Brief for Union Respondent 22–23; see Brief for State Respondents 23–24.

This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

B

Since the union speech paid for by agency fees is not controlled by *Garcetti*, we move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. See 573 U. S., at 675–676 (KAGAN, J., dissenting). We squarely rejected that argument, see *id.*, at 653–654, and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of . . . state spend-

ing for employee benefits . . . is not a matter of great public concern," *id.*, at 654.

Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget problems.[10] As of 2013, Illinois had nearly $160 billion in unfunded pension and retiree healthcare liabilities.[11] By 2017, that number had only grown, and the State was grappling with $15 billion in unpaid bills.[12] We are told that a "quarter of the budget is now devoted to paying down" those liabilities.[13] These problems and others led Moody's and S & P to downgrade Illinois' credit rating to "one step above junk"—the "lowest ranking on record for a U. S. state."[14]

The Governor, on one side, and public-sector unions, on the other, disagree sharply about what to do about these problems. The State claims that its employment-related debt is "'squeezing core programs in education, public safety, and human services, in addition to limiting [the State's] ability to pay [its] bills.'" Securities Act of 1933 Release No. 9389, 105 S. E. C. Docket 3381, 3383 (2013). It therefore "told the

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[10] See Brief for State of Michigan et al. as *Amici Curiae* 9–24. Nationwide, the cost of state and local employees' wages and benefits, for example, is nearly $1.5 trillion—more than half of those jurisdictions' total expenditures. See Dept. of Commerce, Bureau of Economic Analysis, National Data, GDP & Personal Income, Table 6.2D, line 92 (Aug. 3, 2017), and Table 3.3, line 37 (May 30, 2018), https://www.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey. And many States and cities struggle with unfunded pension and retiree healthcare liabilities and other budget issues.

[11] PEW Charitable Trusts, Fiscal 50: State Trends and Analysis (updated May 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50#ind4.

[12] See Brief for Jason R. Barclay et al. as *Amici Curiae* 9; M. Egan, How Illinois Became America's Most Messed-Up State, CNN Money (July 1, 2017), https://cnnmon.ie/2tp9NX5.

[13] Brief for Jason R. Barclay et al. as *Amici Curiae* 9.

[14] E. Campbell, S&P, Moody's Downgrade Illinois to Near Junk, Lowest Ever for a U. S. State, Bloomberg (June 1, 2017), https://bloom.bg/2roEJUc.

Union that it would attempt to address th[e financial] crisis, at least in part, through collective bargaining." Board Decision 12–13. And "the State's desire for savings" in fact "dr[o]ve [its] bargaining" positions on matters such as health-insurance benefits and holiday, overtime, and promotion policies. *Id.*, at 13; *Illinois Dept. of Central Management Servs.* v. *AFSCME, Council 31*, No. S–CB–16–017 etc., 33 PERI ¶67 (ILRB Dec. 13, 2016) (ALJ Decision), pp. 26–28, 63–66, 224. But when the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to Illinois' pension and tax systems (such as closing "corporate tax loopholes," "[e]xpanding the base of the state sales tax," and "allowing an income tax that is adjusted in accordance with ability to pay"). *Id.*, at 27–28. To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square," *post*, at 945 (KAGAN, J., dissenting)—is to deny reality.

In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, *e. g.*, Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as *Amici Curiae* 10–17; Brief for National Women's Law Center et al. as *Amici Curiae* 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.

Take the example of education, which was the focus of briefing and argument in *Friedrichs*. The public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest cate-

gory of state and local government employees, and education is typically the largest component of state and local government expenditures.[15]

Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?[16] Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots?[17] Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

Unions can also speak out in collective bargaining on controversial subjects such as climate change,[18] the Confederacy,[19] sexual orientation and gender identity,[20] evolution,[21]

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[15] See National Association of State Budget Officers, Summary: Spring 2018 Fiscal Survey of States 2 (June 14, 2018), http://www.nasbo.org; ProQuest Statistical Abstract of the United States: 2018, p. 306, Table 476, p. 321, Table 489.

[16] See Rogers, School Districts 'Race to the Top' Despite Teacher Dispute, Marin Independent J., June 19, 2010.

[17] See Sawchuk, Transferring Top Teachers Has Benefits: Study Probes Moving Talent to Low-Performing Schools, Education Week, Nov. 13, 2013, pp. 1, 13.

[18] See Tucker, Textbooks Equivocate on Global Warming: Stanford Study Finds Portrayal 'Dishonest,' San Francisco Chronicle, Nov. 24, 2015, p. C1.

[19] See Reagan, Anti-Confederacy Movement Rekindles Texas Textbook Controversy, San Antonio Current, Aug. 4, 2015.

[20] See Watanabe, How To Teach Gay Issues in 1st Grade? A New Law Requiring California Schools To Have Lessons About LGBT Americans Raises Tough Questions, L. A. Times, Oct. 16, 2011, p. A1.

[21] See Goodstein, A Web of Faith, Law and Science in Evolution Suit, N. Y. Times, Sept. 26, 2005, p. A1.

and minority religions.[22] These are sensitive political topics, and they are undoubtedly matters of profound "'value and concern to the public.'" *Snyder* v. *Phelps*, 562 U. S. 443, 453 (2011). We have often recognized that such speech "'occupies the highest rung of the hierarchy of First Amendment values'" and merits "'special protection.'" *Id.*, at 452.

What does the dissent say about the prevalence of such issues? The most that it is willing to admit is that "some" issues that arise in collective bargaining "raise important non-budgetary disputes." *Post*, at 946. Here again, the dissent refuses to recognize what actually occurs in public-sector collective bargaining.

Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." *Post*, at 945. For instance, the Union respondent in this case recently filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. *State* v. *AFSCME Council 31*, 2016 IL 118422, 51 N. E. 3d 738, 740–742, and n. 4. In short, the union speech at issue in this case is overwhelmingly of substantial public concern.

C

The only remaining question under *Pickering* is whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders, see *supra*, at 895–901—and we will not repeat that analysis.

In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an adequately funded exclusive bargaining agent." 573 U. S., at 663

[22] See Golden, Defending the Faith: New Battleground in Textbook Wars: Religion in History, Wall St. J., Jan. 25, 2006, p. A1.

(KAGAN, J., dissenting); see also *post*, at 936–937 (same). This was not "the interest *Abood* recognized and protected," *Harris*, *supra*, at 663 (same), and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see *post*, at 937–939, ample experience, as we have noted, *supra*, at 895–896, shows that this is questionable.

Especially in light of the more rigorous form of *Pickering* analysis that would apply in this context, see *supra*, at 906–909, the balance tips decisively in favor of the employees' free speech rights.[23]

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[23] Claiming that our decision will hobble government operations, the dissent asserts that it would prevent a government employer from taking action against disruptive non-unionized employees in two carefully constructed hypothetical situations. See *post*, at 946–947. Both hypotheticals are short on potentially important details, but in any event, neither would be affected by our decision in this case. Rather, both would simply call for the application of the standard *Pickering* test.

In one of the hypotheticals, teachers "protest merit pay in the school cafeteria." *Post*, at 947. If such a case actually arose, it would be important to know, among other things, whether the teachers involved were supposed to be teaching in their classrooms at the time in question and whether the protest occurred in the presence of students during the student lunch period. If both those conditions were met, the teachers would presumably be violating content-neutral rules regarding their duty to teach at specified times and places, and their conduct might well have a disruptive effect on the educational process. Thus, in the dissent's hypothetical, the school's interests might well outweigh those of the teachers, but in this hypothetical case, as in all *Pickering* cases, the particular facts would be very important.

In the other hypothetical, employees agitate for a better health plan "at various inopportune times and places." *Post*, at 947. Here, the lack of factual detail makes it impossible to evaluate how the *Pickering* balance would come out. The term "agitat[ion]" can encompass a wide range of conduct, as well as speech. *Post*, at 947. And the time and place of the agitation would also be important.

We readily acknowledge, as *Pickering* did, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U. S., at 568. Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech. See *supra*, at 894. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer. See *Pickering*, *supra*, at 564–566 (holding teacher's dismissal for criticizing school board unconstitutional); *Rankin* v. *McPherson*, 483 U. S. 378, 392 (1987) (holding clerical employee's dismissal for supporting assassination attempt on President unconstitutional); *Treasury Employees*, 513 U. S., at 477 (holding federal-employee honoraria ban unconstitutional).

VI

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991).

We will not overturn a past decision unless there are strong grounds for doing so. *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855–856 (1996); *Citizens United*, 558 U. S., at 377 (ROBERTS, C. J., concurring). But as we have often recognized, *stare decisis* is "'not an inexorable command.'" *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009); see also *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003); *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997); *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 63 (1996); *Payne*, *supra*, at 828.

The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, *supra*, at 235. And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see also *Citizens United*, *supra*, at 362–365 (overruling *Austin*, 494 U. S. 652); *Barnette*, 319 U. S., at 642 (overruling *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940)).

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

A

An important factor in determining whether a precedent should be overruled is the quality of its reasoning, see *Citi-*

zens United, 558 U. S., at 363–364; *id.*, at 382–385 (ROBERTS, C. J., concurring); *Lawrence*, 539 U. S., at 577–578, and as we explained in *Harris*, *Abood* was poorly reasoned, see 573 U. S., at 635–638. We will summarize, but not repeat, *Harris*'s lengthy discussion of the issue.

Abood went wrong at the start when it concluded that two prior decisions, *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956), and *Machinists* v. *Street*, 367 U. S. 740 (1961), "appear[ed] to require validation of the agency-shop agreement before [the Court]." 431 U. S., at 226. Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization*" of *private-sector* union shops under the Railway Labor Act. *Street*, *supra*, at 749 (emphasis added).[24] *Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees. See *Harris*, *supra*, at 636.

Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. In *Hanson*, the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses. 351 U. S., at 233–235.

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[24] No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, 53 (1999); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). Compare, *e. g.*, *White* v. *Communications Workers of Am., AFL–CIO, Local 13000*, 370 F. 3d 346, 350 (CA3 2004) (no state action), and *Kolinske* v. *Lubbers*, 712 F. 2d 471, 477–478 (CADC 1983) (same), with *Beck* v. *Communications Workers of Am.*, 776 F. 2d 1187, 1207 (CA4 1985) (state action), and *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14, 16, and n. 2 (CA1 1971) (same). We reserved decision on this question in *Communications Workers* v. *Beck*, 487 U. S. 735, 761 (1988), and do not resolve it here.

After deciding those questions, the Court summarily dismissed what was essentially a facial First Amendment challenge, noting that the record did not substantiate the challengers' claim. *Id.*, at 238; see *Harris*, *supra*, at 635–636. For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue. 367 U. S., at 749–750, 768–769. *Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court. *Harris*, 573 U. S., at 635. As we said in *Harris*, "[s]urely a First Amendment issue of this importance deserved better treatment." *Id.*, at 636.

Abood's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. (As noted, *supra*, at 894–895, today's dissent makes the same fundamental mistake.) *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. Rather, *Abood* followed *Hanson* and *Street*, which it interpreted as having deferred to "*the legislative assessment* of the important contribution of the union shop to the system of labor relations established by Congress." 431 U. S., at 222 (emphasis added). But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of

all the employees in the relevant unit but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked. See *supra*, at 895–896; *Harris*, *supra*, at 649.

Abood also did not sufficiently take into account the difference between the effects of agency fees in public-and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political' " speech. 431 U. S., at 226. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. *Id.*, at 228; see *id.*, at 228–231. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. 431 U. S., at 229. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." *Harris*, 573 U. S., at 636.

Overlooking the importance of this distinction, "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Ibid.* Likewise, "*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' . . . or nonchargeable." *Id.*, at 637. Nor did *Abood* "foresee the practical problems that would face objecting nonmembers." 573 U. S., at 637.

In sum, as detailed in *Harris*, *Abood* was not well reasoned.[25]

B

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question, *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009), and that factor also weighs against *Abood*.

1

Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. We tried to give the line some definition in *Lehnert*. There, a majority of the Court adopted a three-part test requiring that chargeable expenses (1) be "'germane'" to collective bargaining, (2) be "justified" by the government's labor-peace and free-rider interests, and (3) not add "significantly" to the burden on free speech, 500 U. S., at 519, but the Court splintered over the application of this test, see *id.*, at 519–522 (plurality opinion); *id.*, at 533–534 (Marshall, J., concurring in part and dissenting in part). That division was not surprising. As the *Lehnert* dissenters aptly observed, each part of the majority's test "involves a substantial judgment call," *id.*, at 551 (opinion of Scalia, J.), rendering the test "altogether malleable" and "no[t] principled," *id.*, at 563 (KENNEDY, J., concurring in judgment in part and dissenting in part).

Justice Scalia presciently warned that *Lehnert*'s amorphous standard would invite "perpetua[l] give-it-a-try litigation," *id.*, at 551, and the Court's experience with union lobbying expenses illustrates the point. The *Lehnert* plurality held that money spent on lobbying for increased education

[25] Contrary to the dissent's claim, see *post*, at 948–949, and n. 4, the fact that "[t]he rationale of [*Abood*] does not withstand careful analysis" *is* a reason to overrule it, *e. g.*, *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003). And that is even truer when, as here, the defenders of the precedent do not attempt to "defen[d its actual] reasoning." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363 (2010); *id.*, at 382–385 (ROBERTS, C. J., concurring).

funding was not chargeable. *Id.*, at 519–522. But Justice Marshall—applying the same three-prong test—reached precisely the opposite conclusion. *Id.*, at 533–542. And *Lehnert* failed to settle the matter; States and unions have continued to "give it a try" ever since.

In *Knox*, for example, we confronted a union's claim that the costs of lobbying the legislature and the electorate about a ballot measure were chargeable expenses under *Lehnert*. See Brief for Respondent in *Knox* v. *Service Employees*, O. T. 2011, No. 10–1121, pp. 48–53. The Court rejected this claim out of hand, 567 U. S., at 320–321, but the dissent refused to do so, *id.*, at 336 (opinion of BREYER, J.). And in the present case, nonmembers are required to pay for unspecified "[l]obbying" expenses and for "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." App. to Pet. for Cert. 31a–32a. That formulation is broad enough to encompass just about anything that the union might choose to do.

Respondents agree that *Abood*'s chargeable-nonchargeable line suffers from "a vagueness problem," that it sometimes "allows what it shouldn't allow," and that a "firm[er] line c[ould] be drawn." Tr. of Oral Arg. 47–48. They therefore argue that we should "consider revisiting" this part of *Abood*. Tr. of Oral Arg. 67; see Brief for Union Respondent 46–47; Brief for State Respondents 30. This concession only underscores the reality that *Abood* has proved unworkable: Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw.

2

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations. While *Hudson* requires a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," 475 U. S., at 306, the *Hudson* notice in the present case and in others that have come before us do not begin to permit a nonmember to make such a determination.

In this case, the notice lists categories of expenses and sets out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses. Here are some examples regarding the Union respondent's expenditures:

Category	**Total Expense**	**Chargeable Expense**
Salary and Benefits	$14,718,708	$11,830,230
Office Printing, Supplies, and Advertising	$148,272	$127,959
Postage and Freight	$373,509	$268,107
Telephone	$214,820	$192,721
Convention Expense	$268,855	$268,855

See App. to Pet. for Cert. 35a–36a.

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.[26]

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, see Brief for Union Respondent 10–11, but objectors must still pay for the attorneys and experts needed to mount a serious challenge. And the attorney's fees incurred in such a proceeding can be substantial. See, *e. g.*, *Knox* v. *Chiang*, 2013 WL 2434606, *15 (ED Cal., June 5, 2013) (attorney's fees in *Knox* exceeded $1

[26] For this reason, it is hardly surprising that chargeability issues have not arisen in many Court of Appeals cases. See *post*, at 951 (KAGAN, J., dissenting).

million). The Union respondent's suggestion that an objector could obtain adequate review without even showing up at an arbitration, see App. to Pet. for Cert. 40a–41a, is therefore farfetched.

C

Developments since *Abood*, both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

1

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris*, 573 U. S., at 638; *Abood*, 431 U. S., at 220–222. But, as already noted, experience has shown otherwise. See *supra*, at 895–896.

It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. The first State to permit collective bargaining by government employees was Wisconsin in 1959, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014), and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's, shortly before *Abood* was decided, Freeman, Unionism Comes to the Public Sector, 24 J. Econ. Lit. 41, 45 (1986). Since then, public-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector employees. B. Hirsch & D. Macpherson, Union Membership and Earnings Data Book 9–10, 12, 16 (2013 ed.).

This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in

2014 dollars. See Dept. of Commerce, Statistical Abstract of the United States: 1972, p. 419; CPI Inflation Calculator, BLS, http://data.bls.gov/cgi-bin/cpicalc.pl. By 2014, that figure had ballooned to approximately $10,238 per capita. ProQuest, Statistical Abstract of the United States: 2018, p. 17, Table 14, p. 300, Table 469. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee retirement packages. Brief for Jason R. Barclay et al. as *Amici Curiae* 9, 14. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. See Brief for State of Michigan et al. as *Amici Curiae* 10–19. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

2

Abood is also an "anomaly" in our First Amendment jurisprudence, as we recognized in *Harris* and *Knox*. *Harris*, *supra*, at 627; *Knox*, 567 U. S., at 311. This is not an altogether new observation. In *Abood* itself, Justice Powell faulted the Court for failing to perform the "'exacting scrutiny'" applied in other cases involving significant impingements on First Amendment rights. 431 U. S., at 259; see *id.*, at 259–260, and n. 14. Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. See, *e. g.*, *Roberts*, 468 U. S., at 623; *United Foods*, 533 U. S., at 414. And we have more recently refused, even in agency-fee cases, to extend *Abood* beyond circumstances where it directly controls. See *Knox*, *supra*, at 314; *Harris*, *supra*, at 646–647.

Abood particularly sticks out when viewed against our cases holding that public employees generally may not be

required to support a political party. See *Elrod*, 427 U. S. 347; *Branti*, 445 U. S. 507; *Rutan*, 497 U. S. 62; *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U. S. 712 (1996). The Court reached that conclusion despite a "long tradition" of political patronage in government. *Rutan*, *supra*, at 95 (Scalia, J., dissenting); see also *Elrod*, 427 U. S., at 353 (plurality opinion); *id.*, at 377–378 (Powell, J., dissenting). It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. As Justice Powell observed: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of *greater* deference, when challenged on First Amendment grounds, than its decision to adhere to the *tradition* of political patronage." *Abood*, *supra*, at 260, n. 14 (opinion concurring in judgment) (citing *Elrod*, *supra*, at 376–380, 382–387 (Powell, J., dissenting); emphasis added). We have no occasion here to reconsider our political patronage decisions, but Justice Powell's observation is sound as far as it goes. By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.

D

In some cases, reliance provides a strong reason for adhering to established law, see, *e. g.*, *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202–203 (1991), and this is the factor that is stressed most strongly by respondents, their *amici*, and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provisions granting them such fees. Tr. of Oral Arg. 67–68; see Brief for State Respondents 54; Brief for Union Respondent 50; *post*, at 951–955 (KAGAN, J., dissenting). In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time. "The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected." *Arizona* v. *Gant*, 556 U. S. 332, 349 (2009).

For another, *Abood* does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 186 (2018); see *supra*, at 921–924.

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." 567 U. S., at 311. Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood*'s many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. *Friedrichs* v. *California Teachers Assn.*, 576 U. S. 1082. After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 578 U. S. 1 (2016) (*per curiam*). During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

That is certainly true with respect to the collective-bargaining agreement in the present case. That agreement initially ran from July 1, 2012, until June 30, 2015. App. 331. Since then, the agreement has been extended pursuant to a provision providing for automatic renewal for an additional year unless either party gives timely notice that it desires to amend or terminate the contract. *Ibid*. Thus, for the

past three years, the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time.

Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox* (2012) or *Harris* (2014). But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. See *NLRB* v. *Rockaway News Supply Co.*, 345 U. S. 71, 76–79 (1953); see also 8 R. Lord, Williston on Contracts § 19:70 (4th ed. 2010). Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection. The agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement "shall not invalidate the remaining portions," which "shall remain in full force and effect." App. 328. Such severability clauses ensure that "entire contracts" are not "br[ought] down" by today's ruling. *Post*, at 952, n. 5 (KAGAN, J., dissenting).

In short, the uncertain status of *Abood*, the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a factor supporting *Abood*.[27]

[27] The dissent emphasizes another type of reliance, namely, that "[o]ver 20 States have by now enacted statutes authorizing [agency-fee] provisions." *Post*, at 952. But as we explained in *Citizens United*, "[t]his is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.'" 558 U. S., at 365 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). Nor does our decision "'require an extensive legislative response.'" *Post*, at 952. States can keep their labor-relations systems exactly as they are—only they cannot force

* * *

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

All these reasons—that *Abood*'s proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the "'special justification[s]'" for overruling *Abood*. *Post*, at 949 (KAGAN, J., dissenting) (quoting *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015)).[28]

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees.

