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OFFICIAL REPORTS

OF

THE SUPREME COURT

FEBRUARY 19 THROUGH MARCH 25, 2019

END OF VOLUME

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

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

For the Sixth Circuit, Sonia Sotomayor, Associate Justice.

For the Seventh Circuit, Brett M. Kavanaugh, Associate Justice.

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

For the Ninth Circuit, Elena Kagan, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

October 19, 2018.

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

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MOORE *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 18–443. Decided February 19, 2019

A Texas trial court determined that Bobby James Moore had an intellectual disability that rendered him ineligible for the death penalty under *Atkins* v. *Virginia*, 536 U. S. 304. The Texas Court of Criminal Appeals reversed. *Ex parte Moore*, 470 S. W. 3d 481, 527–528. This Court vacated that decision and remanded the case for further consideration "not inconsistent with" the Court's analysis. *Moore* v. *Texas*, 581 U. S. 1, 21. After remand, the Texas appeals court again concluded that Moore had not demonstrated that he had an intellectual disability. *Ex parte Moore*, 548 S. W. 3d 552. Moore filed a petition for certiorari seeking reversal of that determination. The Texas district attorney agrees that Moore is intellectually disabled and cannot be executed; the Texas attorney general disagrees, moves to intervene, and asks the Court to deny Moore's petition.

Held: Because the trial court record demonstrates that Moore is a person with an intellectual disability, the Court reverses the appeals court's contrary determination. The appeals court's opinion after remand rests in critical parts on the same analysis that this Court previously found wanting. First, the appeals court again relied less upon Moore's adaptive deficits than upon Moore's apparent adaptive strengths. See *Moore*, 581 U. S., at 15. And while the appeals court emphasized Moore's capacity to communicate, read, and write based in part on pro se papers Moore filed in court, that relevant evidence lacks convincing strength without a determination that Moore wrote the papers on his own, a finding the appeals court declined to make. The appeals court also relied heavily upon adaptive improvements made in prison, even though this Court's prior opinion cautioned against doing so. See *id.*, at 16. Further, the appeals court concluded that Moore failed to show that the "cause of [his] deficient social behavior was related to any deficits in general mental abilities" rather than "emotional problems." *Ex parte Moore*, 548 S. W. 3d, at 570. This Court previously stated that the appeals court had "departed from clinical practice" when it followed similar reasoning, however, and pointed to the position of the American Psychological Association that a mental-health issue is "not evidence that a person does not also have intellectual disability." 581 U. S., at 17. Finally, the appeals court stated that it would abandon reliance

on evidentiary factors set forth in a Texas case called *Ex parte Briseno*, 135 S. W. 3d 1, but the similarity between those factors and the appeals court's statements suggests that *Briseno* continues to permeate that court's analysis. The appeals court's opinion, taken as a whole and read in light of both of the Court's prior opinion and the trial court record, rests upon analysis that too closely resembles what the Court previously found improper. On the basis of the record, Moore has shown he is a person with intellectual disability.

Certiorari granted; 548 S. W. 3d 552, reversed and remanded.

Per Curiam.

In 2015, the Texas Court of Criminal Appeals held that petitioner, Bobby James Moore, did *not* have intellectual disability and consequently was eligible for the death penalty. *Ex parte Moore*, 470 S. W. 3d 481, 527–528 (*Ex parte Moore I*). We previously considered the lawfulness of that determination, vacated the appeals court's decision, and remanded the case for further consideration of the issue. *Moore* v. *Texas*, 581 U. S. 1, 20–21 (2017). The appeals court subsequently reconsidered the matter but reached the same conclusion. *Ex parte Moore*, 548 S. W. 3d 552, 573 (Tex. Crim. App. 2018) (*Ex parte Moore II*). We again review its decision, and we reverse its determination.

I

When we first heard this case, in *Moore*, we noted that the state trial court (a state habeas court) "received affidavits and heard testimony from Moore's family members, former counsel, and a number of court-appointed mental-health experts." 581 U. S., at 6. We described the evidence as "reveal[ing]" the following:

> "Moore had significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. At school,

> because of his limited ability to read and write, Moore could not keep up with lessons. Often, he was separated from the rest of the class and told to draw pictures. Moore's father, teachers, and peers called him 'stupid' for his slow reading and speech. After failing every subject in the ninth grade, Moore dropped out of high school. Cast out of his home, he survived on the streets, eating from trash cans, even after two bouts of food poisoning." *Id.*, at 6–7 (citations omitted).

On the basis of this and other evidence, the trial court found that Moore had intellectual disability and thus was ineligible for the death penalty under *Atkins* v. *Virginia*, 536 U. S. 304 (2002). App. to Pet. for Cert. 310a–311a. The Texas Court of Criminal Appeals reversed that determination, *Ex parte Moore I*, 470 S. W. 3d 481, and we reviewed its decision, *Moore*, 581 U. S. 1.