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nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the Federal Government and 28 other States.

[28] Unfortunately, the dissent sees the need to resort to accusations that we are acting like "black-robed rulers" who have shut down an "energetic policy debate." *Post*, at 956. We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning side," *ibid.*—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution. Here, States with agency-fee laws have abridged fundamental free speech rights. In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood, "[t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943).

Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. § 315/6(e). No form of employee consent is required.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); see also *Knox*, 567 U. S., at 312–313. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

* * *

Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

I join JUSTICE KAGAN's dissent in full. Although I joined the majority in *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011), I disagree with the way that this Court has since interpreted and applied that opinion. See, *e. g.*, *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. 755 (2018). Having seen the troubling development in First

Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with JUSTICE KAGAN that *Sorrell*—in the way it has been read by this Court—has allowed courts to "wiel[d] the First Amendment in . . . an aggressive way" just as the majority does today. *Post*, at 956.

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

For over 40 years, *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an "anomaly," *ante*, at 891, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6-year campaign to reverse *Abood*. See *Friedrichs* v. *California Teachers Assn.*, 578 U. S. 1 (2016) (*per curiam*); *Harris* v. *Quinn*, 573 U. S. 616 (2014); *Knox* v. *Service Employees*, 567

U. S. 298 (2012). Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

I

I begin with *Abood*, the 41-year-old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit's public school teachers. The union's collective-bargaining agreement with the city included an "agency shop" clause, which required teachers who had not joined the union to pay it "a service charge equal to the regular dues required of [u]nion members." *Abood*, 431 U. S., at 212. A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation"—a "central element" in "industrial relations"

since the New Deal. *Id.*, at 220. Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: "avoid[ ] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"; "prevent[ ] inter-union rivalries from creating dissension within the work force"; "free[ ] the employer from the possibility of facing conflicting demands from different unions"; and "permit[ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.*, at 220–221. As proof, the Court pointed to the example of exclusive-representation arrangements in the private-employment sphere: There, Congress had long thought that such schemes would promote "peaceful labor relations" and "labor stability." *Id.*, at 219, 229. A public employer like Detroit, the Court believed, could reasonably make the same calculation.

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. *Id.*, at 221. "The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Ibid.* Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff." *Ibid.* And there is no way to confine the union's services to union members alone (and thus to trim costs) because unions must by law fairly represent all employees in a given bargaining unit—union members and non-members alike. See *ibid.*

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees, the Court reasoned, "distribute fairly the cost" of collective bargaining "among those who benefit"—that is, *all* employees in the work unit. *Id.*, at 222. And they "counteract[ ] the incentive that employees might otherwise have to become 'free riders.'" *Ibid.* In other words, an agency-fee provision prevents employees from reaping all the "benefits of union representation"—higher pay, a better retirement plan, and so forth—while leaving it to others to bear the costs. *Ibid.* To the Court, the upshot was clear: A government entity could reasonably conclude that such a clause was needed to maintain the kind of exclusive-bargaining arrangement that would facilitate peaceful and stable labor relations.

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." *Ibid.* And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context—as when they "contribute to political candidates." *Id.*, at 232, 234. Employees might well object to the use of their money to support such "ideological causes." *Id.*, at 235.

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." *Id.*, at 225–226. There, the Court held, the "important government interests" in having a stably funded bargaining partner justify "the impingement upon" public employees' expression. *Id.*, at 225. But on the other hand, employees could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment

rights defeated any conflicting government interest. See *id.*, at 234–235.

II

Unlike the majority, I see nothing "questionable" about *Abood*'s analysis. *Ante*, at 891 (quoting *Harris*, 573 U. S., at 635). The decision's account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers' interests and public employees' expression is right at home in First Amendment doctrine.

A

Abood's reasoning about governmental interests has three connected parts. First, exclusive-representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. See 431 U. S., at 220–221. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. See *id.*, at 221. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others. See *id.*, at 222.

The majority does not take issue with the first point. See *ante*, at 916 (It is "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" in order to advance the State's "interests as an employer"). The majority claims that the second point never appears in *Abood*, but is willing to assume it for the sake of argument. See *ante*, at 914–915; but see *Abood*, 431

U. S., at 221 (The tasks of an exclusive representative "often entail expenditure of much time and money"). So the majority stakes everything on the third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees. *Ante*, at 896 (It "is simply not true" that exclusive representation and agency fees are "inextricably linked"); see *ante*, at 898.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. See *supra*, at 933. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood*'s rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.

The majority's initial response to this reasoning is simply to dismiss it. "[F]ree-rider arguments," the majority pronounces, "are generally insufficient to overcome First Amendment objections." *Ante*, at 897 (quoting *Knox*, 567 U. S., at 311). "To hold otherwise," it continues, "would have startling consequences" because "[m]any private groups speak out" in ways that will "benefit[ ] nonmembers." *Ante*, at 897. But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other

private groups, must serve members and non-members alike. Groups advocating for "senior citizens or veterans" (to use the majority's examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized. See, *e. g.*, *Machinists* v. *Street*, 367 U. S. 740, 762 (1961). Justice Scalia, responding to the same argument as the majority's, may have put the point best. In a way that is true of no other private group, the "law *requires* the union to carry" non-members—"indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests." *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (opinion concurring in judgment in part and dissenting in part). That special feature was what justified *Abood*: "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them." 500 U. S., at 556.

The majority's fallback argument purports to respond to the distinctive position of unions, but still misses *Abood*'s economic insight. Here, the majority delivers a four-page exegesis on why unions will seek to serve as an exclusive-bargaining representative even "if they are not given agency fees." *Ante*, at 898; see *ante*, at 898–900. The gist of the account is that "designation as the exclusive representative confers many benefits," which outweigh the costs of providing services to non-members. *Ante*, at 898. But that response avoids the key question, which is whether unions without agency fees will be *able to* (not whether they will *want to*) carry on as an effective exclusive representative. And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they

can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. See Ichniowski & Zax, Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991).[1] And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

Of course, not all public employers will share that view. Some would rather not bargain with an exclusive representative. Others would prefer that representative to be poorly funded—to serve more as a front than an effectual bargaining partner. But as reflected in the number of fair-share statutes and contracts across the Nation, see *supra*, at 932, many government entities think that effective exclusive representation makes for good labor relations—and recognize, just as *Abood* did, that representation of that kind often de-

[1] The majority relies on statistics from the federal workforce (where agency fees are unlawful) to suggest that public employees do not act in accord with economic logic. See *ante*, at 896. But first, many fewer federal employees pay dues than have voted for a union to represent them, indicating that free-riding in fact pervades the federal sector. See, *e. g.*, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014). And second, that sector is not typical of other public workforces. Bargaining in the federal sphere is limited; most notably, it does not extend to wages and benefits. See *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 649 (1990). That means union operating expenses are lower than they are elsewhere. And the gap further widens because the federal sector uses large, often national, bargaining units that provide unions with economies of scale. See Brief for International Brotherhood of Teamsters as *Amicus Curiae* 7. For those reasons, the federal workforce is the wrong place to look for meaningful empirical evidence on the issues here.

pends on agency fees. See, *e. g.*, *Harris*, 573 U. S., at 679–680 (KAGAN, J., dissenting) (describing why Illinois thought that bargaining with an adequately funded exclusive representative of in-home caregivers would enable the State to better serve its disabled citizens). *Abood* respected that state interest; today's majority fails even to understand it. Little wonder that the majority's First Amendment analysis, which involves assessing the government's reasons for imposing agency fees, also comes up short.

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech.

"Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." *NASA* v. *Nelson*, 562 U. S. 134, 148 (2011) (internal quotation marks omitted). The government, we have stated, needs to run "as effectively and efficiently as possible." *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 598 (2008) (internal quotation marks omitted). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U. S. 410, 418 (2006). Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions."

Engquist, 553 U. S., at 600. But under our precedent, their rights often yield when weighed "against the realities of the employment context." *Ibid.* If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the Government could not function." *NASA*, 562 U. S., at 149 (internal quotation marks omitted).

Those principles apply with full force when public employees' expressive rights are at issue. As we have explained: "Government employers, like private employers, need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti*, 547 U. S., at 418. Again, significant control does not mean absolute authority. In particular, the Court has guarded against government efforts to "leverage the employment relationship" to shut down its employees' speech as private citizens. *Id.*, at 419. But when the government imposes speech restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them. See, *e. g.*, *id.*, at 426; *Connick* v. *Myers*, 461 U. S. 138, 154 (1983).

In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). That case arose out of an individual employment action: the firing of a public school teacher. As we later described the *Pickering* inquiry, the Court first asks whether the employee "spoke as a citizen on a matter of public concern." *Garcetti*, 547 U. S., at 418. If she did not—but rather spoke as an employee on a workplace matter—she has no "possibility of a First Amendment claim": A public employer can curtail her speech just as a private one could. *Ibid.* But if she did speak as a citizen on a public matter, the public employer must demonstrate "an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* The government, that is, needs to show

that legitimate workplace interests lay behind the speech regulation.

Abood coheres with that framework. The point here is not, as the majority suggests, that *Abood* is an overt, one-to-one "application of *Pickering*." *Ante*, at 909. It is not. *Abood* related to a municipality's labor policy, and so the Court looked to prior cases about unions, not to *Pickering*'s analysis of an employee's dismissal. (And truth be told, *Pickering* was not at that time much to look at: What the Court now thinks of as the two-step *Pickering* test, as the majority's own citations show, really emerged from *Garcetti* and *Connick*—two cases post-dating *Abood*. See *ante*, at 905.)[2] But *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests. Consider the parallels:

Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the use of agency fees to subsidize the speech involved in "collective bargaining, contract administration, and grievance adjustment." 431 U. S., at 225–226. It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," *Borough of Duryea* v. *Guarnieri*, 564 U. S. 379, 391 (2011); the speech

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[2] For those reasons, it is not surprising that the "categorization schemes" in *Abood* and *Pickering* are not precisely coterminous. *Ante*, at 909. The two cases are fraternal rather than identical twins—both standing for the proposition that the government receives great deference when it regulates speech as an employer rather than as a sovereign. See *infra* this page and 942.

occurred (almost always) in the workplace; and the speech was directed (at least mainly) to the employer. As noted earlier, *Abood* described the managerial interests of employers in channeling all that speech through a single union. See 431 U. S., at 220–222, 224–226; *supra*, at 932–933. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. But still, *Abood* realized that compulsion could go too far. The Court barred the use of fees for union speech supporting political candidates or "ideological causes." 431 U. S., at 235. That speech, it understood, was "unrelated to [the union's] duties as exclusive bargaining representative," but instead was directed at the broader public sphere. *Id.*, at 234. And for that reason, the Court saw no legitimate managerial interests in compelling its subsidization. The employees' First Amendment claims would thus prevail—as, again, they would have under *Pickering*.

Abood thus dovetailed with the Court's usual attitude in First Amendment cases toward the regulation of public employees' speech. That attitude is one of respect—even solicitude—for the government's prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. There, managerial interests are obvious and strong. And so government employees are . . . just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one.

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply here our usual deferential approach, as exemplified in *Pickering*, to the regulation of public employee speech. First, the majority says, this case involves a "blanket" policy rather than an individualized employment decision, so *Pickering* is a "painful fit." *Ante,* at 906–907. Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. See *ante,* at 908. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government's managerial interests do not justify its regulation. See *ante,* at 910–914. The majority goes wrong at every turn.

First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Even the majority must concede that "we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees." *Ante,* at 907. In fact, the majority cannot come up with any case in which we have *not* done so. All it can muster is one case in which *while* applying the *Pickering* test to a broad rule—barring any federal employee from accepting any payment for any speech or article on any topic—the Court noted that the policy's breadth would count against the government at the test's second step. See *United States* v. *Treasury Employees*, 513 U. S. 454 (1995). Which is completely predictable. The inquiry at that stage, after all, is whether the government has an employment-related interest in going however far it has gone—and in *Treasury Employees*, the government had indeed gone far. (The Court ultimately struck down the rule because it applied to speech in which the government had no identifiable managerial interest.

See *id.*, at 470, 477.) Nothing in *Treasury Employees* suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech. That would be a perverse regime, given the greater regularity of rulemaking and the lesser danger of its abuse. So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering*.

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. See *ante*, at 893. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. See *ibid.* (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943)). Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988); see *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (referring to "[t]he right to speak and the right to refrain from speaking" as "complementary components" of the First Amendment). And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. See Brief for Eugene Volokh et al. as *Amici Curiae* 4–5 (offering many examples to show that the First Amendment "simply do[es] not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of").[3] So when a government mandates a speech

[3] That's why this Court has blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations. The list includes mandatory fees im-

subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government's "freer hand" in dealing with its employees should apply with equal (if not greater) force. *NASA*, 562 U. S., at 148.

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. The majority mainly argues here that, at *Pickering*'s first step, "union speech in collective bargaining" is a "matter of great public concern" because it "affect[s] how public money is spent" and addresses "other important matters" like teacher merit pay or tenure. *Ante*, at 910–912 (internal quotation marks omitted). But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. *Treasury Employees* offers the Court's fullest explanation. The Court held there that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern." 513 U. S., at 466 (quoting *Pickering*, 391 U. S., at 568). Why? Because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment." 513 U. S., at 466; see *id.*, at 465, 470 (repeating that analysis twice more). The Court could not

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posed on state bar members (for professional expression); university students (for campus events); and fruit processors (for generic advertising). See *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 14 (1990); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 233 (2000); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 474 (1997); see also *infra*, at 949–950.

have cared less whether the speech at issue was "important." *Ante*, at 912. It instead asked whether the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) *about* it.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering*'s first step. This Court has rejected all attempts by employees to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Guarnieri*, 564 U. S., at 391; see *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 675 (1996) (stating that public employees' "speech on merely private employment matters is unprotected"). For that reason, even the Justices who originally objected to *Abood* conceded that the use of agency fees for bargaining on "economic issues" like "salaries and pension benefits" would not raise significant First Amendment questions. 431 U. S., at 263, n. 16 (Powell, J., concurring in judgment). Of course, most of those issues have budgetary consequences: They "affect[ ] how public money is spent." *Ante*, at 912. And some raise important non-budgetary disputes; teacher merit pay is a good example, see *ante*, at 913. But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggests, the mass of public employees' complaints (about pay and benefits and workplace policy and such) *would* become "federal constitutional issue[s]." *Guarnieri*, 564 U. S., at 391. And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do. See *supra*, at 939–941.

Consider an analogy, not involving union fees: Suppose a government entity disciplines a group of (non-unionized) em-

ployees for agitating for a better health plan at various inopportune times and places. The better health plan will of course drive up public spending; so according to the majority's analysis, the employees' speech satisfies *Pickering*'s "public concern" test. Or similarly, suppose a public employer penalizes a group of (non-unionized) teachers who protest merit pay in the school cafeteria. Once again, the majority's logic runs, the speech is of "public concern," so the employees have a plausible First Amendment claim. (And indeed, the majority appears to concede as much, by asserting that the results in these hypotheticals should turn on various "factual detail[s]" relevant to the interest balancing that occurs at the *Pickering* test's *second* step. *Ante*, at 915, n. 23.) But in fact, this Court has always understood such cases to end at *Pickering*'s *first* step: If an employee's speech is about, in, and directed to the workplace, she has no "possibility of a First Amendment claim." *Garcetti*, 547 U. S., at 418; see *supra*, at 940. So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.

What's more, the government should prevail even if the speech involved in collective bargaining satisfies *Pickering*'s first part. Recall that the next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U. S., at 418; *supra*, at 940. That inquiry is itself famously respectful of government interests. This Court has reversed the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning." *Garcetti*, 547 U. S., at 419; *Rankin* v. *McPher-*

son, 483 U. S. 378, 388 (1987). Nothing like that is true here. As *Abood* described, many government entities have found agency fees the best way to ensure a stable and productive relationship with an exclusive-bargaining agent. See 431 U. S., at 220–221, 224–226; *supra*, at 933–934. And here, Illinois and many governmental *amici* have explained again how agency fees advance their workplace goals. See Brief for State Respondents 12, 36; Brief for Governor Tom Wolf et al. as *Amici Curiae* 21–33. In no other employee-speech case has this Court dismissed such work-related interests, as the majority does here. See *supra*, at 936–939 (discussing the majority's refusal to engage with the logic of the State's position). Time and again, the Court has instead respected and acceded to those interests—just as *Abood* did.

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so.

III

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong.[4] But even if that were true (which it is not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455 (2015). Any departure

[4] And then, after ostensibly turning to *stare decisis*, the majority spends another four pages insisting that *Abood* was "not well reasoned," which is just more of the same. *Ante*, at 921; see *ante*, at 917–921.

from settled precedent (so the Court has often stated) demands a "special justification—over and above the belief that the precedent was wrongly decided." *Id.*, at 456 (internal quotation marks omitted); see, *e. g.*, *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). And the majority does not have anything close. To the contrary: All that is "special" in this case—especially the massive reliance interests at stake—demands retaining *Abood*, beyond even the normal precedent.

Consider first why these principles about precedent are so important. *Stare decisis*—"the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law." *Kimble*, 576 U. S., at 455 (quoting *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014)). It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). It fosters respect for and reliance on judicial decisions. See *ibid.* And it "contributes to the actual and perceived integrity of the judicial process," *ibid.*, by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986).

And *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). See, *e. g.*, *Locke* v. *Karass*, 555 U. S. 207, 213–214 (2009); *Lehnert*, 500 U. S., at 519; *Teachers* v. *Hudson*, 475 U. S. 292, 301–302 (1986); *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455–457 (1984). Reviewing those decisions not a decade ago, this Court—unanimously—called the *Abood* rule "a general First Amendment principle." *Locke*, 555 U. S., at 213. And indeed, the Court has relied on that rule when deciding cases involving compelled speech subsidies outside the labor

sphere—cases today's decision does not question. See, *e. g.*, *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 9–17 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 230–232 (2000) (public university student fees); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 471–473 (1997) (commercial advertising assessments); see also n. 3, *supra*.

Ignoring our repeated validation of *Abood*, the majority claims it has become "an outlier among our First Amendment cases." *Ante*, at 924. That claim fails most spectacularly for reasons already discussed: *Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech. See *supra*, at 941–942. Needing to stretch further, the majority suggests that *Abood* conflicts with "our political patronage decisions." *Ante*, at 926. But in fact those decisions strike a balance much like *Abood*'s. On the one hand, the Court has enabled governments to compel policymakers to support a political party, because that requirement (like fees for collective bargaining) can reasonably be thought to advance the interest in workplace effectiveness. See *Elrod* v. *Burns*, 427 U. S. 347, 366–367 (1976); *Branti* v. *Finkel*, 445 U. S. 507, 517 (1980). On the other hand, the Court has barred governments from extending that rule to non-policymaking employees because that application (like fees for political campaigns) can't be thought to promote that interest, see *Elrod*, 427 U. S., at 366; the government is instead trying to "leverage the employment relationship" to achieve other goals, *Garcetti*, 547 U. S., at 419. So all that the majority has left is *Knox* and *Harris*. See *ante*, at 925. Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."

The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. *Ante*, at 921. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? *Ante*, at 921. Well, not quite that—but as exercises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood*, this Court has had to resolve only a handful of cases raising questions about the distinction. To my knowledge, the circuit courts are not divided on any classification issue; neither are they issuing distress signals of the kind that sometimes prompt the Court to reverse a decision. See, *e. g.*, *Johnson* v. *United States*, 576 U. S. 591 (2015) (overruling precedent because of frequent splits and mass confusion). And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining. The majority cites some disagreement in two of the classification cases this Court decided—as if non-unanimity among Justices were something startling. And it notes that a dissenter in one of those cases called the Court's approach "malleable" and "not principled," *ante*, at 921—as though those weren't stock terms in dissenting vocabulary. See, *e. g.*, *Murr* v. *Wisconsin*, 582 U. S. 383, 407 (2017) (ROBERTS, C. J., dissenting); *Dietz* v. *Bouldin*, 579 U. S. 40, 55 (2016) (THOMAS, J., dissenting); *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 294 (2015) (Scalia, J., dissenting). As I wrote in *Harris* a few Terms ago: "If the kind of handwringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U. S. Reports." 573 U. S., at 671.

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis*, this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private

realm, have acted in reliance on a previous decision." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991). That is because overruling a decision would then "require an extensive legislative response" or "dislodge settled rights and expectations." *Ibid.* Both will happen here: The Court today wreaks havoc on entrenched legislative and contractual arrangements.

Over 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. See, *e. g.*, Brief for State of California as *Amicus Curiae* 24–25. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. The majority responds, in a footnote no less, that this is of no proper concern to the Court. See *ante*, at 928–929, n. 27. But in fact, we have weighed heavily against "abandon[ing] our settled jurisprudence" that "[s]tate legislatures have relied upon" it and would have to "reexamine [and amend] their statutes" if it were overruled. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U. S. 768, 785 (1992); *Hilton*, 502 U. S., at 203.

Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne*, 501 U. S., at 828. Not today. The majority undoes bargains reached all over the country.[5] It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the parties—immediately—to renegotiate once-settled terms

[5] Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses. See *ante*, at 928 (noting that unions could have negotiated for that result); Brief for Governor Tom Wolf et al. as *Amici Curiae* 11.

and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. (New York City, for example, has agreed to agency fees in 144 contracts with 97 public-sector unions. See Brief for New York City Municipal Labor Committee as *Amicus Curiae* 4.) It does so knowing that those renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. See *supra*, at 952. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

The majority asserts that no one should care much because the canceled agreements are "of rather short duration" and would "expire on their own in a few years' time." *Ante*, at 927, 928. But to begin with, that response ignores the substantial time and effort that state legislatures will have to devote to revamping their statutory schemes. See *supra*, at 952. And anyway, it misunderstands the nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various "long-settled" terms—like fair-share provisions—are taken as a given. Brief for Governor Tom Wolf et al. 11; see Brief for New York City Sergeants Benevolent Assn. as *Amicus Curiae* 18. So the majority's ruling does more than advance by a few years a future renegotiation (though even that would be significant). In most cases, it commands new bargaining over how to replace a term that the parties never expected to change. And not just new bargaining; given the interests at stake, complicated and possibly contentious bargaining as well. See Brief for Governor Tom Wolf et al. 11.[6]

[6] In a single, cryptic sentence, the majority also claims that arguments about reliance "based on [*Abood*'s] clarity are misplaced" because *Abood* did not provide a "clear or easily applicable standard" to separate fees for

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood*." *Ante*, at 927. Here, the majority proudly lays claim to its 6-year crusade to ban agency fees. In *Knox*, the majority relates, it described *Abood* as an "anomaly." *Ante*, at 927 (quoting 567 U. S., at 311). Then, in *Harris*, it "cataloged *Abood*'s many weaknesses." *Ante*, at 927. Finally, in *Friedrichs*, "we granted a petition for certiorari asking us to" reverse *Abood*, but found ourselves equally divided. *Ante*, at 927. "During this period of time," the majority concludes, public-sector unions "must have understood that the constitutionality of [an agency-fee] provision was uncertain." *Ibid.* And so, says the majority, they should have structured their affairs accordingly.

But that argument reflects a radically wrong understanding of how *stare decisis* operates. Justice Scalia once confronted a similar argument for "disregard[ing] reliance interests" and showed how antithetical it was to rule-of-law principles. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 320 (1992) (opinion concurring in part and concurring in judgment). He noted first what we always tell lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.*, at 321 (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989); some alterations omitted). That instruction, Justice Scalia explained, was "incompatible" with an expectation that "pri-

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collective bargaining from those for political activities. *Ante*, at 927. But to begin, the standard for separating those activities was clear and workable, as I have already shown. See *supra*, at 951. And in any event, the reliance *Abood* engendered was based not on the clarity of that line, but on the clarity of its holding that governments and unions could generally agree to fair-share arrangements.

vate parties anticipate our overrulings." 504 U. S., at 321. He concluded: "[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Ibid.* *Abood*'s holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs," *ante*, at 929, is to trivialize *stare decisis*.

IV

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Departures from *stare decisis* are supposed to be "exceptional action[s]" demanding "special justification," *Rumsey*, 467 U. S., at 212—but the majority offers nothing like that here. In contrast to the vigor of its attack on *Abood*, the majority's discussion of *stare decisis* barely limps to the finish line. And no wonder: The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood*'s legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States." *Ante,* at 928–929, n. 27.

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, *e. g.*, *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. 755 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users); *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011) (striking down a law that restricted pharmacies from selling various data). And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

Syllabus

SAUSE *v.* BAUER ET AL.

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

No. 17–742. Decided June 28, 2018

Two police officers gained entry to petitioner's apartment while responding to a noise complaint. Petitioner alleged the officers engaged in abusive conduct and ordered her to stop when she knelt and began to pray. Petitioner filed a *pro se* complaint pursuant to 42 U. S. C. § 1983 asserting violations of her First and Fourth Amendment rights. The District Court granted defendants' motion to dismiss for failure to state a claim on which relief could be granted. Petitioner's sole argument on appeal was that her free exercise rights were violated by the two officers who entered her home. The Court of Appeals for the Tenth Circuit affirmed the dismissal, concluding that the officers were entitled to qualified immunity.

Held: Neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved against petitioner consistent with the requirement to liberally construe allegations in a *pro se* complaint. While the First Amendment protects the right to pray, a police officer may lawfully prevent a person from praying at a particular time and place. Here, the officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights. Petitioner's complaint contains no express allegations regarding whether the police officers were in petitioner's apartment based on her consent, whether they had some other ground consistent with the Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. Her complaint does not state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. The analysis of petitioner's free exercise claim depends on these issues. Although petitioner elected on appeal not to pursue an independent Fourth Amendment claim, her First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering these matters, neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved.

Certiorari granted; 859 F. 3d 1270, reversed and remanded.

PER CURIAM.

Petitioner Mary Ann Sause, proceeding *pro se*, filed this action under Rev. Stat. 1979, 42 U. S. C. § 1983, and named as defendants past and present members of the Louisburg, Kansas, police department, as well as the current mayor and a former mayor of the town. The centerpiece of her complaint was the allegation that two of the town's police officers visited her apartment in response to a noise complaint, gained admittance to her apartment, and then proceeded to engage in a course of strange and abusive conduct, before citing her for disorderly conduct and interfering with law enforcement. Among other things, she alleged that at one point she knelt and began to pray but one of the officers ordered her to stop. She claimed that a third officer refused to investigate her complaint that she had been assaulted by residents of her apartment complex and had threatened to issue a citation if she reported this to another police department. In addition, she alleged that the police chief failed to follow up on a promise to investigate the officers' conduct and that the present and former mayors were aware of unlawful conduct by the town's police officers.

Petitioner's complaint asserted a violation of her First Amendment right to the free exercise of religion and her Fourth Amendment right to be free of any unreasonable search or seizure. The defendants moved to dismiss the complaint for failure to state a claim on which relief may be granted, arguing that the defendants were entitled to qualified immunity. Petitioner then moved to amend her complaint, but the District Court denied that motion and granted the motion to dismiss.

On appeal, petitioner, now represented by counsel, argued only that her free exercise rights were violated by the two officers who entered her home. The Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, concluding that the officers were entitled to qualified immunity. 859 F. 3d 1270 (2017). Chief Judge Tymkovich filed a

concurring opinion. While agreeing with the majority regarding petitioner's First Amendment claim, he noted that petitioner's "allegations fit more neatly in the Fourth Amendment context." *Id.*, at 1279. He also observed that if the allegations in the complaint are true, the conduct of the officers "should be condemned," and that if the allegations are untrue, petitioner had "done the officers a grave injustice." *Ibid.*

The petition filed in this Court contends that the Court of Appeals erred in holding that the officers who visited petitioner's home are entitled to qualified immunity. The petition argues that it was clearly established that law enforcement agents violate a person's right to the free exercise of religion if they interfere, without any legitimate law enforcement justification, when a person is at prayer. The petition further maintains that the absence of a prior case involving the unusual situation alleged to have occurred here does not justify qualified immunity.

There can be no doubt that the First Amendment protects the right to pray. Prayer unquestionably constitutes the "exercise" of religion. At the same time, there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place. For example, if an officer places a suspect under arrest and orders the suspect to enter a police vehicle for transportation to jail, the suspect does not have a right to delay that trip by insisting on first engaging in conduct that, at another time, would be protected by the First Amendment. When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.

That is the situation here. As the case comes before us, it is unclear whether the police officers were in petitioner's apartment at the time in question based on her consent, whether they had some other ground consistent with the

Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. Petitioner's complaint contains no express allegations on these matters. Nor does her complaint state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. Without knowing the answers to these questions, it is impossible to analyze petitioner's free exercise claim.

In considering the defendants' motion to dismiss, the District Court was required to interpret the *pro se* complaint liberally, and when the complaint is read that way, it may be understood to state Fourth Amendment claims that could not properly be dismissed for failure to state a claim. We appreciate that petitioner elected on appeal to raise only a First Amendment argument and not to pursue an independent Fourth Amendment claim, but under the circumstances, the First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering these matters, neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved. Thus, petitioner's choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address these matters.

For these reasons, we grant the petition for a writ of certiorari; we reverse the judgment of the Tenth Circuit; and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

Per Curiam

SEXTON, WARDEN *v.* BEAUDREAUX

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

No. 17–1106. Decided June 28, 2018

A California jury found respondent Nicholas Beaudreaux guilty of first-degree murder in the 2006 shooting of Wayne Drummond. Beaudreaux's conviction was affirmed on direct appeal, and his first state habeas petition was denied. In 2013, Beaudreaux filed a second state habeas petition in which he claimed that his trial attorney was ineffective for failing to file a motion to suppress the identification testimony of Dayo Esho, one of the witnesses to Drummond's shooting. The California Court of Appeal summarily denied the petition, and the California Supreme Court denied review. Petitioner then filed a federal habeas petition, which the District Court denied. A split panel of the United States Court of Appeals for the Ninth Circuit reversed on the ground that the state court's rejection of respondent's claim of ineffective assistance of counsel was objectively unreasonable.

Held: The Ninth Circuit's decision reversing the denial of habeas relief ignored well-established principles. The Court's precedents applying 28 U. S. C. §2254(d) require that when, as here, there is no reasoned state-court decision on the merits, the federal court "must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington* v. *Richter*, 562 U. S. 86, 102. If such disagreement is possible, then the petitioner's claim must be denied. *Ibid.* The Ninth Circuit failed to properly apply this standard. It did not consider reasonable grounds that could have supported the state court's summary decision, and it analyzed respondent's arguments without any meaningful deference to the state court.

Certiorari granted; 734 Fed. Appx. 387, reversed and remanded.

PER CURIAM.

In this case, the United States Court of Appeals for the Ninth Circuit reversed a denial of federal habeas relief, 28 U. S. C. §2254, on the ground that the state court had unreasonably rejected respondent's claim of ineffective assistance of counsel. The Court of Appeals' decision ignored well-

established principles. It did not consider reasonable grounds that could have supported the state court's summary decision, and it analyzed respondent's arguments without any meaningful deference to the state court. Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

I

Respondent Nicholas Beaudreaux shot and killed Wayne Drummond during a late-night argument in 2006. Dayo Esho and Brandon Crowder were both witnesses to the shooting. The next day, Crowder told the police that he knew the shooter from middle school, but did not know the shooter's name. Esho described the shooter, but also did not know his name. Seventeen months later, Crowder was arrested for an unrelated crime. While Crowder was in custody, police showed him a middle-school yearbook with Beaudreaux's picture, as well as a photo lineup including Beaudreaux. Crowder identified Beaudreaux as the shooter in the Drummond murder.

Officers interviewed Esho the next day. They first spoke with him during his lunch break. They showed him a display that included a recent picture of Beaudreaux and pictures of five other men. Esho tentatively identified Beaudreaux as the shooter, saying his picture "was 'closest' to the gunman." *Beaudreaux* v. *Soto*, 734 Fed. Appx. 387, 389 (CA9 2017). Later that day, one of the officers found another photograph of Beaudreaux that was taken "closer to the date" of the shooting. Record ER 263. Beaudreaux looked different in the two photographs. In the first, " 'his face [was] a little wider and his head [was] a little higher.' " *Id.*, at ER 262. Between four and six hours after the first interview, the officers returned to show Esho a second six-man photo lineup, which contained the older picture of Beaudreaux. Beaudreaux's photo was in a different position in the lineup than it had been in the first one. Esho again identified Beaudreaux as the shooter,

telling the officers that the second picture was "'very close.'" *Id.*, at ER 264. But he again declined to positively state that Beaudreaux was the shooter. Esho was hesitant because there were "a few things" he remembered about the shooter that would require seeing him in person. *Id.*, at ER 283–ER 284. At a preliminary hearing, Esho identified Beaudreaux as the shooter. At trial, Esho explained that it "clicked" when he saw Beaudreaux in person based on "the way that he walked." *Id.*, at ER 285. After seeing him in person, Esho was "sure" that Beaudreaux was the shooter. *Ibid.* At no time did any investigator or prosecutor suggest to Esho that Beaudreaux was the one who shot Drummond. *Ibid.*

Beaudreaux was tried in 2009 for first-degree murder and attempted second-degree robbery. Esho and Crowder both testified against Beaudreaux and both identified him as Drummond's shooter. The jury found Beaudreaux guilty, and the trial court sentenced him to a term of 50 years to life. Beaudreaux's conviction was affirmed on direct appeal, and his first state habeas petition was denied.

In 2013, Beaudreaux filed a second state habeas petition. He claimed, among other things, that his trial attorney was ineffective for failing to file a motion to suppress Esho's identification testimony. The California Court of Appeal summarily denied the petition, and the California Supreme Court denied review. Beaudreaux then filed a federal habeas petition, which the District Court denied.

A divided panel of the Ninth Circuit reversed. The panel majority spent most of its opinion conducting a *de novo* analysis of the merits of the would-be suppression motion—relying in part on arguments and theories that Beaudreaux had not presented to the state court in his second state habeas petition. See 734 Fed. Appx. 387; Record ER 153–ER 154. It first determined that counsel's failure to file the suppression motion constituted deficient performance. See 734 Fed. Appx., at 389. The circumstances surround-

ing Esho's pretrial identification were "unduly suggestive," according to the Ninth Circuit, because only Beaudreaux's picture was in both photo lineups. *Ibid.* And, relying on Ninth Circuit precedent, the panel majority found that the preliminary hearing was unduly suggestive as well. *Ibid.* (quoting *Johnson* v. *Sublett*, 63 F. 3d 926, 929 (CA9 1995)). The panel majority next concluded that, under the totality of the circumstances, Esho's identification was not reliable enough to overcome the suggestiveness of the procedures. 734 Fed. Appx., at 389–390. The panel majority then determined that counsel's failure to file the suppression motion prejudiced Beaudreaux, given the weakness of the State's case. *Id.*, at 390. After conducting this *de novo* analysis of Beaudreaux's ineffectiveness claim, the panel majority asserted that the state court's denial of this claim was not just wrong, but objectively unreasonable under §2254(d). See *id.*, at 390–391. Judge Gould dissented. He argued that the state court could have reasonably concluded that Beaudreaux had failed to prove prejudice. *Id.*, at 391.

The State of California petitioned for certiorari.

II

Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court cannot grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court, or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d). When, as here, there is no reasoned state-court decision on the merits, the federal court "must determine what arguments or theories . . . could have supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those argu-

ments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). If such disagreement is possible, then the petitioner's claim must be denied. *Ibid.* We have often emphasized that "this standard is difficult to meet" "because it was meant to be." *Ibid.*; *e. g.*, *Burt* v. *Titlow*, 571 U. S. 12, 20 (2013). The Ninth Circuit failed to properly apply this standard.

A

To prove ineffective assistance of counsel, a petitioner must demonstrate both deficient performance and prejudice. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). The state court's denial of relief in this case was not an unreasonable application of *Strickland*. A fairminded jurist could conclude that counsel's performance was not deficient because counsel reasonably could have determined that the motion to suppress would have failed. See *Premo* v. *Moore*, 562 U. S. 115, 124 (2011).[1]

This Court has previously described "the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement." *Perry* v. *New Hampshire*, 565 U. S. 228, 238 (2012). In particular, the Court has said that "due process concerns arise only when law enforcement officers use[d] an identification procedure that is *both* suggestive and unnecessary." *Id.*, at 238–239 (citing *Manson* v. *Braithwaite*, 432 U. S. 98, 107, 109 (1977), and *Neil* v. *Biggers*, 409 U. S. 188, 198 (1972); emphasis added). To be "'impermissibly suggestive,'" the procedure must "'give rise to a very substantial likelihood of irreparable misidentification.'" *Id.*, at 197 (quoting *Simmons* v. *United States*, 390 U. S. 377, 384

[1] Judge Gould found that the state court could have reasonably concluded that Beaudreaux failed to prove prejudice because the weight of the evidence against him—even without Esho's identification—would have been sufficient to ensure his conviction. See *Beaudreaux* v. *Soto*, 734 Fed. Appx. 387, 391 (CA9 2017). We need not reach that issue.

(1968)). It is not enough that the procedure "may have in some respects fallen short of the ideal." *Id.*, at 385–386. Even when an unnecessarily suggestive procedure was used, "suppression of the resulting identification is not the inevitable consequence." *Perry*, 565 U. S., at 239. Instead, "the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Ibid.* (quoting *Biggers*, *supra*, at 201). "'[R]eliability [of the eyewitness identification] is the linchpin' of that evaluation." *Perry*, *supra*, at 239 (quoting *Manson*, 432 U. S., at 114; alterations in original). The factors affecting reliability include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Id.*, at 114. This Court has held that pretrial identification procedures violated the Due Process Clause only once, in *Foster* v. *California*, 394 U. S. 440 (1969). There, the police used two highly suggestive lineups and "a one-to-one confrontation," which "made it all but inevitable that [the witness] would identify [the defendant]." *Id.*, at 443.[2]

In this case, there is at least one theory that could have led a fairminded jurist to conclude that the suppression motion would have failed. See *Richter*, *supra*, at 102.[3] The

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[2] In the first lineup, the suspect was nearly six inches taller than the other two men in the lineup, and was the only one wearing a leather jacket like the one the witness described the robber as wearing. *Foster*, 394 U. S., at 441, 443. Police then arranged a "one-to-one confrontation" in which the witness sat in the same room as the suspect and spoke to him. *Id.*, at 441. And in the second lineup, the suspect was the only one in the five-man lineup who had been in the original lineup. *Id.*, at 441–442.

[3] Because our decision merely applies 28 U. S. C. § 2254(d)(1), it takes no position on the underlying merits and does not decide any other issue. See *Kernan* v. *Cuero*, 583 U. S. 1, 9 (2017) (*per curiam*); *Marshall* v. *Rodgers*, 569 U. S. 58, 64 (2013) (*per curiam*).

state court could have reasonably concluded that Beaudreaux failed to prove that, "under the 'totality of the circumstances,'" the identification was not "reliable." *Biggers*, *supra*, at 199. Beaudreaux's claim was facially deficient because his state habeas petition failed to even address this requirement. See Record ER 153–ER 154. And the state court could have reasonably concluded that the totality of the circumstances tipped against Beaudreaux. True, Esho gave a vague initial description of the shooter, see *Manson*, *supra*, at 115 (noting the detailed physical description the witness gave "minutes after"), and there was a 17-month delay between the shooting and the identification, see *Biggers*, *supra*, at 201 (determining that "a lapse of seven months . . . would be a seriously negative factor in most cases"). But, as the District Court found, Esho had a good opportunity to view the shooter, having talked to Beaudreaux immediately after the shooting. See App. to Pet. for Cert. 66a. He also was paying attention during the crime and even remembered Beaudreaux's distinctive walk. See *id.*, at 64a, 66a. Esho demonstrated a high overall level of certainty in his identification. He chose Beaudreaux's picture in both photo lineups, and he was "sure" about his identification once he saw Beaudreaux in person. Record ER 285; App. to Pet. for Cert. 63a–64a, 66a. There also was "little pressure" on Esho to make a particular identification. *Manson*, *supra*, at 116. It would not have been "'"objectively unreasonable"'" to weigh the totality of these circumstances against Beaudreaux. *White* v. *Woodall*, 572 U. S. 415, 419 (2014).

B

The Ninth Circuit's opinion was not just wrong. It also committed fundamental errors that this Court has repeatedly admonished courts to avoid.

First, the Ninth Circuit effectively inverted the rule established in *Richter*. Instead of considering the "arguments or theories [that] could have supported" the state court's sum-

mary decision, 562 U. S., at 102, the Ninth Circuit considered arguments against the state court's decision that Beaudreaux never even made in his state habeas petition.

Additionally, the Ninth Circuit failed to assess Beaudreaux's ineffectiveness claim with the appropriate amount of deference. The Ninth Circuit essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable. But deference to the state court should have been near its apex in this case, which involves a *Strickland* claim based on a motion that turns on general, fact-driven standards such as suggestiveness and reliability. The Ninth Circuit's analysis did not follow this Court's repeated holding that, "'[t]he more general the rule . . . the more leeway [state] courts have.'" *Renico* v. *Lett*, 559 U. S. 766, 776 (2010) (brackets in original). Nor did it follow this Court's precedents stating that, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles* v. *Mirzayance*, 556 U. S. 111, 123 (2009). The Ninth Circuit's essentially *de novo* analysis disregarded this deferential standard.