At the outset of our opinion, we recognized as valid the three underlying legal criteria that both the trial court and appeals court had applied. *Id.*, at 7–8 (citing American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010) (AAIDD–11); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM–5)). To make a finding of intellectual disability, a court must see: (1) deficits in intellectual functioning—primarily a test-related criterion, see DSM–5, at 37; (2) adaptive deficits, "assessed using both clinical evaluation and individualized . . . measures," *ibid.*; and (3) the onset of these deficits while the defendant was still a minor, *id.*, at 38. With respect to the first criterion, we wrote that Moore's intellectual testing indicated his was a borderline case, but that he had demonstrated sufficient intellectual-functioning deficits to require consideration of the second criterion—adaptive functioning. *Moore*, 581 U. S., at 13–15. With respect to the third criterion, we

found general agreement that any onset took place when Moore was a minor. *Id.*, at 7, n. 3.

But there was significant disagreement between the state courts about whether Moore had the adaptive deficits needed for intellectual disability. "In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical)." *Id.*, at 8 (citing AAIDD–11, at 43). Based on the evidence before it, the trial court found that "Moore's performance fell roughly two standard deviations below the mean in *all three* skill categories." 581 U. S., at 8; see App. to Pet. for Cert. 309a. Reversing that decision, the appeals court held that Moore had "not proven by a preponderance of the evidence" that he possessed the requisite adaptive deficits, and thus was eligible for the death penalty. *Ex parte Moore I*, 470 S. W. 3d, at 520. We disagreed with the appeals court's adaptive-functioning analysis, however, and identified at least five errors.

First, the Texas Court of Criminal Appeals "overemphasized Moore's perceived adaptive strengths." *Moore*, 581 U. S., at 15. "But the medical community," we said, "focuses the adaptive-functioning inquiry on adaptive *deficits*." *Ibid.*

Second, the appeals court "stressed Moore's improved behavior in prison." *Id.*, at 16. But "[c]linicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Ibid.* (quoting DSM–5, at 38).

Third, the appeals court "concluded that Moore's record of academic failure, . . . childhood abuse[,] and suffering . . . detracted from a determination that his intellectual and adaptive deficits were related." 581 U. S., at 16. But "in the medical community," those "traumatic experiences" are considered " '*risk factors*' *for* intellectual disability." *Ibid.* (quoting AAIDD–11, at 59–60).

Fourth, the Texas Court of Criminal Appeals required "Moore to show that his adaptive deficits were not related to 'a personality disorder.'" 581 U. S., at 17 (quoting *Ex parte Moore I*, 470 S. W. 3d, at 488). But clinicians recognize that the "existence of a personality disorder or mental-health issue . . . is 'not evidence that a person does not also have intellectual disability.'" 581 U. S., at 17 (quoting Brief for American Psychological Association (APA) et al. as *Amici Curiae* in *Moore* v. *Texas*, O. T. 2016, No. 15–797, p. 19).

Fifth, the appeals court directed state courts, when examining adaptive deficits, to rely upon certain factors set forth in a Texas case called *Ex parte Briseno*, 135 S. W. 3d 1 (Tex. Crim. App. 2004). *Ex parte Moore I*, 470 S. W. 3d, at 486, 489. The *Briseno* factors were: whether "those who knew the person best during the developmental stage" thought of him as "mentally retarded"; whether he could "formulat[e] plans" and "car[ry] them through"; whether his conduct showed "leadership"; whether he showed a "rational and appropriate" "response to external stimuli"; whether he could answer questions "coherently" and "rationally"; whether he could "hide facts or lie effectively"; and whether the commission of his offense required "forethought, planning, and complex execution of purpose." 135 S. W. 3d, at 8–9.

We criticized the use of these factors both because they had no grounding in prevailing medical practice and because they invited "lay perceptions of intellectual disability" and "lay stereotypes" to guide assessment of intellectual disability. *Moore*, 581 U. S., at 18. Emphasizing the *Briseno* factors over clinical factors, we said, "'creat[es] an unacceptable risk that persons with intellectual disability will be executed.'" 581 U. S., at 17 (quoting *Hall* v. *Florida*, 572 U. S. 701, 704 (2014)). While our decisions in "*Atkins* and *Hall* left to the States 'the task of developing appropriate ways to enforce' the restriction on executing the intellectually disabled," 581 U. S., at 13 (quoting *Hall*, 572 U. S., at 719), a court's intellectual disability determination "must be 'in-

formed by the medical community's diagnostic framework,'" 581 U. S., at 13 (quoting *Hall*, 572 U. S., at 721).

Three Members of this Court dissented from the majority's treatment of Moore's intellectual functioning and with aspects of its adaptive-functioning analysis, but all agreed about the impropriety of the *Briseno* factors. As The Chief Justice wrote in his dissenting opinion, the *Briseno* factors were "an unacceptable method of enforcing the guarantee of *Atkins*" and the Texas Court of Criminal Appeals "therefore erred in using them to analyze adaptive deficits." *Moore*, 581 U. S., at 21 (opinion of Roberts, C. J.).

For the reasons we have described, the Court set aside the judgment of the appeals court and remanded the case "for further proceedings not inconsistent with this opinion." *Id.*, at 21.

II

On remand the Texas Court of Criminal Appeals reconsidered the appeal and reached the same basic conclusion, namely, that Moore had not demonstrated intellectual disability. *Ex parte Moore II*, 548 S. W. 3d, at 555. The court again noted the three basic criteria: intellectual-functioning deficits, adaptive deficits, and early onset. *Id.*, at 560–562. But this time it focused almost exclusively on the second criterion, adaptive deficits. The court said that, in doing so, it would "abandon reliance on the *Briseno* evidentiary factors." *Id.*, at 560. It would instead use "'current medical diagnostic standards'" set forth in the American Psychiatric Association's DSM–5. *Id.*, at 559–560. In applying those standards to the trial court record, it found the State's expert witness, Dr. Kristi Compton, "'far more credible and reliable'" than the other experts considered by the trial court. *Id.*, at 562. (As in our last opinion, we neither second nor second-guess that judgment.) And, as we have said, it reached the same conclusion it had before.

Moore has now filed a petition for certiorari in which he argues that the trial court record demonstrates his intellec-

tual disability. He asks us to reverse the appeals court's contrary holding. Pet. for Cert. 2. The prosecutor, the district attorney of Harris County, "agrees with the petitioner that he is intellectually disabled and cannot be executed." Brief in Opposition 9. The APA, American Bar Association (ABA), and various individuals have also filed *amicus curiae* briefs supporting the position of Moore and the prosecutor. Brief for APA et al. as *Amici Curiae*; Brief for ABA as *Amicus Curiae*; Brief for Donald B. Ayer et al. as *Amici Curiae*. The attorney general of Texas, however, has filed a motion for leave to intervene and asks us to deny Moore's petition. Motion for Leave To Intervene as a Respondent.

III

After reviewing the trial court record and the court of appeals' opinion, we agree with Moore that the appeals court's determination is inconsistent with our opinion in *Moore*. We have found in its opinion too many instances in which, with small variations, it repeats the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion.

For one thing, the court of appeals again relied less upon the adaptive *deficits* to which the trial court had referred than upon Moore's apparent adaptive *strengths*. See *Moore*, 581 U. S., at 15 (criticizing the appeals court's "overempha-s[is]" upon Moore's "perceived adaptive strengths"); *supra*, at 136. The appeals court's discussion of Moore's "[c]ommunication [s]kills" does not discuss the evidence relied upon by the trial court. *Ex parte Moore II*, 548 S. W. 3d, at 563–565. That evidence includes the young Moore's inability to understand and answer family members, even a failure on occasion to respond to his own name. App. to Pet. for Cert. 289a–290a. Its review of Moore's "[r]eading and [w]riting" refers to deficits only in observing that "in prison, [Moore] progressed from being illiterate to being able to write at a

seventh-grade level." *Ex parte Moore II*, 548 S. W. 3d, at 565. But the trial court heard, among other things, evidence that in school Moore was made to draw pictures when other children were reading, and that by sixth grade Moore struggled to read at a second-grade level. App. to Pet. for Cert. 290a, 295a.

Instead, the appeals court emphasized Moore's capacity to communicate, read, and write based in part on *pro se* papers Moore filed in court. *Ex parte Moore II*, 548 S. W. 3d, at 565–566. That evidence is relevant, but it lacks convincing strength without a determination about whether Moore wrote the papers on his own, a finding that the court of appeals declined to make. Rather, the court dismissed the possibility of outside help: Even if other inmates "composed" these papers, it said, Moore's "ability to copy such documents by hand" was "within the realm of only a few intellectually disabled people." *Id.*, at 565. Similarly, the court of appeals stressed Moore's "coherent" testimony in various proceedings, but acknowledged that Moore had "a lawyer to coach him" in all but one. *Id.*, at 564, and n. 95. As for that *pro se* hearing, the court observed that Moore read letters into the record "without any apparent difficulty." *Ibid.*

For another thing, the court of appeals relied heavily upon adaptive improvements made in prison. See *Moore*, 581 U. S., at 16 ("caution[ing] against reliance on adaptive strengths developed" in "prison"); *supra*, at 136. It concluded that Moore has command of elementary math, but its examples concern trips to the prison commissary, commissary purchases, and the like. *Ex parte Moore II*, 548 S. W. 3d, at 566–569. It determined that Moore had shown leadership ability in prison by refusing, on occasion, "to mop up some spilled oatmeal," shave, get a haircut, or sit down. *Id.*, at 570–571, and n. 149. And as we have said, it stressed correspondence written in prison. *Id.*, at 565. The length and detail of the court's discussion on these points is difficult to

square with our caution against relying on prison-based development.