* * *

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the United States Courts 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 BREYER dissents.

Syllabus

NORTH CAROLINA ET AL. *v.* COVINGTON ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 17–1364. Decided June 28, 2018

In earlier proceedings in this case, this Court summarily affirmed a District Court's judgment that the North Carolina General Assembly's 2011 redistricting plan resulted in racially gerrymandered districts. At the same time, the Court vacated the District Court's remedial order—which, among other things, directed the General Assembly to adopt new districting maps—finding the order was based on only the "most cursory" review of the equitable balance involved in court-ordered special elections. *North Carolina* v. *Covington*, 581 U. S. 486, 488 (*per curiam*). On remand, the District Court ordered the General Assembly to draw remedial maps for the State House and State Senate. Plaintiffs objected to the newly drawn maps, arguing that four legislative districts—Senate Districts 21 and 28 and House Districts 21 and 57—still segregated voters on the basis of race and that five State House districts in Wake and Mecklenburg Counties were revised in a manner that constituted mid-decade redistricting in violation of the North Carolina Constitution. The District Court appointed a Special Master to redraw the lines of the districts to which the plaintiffs objected. Upon receipt of the Special Master's report, the District Court sustained the plaintiffs' objections, adopted the Special Master's recommended reconfiguration, and directed the defendants to implement the Special Master's recommended district lines and to conduct elections accordingly. See 283 F. Supp. 3d 410, 414. With respect to Senate Districts 21 and 28 and House Districts 21 and 57, the District Court found that the General Assembly's remedial plans as to those districts were unconstitutional in part because they retained the core shape of districts the District Court had earlier found to be unconstitutional and perpetuated the effects of the racial gerrymander. *Id.*, at 438–439. The District Court then sustained the plaintiffs' remaining objection that several House districts in Wake and Mecklenburg Counties had been redrawn unnecessarily in violation of the North Carolina Constitution's prohibition on mid-decade redistricting. See *id.*, at 443. The defendants applied to the Court for a stay pending appeal, and the Court granted a stay with respect to implementation of the Special Master's remedial districts in Wake and Mecklenburg Counties, but otherwise denied the application. 583 U. S. 1109.

Per Curiam

Held: The District Court's order is affirmed in part and reversed in part. The order is affirmed insofar as it provided a court-drawn remedy for Senate Districts 21 and 28 and House Districts 21 and 57. First, the District Court had jurisdiction to enter a remedial order in this case. The plaintiffs' racial gerrymandering claims did not cease to exist when the North Carolina General Assembly enacted remedial plans and repealed the old plans. Because plaintiffs assert that they continue to be racially segregated under the remedial plans, their claims remained the subject of a live dispute. Second, the District Court's conclusion that those four districts unconstitutionally sort voters on the basis of race is not undermined by the fact that the 2017 legislature instructed its map drawers not to look at race when crafting a remedial map. The District Court's detailed, district-by-district factfinding turned up sufficient circumstantial evidence that race was the predominant factor governing the shape of those four districts. See *Miller* v. *Johnson*, 515 U. S. 900, 916. Third, the District Court did not abuse its discretion by arranging for the Special Master to draw up an alternative remedial map instead of giving the General Assembly another chance. The District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of the upcoming election cycle. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5 (*per curiam*).

The District Court's order is reversed as to the legislature's redrawing of House districts in Wake and Mecklenburg Counties. The District Court redrew those districts because it found that the legislature's revision of them violated the North Carolina Constitution's ban on mid-decade redistricting. The District Court's decision to override the legislature's remedial map on that basis was clear error. See *Burns* v. *Richardson*, 384 U. S. 73, 85. The District Court's remedial authority was limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts. Once the court ensured that the racial gerrymanders at issue were remedied, its proper role in the legislative districting process was at an end.

283 F. Supp. 3d 410, affirmed in part and reversed in part.

PER CURIAM.

This appeal arises from a remedial redistricting order entered by the District Court in a racial gerrymandering case we have seen before. The case concerns the redistricting of state legislative districts by the North Carolina General Assembly in 2011, in response to the 2010 census. A group of plaintiff voters, appellees here, alleged that the General

Assembly racially gerrymandered their districts when—in an ostensible effort to comply with the requirements of the Voting Rights Act of 1965—it drew 28 State Senate and State House of Representatives districts comprising majorities of black voters. The District Court granted judgment to the plaintiffs, and we summarily affirmed that judgment. See *Covington* v. *North Carolina*, 316 F. R. D. 117 (MDNC 2016), summarily aff'd, 581 U. S. 1015 (2017).

At the same time, however, we vacated the District Court's remedial order, which directed the General Assembly to adopt new districting maps, shortened by one year the terms of the legislators currently serving in the gerrymandered districts, called for special elections in those districts, and suspended two provisions of the North Carolina Constitution. See *North Carolina* v. *Covington*, 581 U. S. 486, 487 (2017) (*per curiam*). The District Court ordered all of this, we noted, after undertaking only the "most cursory" review of the equitable balance involved in court-ordered special elections. *Id.*, at 488. Having found that the District Court's discretion "'was barely exercised,'" we remanded the case for further remedial proceedings. *Id.*, at 489 (quoting *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 27 (2008)).

On remand, the District Court ordered the General Assembly to draw remedial maps for the State House and State Senate within a month, and to file those maps in the District Court for approval. The General Assembly complied after directing its map drawers to, among other things, make "[r]easonable efforts . . . to avoid pairing incumbent members of the House [and] Senate" and not to use "[d]ata identifying the race of individuals or voters" in the drawing of the new districts. 283 F. Supp. 3d 410, 417–418 (MDNC 2018) (*per curiam*). The plaintiffs filed objections to the new maps. They argued that four legislative districts—Senate Districts 21 and 28 and House Districts 21 and 57—still segregated voters on the basis of race. The plaintiffs also objected to

the General Assembly's decision to redraw five State House districts situated in Wake and Mecklenburg Counties. They argued that those five districts "did not violate the [U. S.] Constitution, [and] did not abut a district violating the [U. S.] Constitution." *Id.*, at 443. Thus, they contended, the revision of the borders of those districts constituted mid-decade redistricting in violation of the North Carolina Constitution. See Art. II, §5(4); *Commissioners of Granville County* v. *Ballard*, 69 N. C. 18, 20–21 (1873).

After some consideration of these objections, the District Court appointed a Special Master to redraw the lines of the districts to which the plaintiffs objected, along with any nonadjacent districts to the extent "necessary" to comply with districting criteria specified by the District Court. App. to Juris. Statement 106–107. Those criteria included adherence to the "county groupings" used by the legislature in its remedial plan and to North Carolina's "Whole County Provision as interpreted by the North Carolina Supreme Court." *Id.*, at 108. The District Court further instructed the Special Master to make "reasonable efforts to adhere to . . . state policy objectives" by creating relatively compact districts and by avoiding split municipalities and precincts. *Id.*, at 108–109. The District Court also permitted the Special Master to "adjust district lines to avoid pairing any incumbents who have not publicly announced their intention not to run in 2018" and to "consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders." *Id.*, at 109–111.

Upon receipt of the Special Master's report, the District Court sustained the plaintiffs' objections and adopted the Special Master's recommended reconfiguration of the state legislative maps. See 283 F. Supp. 3d, at 414. With respect to Senate Districts 21 and 28 and House Districts 21 and 57, the District Court found that those districts, as redrawn by the legislature, "retain[ed] the core shape" of districts that

it had earlier found to be unconstitutional. *Id.*, at 436; see *id.*, at 439, 440, 441–442. The District Court noted, for instance, that the legislature's remedial plan for Senate District 21 copied the prior plan's "horseshoe-shaped section of the city of Fayetteville," which "include[d] Fayetteville's predominantly black [voting districts] and blocks and exclude[d] Fayetteville's predominantly white [voting districts] and blocks." *Id.*, at 436. Although the defendants explained that the new district was designed to "'preserve the heart of Fayetteville,'" the District Court found that they had "fail[ed] to provide any explanation or evidence as to why 'preserving the heart of Fayetteville' required the exclusion of numerous majority-white precincts in downtown Fayetteville from the remedial district." *Ibid.* (alterations omitted). Likewise, the District Court found that the legislature's remedial version of Senate District 28, though it "encompasse[d] only a portion of [the city of] Greensboro," nevertheless "encompasse[d] *all* of the majority black [voting districts] within Greensboro," while "exclud[ing] predominantly white sections of Greensboro," and "reach[ing] out of Greensboro's city limits to capture predominantly African-American areas in eastern Guilford County." *Id.*, at 438. By choosing to preserve the shape of the district's "'anchor'" in eastern Greensboro, the District Court found, the General Assembly had "ensured that the district would retain a high [black voting age population], thereby perpetuating the effects of the racial gerrymander." *Id.*, at 438–439.

The District Court made similar findings with respect to the legislature's remedial House Districts 21 and 57. House District 21, it found, "(1) preserve[d] the core shape of . . . the previously unconstitutional district, (2) include[d] all but one of the majority-black [voting districts] in the two counties through which it [ran], (3) divide[d] a municipality and precinct along racial lines, [and] (4) ha[d] an irregular shape that correspond[ed] to the racial make-up of the geographic area." *Id.*, at 439–440. In light of this and other evidence,

the District Court concluded that House District 21 "continue[d] to be a racial gerrymander." *Id.*, at 440. House District 57, the District Court found, likewise inexplicably "divide[d] the city of Greensboro along racial lines," *id.*, at 442, and otherwise preserved features of the previously invalidated 2011 maps. The District Court thus concluded that the General Assembly's remedial plans as to those districts were unconstitutional. *Ibid.*

The District Court then sustained the plaintiffs' remaining objection that several House districts in Wake and Mecklenburg Counties had been redrawn unnecessarily in violation of the North Carolina Constitution's prohibition on mid-decade redistricting. See *id.*, at 443 (citing Art. II, § 5(4)). The court reasoned that the prohibition "preclude[d] the General Assembly from engaging in mid-decade redistricting" except to the extent "required by federal law or a judicial order." 283 F. Supp. 3d, at 443. It noted further that, "[w]hen a court must draw remedial districts itself, this means that a court may redraw only those districts necessary to remedy the constitutional violation," *ibid.* (citing *Upham* v. *Seamon*, 456 U. S. 37, 40–41 (1982) (*per curiam*)), and that "*Upham* requires that a federal district court's remedial order not unnecessarily interfere with state redistricting choices," 283 F. Supp. 3d, at 443. This remedial principle informed the District Court's conclusion that "the General Assembly [had] exceeded its authority under [the District Court's remedial] order by disregarding the mid-decade redistricting prohibition," since the legislature had failed to "put forward any evidence showing that revising *any* of the five Wake and Mecklenburg County House districts challenged by Plaintiffs was necessary to remedy the racially gerrymandered districts in those two counties." *Id.*, at 444.

Finally, the District Court adopted the Special Master's recommended replacement plans for the districts to which the plaintiffs had objected. In adopting those recommenda-

tions, the District Court turned away the defendants' argument that they were built on "specific . . . quota[s]" of black voters in each reconstituted district. *Id.*, at 448–449. The District Court instead credited the Special Master's submission that his "'remedial districts were drawn not with any racial target in mind, but in order to maximize compactness, preserve precinct boundaries, and respect political subdivision lines,'" and that the remedial map was the product of "'explicitly race-neutral criteria.'" *Id.*, at 449. The District Court directed the defendants to implement the Special Master's recommended district lines and to conduct elections accordingly.

The defendants applied to this Court for a stay of the District Court's order pending appeal. We granted a stay with respect to implementation of the Special Master's remedial districts in Wake and Mecklenburg Counties, but otherwise denied the application. See 583 U. S. 1109 (2018). The defendants timely appealed directly to this Court as provided under 28 U. S. C. § 1253. We have jurisdiction, and now summarily affirm in part and reverse in part the order of the District Court.

* * *

The defendants first argue that the District Court lacked jurisdiction even to enter a remedial order in this case. In their view, "[w]here, as here, a lawsuit challenges the validity of a statute," the case becomes moot "when the statute is repealed." Juris. Statement 17. Thus, according to the defendants, the plaintiffs' racial gerrymandering claims ceased to exist when the North Carolina General Assembly enacted remedial plans for the State House and State Senate and repealed the old plans.

The defendants misunderstand the nature of the plaintiffs' claims. Those claims, like other racial gerrymandering claims, arise from the plaintiffs' allegations that they have been "separate[d] . . . into different districts on the basis of race." *Shaw* v. *Reno*, 509 U. S. 630, 649 (1993). Resolution

of such claims will usually turn upon "circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing" the lines of legislative districts. *Miller* v. *Johnson*, 515 U. S. 900, 913 (1995). But it is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims. It is for this reason, among others, that the plaintiffs have standing to challenge racial gerrymanders only with respect to those legislative districts in which they reside. See *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 263 (2015). Here, in the remedial posture in which this case is presented, the plaintiffs' claims that they were organized into legislative districts on the basis of their race did not become moot simply because the General Assembly drew new district lines around them. To the contrary, they argued in the District Court that some of the new districts were mere continuations of the old, gerrymandered districts. Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction.

Second, the defendants argue that the District Court erred when it "conclu[ded] that the General Assembly engaged in racial gerrymandering by declining to consider race." Juris. Statement 20. They assert that "there is no dispute that the General Assembly did *not* consider race *at all* when designing the 2017 [remedial plans]—not as a predominant motive, a secondary motive, or otherwise," and that such "undisputed fact should have been the end of the plaintiffs' racial gerrymandering challenges." *Id.*, at 21–22.

This argument suffers from the same conceptual flaws as the first. While it may be undisputed that the 2017 legislature instructed its map drawers not to look at race when crafting a remedial map, what is also undisputed—because the defendants do not attempt to rebut it in their jurisdictional statement or in their brief opposing the plaintiffs'

motion to affirm—is the District Court's detailed, district-by-district factfinding respecting the legislature's remedial Senate Districts 21 and 28 and House Districts 21 and 57.

That factfinding, as discussed above, turned up sufficient circumstantial evidence that race was the predominant factor governing the shape of those four districts. See, *e. g.*, 283 F. Supp. 3d, at 436. As this Court has previously explained, a plaintiff can rely upon either "circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose" in proving a racial gerrymandering claim. *Miller*, *supra*, at 916. The defendants' insistence that the 2017 legislature did not look at racial data in drawing remedial districts does little to undermine the District Court's conclusion—based on evidence concerning the shape and demographics of those districts—that the districts unconstitutionally sort voters on the basis of race. 283 F. Supp. 3d, at 442.

Third, the defendants argue that the District Court abused its discretion by arranging for the Special Master to draw up an alternative remedial map instead of giving the General Assembly—which "stood ready and willing to promptly carry out its sovereign duty"—another chance at a remedial map. Juris. Statement 33. Yet the District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5 (2006) (*per curiam*). Here the District Court determined that "providing the General Assembly with a second bite at the apple" risked "further draw-[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle." 283 F. Supp. 3d, at 448, n. 10. We conclude that the District Court's appointment of a Special Master in this case was not an abuse of discretion.

Neither was the District Court's decision to adopt the Special Master's recommended remedy for the racially gerrymandered districts. The defendants argue briefly that the District Court's adoption of that recommendation was error

because the Special Master's remedial plan was "expressly race-conscious" and succeeded in "compel[ling] the State to employ racial quotas of plaintiffs' choosing." Juris. Statement 34–35. Yet this Court has long recognized "[t]he distinction between being aware of racial considerations and being motivated by them." *Miller*, *supra*, at 916. The District Court's allowance that the Special Master could "consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders," App. to Juris. Statement 111, does not amount to a warrant for "racial quotas." In any event, the defendants' assertions on this question make no real attempt to counter the District Court's agreement with the Special Master that "'no racial targets were sought or achieved'" in drawing the remedial districts. 283 F. Supp. 3d, at 449.

All of the foregoing is enough to convince us that the District Court's order should be affirmed insofar as it provided a court-drawn remedy for Senate Districts 21 and 28 and House Districts 21 and 57. The same cannot be said, however, of the District Court's actions concerning the legislature's redrawing of House districts in Wake and Mecklenburg Counties. There the District Court proceeded from a mistaken view of its adjudicative role and its relationship to the North Carolina General Assembly.

The only injuries the plaintiffs established in this case were that they had been placed in their legislative districts on the basis of race. The District Court's remedial authority was accordingly limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 353 (2006). But the District Court's revision of the House districts in Wake and Mecklenburg Counties had nothing to do with that. Instead, the District Court redrew those districts because it found that the legislature's revision of them violated the North Carolina Consti-

tution's ban on mid-decade redistricting, not federal law. Indeed, the District Court understood that ban to apply unless such redistricting was "required by federal law or judicial order." 283 F. Supp. 3d, at 443. The District Court's enforcement of the ban was thus premised on the conclusion that the General Assembly's action was not "required" by federal law.

The District Court's decision to override the legislature's remedial map on that basis was clear error. "[S]tate legislatures have primary jurisdiction over legislative reapportionment," *White* v. *Weiser*, 412 U. S. 783, 795 (1973) (internal quotation marks omitted), and a legislature's "freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands" of federal law, *Burns* v. *Richardson*, 384 U. S. 73, 85 (1966). A district court is "not free . . . to disregard the political program of" a state legislature on other bases. *Upham*, 456 U. S., at 43. Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end.

The order of the District Court is affirmed in part and reversed in part.

It is so ordered.

JUSTICE THOMAS, dissenting.

I do not think the complicated factual and legal issues in this case should be disposed of summarily. I would have set this case for briefing and oral argument. I respectfully dissent.

Reporter's Note

Orders commencing with June 25, 2018, begin with page 1012. The preceding orders in 585 U. S., from June 14 through June 18, 2018, were reported in Part 1, at 1001–1012. 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. 17–1199. WILSON *v.* HAWAII ET AL., 584 U. S. 932;
No. 17–1253. BEAVERS *v.* SCHNEIDER NATIONAL, INC., 584 U. S. 978;
No. 17–6978. FREDERICK *v.* PENNSYLVANIA, 583 U. S. 1125;
No. 17–7474. GOUCH-ONASSIS *v.* CALIFORNIA, 584 U. S. 906;
No. 17–7680. BURKE *v.* FURTADO, 584 U. S. 919;
No. 17–7943. STANLEY *v.* WASHINGTON, 584 U. S. 965; and
No. 17–8220. RUSSELL *v.* FLORIDA, 584 U. S. 955. Petitions for rehearing denied.

No. 17–7709. ALCORTA *v.* UNITED STATES, 583 U. S. 1207. Petition for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

JUNE 25, 2018

Vacated and Remanded on Appeal

No. 17–1295. RUCHO ET AL. *v.* COMMON CAUSE ET AL. Appeal from D. C. M. D. N. C. Judgment vacated, and case remanded for further consideration in light of *Gill* v. *Whitford*, *ante*, p. 48. Reported below: 279 F. Supp. 3d 587.

Certiorari Granted—Vacated and Remanded

No. 16–9541. CLARK *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCoy* v. *Louisiana*, 584 U. S. 414 (2018). Reported below: 2012–0508 (La. 12/19/16), 220 So. 3d 583.

No. 16–9608. RENTERIA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 847 F. 3d 297;
No. 17–6389. CRUZ-PENA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 700 Fed. Appx. 338;
No. 17–6556. ANTHONY *v.* UNITED STATES. C. A. 5th Cir. Reported below: 693 Fed. Appx. 380;
No. 17–6805. AGUSTIN-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 699 Fed. Appx. 391; and
No. 17–7261. RUIZ-DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 713 Fed. Appx. 273. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Rosales-Mireles* v. *United States*, *ante*, p. 129.

No. 17–108. ARLENE'S FLOWERS, INC., DBA ARLENE'S FLOWERS AND GIFTS, ET AL. *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617 (2018). Reported below: 187 Wash. 2d 804, 389 P. 3d 543.

No. 17–7779. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 876 F. 3d 812;

No. 17–7781. RAMIREZ GALVAN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 699 Fed. Appx. 314;

No. 17–7793. RAMIREZ-HIDALGO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 707 Fed. Appx. 850; and

No. 17–8109. RUBIO-SORTO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 707 Fed. Appx. 239. 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*, 584 U. S. 148 (2018).

Certiorari Dismissed

No. 17–8557. ROSE *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–8682. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–8689. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS ET AL. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–9028. SCOTTON *v.* UNITED STATES (two judgments). C. A. 11th Cir. Certiorari denied. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–3013. IN RE DISBARMENT OF SIEGEL. Disbarment entered. [For earlier order herein, see 584 U. S. 912.]

No. D–3015. In re Disbarment of Bassi. Disbarment entered. [For earlier order herein, see 584 U. S. 912.]

No. D–3016. In re Disbarment of Brazil. Disbarment entered. [For earlier order herein, see 584 U. S. 912.]