Further, the court of appeals concluded that Moore failed to show that the "cause of [his] deficient social behavior was related to any deficits in general mental abilities" rather than "emotional problems." *Id.*, at 570. But in our last review, we said that the court of appeals had "departed from clinical practice" when it required Moore to prove that his "problems in kindergarten" stemmed from his intellectual disability rather than " 'emotional problems.' " *Moore*, 581 U. S., at 17 (quoting *Ex parte Moore I*, 470 S. W. 3d, at 488, 526). And we pointed to an *amicus* brief in which the APA explained that a personality disorder or mental-health issue is " 'not evidence that a person does not also have intellectual disability.' " 581 U. S., at 17 (quoting Brief for APA et al. as *Amici Curiae* in No. 15–797, at 19).

Finally, despite the court of appeals' statement that it would "abandon reliance on the *Briseno* evidentiary factors," *Ex parte Moore II*, 548 S. W. 3d, at 560, it seems to have used many of those factors in reaching its conclusion. See *supra*, at 137 (detailing those factors). Thus, *Briseno* asked whether the "offense require[d] forethought, planning, and complex execution of purpose." 135 S. W. 3d, at 9. The court of appeals wrote that Moore's crime required "a level of planning and forethought." *Ex parte Moore II*, 548 S. W. 3d, at 572, 603 (observing that Moore "w[ore] a wig, conceal[ed] the weapon, and fle[d]" after the crime).

Briseno asked whether the defendant could "respond coherently, rationally, and on point to oral and written questions." 135 S. W. 3d, at 8. The court of appeals found that Moore "responded rationally and coherently to questions." *Ex parte Moore II*, 548 S. W. 3d, at 564.

And *Briseno* asked whether the defendant's "conduct show[s] leadership or . . . that he is led around by others." 135 S. W. 3d, at 8. The court of appeals wrote that Moore's

"refus[al] to mop up some spilled oatmeal" (and other such behavior) showed that he "influences others and stands up to authority." *Ex parte Moore II*, 548 S. W. 3d, at 570–571.

Of course, clinicians also ask questions to which the court of appeals' statements might be relevant. See AAIDD–11, at 44 (noting that how a person "follows rules" and "obeys laws" can bear on assessment of her social skills). But the similarity of language and content between *Briseno*'s factors and the court of appeals' statements suggests that *Briseno* continues to "pervasively infec[t] the [the appeals courts'] analysis." *Moore*, 581 U. S., at 21.

To be sure, the court of appeals opinion is not identical to the opinion we considered in *Moore*. There are sentences here and there suggesting other modes of analysis consistent with what we said. But there are also sentences here and there suggesting reliance upon what we earlier called "lay stereotypes of the intellectually disabled." *Id.*, at 18. Compare *Ex parte Moore II*, 548 S. W. 3d, at 570–571 (finding evidence that Moore "had a girlfriend" and a job as tending to show he lacks intellectual disability), with AAIDD–11, at 151 (criticizing the "incorrect stereotypes" that persons with intellectual disability "never have friends, jobs, spouses, or children"), and Brief for APA et al. as *Amici Curiae* 8 ("[I]t is estimated that between nine and forty percent of persons with intellectual disability have some form of paid employment").

We conclude that the appeals court's opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court. We consequently agree with Moore and the prosecutor that, on the basis of the trial court record, Moore has shown he is a person with intellectual disability.

* * *

The petition for certiorari is granted. The attorney general of Texas' motion to intervene is denied; we have considered that filing as an *amicus* brief. The judgment of the Texas Court of Criminal Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice Roberts, concurring.

When this case was before us two years ago, I wrote in dissent that the majority's articulation of how courts should enforce the requirements of *Atkins* v. *Virginia*, 536 U. S. 304 (2002), lacked clarity. *Moore* v. *Texas*, 581 U. S. 1, 29–30 (2017). It still does. But putting aside the difficulties of applying *Moore* in other cases, it is easy to see that the Texas Court of Criminal Appeals misapplied it here. On remand, the court repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance. The court repeated its improper reliance on the factors articulated in *Ex parte Briseno*, 135 S. W. 3d 1, 8 (Tex. Crim. App. 2004), and again emphasized Moore's adaptive strengths rather than his deficits. That did not pass muster under this Court's analysis last time. It still doesn't. For those reasons, I join the Court's opinion reversing the judgment below.

Justice Alito, with whom Justice Thomas and Justice Gorsuch join, dissenting.

Two years ago, this Court vacated a judgment of the Texas Court of Criminal Appeals holding that Bobby James Moore was not intellectually disabled and was therefore eligible for the death penalty. *Moore* v. *Texas*, 581 U. S. 1 (2017). While the Court divided on the appropriate disposition, both the majority and the dissent agreed that the Court of Criminal Appeals should have assessed Moore's claim of intellec-

tual disability under contemporary standards rather than applying the outdated evidentiary factors laid out in *Ex parte Briseno*, 135 S. W. 3d 1, 8 (Tex. Crim. App. 2004). *Moore*, 581 U. S., at 5–6; *id.*, at 21 (ROBERTS, C. J., dissenting). On remand, the Court of Criminal Appeals adopted the leading contemporary clinical standards for assessing intellectual disability, applied those standards to the record, and once again determined that Moore is eligible for the death penalty. *Ex parte Moore*, 548 S. W. 3d 552, 555 (2018).

Today, the Court reverses that most recent decision, holding that the Court of Criminal Appeals failed to follow our decision in *Moore*. Such a failure would be understandable given the "lack of guidance [*Moore*] offers to States seeking to enforce the holding of *Atkins*." *Moore*, 581 U. S., at 29 (ROBERTS, C. J., dissenting). Indeed, each of the errors that the majority ascribes to the state court's decision is traceable to *Moore*'s failure to provide a clear rule. For example, the majority faults the Court of Criminal Appeals for "rel[ying] less upon the adaptive *deficits* . . . than upon Moore's apparent adaptive *strengths*," *ante*, at 139, and for "rel[ying] heavily upon adaptive improvements made in prison," *ante*, at 140. But in *Moore*, we said only that a court ought not "overemphasiz[e]" adaptive strengths or place too much "stres[s]" on improved behavior in prison. This left "[t]he line between the permissible—consideration, maybe even emphasis—and the forbidden—'overemphasis'—. . . not only thin, but totally undefined . . . ." *Moore*, 581 U. S., at 31 (ROBERTS, C. J., dissenting). The majority's belief that the state court failed to follow *Moore* on remand merely proves that "[n]either the Court's articulation of this standard [in *Moore*] nor its application sheds any light on what it means." *Id.*, at 30 (ROBERTS, C. J., dissenting).

Having concluded that the Court of Criminal Appeals failed to apply the standard allegedly set out in *Moore*, the Court today takes it upon itself to correct these factual find-

ings and reverse the judgment.* This is not our role. "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U. S. 220, 227 (1925); see also *Salazar-Limon* v. *Houston*, 581 U. S. 946, 947–948 (2017) (ALITO, J., concurring in denial of certiorari) ("[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case"). If the Court is convinced that the Court of Criminal Appeals made a legal error, it should vacate the judgment below, pronounce the standard that we failed to provide in *Moore*, and remand for the state court to apply that standard. The Court's decision, instead, to issue a summary reversal belies our role as "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

The Court's foray into factfinding is an unsound departure from our usual practice. The error in this litigation was not the state court's decision on remand but our own failure to provide a coherent rule of decision in *Moore*. I would deny the petition for a writ of certiorari. I certainly would not summarily reverse and make our own finding of fact without even giving the State the opportunity to brief and argue the question. I therefore respectfully dissent.

*The Court excuses its usurpation of the factfinding role by contrasting the conclusions of "the trial court," *ante*, at 139–140, 142, with the views of "the court of appeals," *ante*, at 140–141. But in Texas habeas proceedings, the Texas Court of Criminal Appeals is "the ultimate factfinder" and has authority to accept, alter, or reject the "recommendation" of the habeas court. *Ex parte Reed*, 271 S. W. 3d 698, 727 (2008).

TIMBS *v.* INDIANA

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 17–1091. Argued November 28, 2018—Decided February 20, 2019

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State's request. The vehicle's forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions.

Held: The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. Pp. 150–156.

(a) The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States Bill of Rights protections "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *McDonald* v. *Chicago*, 561 U. S. 742, 767 (alterations omitted). If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires. P. 150.

(b) The prohibition embodied in the Excessive Fines Clause carries forward protections found in sources from Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day. Protection against excessive fines has been a constant shield throughout Anglo-American history for good reason: Such fines undermine other liberties. They can be used, *e. g.*, to retaliate against or chill the speech of political enemies. They can also be employed, not in service of penal purposes, but as a source of revenue. The historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is indeed overwhelming. Pp. 151–154.

(c) Indiana argues that the Clause does not apply to its use of civil *in rem* forfeitures, but this Court held in *Austin* v. *United States*, 509 U. S. 602, that such forfeitures fall within the Clause's protection when they are at least partially punitive. Indiana cannot prevail unless the Court overrules *Austin* or holds that, in light of *Austin*, the Excessive Fines Clause is not incorporated because its application to civil *in rem* forfeitures is neither fundamental nor deeply rooted.

The first argument, overturning *Austin*, is not properly before this Court. The Indiana Supreme Court held only that the Excessive Fines Clause did not apply to the States. The court did not address the Clause's application to civil *in rem* forfeitures, nor did the State ask it to do so. Timbs thus sought this Court's review only of the question whether the Excessive Fines Clause is incorporated by the Fourteenth Amendment. Indiana attempted to reformulate the question to ask whether the Clause restricted States' use of civil *in rem* forfeitures and argued on the merits that *Austin* was wrongly decided. Respondents' "right . . . to restate the questions presented," however, "does not give them the power to expand [those] questions," *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 279, n. 10 (emphasis deleted), particularly where the proposed reformulation would lead the Court to address a question neither pressed nor passed upon below, cf. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7.