No. D–3017. In re Disbarment of Crawford. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3018. In re Disbarment of Gaskins. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3019. In re Disbarment of Landry. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3020. In re Disbarment of Denrich. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3021. In re Disbarment of Smith. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3023. In re Disbarment of Nyce. Disbarment entered. [For earlier order herein, see 584 U. S. 929.]

No. D–3024. In re Disbarment of Terrell. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3025. In re Disbarment of Andrews. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3026. In re Disbarment of Harrell. Disbarment entered. [For earlier order herein, see 584 U. S. 914.]

No. D–3027. In re Disbarment of Loudon. Disbarment entered. [For earlier order herein, see 584 U. S. 914.]

No. 17M131. Kalin Thanh Dao *v.* United States. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17–1165. de Csepel et al. *v.* Republic of Hungary et al. C. A. D. C. Cir.; and

No. 17–1301. Harvey et al. *v.* UTE Indian Tribe of the Uintah and Ouray Reservation et al. Sup. Ct. Utah. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 17–8084. KOCH *v.* CITY OF SARGENT, NEBRASKA. Ct. App. Neb. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [584 U. S. 949] denied.

No. 17–8616. HARNDEN *v.* MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 16, 2018, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 17–9155. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

No. 17–8811. IN RE MASON. Petition for writ of mandamus denied.

No. 17–8965. IN RE ALLAH. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 16–1094. REPUBLIC OF SUDAN *v.* HARRISON ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 802 F. 3d 399.

No. 16–1498. WASHINGTON STATE DEPARTMENT OF LICENSING *v.* COUGAR DEN, INC. Sup. Ct. Wash. Certiorari granted. Reported below: 188 Wash. 2d 55, 392 P. 3d 1014.

No. 17–1094. NUTRACEUTICAL CORP. *v.* LAMBERT. C. A. 9th Cir. Certiorari granted. Reported below: 870 F. 3d 1170.

No. 17–1184. BIESTEK *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION. C. A. 6th Cir. Certiorari granted. Reported below: 880 F. 3d 778.

No. 17–1229. HELSINN HEALTHCARE S. A. *v.* TEVA PHARMACEUTICALS USA, INC., ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 855 F. 3d 1356.

No. 17–1272. HENRY SCHEIN, INC., ET AL. *v.* ARCHER & WHITE SALES, INC. C. A. 5th Cir. Certiorari granted. Reported below: 878 F. 3d 488.

No. 17–419. DAWSON ET UX. *v.* STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER. Sup. Ct. App. W. Va. Certiorari

granted limited to the question presented by the Solicitor General in his brief for the United States as *amicus curiae*.

Certiorari Denied

No. 16–163. Wynn Las Vegas, LLC, et al. *v.* Cesarz et al.; and

No. 16–920. National Restaurant Assn. et al. *v.* Department of Labor et al. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 3d 1080.

No. 17–528. Strang *v.* Ford Motor Company General Retirement Plan et al. C. A. 6th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 400.

No. 17–1041. Sheridan *v.* Ortega Melendres et al. C. A. 9th Cir. Certiorari denied.

No. 17–1058. SNR Wireless LicenseCo, LLC, et al. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 868 F. 3d 1021.

No. 17–1060. United States ex rel. Carter *v.* Halliburton Co. et al. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 3d 199.

No. 17–1093. Reed *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 541 S. W. 3d 759.

No. 17–1134. Ellison et al. *v.* United States; and

No. 17–7809. Swenson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 616.

No. 17–1150. Chung Hou Hsiao *v.* Hazuda et al. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 3d 1034.

No. 17–1153. Sierra Pacific Industries, Inc., et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 1157.

No. 17–1172. Dassey *v.* Dittmann. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 3d 297.

No. 17–1180. Union Pacific Railroad Co. *v.* Equal Employment Opportunity Commission. C. A. 7th Cir. Certiorari denied. Reported below: 867 F. 3d 843.

No. 17–1243. Specialty Fertilizer Products, LLC *v.* Shell Oil Co. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 700 Fed. Appx. 1006.

No. 17–1251. Casey *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 881 F. 3d 232.

No. 17–1279. Bernstein, Shur, Sawyer & Nelson, P. A., et al. *v.* Snow. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2017 ME 239, 176 A. 3d 729.

No. 17–1300. Findlay et al. *v.* Federal Housing Finance Agency; and

No. 17–1302. Nomura Securities International, Inc., et al. *v.* Federal Housing Finance Agency. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 3d 85.

No. 17–1304. Rodriguez Vazquez *v.* Sessions, Attorney General. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 3d 862.

No. 17–1309. Universal Processing Services of Wisconsin, LLC *v.* Federal Trade Commission. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 3d 1234.

No. 17–1314. Raza et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 604.

No. 17–1328. Preston et al. *v.* Acosta, Secretary of Labor. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 3d 877.

No. 17–1330. Sharp Image Gaming, Inc. *v.* Shingle Springs Band of Miwok Indians. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 15 Cal. App. 5th 391, 223 Cal. Rptr. 3d 362.

No. 17–1357. Five Star Senior Living Inc., fka Five Star Quality Care, Inc., et al. *v.* Mandviwala. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 415.

No. 17–1443. Security People, Inc. *v.* Ojmar US, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 702 Fed. Appx. 982.

No. 17–1457. MacDonald *v.* Lawyers Board of Professional Responsibility. Sup. Ct. Minn. Certiorari denied. Reported below: 906 N. W. 2d 238.

No. 17–1462. Reddi *v.* Hughes & Hughes LLP et al. C. A. 9th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 279.

No. 17–1467. Geddes et al. *v.* People's Counsel of Baltimore County et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 232 Md. App. 726 and 735.

No. 17–1468. Williston *v.* Vasterling et al. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 536 S. W. 3d 321.

No. 17–1475. Beason *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 17–1482. Woodhull *v.* Mascarella, Individually and as Personal Representative of the Estate of Falvo, et al. C. A. 11th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 872.

No. 17–1488. Timbes *v.* Deutsche Bank National Trust Co. et al. C. A. 11th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 971.

No. 17–1489. Braddock *v.* Jolie et al. C. A. 9th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 318.

No. 17–1496. Ringgold et al. *v.* Sankary et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 17–1500. Williams *v.* 21st Mortgage Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 302.

No. 17–1525. Segaline *v.* Washington Department of Labor and Industries et al. Ct. App. Wash. Certiorari denied. Reported below: 199 Wash. App. 748, 400 P. 3d 1281.

No. 17–1526. Davidson et al. *v.* Fairchild Controls Corp. C. A. 5th Cir. Certiorari denied. Reported below: 882 F. 3d 180.

No. 17–1558. Odom *v.* Adger et al. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 185.

No. 17–1567. JENSEN *v.* OBENLAND, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 657.

No. 17–1577. BEST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 615.

No. 17–1583. BALES *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 77 M. J. 268.

No. 17–1585. BUGONI *v.* O'BRIEN ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 236 So. 3d 1094.

No. 17–1593. SUBWAY RESTAURANTS, INC. *v.* WARCIAK. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 3d 870.

No. 17–1597. MULLARKEY *v.* KAUFFMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–6790. WINGO *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 306 Kan. 995, 399 P. 3d 190.

No. 17–7141. YOUNG *v.* OCASIO, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 17–7282. HUEY *v.* KANSAS (Reported below: 306 Kan. 1005, 399 P. 3d 211); WEIS *v.* KANSAS (306 Kan. xii, 399 P. 3d 872); GRIFFIN *v.* KANSAS (306 Kan. xi, 399 P. 3d 872); VILLA *v.* KANSAS (306 Kan. xii, 399 P. 3d 872); and WATKINS *v.* KANSAS (306 Kan. 1093, 401 P. 3d 607). Sup. Ct. Kan. Certiorari denied.

No. 17–7301. MEREDITH *v.* KANSAS (Reported below: 306 Kan. 906, 399 P. 3d 859); HILL *v.* KANSAS (306 Kan. 1043, 399 P. 3d 218); DONALDSON *v.* KANSAS (306 Kan. 998, 399 P. 3d 870); HIRSCHBERG *v.* KANSAS (306 Kan. 1002, 399 P. 3d 216); BURDICK *v.* KANSAS (306 Kan. 1036, 399 P. 3d 192); BROWN *v.* KANSAS (306 Kan. x, 399 P. 3d 872); RICHARDSON *v.* KANSAS (307 Kan. 2, 404 P. 3d 671); and SCUDERI *v.* KANSAS (306 Kan. 1267, 403 P. 3d 1206). Sup. Ct. Kan. Certiorari denied.

No. 17–7459. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 160.

No. 17–7592. CHANEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–7785. STEVENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8003. SIMMONS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 307 Kan. 38, 405 P. 3d 1190.

No. 17–8188. GROUP *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8344. THARPE *v.* SELLERS, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 17–8428. REAVES *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 3d 1137.

No. 17–8572. SUGHRUE *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 895.

No. 17–8574. JACOBS *v.* ESTEFAN. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 829.

No. 17–8575. LINEHAN *v.* PIPER. C. A. 8th Cir. Certiorari denied.

No. 17–8577. BAILEY *v.* GARDNER ET AL. C. A. 4th Cir. Certiorari denied.

No. 17–8578. BAILEY *v.* BLAKE ET AL. C. A. 4th Cir. Certiorari denied.

No. 17–8579. BRANNAN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 54 Kan. App. 2d xviii, 394 P. 3d 155.

No. 17–8580. ADAMS *v.* BAILEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 294.

No. 17–8581. BICKHAM *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 142894–U.

No. 17–8582. BAILEY *v.* CUMBERLAND COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 17–8589. RAFAY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 17–8592. Rodriguez *v.* Davis, Director, Texas Department of Criminal Justice. Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 17–8593. Brooks *v.* Raemisch, Executive Director, Colorado Department of Corrections, et al. C. A. 10th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 766.

No. 17–8596. Dekom *v.* United States District Court for the District of Columbia. C. A. D. C. Cir. Certiorari denied.

No. 17–8597. Stevenson *v.* Bisbee et al. C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 250.

No. 17–8609. Manuel Lopez *v.* City of Santa Ana, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 401.

No. 17–8610. Lepon *v.* Iowa. Ct. App. Iowa. Certiorari denied. Reported below: 908 N. W. 2d 880.

No. 17–8613. Thomas *v.* Florida. C. A. 11th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 653.

No. 17–8620. K. H. *v.* Wisconsin (Reported below: 2017 WI App 56, 377 Wis. 2d 729, 902 N. W. 2d 809); A. S. F. *v.* Wisconsin (2017 WI App 56, 377 Wis. 2d 730, 902 N. W. 2d 810); and M. W. *v.* Wisconsin (2017 WI App 56, 377 Wis. 2d 730, 902 N. W. 2d 810). Ct. App. Wis. Certiorari denied.

No. 17–8622. Pavon *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 17–8641. Boyd *v.* CitiMortgage Inc. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 17–8644. Martin *v.* Sinclair Community College et al. C. A. 6th Cir. Certiorari denied.

No. 17–8652. Jones *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 234 So. 3d 545.

No. 17–8656. Beachem *v.* Florida Department of Revenue, on Behalf of Thomas. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 241 So. 3d 823.

No. 17–8657. Bassett *v.* Horton, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–8685. Bell *v.* Inova Health Care, dba Inova Fairfax Hospital (two judgments). Sup. Ct. Va. Certiorari denied.

No. 17–8702. Bradley *v.* Wisconsin Department of Children and Families et al. C. A. 7th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 549.

No. 17–8741. Ling Zhuang *v.* Appellate Division, Superior Court of California, Los Angeles County, et al. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 17–8742. Morales *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 362.

No. 17–8758. Khalil *v.* Sessions, Attorney General. C. A. 6th Cir. Certiorari denied.

No. 17–8825. Walker *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 17–8854. Fish *v.* Elon Property Management. Sup. Ct. Fla. Certiorari denied.

No. 17–8868. Mattison *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 17–8907. Jeanbart *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 236 So. 3d 427.

No. 17–8929. Isom *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 236 So. 3d 1054.

No. 17–8934. Hawkins *v.* Kauffman, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied.

No. 17–8941. Kennell *v.* Griffith, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 3d 637.

No. 17–8964. Burton *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 17–8966. Avila-Luna *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 17–8969. Noe *v.* Daniels, Warden. C. A. 9th Cir. Certiorari denied.

No. 17–8975. Buxton *v.* Estock, Acting Superintendent, State Correctional Institution at Mercer, et al. C. A. 3d Cir. Certiorari denied.

No. 17–8978. Joseph *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8979. Amodeo *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8980. Blanchard *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 3d 1.

No. 17–8982. Owens *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 722.

No. 17–9009. Wilson *v.* Gaetz et al. C. A. 7th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 540.

No. 17–9029. Smith *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 3d 460.

No. 17–9033. Riley *v.* Calloway, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 882 F. 3d 738.

No. 17–9037. Gofphin *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 971.

No. 17–9039. Plaketta *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 677.

No. 17–9042. Jackson *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–9043. Fykes *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 17–9049. Sublett *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 380.

No. 17–9050. Salvador *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 670.

No. 17–9053. Tizoc *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 885 F. 3d 516.

No. 17–9055. OLIVIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 888.

No. 17–9057. AGUDO-MONROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 666.

No. 17–9059. RIVERA-CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 878 F. 3d 404.

No. 17–9061. REYES-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 678.

No. 17–9065. CHAMBERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 882 F. 3d 1305.

No. 17–9066. FLOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–9067. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 578.

No. 17–9068. BOAZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 884 F. 3d 808.

No. 17–9070. PINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 309.

No. 17–9083. COOKE *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 181 A. 3d 152.

No. 17–9129. MAGEE *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2016–1074 (La. App. 1 Cir. 4/12/17).

No. 17–423. STERBA ET UX. *v.* PNC BANK. C. A. 9th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 852 F. 3d 1175.

No. 17–1159. NORTHERN ARAPAHO TRIBE ET AL. *v.* WYOMING ET AL.; and

No. 17–1164. EASTERN SHOSHONE TRIBE *v.* WYOMING ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of these petitions. Reported below: 875 F. 3d 505.

No. 17–1354. GELHAUS *v.* ESTATE OF LOPEZ, BY AND THROUGH SUCCESSOR IN INTEREST, LOPEZ, ET AL. C. A. 9th Cir. Motions of Peace Officers' Research Association of Califor-

nia et al., California State Sheriffs' Association et al., Force Litigation Consulting LLC et al., and International Municipal Lawyers Association et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 871 F. 3d 998.

No. 17–1439. VEY *v.* TYSKIEWIEZ. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 668 Fed. Appx. 427.

No. 17–7869. MARSHALL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Motion of Promise of Justice Initiative for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 226 So. 3d 211.

No. 17–8491. PEEDE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 923.

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, respecting the denial of certiorari.

In his petition for writ of habeas corpus under 28 U. S. C. § 2254, petitioner Robert Peede contended that he received ineffective assistance of counsel during his capital sentencing proceedings because his trial counsel did not present certain mitigating evidence concerning his mental health and difficult childhood. The District Court granted habeas relief on the basis that counsel's performance was deficient and that there was a reasonable probability that Peede would have received a different sentence had counsel introduced the mitigating evidence. On appeal from that decision, the Court of Appeals for the Eleventh Circuit reversed. In its view, Peede could not establish that he was prejudiced by any deficiency of counsel because the "new mitigation evidence . . . posed a doubled-edge-sword dilemma" in that "the new information could have hurt as much as it helped." *Peede* v. *Attorney General of Fla.*, 715 Fed. Appx. 923, 931 (2017). The Eleventh Circuit further noted that it "ha[s] repeatedly ruled that [such so-called double-edged] post-conviction evidence is usually insufficient to warrant habeas relief." *Id.*, at 931–932.

Such a blanket rule foreclosing a showing of prejudice because the new evidence is double edged flatly contradicts this Court's precedent. See *Rompilla* v. *Beard*, 545 U. S. 374, 393 (2005); *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003); *Williams* v. *Taylor*, 529

U. S. 362, 398 (2000). As I recently emphasized in dissent from the denial of certiorari in *Trevino* v. *Davis*, 584 U. S. 1019 (2018), "[w]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." *Id.*, at 1021. That is, "new evidence must not be evaluated in isolation," regardless of whether it is considered to be double edged. *Ibid.*

Considering the posture of this case, under which our review is constrained by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. §§2254(d)(1)–(2), I cannot conclude the particular circumstances here warrant this Court's intervention. That said, the Eleventh Circuit's consideration of Peede's claim is deeply concerning. The ultimate question at issue in a case like this is whether "there is a reasonable probability that [the jury] would have struck a different balance." *Wiggins*, 539 U. S., at 537. A truncated consideration of new mitigating evidence that simply dismisses it as double edged does nothing to further that inquiry.

No. 17–8627. ARLOTTA *v.* COOK MOVING SYSTEM, INC., ET AL. C. A. 2d Cir. Certiorari before judgment denied.

No. 17–8643. KERSEY *v.* BECTON DICKINSON & CO. ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–1362. SCHNEIDER *v.* COMMISSIONER OF INTERNAL REVENUE, 584 U. S. 963;

No. 17–6721. ONTIVEROS-CEDILLO *v.* UNITED STATES; and BOLANOS-GALVAN, AKA ALVARAD, AKA GALVAN BOLANOS, AKA BOLANOS GALVAN *v.* UNITED STATES, 584 U. S. 980;

No. 17–7918. IN RE COLEN, 584 U. S. 958;

No. 17–8167. SPALDING *v.* UNITED STATES, 584 U. S. 956; and

No. 17–8204. SAID *v.* COMMISSIONER OF INTERNAL REVENUE, 584 U. S. 955. Petitions for rehearing denied.

JUNE 27, 2018

Certiorari Denied

No. 17–9559 (17A1412). BIBLE *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS

DIVISION, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 739 Fed. Appx. 766.

JUNE 28, 2018

Affirmed on Appeal

No. 16–166. HARRIS ET AL. *v.* COOPER, GOVERNOR OF NORTH CAROLINA, ET AL. Affirmed on appeal from D. C. M. D. N. C.

Certiorari Granted—Reversed and Remanded. (See No. 17–742, *ante*, p. 957; and No. 17–1106, *ante*, p. 961.)

Certiorari Granted—Vacated and Remanded

No. 16–1146. A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Reported below: 669 Fed. Appx. 495;

No. 16–1153. LIVINGWELL MEDICAL CLINIC, INC., ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Reported below: 669 Fed. Appx. 493;

No. 17–211. MOUNTAIN RIGHT TO LIFE, INC., DBA PREGNANCY AND FAMILY RESOURCE CENTER, ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Reported below: 692 Fed. Appx. 807; and

No. 17–976. CTIA–THE WIRELESS ASSN. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. C. A. 9th Cir. Reported below: 854 F. 3d 1105. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, *ante*, p. 775.

No. 16–9187. SOLANO-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 847 F. 3d 170; and

No. 16–9587. VILLARREAL-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 685 Fed. Appx. 297. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Rosales-Mireles* v. *United States*, *ante*, p. 129, and for consideration of question whether cases are moot.

No. 17–166. ZANDERS *v.* INDIANA. Sup. Ct. Ind. Certiorari granted, judgment vacated, and case remanded for further consid-

eration in light of *Carpenter* v. *United States*, *ante*, p. 296. Reported below: 73 N. E. 3d 178.

No. 17–981. RIFFEY ET AL. *v.* RAUNER, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Janus* v. *State, County, and Municipal Employees*, *ante*, p. 878. Reported below: 873 F. 3d 558.

No. 17–1050. SALDANA CASTILLO *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pereira* v. *Sessions*, *ante*, p. 198. Reported below: 693 Fed. Appx. 647.

No. 17–1194. INTERNATIONAL REFUGEE ASSISTANCE PROJECT ET AL. *v.* TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 17–1270. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* INTERNATIONAL REFUGEE ASSISTANCE PROJECT ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Trump* v. *Hawaii*, *ante*, p. 667. Reported below: 883 F. 3d 233.

No. 17–1356. KAUSHAL *v.* INDIANA. Ct. App. Ind. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jae Lee* v. *United States*, 582 U. S. 357 (2017). Reported below: 87 N. E. 3d 56.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Court grants, vacates, and remands this case in light of *Jae Lee* v. *United States*, 582 U. S. 357 (2017). But *Lee* was handed down on June 23, 2017—almost a month before the Indiana Court of Appeals issued its decision in this case. Moreover, petitioner admits that he cited and advanced arguments based on *Lee* in both his petition for rehearing before the Indiana Court of Appeals and his petition for transfer to the Indiana Supreme Court. Reply Brief 3. I would accordingly deny the petition for the reasons stated in Justice Scalia's dissenting opinion in *Webster* v. *Cooper*, 558 U. S. 1039, 1040 (2009).