The second argument, that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures, misapprehends the nature of the incorporation inquiry. In considering whether the Fourteenth Amendment incorporates a Bill of Rights protection, this Court asks whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted. To suggest otherwise is inconsistent with the approach taken in cases concerning novel applications of rights already deemed incorporated. See, *e. g.*, *Packingham* v. *North Carolina*, 582 U. S. 98, 101. The Excessive Fines Clause is thus incorporated regardless of whether application of the Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted. Pp. 154–156.

84 N. E. 3d 1179, vacated and remanded.

Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh, JJ., joined. Gorsuch, J., filed a concurring opinion, *post*, p. 157. Thomas, J., filed an opinion concurring in the judgment, *post*, p. 157.

Wesley P. Hottot argued the cause for petitioner. With him on the briefs were *Samuel B. Gedge*, *Scott G. Bullock*, and *Darpana M. Sheth*.

Thomas M. Fisher, Solicitor General of Indiana, argued the cause for respondent. With him on the brief were *Curtis T. Hill, Jr.*, Attorney General, *Kian J. Hudson*, Deputy Solicitor General, and *Aaron T. Craft* and *Julia C. Payne*, Deputy Attorneys General.*

Justice Ginsburg delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert M. Carlson* and *Robert N. Weiner*; for the American Civil Liberties Union et al. by *Nusrat J. Choudhury*, *Orion Danjuma*, *Dennis D. Parker*, *Ezekiel Edwards*, *David Cole*, *Charles Duan*, *Nila Bala*, and *Samuel Brooke*; for the American Civil Rights Union by *Kenneth A. Klukowski*; for Cause of Action Institute by *John J. Vecchione*, *Julie A. Smith*, and *Cynthia F. Crawford*; for the Chamber of Commerce of the United States of America by *Bert W. Rein*, *Carol A. Laham*, *Andrew G. Woodson*, and *Daryl Joseffer*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, *David H. Gans*, and *Brian R. Frazelle*; for the DKT Liberty Project et al. by *Jessica Ring Amunson*, *Clark M. Neily III*, *Jay R. Schweikert*, *Shana-Tara O'Toole*, *Timothy Sandefur*, and *Aditya Dynar*; for the Drug Policy Alliance et al. by *Vincent Levy* and *Daniel M. Sullivan*; for Indiana Criminal Defense Lawyers by *William B. Shields* and *James T. Giles*; for the Institute for Free Speech by *Allen Dickerson*, *Zac Morgan*, and *Owen Yeates*; for Judicial Watch, Inc., et al. by *Chris Fedeli*; for the Juvenile Law Center et al. by *Marsha L. Levick* and *Jessica Feierman*; for the NAACP Legal Defense & Educational Fund, Inc., by *Daniel S. Harawa*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, and *Samuel Spital*; for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green*; for the Pacific Legal Foundation by *Christina M. Martin*, *Lawrence G. Salzman*, and *Anthony L. François*; for The Rutherford Institute by *D. Alicia Hickok* and *John W. Whitehead*; and for Scholars by *Eugene Volokh*.

Lawrence Rosenthal and *Lisa Soronen* filed a brief for the National Association of Counties et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for Eighth Amendment Scholars by *David Schulmeister*; and for the Foundation for Moral Law by *John A. Eidsmoe*.

supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. We granted certiorari. 585 U. S. 1002 (2018).

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishments" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *McDonald* v. *Chicago*, 561 U. S. 742,

767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

I

A

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833). "The constitutional Amendments adopted in the aftermath of the Civil War," however, "fundamentally altered our country's federal system." *McDonald*, 561 U. S., at 754. With only "a handful" of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. *Id.*, at 764–765, and nn. 12–13. A Bill of Rights protection is incorporated, we have explained, if it is "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *Id.*, at 767 (internal quotation marks omitted; emphasis deleted).

Incorporated Bill of Rights guarantees are "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.*, at 765 (internal quotation marks omitted). Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.[1]

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[1] The sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca* v. *Oregon*, 406 U. S. 404 (1972). As we have explained, that "exception to th[e] general rule . . . was the result of an unusual division among the Justices," and it "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald*, 561 U. S., at 766, n. 14.

B

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Taken together, these Clauses place "parallel limitations" on "the power of those entrusted with the criminal-law function of government." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 263 (1989) (quoting *Ingraham* v. *Wright*, 430 U. S. 651, 664 (1977)). Directly at issue here is the phrase "nor excessive fines imposed," which "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States* v. *Bajakajian*, 524 U. S. 321, 327–328 (1998) (quoting *Austin* v. *United States*, 509 U. S. 602, 609–610 (1993)). The Fourteenth Amendment, we hold, incorporates this protection.

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement . . . ." § 20, 9 Hen. 3, ch. 14, in 1 Eng. Stat. at Large 5 (1225).[2] As relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *Browning-Ferris*, 492 U. S., at 271. See also 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . ."). But cf. *Bajakaj-*

[2] "Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown." *Browning-Ferris*, 492 U. S., at 269. "[T]hough fines and amercements had distinct historical antecedents, they served fundamentally similar purposes—and, by the seventeenth and eighteenth centuries, the terms were often used interchangeably." Brief for Eighth Amendment Scholars as *Amici Curiae* 12.

ian, 524 U. S., at 340, n. 15 (taking no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine).