No. 17–5402. REED *v.* VIRGINIA. Sup. Ct. Va.;

No. 17–5692. CHAMBERS, AKA SEALED DEFENDANT *v.* UNITED STATES. C. A. 2d Cir. Reported below: 681 Fed. Appx. 72;

No. 17–6213. HANKSTON *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 517 S. W. 3d 112; and

No. 17–6704. BANKS *v.* UNITED STATES. C. A. 10th Cir. Reported below: 706 Fed. Appx. 455. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Carpenter* v. *United States*, *ante*, p. 296.

No. 17–5964. THOMPSON *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Carpenter* v. *United States*, *ante*, p. 296. JUSTICE GORSUCH took no part in the consideration or decision of this motion and this petition. Reported below: 866 F. 3d 1149.

Certiorari Granted

No. 17–532. HERRERA *v.* WYOMING. Dist. Ct. Wyo., Sheridan County. Certiorari granted.

No. 17–571. FOURTH ESTATE PUBLIC BENEFIT CORP. *v.* WALL-STREET.COM, LLC, ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 856 F. 3d 1338.

No. 17–646. GAMBLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 694 Fed. Appx. 750.

No. 17–1174. NIEVES ET AL. *v.* BARTLETT. C. A. 9th Cir. Certiorari granted. Reported below: 712 Fed. Appx. 613.

No. 17–1299. FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT. Sup. Ct. Nev. Certiorari granted. Reported below: 133 Nev. 826, 407 P. 3d 717.

No. 17–1307. OBDUSKEY *v.* MCCARTHY & HOLTHUS LLP. C. A. 10th Cir. Certiorari granted. Reported below: 879 F. 3d 1216.

No. 17–290. MERCK SHARP & DOHME CORP. *v.* ALBRECHT ET AL. C. A. 3d Cir. Certiorari granted. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 852 F. 3d 268.

Certiorari Denied

No. 16–6308. GRAHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 824 F. 3d 421.

No. 16–6761. CAIRA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 833 F. 3d 803.

No. 16–7314. ANTONIO RIOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 3d 403.

No. 16–9536. ALEXANDER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 76 M. J. 336.

No. 17–243. ABDIRAHMAN *v.* UNITED STATES (Reported below: 76 M. J. 337); ALIRAD *v.* UNITED STATES (76 M. J. 343); AVERETT *v.* UNITED STATES (76 M. J. 345); AYERS *v.* UNITED STATES (76 M. J. 340); BAILON *v.* UNITED STATES (76 M. J. 345); BANKS *v.* UNITED STATES (76 M. J. 341); BARDIN *v.* UNITED STATES (76 M. J. 410); BARKSDALE *v.* UNITED STATES (76 M. J. 340); BENJAMIN *v.* UNITED STATES (76 M. J. 339); BENNETT *v.* UNITED STATES (76 M. J. 337); BERG *v.* UNITED STATES (76 M. J. 345); BICKERSTAFF *v.* UNITED STATES (76 M. J. 342); BIRDSONG *v.* UNITED STATES (76 M. J. 338); BLAKESLEY *v.* UNITED STATES (76 M. J. 338); BONILLA *v.* UNITED STATES (76 M. J. 335); BOYD *v.* UNITED STATES (76 M. J. 348); BRIGGS *v.* UNITED STATES (76 M. J. 338); BROOKSHIRE *v.* UNITED STATES (76 M. J. 341); BROWN *v.* UNITED STATES (76 M. J. 337); BUCKNER *v.* UNITED STATES (76 M. J. 341); BULLOCK *v.* UNITED STATES (76 M. J. 345); BUSTAMONTE *v.* UNITED STATES (76 M. J. 342); CARROLL *v.* UNITED STATES (76 M. J. 338); CHARLES *v.* UNITED STATES (76 M. J. 344); COKER *v.* UNITED STATES (76 M. J. 342); COLEMAN *v.* UNITED STATES (76 M. J. 338); COOPER *v.* UNITED STATES (76 M. J. 336); COTTNER *v.* UNITED STATES (76 M. J. 341); CREWS *v.* UNITED STATES (76 M. J. 350); CUELLAR *v.* UNITED STATES (76 M. J. 398); CURRY *v.* UNITED STATES (76 M. J. 339); DAVENPORT *v.* UNITED STATES (76 M. J. 340); DAVIS *v.* UNITED STATES (76 M. J. 344); DEJESUS *v.* UNITED STATES (76 M. J. 398); DELVALLE *v.* UNITED STATES (76 M. J. 342); DOHERTY *v.* UNITED STATES (76 M. J. 344); DONOHUE *v.* UNITED STATES (76 M. J. 337); DORRIS *v.* UNITED STATES (76 M. J. 343); DOUGLAS *v.* UNITED STATES (76 M. J. 342); DUNHAM *v.* UNITED STATES (76 M. J. 340); EARLE *v.* UNITED STATES (76 M. J. 403); ECHOLS *v.* UNITED STATES (76 M. J. 338); ENTZMINGER *v.* UNITED STATES (76 M. J. 345); ERIKSON *v.* UNITED STATES (76 M. J. 231); FLETCHER *v.* UNITED STATES (76 M. J. 338); FOGLE *v.* UNITED STATES (76 M. J. 341); FRANCISCO *v.* UNITED STATES (76 M. J. 339); GALVAN *v.* UNITED STATES (76 M. J. 344); GARCIA *v.* UNITED STATES (76 M. J. 344); GARMAN *v.* UNITED STATES (76 M. J. 403); GEORGE *v.* UNITED STATES (76 M. J. 345); GIRAU *v.*

United States (76 M. J. 337); Gore *v.* United States (76 M. J. 398); Goss *v.* United States (76 M. J. 354); Greene *v.* United States (76 M. J. 352); Greytunkl *v.* United States (76 M. J. 339); Griffith *v.* United States (76 M. J. 338); Guice *v.* United States (76 M. J. 341); Hercules *v.* United States (76 M. J. 341); Hirsch *v.* United States (76 M. J. 345); Ho *v.* United States (76 M. J. 337); Hodge *v.* United States (76 M. J. 337); Huertalopez *v.* United States (76 M. J. 345); Hughes *v.* United States (76 M. J. 343); Humburd *v.* United States (76 M. J. 342); Jeffers *v.* United States (76 M. J. 339); Jewell *v.* United States (76 M. J. 336); Jiminez-Victoria *v.* United States (76 M. J. 354); Johnson *v.* United States (76 M. J. 340); Jones *v.* United States (76 M. J. 339); Kargbo *v.* United States (76 M. J. 403); Kelley *v.* United States (76 M. J. 342); Kidd *v.* United States (76 M. J. 343); Kissell *v.* United States (76 M. J. 335); Knoop *v.* United States (76 M. J. 349); Koenig *v.* United States (76 M. J. 411); Koth *v.* United States (76 M. J. 401); Kundradurham *v.* United States (76 M. J. 401); Land *v.* United States (76 M. J. 342); Lavasseur *v.* United States (76 M. J. 338); Layton *v.* United States (76 M. J. 338); LeRoy *v.* United States (76 M. J. 341); Lewis *v.* United States (76 M. J. 341); Lowrey *v.* United States (76 M. J. 340); Luna *v.* United States (76 M. J. 341); Maestre *v.* United States (76 M. J. 341); Maez *v.* United States (76 M. J. 354); Mairena *v.* United States (76 M. J. 345); Majetich *v.* United States (76 M. J. 345); Markley *v.* United States (76 M. J. 342); Martin *v.* United States (76 M. J. 344); Maston *v.* United States (76 M. J. 345); Maydoney *v.* United States (76 M. J. 338); Mazzie *v.* United States (76 M. J. 345); McFadden *v.* United States (76 M. J. 401); McGowan *v.* United States (76 M. J. 338); Mecker *v.* United States (76 M. J. 339); Medrano *v.* United States (76 M. J. 354); Melvin *v.* United States (76 M. J. 338); Millay *v.* United States (76 M. J. 342); Miner *v.* United States (76 M. J. 343); Montoya *v.* United States (76 M. J. 349); Morrill *v.* United States (76 M. J. 341); Murdorf *v.* United States (76 M. J. 345); Murphy *v.* United States (76 M. J. 336); Nataren *v.* United States (76 M. J. 342); Nealy *v.* United States (76 M. J. 341); Nyangau *v.* United States (76 M. J. 338); O'Connor *v.* United States (76 M. J. 341); Orage *v.* United States (76 M. J. 345); Oscar *v.* United States (76 M. J. 336); Ozoskey *v.* United States (76 M. J. 409); Patterson *v.* United States (76 M. J. 345); Perez *v.* United States (76 M. J.

341); Perry *v.* United States (76 M. J. 401); Pimentel *v.* United States (76 M. J. 337); Piszcz *v.* United States (76 M. J. 344); Podobnik *v.* United States (76 M. J. 341); Pretlow *v.* United States (76 M. J. 340); Prewitt *v.* United States (76 M. J. 337); Ramirez *v.* United States (76 M. J. 336); Reed *v.* United States (76 M. J. 345); Rhodes *v.* United States (76 M. J. 341); Richardson-Hoeg *v.* United States (76 M. J. 336); Rich *v.* United States (76 M. J. 338); Riley *v.* United States (76 M. J. 342); Riley *v.* United States (76 M. J. 336); Rios *v.* United States (76 M. J. 341); Robinson *v.* United States (76 M. J. 401); Rochford *v.* United States (76 M. J. 338); Rosado Dejesus *v.* United States (76 M. J. 351); Sadler *v.* United States (76 M. J. 336); Sampson *v.* United States (76 M. J. 345); Sands *v.* United States (76 M. J. 338); Santucci *v.* United States (76 M. J. 341); Sharpe *v.* United States (76 M. J. 401); Shave *v.* United States (76 M. J. 345); Slater *v.* United States (76 M. J. 345); Smith *v.* United States (76 M. J. 342); Smith *v.* United States (76 M. J. 339); Smith *v.* United States (76 M. J. 345); Solt *v.* United States (76 M. J. 401); Soria *v.* United States (76 M. J. 341); Spriggs *v.* United States (76 M. J. 343); Stanford *v.* United States (76 M. J. 398); Stanley *v.* United States (76 M. J. 341); Strempler *v.* United States (76 M. J. 342); Sutton *v.* United States (76 M. J. 337); Taylor *v.* United States (76 M. J. 338); Thomas *v.* United States (76 M. J. 344); Thompson *v.* United States (76 M. J. 344); Threat *v.* United States (76 M. J. 345); Threet *v.* United States (76 M. J. 339); Toney *v.* United States (76 M. J. 402); Torres-Garza *v.* United States (76 M. J. 345); Trejo *v.* United States (76 M. J. 342); Tyson *v.* United States (76 M. J. 340); Viera *v.* United States (76 M. J. 339); Villar *v.* United States (76 M. J. 344); Warren *v.* United States (76 M. J. 341); Watford *v.* United States (76 M. J. 351); Watkins *v.* United States (76 M. J. 337); White *v.* United States (76 M. J. 341); Williams *v.* United States (76 M. J. 341); Williams *v.* United States (76 M. J. 344); and Wilson *v.* United States (76 M. J. 345). C. A. Armed Forces. Certiorari denied.

No. 17–425. Wass *v.* Idaho. Sup. Ct. Idaho. Certiorari denied. Reported below: 162 Idaho 361, 396 P. 3d 1243.

No. 17–701. Richards *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 76 M. J. 365.

No. 17–840. CASH *v.* UNITED STATES (Reported below: 76 M. J. 438); GURCZYNSKI *v.* UNITED STATES (76 M. J. 441); and WILLIAMS *v.* UNITED STATES (77 M. J. 64). C. A. Armed Forces. Certiorari denied.

No. 17–950. ULBRICHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 858 F. 3d 71.

No. 17–1002. UNITED STATES *v.* UNION PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 865 F. 3d 1045.

No. 17–1087. FIRST RESORT, INC. *v.* HERRERA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 3d 1263.

No. 17–1369. MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. *v.* GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 3d 101.

No. 17–5943. RILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 3d 1012.

No. 17–6256. PATRICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 842 F. 3d 540.

No. 17–6892. WILFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 727.

No. 17–7220. BORMUTH *v.* JACKSON COUNTY, MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 3d 494.

No. 17–7769. GRAY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 77 M. J. 5.

No. 16–1189. E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* SMILEY ET AL. C. A. 3d Cir. Motions of Cato Institute and Pacific Legal Foundation et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of these motions and this petition. Reported below: 839 F. 3d 325.

Statement of JUSTICE GORSUCH, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, respecting the denial of certiorari.

Can an agency advance an interpretation of a statute for the first time in litigation and then demand deference for its view?

There is a well-defined circuit split on the question. The Court of Appeals in this case said yes, joining several other circuits who share that view. 839 F. 3d 325, 329, 333–334 (CA3 2016) (case below); *SEC* v. *Rosenthal*, 650 F. 3d 156, 160 (CA2 2011); *TVA* v. *Whitman*, 336 F. 3d 1236, 1250 (CA11 2003); *Dania Beach* v. *FAA*, 628 F. 3d 581, 586–587 (CADC 2010). But "[t]wo circuits, the Sixth and Ninth, expressly deny *Skidmore* deference to agency litigation interpretations, and the Seventh does so implicitly." Hubbard, Comment, Deference to Agency Statutory Interpretations First Advanced in Litigation? The *Chevron* Two-Step and the *Skidmore* Shuffle, 80 U. Chi. L. Rev. 447, 462 (2013) (footnotes omitted); *Smith* v. *Aegon Companies Pension Plan*, 769 F. 3d 922, 929 (CA6 2014); *Alaska* v. *Federal Subsistence Bd.*, 544 F. 3d 1089, 1095 (CA9 2008); *In re UAL Corp. (Pilots' Pension Plan Termination)*, 468 F. 3d 444, 449–450 (CA7 2006).

The issue surely qualifies as an important one. After all, *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944), deference only makes a difference when the court would not otherwise reach the same interpretation as the agency. And a number of scholars and *amici* have raised thoughtful questions about the propriety of affording that kind of deference to agency litigation positions. For example, how are people to know if their conduct is permissible when they act if the agency will only tell them later during litigation? Don't serious equal protection concerns arise when an agency advances an interpretation only in litigation with full view of who would benefit and who would be harmed? Might the practice undermine the Administrative Procedure Act's structure by incentivizing agencies to regulate by *amicus* brief, rather than by rule? Should we be concerned that some agencies (including the one before us) have apparently become particularly aggressive in "attempt[ing] to mold statutory interpretation and establish policy by filing 'friend of the court' briefs in private litigation"? Eisenberg, Regulation by *Amicus*: The Department of Labor's Policy Making in the Courts, 65 Fla. L. Rev. 1223 (2013); see also, *e. g.*, Hickman & Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235, 1303 (2007); Pierce, Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 606–607 (2006); Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 1010–1011 (1992).

Respectfully, I believe this circuit split and these questions warrant this Court's attention. If not in this case then, hopefully, soon.

No. 16–6694. JORDAN *v.* UNITED STATES. C. A. 4th Cir. Motion of respondent for leave to file brief in opposition under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 824 F. 3d 421.

No. 17–475. SECURITIES AND EXCHANGE COMMISSION *v.* BANDIMERE. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 844 F. 3d 1168.

No. 17–565. ROWAN COUNTY, NORTH CAROLINA *v.* LUND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 863 F. 3d 268.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

This Court's Establishment Clause jurisprudence is in disarray. Sometimes our precedents focus on whether a "reasonable observer" would think that a government practice endorses religion; other times our precedents focus on whether a government practice is supported by this country's history and tradition. See *Utah Highway Patrol Assn.* v. *American Atheists, Inc.*, 565 U. S. 994, 997–1001 (2011) (THOMAS, J., dissenting from denial of certiorari); *Van Orden* v. *Perry*, 545 U. S. 677, 694–697 (2005) (THOMAS, J., concurring). Happily, our precedents on legislative prayer tend to fall in the latter camp. See, *e. g.*, *Town of Greece* v. *Galloway*, 572 U. S. 565 (2014); *Marsh* v. *Chambers*, 463 U. S. 783 (1983).

Yet the decision below did not adhere to this historical approach. In ruling that Rowan County must change the prayers it uses to open its board meetings, the Court of Appeals for the Fourth Circuit emphasized that the county's prayers are led by the legislators themselves, not by paid chaplains or guest ministers. This analysis failed to appreciate the long history of legislator-led prayer in this country, and it squarely contradicted a recent decision of the Sixth Circuit. I would have granted Rowan County's petition for certiorari.

I

Rowan County, North Carolina, is governed by a five-member Board of Commissioners (Board). The Board convenes twice a month, in meetings that are open to the public. Each meeting begins with a prayer, which the commissioners take turns leading. Prayers usually begin with an invitation ("Let us pray," "Let's pray together," "Please pray with me") and end with a communal "Amen." Because the current commissioners are all Christians, their prayers tend to reference "Jesus," "Christ," or the "Savior." But the Board does not require the commissioners to profess any particular religion, or require the prayers to have any particular content. The content of the prayer is entirely up to the commissioner giving it.

Three residents of Rowan County, who were offended by the Board's prayers, sued the county, alleging violations of the Establishment Clause. The District Court entered summary judgment in the residents' favor, 103 F. Supp. 3d 712, 713 (MDNC 2015), but a divided panel of the Fourth Circuit reversed, 837 F. 3d 407, 411 (2016). On rehearing en banc, the full Fourth Circuit affirmed the District Court's initial decision. 863 F. 3d 268, 275 (2017).

Disagreeing with the earlier panel, the en banc court began by distinguishing this Court's decision in *Town of Greece*, which upheld the prayer policy of the town of Greece in New York. The prayers in Greece were given by "guest ministers," the Fourth Circuit explained, while the prayers in Rowan County are given by the commissioners. See 863 F. 3d, at 277–278. The Fourth Circuit deemed legislator-led prayer more suspect under the Establishment Clause because it "identifies the government with religion more strongly" and "heightens the constitutional risks posed by requests to participate and by sectarian prayers." *Id.*, at 278. Since the prayers in Rowan County are legislator led, the Fourth Circuit concluded that *Town of Greece* does not apply and, thus, it "must decide whether [Rowan] [C]ounty's prayer practice, taken as a whole," is constitutional. 863 F. 3d, at 280.

The Fourth Circuit held that it was not, for a "combination" of four reasons. *Id.*, at 281. First, the prayers in Rowan County are given exclusively by the commissioners. *Id.*, at 281–282. Second, of the 143 prayers that the Fourth Circuit analyzed, 139 "invoked" Christianity, only four were nonsectarian, and at least

11 "'promote[d]'" Christianity. *Id.*, at 283–286. Third, the commissioners "told attendees to rise and often invited them to pray." *Id.*, at 286. Fourth, and finally, the prayers took place in "the intimate setting of a municipal board meeting," where the Board often exercises "quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards." *Id.*, at 287–288.

For these four reasons, the Fourth Circuit held that Rowan County's prayer practice violated the Establishment Clause. Five judges dissented, contending that the Fourth Circuit's decision was inconsistent with this Court's precedents and this country's "long and varied tradition of lawmaker-led prayer." See *id.*, at 301–323 (opinion of Agee, J.).

II

I would have granted certiorari in this case. The Fourth Circuit's decision is both unfaithful to our precedents and ahistorical. It also conflicts with a recent en banc decision of the Sixth Circuit.

While the Fourth Circuit stated that a "combination" of factors made the Board's prayers unconstitutional, *id.*, at 281, virtually all of the factors it identified were present in *Town of Greece*. The Fourth Circuit noted that the Board's prayers were typically Christian and occasionally promoted Christianity at the expense of other religions. But so did the prayers in *Town of Greece*. See 572 U. S., at 578–586. The Fourth Circuit stressed that the commissioners often asked attendees to rise and invited them to pray. But the prayergivers in *Town of Greece* made the same invitations. See *id.*, at 588–589 (plurality opinion). The Fourth Circuit thought that audience members would be pressured to participate in the prayers, given the intimate setting of Board meetings and its adjudicatory authority. But these same pressures were present in *Town of Greece*. See *id.*, at 586; *id.*, at 610 (THOMAS, J., concurring in part and concurring in judgment).

The only real difference between this case and *Town of Greece* is the person leading the prayer. Prayers in Rowan County are led by the commissioners, while prayers in Greece are led by guest ministers. The Fourth Circuit leaned heavily on this distinction to justify conducting its own free-floating evaluation of Rowan County's prayers. See 863 F. 3d, at 280. But what it should have done, under our precedents, is examine whether "his-

tory shows that the specific practice [of legislator-led prayer] is permitted." *Town of Greece*, *supra*, at 577. If the Fourth Circuit had conducted that inquiry, it would have found a rich historical tradition of legislator-led prayer.