Despite Magna Carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. *E. g.*, The Grand Remonstrance ¶¶17, 34 (1641), in The Constitutional Documents of the Puritan Revolution 1625–1660, pp. 210, 212 (S. Gardiner ed., 3d ed. rev. 1906); *Browning-Ferris*, 492 U. S., at 267. When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed Magna Carta's guarantee by providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Adoption of the Excessive Fines Clause was in tune not only with English law; the Clause resonated as well with similar colonial-era provisions. See, *e. g.*, Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), in 5 Federal and State Constitutions 3061 (F. Thorpe ed. 1909) ("[A]ll fines shall be moderate, and saving men's contenements, merchandize, or wainage."). In 1787, the constitutions of eight States—accounting for 70% of the U. S. population—forbade excessive fines. Calabresi, Agudo, & Dore, State Bills of Rights in 1787 and 1791, 85 S. Cal. L. Rev. 1451, 1517 (2012).

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U. S. population—expressly prohibited excessive fines. Calabresi & Agudo, Individual Rights Under State Constitu-

tions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008).

Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. See, *e. g.*, Mississippi Vagrant Law, Laws of Miss. § 2 (1865), in 1 W. Fleming, Documentary History of Reconstruction 283–285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. *E. g.*, *id.* § 5; see Finkelman, John Bingham and the Background to the Fourteenth Amendment, 36 Akron L. Rev. 671, 681–685 (2003) (describing Black Codes' use of fines and other methods to "replicate, as much as possible, a system of involuntary servitude"). Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 443 (1866); *id.*, at 1123–1124.

Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. Brief in Opposition 8–9. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. *Id.*, at 9 (citing *Norris* v. *State*, 271 Ind. 568, 576, 394 N. E. 2d 144, 150 (1979)).

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics

learned several centuries ago. See *Browning-Ferris*, 492 U. S., at 267. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." *Harmelin* v. *Michigan,* 501 U. S. 957, 979, n. 9 (1991) (opinion of Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit"). This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.").

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U. S., at 767 (internal quotation marks omitted; emphasis deleted).

II

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted.

In *Austin* v. *United States*, 509 U. S. 602 (1993), however, this Court held that civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive. *Austin* arose in the federal context. But when a Bill of Rights protection is incorporated, the protection applies "identically to both the Federal Government and the States." *McDonald*, 561 U. S., at 766, n. 14. Accordingly, to prevail, Indiana must persuade us either to overrule our decision in

Austin or to hold that, in light of *Austin*, the Excessive Fines Clause is not incorporated because the Clause's application to civil *in rem* forfeitures is neither fundamental nor deeply rooted. The first argument is not properly before us, and the second misapprehends the nature of our incorporation inquiry.

A

In the Indiana Supreme Court, the State argued that forfeiture of Timbs's SUV would not be excessive. See Brief in Opposition 5. It never argued, however, that civil *in rem* forfeitures were categorically beyond the reach of the Excessive Fines Clause. The Indiana Supreme Court, for its part, held that the Clause did not apply to the States at all, and it nowhere addressed the Clause's application to civil *in rem* forfeitures. See 84 N. E. 3d 1179. Accordingly, Timbs sought our review of the question "[w]hether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment." Pet. for Cert. i. In opposing review, Indiana attempted to reformulate the question to ask "[w]hether the Eighth Amendment's Excessive Fines Clause restricts States' use of civil asset forfeitures." Brief in Opposition i. And on the merits, Indiana has argued not only that the Clause is not incorporated, but also that *Austin* was wrongly decided. Respondents' "right, in their brief in opposition, to restate the questions presented," however, "does not give them the power to expand [those] questions." *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 279, n. 10 (1993) (emphasis deleted). That is particularly the case where, as here, a respondent's reformulation would lead us to address a question neither pressed nor passed upon below. Cf. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not of first view . . . ."). We thus decline the State's invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive.

B

As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures. We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.

Indiana's suggestion to the contrary is inconsistent with the approach we have taken in cases concerning novel applications of rights already deemed incorporated. For example, in *Packingham* v. *North Carolina*, 582 U. S. 98 (2017), we held that a North Carolina statute prohibiting registered sex offenders from accessing certain commonplace social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, we noted that the First Amendment's Free Speech Clause was "applicable to the States under the Due Process Clause of the Fourteenth Amendment." *Id.,* at 101. We did not, however, inquire whether the Free Speech Clause's application specifically to social media websites was fundamental or deeply rooted. See also, *e. g., Riley* v. *California*, 573 U. S. 373 (2014) (holding, without separately considering incorporation, that States' warrantless search of digital information stored on cell phones ordinarily violates the Fourth Amendment). Similarly here, regardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

* * *

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

It is so ordered.