For as long as this country has had legislative prayer, legislators have led it. Prior to Independence, the South Carolina Provincial Congress appointed one of its members to lead the body in prayer. See Brief for State of West Virginia et al. as *Amici Curiae* 9 (States Brief). Several States, including West Virginia and Illinois, opened their constitutional conventions with prayers led by convention members instead of chaplains. See Brief for Members of Congress as *Amici Curiae* 10 (Congress Brief). The historical evidence shows that Congress and state legislatures have opened legislative sessions with legislator-led prayer for more than a century. See States Brief 8–19; Congress Brief 8–9. In short, the Founders simply "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." S. Rep. No. 376, 32d Cong., 2d Sess., 4 (1853).*

The Sixth Circuit, also sitting en banc, recently surveyed this history and upheld a municipal prayer policy virtually identical to Rowan County's. See *Bormuth* v. *County of Jackson*, 870 F. 3d 494 (2017). The Sixth Circuit acknowledged that its decision was "in conflict with the Fourth Circuit's" but found the latter "unpersuasive," *id.*, at 509, n. 5—not least because the Fourth Circuit "apparently did not consider the numerous examples of [legislator-led] prayers" in our Nation's history, *id.*, at 510. Thus, the Sixth and Fourth Circuits are now split on the legality of legislator-led prayer. State and local lawmakers can lead prayers in Tennessee, Kentucky, Ohio, and Michigan, but not in South Carolina, North Carolina, Virginia, Maryland, or West Virginia. This Court should have stepped in to resolve this conflict.

I respectfully dissent.

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*In addition to having little basis in history, the Fourth Circuit's decision has little basis in logic. It is hard to see how prayers led by sectarian chaplains whose salaries are paid by taxpayers—a practice this Court has upheld, see *Marsh* v. *Chambers*, 463 U. S. 783 (1983)—could be *less* of a government establishment than prayers voluntarily given by legislators. See *Bormuth* v. *County of Jackson*, 870 F. 3d 494, 523 (CA6 2017) (en banc) (Sutton, J., concurring).

No. 17–7153. JORDAN *v.* MISSISSIPPI; and

No. 17–7245. EVANS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: No. 17–7153, 224 So. 3d 1252; No. 17–7245, 226 So. 3d 1.

JUSTICE BREYER, dissenting.

In my dissenting opinion in *Glossip* v. *Gross*, 576 U. S. 863 (2015), I described how the death penalty, as currently administered, suffers from unconscionably long delays, arbitrary application, and serious unreliability. *Id.*, at 909. I write to underline the ways in which the two cases currently before us illustrate the first two of these problems and to highlight additional evidence that has accumulated over the past three years suggesting that the death penalty today lacks "requisite reliability." *Id.*, at 910.

I

The petitioner in the first case, Richard Gerald Jordan, was sentenced to death nearly 42 years ago. He argues that his execution after such a lengthy delay violates the Eighth Amendment's prohibition on "cruel and unusual punishments." I continue to believe this question merits the Court's attention. See *id.*, at 923–938; *Boyer* v. *Davis*, 578 U. S. 965 (2016) (BREYER, J., dissenting from denial of certiorari) ("Richard Boyer was initially sentenced to death 32 years ago"); *Ruiz* v. *Texas*, 580 U. S. 1191 (2017) (BREYER, J., dissenting from denial of stay of execution) ("Petitioner Rolando Ruiz has been on death row for 22 years, most of which he has spent in permanent solitary confinement"); *Lackey* v. *Texas*, 514 U. S. 1045, 1046 (1995) (Stevens, J., memorandum respecting denial of certiorari) (discussing petitioner's "17 years under a sentence of death").

More than a century ago, the Court described a prisoner's 4-*week* wait prior to execution as "one of the most horrible feelings to which [a person] can be subjected." *In re Medley*, 134 U. S. 160, 172 (1890). What explains the more than 4-*decade* wait in this case? Between 1976 and 1986, each of Jordan's first three death sentences was vacated on constitutional grounds, including by this Court. See *Jordan* v. *Mississippi*, 476 U. S. 1101 (1986) (vacating death sentence and remanding case in light of *Skipper* v. *South Carolina*, 476 U. S. 1 (1986)); see also Brief in Opposition in No. 17–7153, pp. 4–5 ("Jordan was originally convicted and *automatically* sentenced to death" in July 1976—the same month that this Court held mandatory death sentences unconstitutional in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (emphasis

added)). In 1998, Jordan was sentenced to death for the fourth time. (He had entered into a plea agreement providing for a sentence of life without parole, but the Mississippi Supreme Court invalidated that agreement and the prosecutor refused to reinstate it. See *Jordan* v. *Fisher*, 576 U. S. 1071 (2015) (SOTOMAYOR, J., dissenting from denial of certiorari).)

Jordan has lived more than half of his life on death row. He has been under a death sentence "longer than any other Mississippi inmate." 224 So. 3d 1252, 1253 (Miss. 2017). The petition states that since 1977, Jordan has been incarcerated in the Mississippi State Penitentiary and spent "most of that time on death row living in isolated, squalid conditions." Pet. for Cert. in No. 17–7153, p. 11; see also *ibid.* (citing *Gates* v. *Cook*, 376 F. 3d 323, 332–335 (CA5 2004) (holding that the conditions of confinement on Mississippi State Penitentiary's death row violate the Eighth Amendment)); Robles, The Marshall Project, Condemned to Death—and Solitary Confinement (July 23, 2017) (reporting based upon a nationwide survey of state corrections officials that Mississippi is 1 among 20 States that permit death row inmates "less than four hours of out-of-cell recreation time each day"), https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement (all Internet materials as last visited June 27, 2018); cf. *Davis* v. *Ayala*, 576 U. S. 257, 286–287 (2015) (KENNEDY, J., concurring) (noting that "the usual pattern" of solitary confinement involves "a windowless cell no larger than a typical parking spot" for up to "23 hours a day"). This Court has repeated that such conditions bear "'a further terror and peculiar mark of infamy' [that is] added to the punishment of death." *In re Medley*, 134 U. S., at 170. Such "additional punishment," the Court has said, is "of the most important and painful character." *Id.*, at 171. In my view, the conditions in which Jordan appears to have been confined over the past four decades reinforce the Eighth Amendment concern raised in his petition.

Jordan, now 72 years old, is one among an aging population of death row inmates who remain on death row for ever longer periods of time. Over the past decade, the percentage of death row prisoners aged 60 or older has increased more than twofold from around 7% in 2008 to more than 16% of the death row population by the most recent estimate. Compare Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2008—Statistical Tables (rev. Jan. 2010) (Table 7), with Dept. of Justice, Bureau of Justice Statistics, E. Davis & T. Snell, Capital

Punishment, 2016, p. 7 (Apr. 2018) (Table 4) (Davis & Snell). Meanwhile, the average period of imprisonment between death sentence and execution has risen from a little over 6 years in 1988 to more than 11 years in 2008 to more than 19 years over the past year. See Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2013—Statistical Tables, p. 14 (rev. Dec. 19, 2014) (Table 10); Death Penalty Information Center (DPIC), Execution List 2018, https://deathpenaltyinfo.org/execution-list-2018; DPIC, Execution List 2017, https://deathpenaltyinfo.org/execution-list-2017; see also F. Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty 161, 168, Fig. 8.1 (2018) (analyzing recent data showing that "nationally, each passing year is associated with approximately 125 additional days of delay from crime to execution").

II

In addition, both Richard Jordan's case and that of Timothy Nelson Evans, the second petitioner here, illustrate the problem of arbitrariness. To begin with, both were sentenced to death in the Second Circuit Court District of Mississippi. Evans says that district accounts for "the largest number of death sentences" of any of the State's 22 districts since 1976. Pet. for Cert. in No. 17–7245, pp. 5–6; see also App. D to Pet. for Cert. (citing death sentencing data maintained by Mississippi's Office of the State Public Defender).

This geographic concentration reflects a nationwide trend. Death sentences, while declining in number, have become increasingly concentrated in an ever-smaller number of counties. In the mid-1990's, more than 300 people were sentenced to death in roughly 200 counties each year. B. Garett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice 138–140 (2017). By comparison, these numbers have declined dramatically over the past three years. A recent study finds, for example, that in 2015, *all* of those who were sentenced to death nationwide (51 people in total) were sentenced in 38 of this Nation's more than 3,000 counties; in 2016, *all* death sentences (31 in total) were imposed in just 28 counties nationwide (fewer than 1% of counties). *Id.*, at 139–140, Fig. 6.2; see also Garrett, Jakubow, & Desai, The American Death Penalty Decline, 107 J. Crim. L. & C. 561, 564, 584 (2017); Fair Punishment Project, Too Broken To Fix: Part I: An In-Depth Look at America's Outlier Death Penalty

Counties 2 (2016) (citing data indicating there were 16 counties, or 0.5% of all counties nationwide, in which five or more death sentences were imposed from 2010 to 2015); cf. M. Radelet, History of the Death Penalty in Colorado 168 (2017) (explaining that Colorado's three death row inmates "[a]ll were prosecuted in the same judicial district, all the cases came from Aurora, all are young black men, and indeed all attended the same high school"); Joint State Government Commission, Capital Punishment in Pennsylvania: Report of the Task Force and Advisory Committee 90 (June 2018) ("[D]ifferences among counties in death penalty outcomes . . . were the largest and most prominent differences found in the study. In a very real sense, a given defendant's chance of having the death penalty sought, retracted, or imposed depends upon where that defendant is prosecuted and tried" (quotation altered)); *Glossip*, 576 U. S., at 918–920 (BREYER, J., dissenting).

This geographic arbitrariness is aggravated by the fact that definitions of death eligibility vary depending on the State. This Court has repeated that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes," *Roper* v. *Simmons*, 543 U. S. 551, 568 (2005) (internal quotation marks omitted), since "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State," *Atkins* v. *Virginia*, 536 U. S. 304, 319 (2002). But the statutory criteria States enact to distinguish a non-death-eligible murder from a particularly heinous death-eligible murder and thus attempt to use to identify the "worst of the worst" murderers are far from uniform. See Baumgartner, *supra*, at 90–115 (reviewing data collected in a "host" of empirical studies showing "that nearly *all* homicides in a given state are death-eligible").

For instance, as Evans argues, Mississippi is one of a small number of States in which defendants may be (and, in Mississippi's Second Circuit Court District, routinely are) sentenced to death for, among other things, felony robbery murder without any finding or proof of intent to kill. Pet. for Cert. in No. 17–7245, at 4–5, and nn. 3–4; see also *id.*, at 8, n. 10; Miss. Code Ann. §§ 97–3–19(2)(e), (f), 99–19–101(5)(d) (2017); McCord & Harmon, Lethal Rejection: An Empirical Analysis of the Astonishing Plunge in Death Sentences in the United States From Their Post-*Furman* Peak, 81 Albany L. Rev. 1, 32–33, and n. 155, Table 10 (2018)

(citing data indicating the general decline in robbery as an aggravating factor and research arguing that relying upon robbery as a sole aggravator is generally insufficient to identify the "worst of the worst"). And the Court recently considered a petition presenting "unrebutted" evidence that "about 98% of first-degree murder defendants in Arizona were eligible for the death penalty" under Arizona's death penalty statute, which allows for imposition of the death penalty for "felony murder based on 22 possible predicate felony offenses . . . including, for example, transporting marijuana for sale." *Hidalgo* v. *Arizona*, 583 U. S. 1196, 1198, 1201 (2018) (BREYER, J., statement respecting denial of certiorari).

I recognize that only a small fraction of the roughly 8,000 death sentences imposed since 1976 have resulted in executions. Executions continue to decline from the modern peak of 98 executions occurring across 72 counties and 20 States in 1999 to 28 executions in 22 counties across 6 States in 2015. Baumgartner, *supra*, at 328. In 2016, 20 people were executed. That number remains the fewest executions in more than a century, just below the 23 executions that took place in 2017. See Davis & Snell 8, 15. More than 700 people await execution on California's death row but the State, which has executed 13 people since 1976, has not carried out an execution since 2006. *Id.*, at 3; DPIC, State by State Database: California, https://deathpenaltyinfo.org/state_by_state. The State of Mississippi, which has executed a total of 21 people since 1976, has not carried out an execution in more than six years. DPIC, State by State Database: Mississippi, https://deathpenaltyinfo.org/state_by_state. This data suggests that the death penalty may eventually disappear. But it also shows that capital punishment is "unusual" (as well as "cruel").

III

Finally, I note that in the past three years, further evidence has accumulated suggesting that the death penalty as it is applied today lacks "requisite reliability." *Glossip*, 576 U. S., at 910 (BREYER, J., dissenting). Four hours before Willie Manning was slated to die by lethal injection, the Mississippi Supreme Court stayed his execution and on April 21, 2015, he became the fourth person on Mississippi's death row to be exonerated. *Id.*, at 927; National Registry of Exonerations (June 25, 2018), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. Since January 2017, six death row inmates have been exonerated.

See DPIC, Description of Innocence, https://deathpenaltyinfo.org/innocence-cases#157. Among them are Rodricus Crawford, Rickey Dale Newman, Gabriel Solache, and Vicente Benavides Figueroa, whose exonerations were based upon evidence of actual innocence. See National Registry of Exonerations, *supra*.

* * *

In my view, many of the capital cases that come before this Court, often in the form of petitions for certiorari, involve, like the cases of Richard Jordan and Timothy Evans, special problems of cruelty or arbitrariness. Hence, I remain of the view that the Court should grant the petitions now before us to consider whether the death penalty as currently administered violates the Constitution's Eighth Amendment.

July 16, 2018

Rehearing Denied

No. 16–9318. Maldonado-Landaverde *v.* United States, 584 U. S. 977;

No. 17–656. Audatex North America, Inc. *v.* Mitchell International, Inc., 584 U. S. 961;

No. 17–1139. Aames *v.* United States et al., 584 U. S. 931;

No. 17–1192. Tirat-Gefen *v.* Batista Almeida, 584 U. S. 962;

No. 17–1271. Kanofsky *v.* Commissioner of Internal Revenue, 584 U. S. 950;

No. 17–1311. Coulter *v.* Coulter, 584 U. S. 993;

No. 17–1313. DEK–M Nationwide, Ltd. *v.* Hill et al., 584 U. S. 979;

No. 17–1315. Cooper *v.* Countrywide Home Loans, Inc., et al., 584 U. S. 993;

No. 17–1347. Castillo *v.* Doral Park Country Club Villas et al., 584 U. S. 979;

No. 17–7448. Martinez-Hernandez *v.* United States, 583 U. S. 1137;

No. 17–7675. Soro *v.* Keyes Co., 584 U. S. 936;

No. 17–7738. Cotton *v.* County of San Bernardino, California, et al., 584 U. S. 937;

No. 17–7742. Ong Vue *v.* Dowling, Warden, 584 U. S. 937;

No. 17–7746. Mackey *v.* Berryhill, Deputy Commissioner for Operations, Social Security Administration, 584 U. S. 937;

No. 17–7921. WEIBLE *v.* CALIFORNIA, 584 U. S. 939;
No. 17–7922. WORTH *v.* NEW YORK, 584 U. S. 965;
No. 17–7951. AUSTIN *v.* JACKSONVILLE SHERIFF'S OFFICE, 584 U. S. 965;
No. 17–7956. TEDESCO *v.* PENNSYLVANIA, 584 U. S. 965;
No. 17–8017. ADAMSON *v.* GRIFFIN, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, 584 U. S. 982;
No. 17–8032. STEELE *v.* THOMAS, WARDEN, 584 U. S. 953;
No. 17–8036. ALSTON *v.* CITY OF MADISON, WISCONSIN, ET AL., 584 U. S. 941;
No. 17–8042. PEYTON *v.* BROWN ET AL., 584 U. S. 982;
No. 17–8069. BUXTON *v.* HILL ET AL., 584 U. S. 982;
No. 17–8111. KLUG *v.* ENGLISH, WARDEN, ET AL., 584 U. S. 944;
No. 17–8207. TROY-MCKOY *v.* UNIVERSITY OF ILLINOIS ET AL., 584 U. S. 995;
No. 17–8218. WASHINGTON *v.* DIAMOND, 584 U. S. 966;
No. 17–8239. BUXTON *v.* THOMPSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MERCER, ET AL., 584 U. S. 1005;
No. 17–8256. CROMARTIE *v.* ALABAMA STATE UNIVERSITY ET AL., 584 U. S. 1005;
No. 17–8372. CERNY ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION, 584 U. S. 985;
No. 17–8513. VALDEZ PEREZ *v.* CALIFORNIA, *ante*, p. 1007; and
No. 17–8559. IN RE JONES, 584 U. S. 975. Petitions for rehearing denied.

No. 16–9660. LARIOS-VILLATORO *v.* UNITED STATES; and HERNANDEZ-HERNANDEZ *v.* UNITED STATES, 584 U. S. 973. Petition for rehearing as to Jaime A. Hernandez-Hernandez denied.

JULY 30, 2018

Miscellaneous Order

No. 18A65. UNITED STATES ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON ET AL. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing

burdens of discovery and trial, as well as desirability of a prompt ruling on the Government's pending dispositive motions.

August 1, 2018

Miscellaneous Order. (For Court's order making allotment of Justices, see *ante*, p. III.)

August 6, 2018

Certiorari Granted—Vacated and Remanded

No. 17–243. Abdirahman *v.* United States . . . Briggs *v.* United States. Petition for rehearing granted. The order entered June 28, 2018, [*ante*, p. 1030] denying petition for writ of certiorari vacated as to petitioner Michael Briggs. Certiorari as to Michael Briggs granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Mangahas*, 77 M. J. 220 (2018).

Miscellaneous Orders

No. 17A1425. Qorane, aka Gaas *v.* Sessions, Attorney General. Application for stay, presented to Justice Sotomayor and referred to the Court, denied.

No. 17–765. United States *v.* Stitt. C. A. 6th Cir.; and

No. 17–766. United States *v.* Sims. C. A. 8th Cir. [Certiorari granted, 584 U. S. 949.] Motion of petitioner to dispense with printing joint appendix granted.

Rehearing Granted. (See No. 17–243, *supra*.)

Rehearing Denied

No. 16–6777. Morton *v.* Perry, Secretary, North Carolina Department of Public Safety, 580 U. S. 1072;

No. 17–1336. Coulter *v.* Lindsay et al., 584 U. S. 1001;

No. 17–1407. Roeder *v.* Schmidt, Attorney General of Kansas, 584 U. S. 1032;

No. 17–1431. Grace et al. *v.* Securities and Exchange Commission, 584 U. S. 994;

No. 17–1435. O'Leary *v.* Office of Personnel Management et al., 584 U. S. 1014;

No. 17–1481. Green *v.* Mnuchin, Secretary of the Treasury, 584 U. S. 1033;

No. 17–6596. MILLER *v.* UNITED STATES, 584 U. S. 964;

No. 17–7328. ISAACSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 583 U. S. 1185;

No. 17–7832. DELGADO *v.* GODINEZ ET AL., 584 U. S. 952;

No. 17–7850. PHILLIP *v.* MCARDLE, 584 U. S. 964;

No. 17–7973. ROOSEVELT W. ET AL. *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, 584 U. S. 966;

No. 17–7978. LUCY *v.* GROW, 584 U. S. 981;

No. 17–8072. LIGGINS *v.* JPMORGAN CHASE BANK, N. A., 584 U. S. 982;

No. 17–8091. NELSON *v.* AMALGAMATED TRANSIT UNION LOCAL 1181–1061, AFL–CIO, ET AL., 584 U. S. 983;

No. 17–8098. KARABAJAKYAN *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION, 584 U. S. 983;

No. 17–8208. BURNETT *v.* BAC HOME LOANS SERVICING, LP, ET AL., 584 U. S. 1004;

No. 17–8225. IN RE CHRISTIAN, 584 U. S. 1000;

No. 17–8226. ECHOLS *v.* CSX TRANSPORTATION, INC., 584 U. S. 955;

No. 17–8248. CIOTTA *v.* HOLLAND, WARDEN, 584 U. S. 1005;

No. 17–8257. SIVAK *v.* IDAHO, 584 U. S. 984;

No. 17–8262. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8263. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8264. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8265. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8266. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8267. WOODSON *v.* UNITED STATES, 584 U. S. 996;

No. 17–8268. WOODSON *v.* UNITED STATES, 584 U. S. 996;

No. 17–8269. WOODSON *v.* UNITED STATES, 584 U. S. 996;

No. 17–8276. ALEXANDER *v.* WILLIAMS, WARDEN, 584 U. S. 967;

No. 17–8290. WRIGHT *v.* BAYVIEW LOAN SERVICING, LLC, ET AL. (two judgments), 584 U. S. 1006;

No. 17–8422. DONAHUE *v.* PENNSYLVANIA, 584 U. S. 1035;

No. 17–8424. ABELA *v.* WASHINGTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, 584 U. S. 1006;

No. 17–8425. IN RE SEVION-EL, 584 U. S. 958;

No. 17–8447. COATES, AKA SIMMONS, AKA THOMAS *v.* SESSIONS, ATTORNEY GENERAL, 584 U. S. 1036;

No. 17–8493. VIOLA *v.* UNITED STATES, 584 U. S. 997;

No. 17–8504. CARPENTER *v.* CITY OF CHICAGO, ILLINOIS, ET AL., *ante*, p. 1007;

No. 17–8505. BOZIC *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, 584 U. S. 1037;

No. 17–8517. OKHIO *v.* UNITED STATES, 584 U. S. 988;

No. 17–8723. DUCKETT *v.* MARSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT BENNER TOWNSHIP, ET AL., 584 U. S. 1018;

No. 17–8754. JACKSON *v.* ALABAMA BOARD OF PARDON AND PAROLES, 584 U. S. 1038; and

No. 17–8890. PHILLIPS *v.* TRUMP, PRESIDENT OF THE UNITED STATES, *ante*, p. 1008. Petitions for rehearing denied.

No. 16–763. KE KAILANI DEVELOPMENT LLC ET AL. *v.* KE KAILANI PARTNERS, LLC, ET AL., 580 U. S. 1117. Motion for leave to file petition for rehearing denied.

No. 17–8334. CHON *v.* UNITED STATES ET AL., 584 U. S. 1010. Petition for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

AUGUST 9, 2018

Miscellaneous Orders

No. 18A142. IRICK *v.* TENNESSEE. Application for stay of execution of sentence of death, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

JUSTICE SOTOMAYOR, dissenting.

Tonight the State of Tennessee intends to execute Billy Ray Irick using a procedure that he contends will amount to excruciating torture. During a recent 10-day trial in the state court, medical experts explained in painstaking detail how the three-drug cocktail Tennessee plans to inject into Irick's veins will cause him to experience sensations of drowning, suffocating, and being burned alive from the inside out. *Abdur'Rahman* v. *Parker*, No. 18–183–II(III) (Ch. Ct. Davidson Cty., Tenn., July 26, 2018), p. 21, and n. 7 (generally crediting the testimony of plaintiffs' experts); Application for Stay of Execution 8–11 (summarizing that testimony); see also *Arthur* v. *Dunn*, 580 U. S. 1141, 1142 (2017) (SOTOMAYOR, J., dissenting from denial of certiorari). The entire process will last at least 10 minutes, and perhaps as many as 18,

before the third drug (potassium chloride) finally induces fatal cardiac arrest. No. 18–183–II(III), at 25–26. Meanwhile, as a result of the second drug (vecuronium bromide), Irick will be "entirely paralyzed, unable to move or scream." *Arthur*, 580 U. S., at 1142 (opinion of SOTOMAYOR, J.).

But Irick may well be aware of what is happening to him. In theory, the first drug in the three-drug protocol, midazolam, is supposed to render a person unable to feel pain during an execution. But the medical experts who testified here explained that midazolam would not work, and the trial court credited that testimony. Application for Stay of Execution 8–11; No. 18–183–II(III), at 21; see also *Arthur*, 580 U. S., at 1145–1146 (opinion of SOTOMAYOR, J.) (describing similar evidence in that case). If the drug indeed fails, the consequences for Irick will be extreme: Although the midazolam may temporarily render Irick unconscious, the onset of pain and suffocation will rouse him. And it may do so just as the paralysis sets in, too late for him to alert bystanders that his execution has gone horribly (if predictably) wrong.

The State does not appear to have rebutted meaningfully any of this evidence.[1] See No. 18–183–II(III), at 21, n. 7 ("The Defendants'

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[1] I say "appear," and give only a general description of the evidence apparently introduced at trial, because in the rushed context of this emergency application, the trial record is not before this Court. I therefore rely on the state courts' orders and the parties' filings to discern what that record is likely to show.

The application comes to this Court in a hurried posture because Tennessee first adopted its current midazolam-based protocol only in January of this year. No. M1987–00131–SC–DPE–DD (Tenn., Aug. 6, 2018), p. 2. Irick, along with 32 coplaintiffs also under sentence of death, promptly challenged it. *Ibid.* With Irick's August 9 execution date looming, the parties and the court brought this complex case to trial in a matter of months. See *ibid.* The trial court issued its decision on July 26, Irick filed a notice of appeal and moved to vacate his execution date on July 30, and a divided Supreme Court of Tennessee denied Irick's motion August 6. *Id.*, at 3, 6. In the meantime, the Tennessee Court of Appeals issued an order advising that it would not have sufficient time to consider the issues raised by Irick's appeal before his scheduled execution. *Abdur'Rahman* v. *Parker*, No. M2018–01385–COA–R3–CV (July 30, 2018). Given the precipitous pace of proceedings, the Tennessee Supreme Court rendered its decision on Irick's motion to vacate without the benefit of the pleadings, trial transcripts, or exhibits on which the trial court relied in reaching its decision. No. M1987–00131–SC–DPE–DD, at 4 (Lee, J., dissenting).

two experts, while qualified, did not have the research knowledge and [e]minent publications that Plaintiffs' experts did"). As noted above, the trial court credited the evidence put on by Irick and his coplaintiffs, finding that they "established that midazolam does not elicit strong analgesic [*i. e.*, pain-inhibiting] effects," and that therefore Irick "may be able to feel pain from the administration of the second and third drugs." *Id.*, at 21. Those are the drugs that will paralyze him and create sensations of suffocation and of burning that "'may well be the chemical equivalent of being burned at the stake'" before eventually stopping his heart. *Arthur*, 580 U. S., at 1142 (opinion of SOTOMAYOR, J.) (quoting *Glossip* v. *Gross*, 576 U. S. 863, 949 (2015) (SOTOMAYOR, J., dissenting)). Accounts from other executions carried out using midazolam lend troubling credence to the trial court's finding. See No. 18–183–II(III), at 28 (noting testimony describing inmates' "grimaces, clenched fists, furrowed brows, and moans" during lethal injection executions, including by use of midazolam); *Glossip*, 576 U. S., at 966–968 (SOTOMAYOR, J., dissenting).

Given the Eighth Amendment's prohibition on "cruel and unusual punishments," one might think that such a finding would resolve this case in Irick's favor. And to stay or delay Irick's execution, the Tennessee Supreme Court needed only to conclude that it is likely (not certain) that Irick can persuade an appellate court that his claim has merit. See Tenn. Sup. Ct. Rule 12(4)(E) (2017); No. M1987–00131–SC–DPE–DD (Tenn., Aug. 6, 2018), p. 3.

But the Tennessee Supreme Court did not find any such likelihood and declined to postpone Irick's execution to allow appellate review of his claims. *Id.*, at 3–5. The court instead effectively let stand the trial court's order, which held that Irick's extensive and persuasive evidence describing the ordeal that awaits him raised no constitutional concerns. The trial court offered two independent reasons for its holding: first, that Irick had not proved that another, less painful method of killing him was available to the State; and second, even assuming Irick had proved a readily available alternative, that this Court would not consider the painful ordeal that Irick faces sufficiently torturous to violate the Eighth Amendment. No. 18–183–II(III), at 9, 21–22. Thereafter, the Tennessee Supreme Court refused to postpone Irick's execution on the ground that he was unlikely to succeed in disturbing the trial court's no-available-alternative holding on appeal. No. M1987–00131–SC–DPE–DD, at 4. The court did not directly

address the trial court's second rationale, but implied that it agreed. See *id.*, at 5.

In *Glossip* v. *Gross*, 576 U. S. 863, this Court did impose the "perverse requirement that inmates offer alternative methods for their own executions." *McGehee* v. *Hutchinson*, 581 U. S. 933, 935 (2017) (SOTOMAYOR, J., dissenting from denial of application for stay and denial of certiorari). Without the trial court record before me, I cannot say definitively that the Tennessee courts are wrong that Irick failed to carry that burden. But Irick's contentions raise serious questions about the courts' conclusion.

Irick raised two different alternative methods in the trial court: a single-drug procedure using only a drug called pentobarbital or, alternatively, a modification of the current procedure to omit the administration of vecuronium bromide as a paralytic at its second step. Tennessee argued, and the trial court found, that pentobarbital was currently unavailable to the State notwithstanding its efforts to find a supplier. No. 18–183–II(III), at 9–19. Irick claims, however, that the court improperly ignored indirect evidence proving pentobarbital's availability. If that contention is accurate, then that could constitute legal error. Further, Irick maintains the trial court improperly refused to permit him to amend the pleadings to argue that simply omitting the paralytic drug would be a suitable alternative, see No. M1987–00131–SC–DPE–DD, at 4–5, even though it appears such an amendment might not have necessitated any additional testimony, see No. M1987–00131–SC–DPE–DD, at 5–6 (Lee, J., dissenting).[2] The record would shed light on the validity of Irick's contentions.

If Irick did fail to plead and prove at least one available alternative, this case further illustrates the error of this Court's "macabre challenge" to condemned prisoners that they must propose an alternative method for their own executions. *Arthur*, 580 U. S., at 1141 (opinion of SOTOMAYOR, J.). But given the life-or-death stakes of determining whether the trial court erred in concluding that Irick failed to prove an alternative means of execution, and because Irick makes a nonfrivolous contention that the trial court did so err, see No. M1987–00131–SC–DPE–DD, at 4–6 (Lee, J.,

[2] Irick contends that his evidence shows that omitting the paralytic would hasten his death and shorten his suffering. Application for Stay of Execution 12, 16.

dissenting), I would grant the stay to allow the state courts more time to consider Irick's claims. See *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983).

As to the prediction that this Court would deem up to 18 minutes of needless torture anything less than cruel, unusual, and unconstitutional, I fervently hope the state courts were mistaken. At a minimum, their conclusion that the Constitution tolerates what the State plans to do to Irick is not compelled by *Glossip*, which did not categorically determine whether a lethal injection protocol using midazolam is a constitutional method of execution. See *Arthur*, 580 U. S., at 1150 (opinion of SOTOMAYOR, J.). *Glossip*'s majority concluded only that, based on the evidence presented in that case, there was no clear error in the District Court's factual finding that midazolam was highly likely to prevent a person from feeling pain. 580 U. S., at 1150 (opinion of Sotomayor, J.) (citing *Glossip*, 576 U. S., at 881). As noted, the trial court here came to a different factual conclusion based on a different factual record, as have others. See *McGehee*, 581 U. S., at 935 (opinion of SOTOMAYOR, J.) (noting a District Court's "well-supported finding that midazolam creates a substantial risk of severe pain"); *Otte* v. *Morgan*, 582 U. S. 955, 956 (2017) (SOTOMAYOR, J., dissenting from denial of application for stay and denial of certiorari) (similar).

If it turns out upon more sober appellate review that this case presents the question, I would grant certiorari to decide the important question whether the Constitution truly tolerates executions carried out by such quite possibly torturous means.

* * *

In refusing to grant Irick a stay, the Court today turns a blind eye to a proven likelihood that the State of Tennessee is on the verge of inflicting several minutes of torturous pain on an inmate in its custody, while shrouding his suffering behind a veneer of paralysis. I cannot in good conscience join in this "rush to execute" without first seeking every assurance that our precedent permits such a result. No. M1987–00131–SC–DPE–DD, at 1 (Lee, J., dissenting). If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism. I dissent.

No. 142, Orig. FLORIDA *v.* GEORGIA. Ralph I. Lancaster, Esq., of Portland, Me., the Special Master in the case, is hereby dis-

charged with the thanks of the Court. It is ordered that the Honorable Paul J. Kelly, Jr., of Santa Fe, N. M., is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit reports as he may deem appropriate. The cost of printing his reports, and all other proper expenses, including travel expenses, shall be submitted to the Court.* [For earlier decision herein, see, *e. g.*, *ante*, p. 803.]

No. 18–5495 (18A145). In re Irick. Application for stay of execution of sentence of death, presented to Justice Kagan, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

August 17, 2018

Dismissal Under Rule 46

No. 17–804. EVE–USA, Inc., et al. *v.* Mentor Graphics Corp. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 851 F. 3d 1275.

August 24, 2018

Miscellaneous Orders

No. 18A16. Chasson, aka Alias, aka Hason *v.* Sessions, Attorney General. Application for stay, addressed to The Chief Justice and referred to the Court, denied.

No. 17–71. Weyerhaeuser Co. *v.* United States Fish and Wildlife Service et al. C. A. 5th Cir. [Certiorari granted, 583 U. S. 1101.] Motion of respondents Markle Interests, LLC, et al. for divided argument denied.

No. 17–571. Fourth Estate Public Benefit Corp. *v.* Wall-Street.com, LLC, et al. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1029.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–587. Mount Lemmon Fire District *v.* Guido et al. C. A. 9th Cir. [Certiorari granted, 583 U. S. 1155.] Motion of

*[Reporter's Note: For amendment of this order, see *post*, p. 1057.]

the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–1026. GARZA *v.* IDAHO. Sup. Ct. Idaho. [Certiorari granted, *ante*, p. 1002.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–1091. TIMBS *v.* INDIANA. Sup. Ct. Ind. [Certiorari granted, *ante*, p. 1002.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–1299. FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT. Sup. Ct. Nev. [Certiorari granted, *ante*, p. 1029.] Motion of petitioner to dispense with printing joint appendix granted.

Rehearing Denied

No. 16–6308. GRAHAM *v.* UNITED STATES, *ante*, p. 1029;

No. 16–6694. JORDAN *v.* UNITED STATES, *ante*, p. 1035;

No. 17–565. ROWAN COUNTY, NORTH CAROLINA *v.* LUND ET AL., *ante*, p. 1035;

No. 17–970. STANFORD *v.* BROWNE ET AL., *ante*, p. 1003;

No. 17–1467. GEDDES ET AL. *v.* PEOPLE'S COUNSEL OF BALTIMORE COUNTY ET AL., *ante*, p. 1018;

No. 17–1488. TIMBES *v.* DEUTSCHE BANK NATIONAL TRUST CO. ET AL., *ante*, p. 1018;

No. 17–1489. BRADDOCK *v.* JOLIE ET AL., *ante*, p. 1018;

No. 17–1495. ROBERTS *v.* FNB SOUTH OF ALMA, GEORGIA, *ante*, p. 1005;

No. 17–1527. CRAMPTON *v.* COMMISSION FOR LAWYER DISCIPLINE OF THE STATE BAR OF TEXAS, *ante*, p. 1005;

No. 17–7136. THOMAS *v.* PERRY, WARDEN, 583 U. S. 1130;

No. 17–7220. BORMUTH *v.* JACKSON COUNTY, MICHIGAN, *ante*, p. 1033;

No. 17–7664. WILLIAMS *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL., 584 U. S. 936;

No. 17–7769. GRAY *v.* UNITED STATES, *ante*, p. 1033;

No. 17–7884. BADMUS *v.* MUTUAL OF OMAHA INSURANCE CO., 584 U. S. 1004;

No. 17–7889. DAVIS, AKA STRONG *v.* PENNSYLVANIA, 584 U. S. 939;

No. 17–7891. BLUEFELD *v.* COHEN ET AL., 584 U. S. 965;

No. 17–8000. BETHUNE *v.* METROPOLITAN TRANSPORTATION AUTHORITY/LONG ISLAND BUS ET AL., 584 U. S. 981;

No. 17–8081. PETTAWAY *v.* TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA ET AL., 584 U. S. 982;

No. 17–8273. BROWER *v.* MICHIGAN, 584 U. S. 1005;

No. 17–8350. MOHAJER *v.* JPMORGAN CHASE BANK, N. A., ET AL., 584 U. S. 1016;

No. 17–8469. IN RE RAA, *ante*, p. 1002;

No. 17–8548. CHILDRESS *v.* CITY OF CHARLESTON POLICE DEPARTMENT ET AL., *ante*, p. 1007;

No. 17–8575. LINEHAN *v.* PIPER, *ante*, p. 1020;

No. 17–8591. COAD *v.* UNITED STATES, 584 U. S. 1007;

No. 17–8609. MANUEL LOPEZ *v.* CITY OF SANTA ANA, CALIFORNIA, ET AL., *ante*, p. 1021;

No. 17–8698. CHUN HEI LAM *v.* UNITED STATES, 584 U. S. 1009;

No. 17–8702. BRADLEY *v.* WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES ET AL., *ante*, p. 1022;

No. 17–8757. LEONARD *v.* OREGON ET AL., *ante*, p. 1008;

No. 17–8811. IN RE MASON, *ante*, p. 1015;

No. 17–8848. IN RE SMOTHERMAN, 584 U. S. 1031; and

No. 17–8946. MALDONADO *v.* UNITED STATES, *ante*, p. 1009. Petitions for rehearing denied.

AUGUST 29, 2018

Miscellaneous Order

No. 18A146. FOOD MARKETING INSTITUTE *v.* ARGUS LEADER MEDIA, DBA ARGUS LEADER. Application to recall and stay the mandate, presented to JUSTICE GORSUCH, and by him referred to the Court, granted, and the mandate of the United States Court of Appeals for the Eighth Circuit in case No. 17–1346 is recalled and stayed pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

AUGUST 30, 2018

Miscellaneous Order

No. 18A118. FULTON ET AL. *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. Application for injunctive relief, presented to JUSTICE ALITO, and by him referred to the Court, denied. JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH would grant the application.

SEPTEMBER 4, 2018

Dismissal Under Rule 46

No. 17–8654. ALMIGHTY SUPREME BORN ALLAH *v.* MILLING ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 876 F. 3d 48.

SEPTEMBER 7, 2018

Miscellaneous Order

No. 18A240. MICHIGAN STATE A. PHILIP RANDOLPH INSTITUTE ET AL. *v.* JOHNSON, MICHIGAN SECRETARY OF STATE. C. A. 6th Cir. Application to vacate stay, presented to JUSTICE KAGAN, and by her referred to the Court, denied. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would grant the application.

SEPTEMBER 18, 2018

Miscellaneous Order

No. 18A274. CROSSROADS GRASSROOTS POLICY STRATEGIES *v.* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON ET AL. D. C. D. C. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. The order heretofore entered by THE CHIEF JUSTICE is vacated.

SEPTEMBER 20, 2018

Dismissal Under Rule 46

No. 17–667. PIONEER CENTRES HOLDING COMPANY STOCK OWNERSHIP PLAN AND TRUST ET AL. *v.* ALERUS FINANCIAL, N. A. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 858 F. 3d 1324.

September 24, 2018

Miscellaneous Orders

No. 17–647. Knick *v.* Township of Scott, Pennsylvania, et al. C. A. 3d Cir. [Certiorari granted, 583 U. S. 1166.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–765. United States *v.* Stitt. C. A. 6th Cir.; and

No. 17–766. United States *v.* Sims. C. A. 8th Cir. [Certiorari granted, 584 U. S. 949.] Joint motion of respondents for divided argument denied. Motion of respondent Jason D. Sims for appointment of counsel granted, and Jeffrey L. Fisher, of Stanford, Cal., is appointed to serve as counsel for respondent Jason D. Sims in No. 17–766.

September 25, 2018

Miscellaneous Order

No. 142, Orig. Florida *v.* Georgia. The August 9, 2018, order in this case is amended to provide that the compensation of a legal assistant for the Special Master shall be charged against and borne by the parties in such proportion as the Court may hereafter direct. The cost of printing the Special Master's reports, and all other proper expenses, including travel expenses, shall be submitted to the Court. [For earlier order herein, see, *e. g., ante,* p. 1052.]

September 27, 2018

Miscellaneous Order

No. 18–6086 (18A311). In re Acker. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 17–1201. Thacker et ux. *v.* Tennessee Valley Authority. C. A. 11th Cir. Certiorari granted.* Reported below: 868 F. 3d 979.

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*[Reporter's Note: For amendment of this order, see, *post,* p. 1058.]

No. 18–96. TENNESSEE WINE AND SPIRITS RETAILERS ASSN. *v.* BYRD, EXECUTIVE DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 883 F. 3d 608.

No. 17–1471. HOME DEPOT U. S. A., INC. *v.* JACKSON. C. A. 4th Cir. Certiorari granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Should this Court's holding in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?" Reported below: 880 F. 3d 165.

No. 17–1484. AZAR, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ALLINA HEALTH SERVICES ET AL. C. A. D. C. Cir. Certiorari granted limited to the following question: "Whether 42 U. S. C. § 1395hh(a)(2) or § 1395hh(a)(4) required the Department of Health and Human Services to conduct notice-and-comment rulemaking before providing the challenged instructions to a Medicare Administrator Contractor making initial determinations of payments due under Medicare." Reported below: 863 F. 3d 937.

No. 17–1625. RIMINI STREET, INC., ET AL. *v.* ORACLE USA, INC., ET AL. C. A. 9th Cir. Certiorari granted. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 879 F. 3d 948.

Certiorari Denied

No. 18–6075 (18A310). ACKER *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 28, 2018

Miscellaneous Order

No. 17–1201. THACKER ET UX. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1057.] Order granting petition for writ of certiorari amended as follows: Certiorari granted limited to Question 1 presented by the petition.