JUSTICE GORSUCH, concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. See, *e. g.*, *post*, at 157–159 (THOMAS, J., concurring in judgment); *McDonald* v. *Chicago*, 561 U. S. 742, 805–858 (2010) (THOMAS, J., concurring in part and concurring in judgment) (documenting evidence that the "privileges or immunities of citizens of the United States" include, at minimum, the individual rights enumerated in the Bill of Rights); Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L. J. 1509 (2007); A. Amar, The Bill of Rights: Creation and Reconstruction 163–214 (1998); M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986). But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citi-

zens of the United States" protected by the Fourteenth Amendment.

I

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." "On its face, this appears to grant . . . United States citizens a certain collection of rights—*i. e.*, privileges or immunities—attributable to that status." *McDonald* v. *Chicago*, 561 U. S. 742, 808 (2010) (THOMAS, J., concurring in part and concurring in judgment). But as I have previously explained, this Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause "quite narrowly." *Id.*, at 808–809. Litigants seeking federal protection of substantive rights against the States thus needed "an alternative fount of such rights," and this Court "found one in a most curious place," *id.*, at 809—the Fourteenth Amendment's Due Process Clause, which prohibits "any State" from "depriv[ing] any person of life, liberty, or property, without due process of law."

Because this Clause speaks only to "process," the Court has "long struggled to define" what substantive rights it protects. *McDonald*, *supra*, at 810 (opinion of THOMAS, J.). The Court ordinarily says, as it does today, that the Clause protects rights that are "fundamental." *Ante*, at 149, 150, 154, 156. Sometimes that means rights that are " 'deeply rooted in this Nation's history and tradition.' " *Ante*, at 150, 154 (quoting *McDonald*, *supra*, at 767 (majority opinion)). Other times, when that formulation proves too restrictive, the Court defines the universe of "fundamental" rights so broadly as to border on meaningless. See, *e. g.*, *Obergefell* v. *Hodges*, 576 U. S. 644, 651–652 (2015) ("rights that allow persons, within a lawful realm, to define and express their identity"); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 851 (1992) ("At the heart of liberty is the right to define

one's own concept of existence, of meaning, of the universe, and of the mystery of human life"). Because the oxymoronic "substantive" "due process" doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not." *McDonald*, *supra*, at 811 (opinion of THOMAS, J.). And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions. *E. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Dred Scott* v. *Sandford*, 19 How. 393, 450 (1857).

The present case illustrates the incongruity of the Court's due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to " 'proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions,' " or that the State failed to provide "some baseline procedures." *Nelson* v. *Colorado*, 581 U. S. 128, 150, n. 1 (2017) (THOMAS, J., dissenting). His claim has nothing to do with any "process" "due" him. I therefore decline to apply the "legal fiction" of substantive due process. *McDonald*, 561 U. S., at 811 (opinion of THOMAS, J.).

II

When the Fourteenth Amendment was ratified, "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' " *Id.*, at 813. Those "rights" were the "inalienable rights" of citizens that had been "long recognized," and "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights" against interference by the States. *Id.*, at 822, 837. Many of these rights had been adopted from English law into colonial charters, then state constitutions and bills of rights,

and finally the Constitution. "Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in [the Bill of Rights] as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text." *Id.*, at 818.

The question here is whether the Eighth Amendment's prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

A

The Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689," *United States* v. *Bajakajian*, 524 U. S. 321, 335 (1998), which itself formalized a longstanding English prohibition on disproportionate fines. The Charter of Liberties of Henry I, issued in 1101, stated that "[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but *according to the measure of the offence so shall he pay* . . . ." Sources of English Legal and Constitutional History ¶8, p. 50 (M. Evans & R. Jack eds. 1984) (emphasis added). Expanding this principle, Magna Carta required that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood," *Bajakajian*, *supra*, at 335:

> "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy." Magna Carta, ch. 20 (1215), in A. Howard, Magna Carta: Text & Commentary 42 (rev. ed. 1998).

Similar clauses levying amercements "only in proportion to the measure of the offense" applied to earls, barons, and clergymen. Chs. 21–22, *ibid.* One historian posits that, due to the prevalence of amercements and their use in increasing the English treasury, "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." Pleas of the Crown for the County of Gloucester xxxiv (F. Maitland ed. 1884).

The principle was reiterated in the First Statute of Westminster, which provided that no man should "be amerced, without reasonable cause, and according to the quantity of his Trespass." 3 Edw., ch. 6 (1275). The English courts have long enforced this principle. In one early case, for example, the King commanded the bailiff "to take a moderate amercement proper to the magnitude and manner of th[e] offense, according to the tenour of the Great Charter of the Liberties of England," and the bailiff was sued for extorting "a heavier ransom." *Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (1316), reprinted in 52 Selden Society 3, 5 (1934); see also *Richard Godfrey's Case*, 11 Co. Rep. 42a, 44a, 77 Eng. Rep. 1199, 1202 (K. B. 1615) (excessive fines are "against law").

During the reign of the Stuarts in the period leading up to the Glorious Revolution of 1688–1689, fines were a flashpoint "in the constitutional and political struggles between the king and his parliamentary critics." L. Schwoerer, The Declaration of Rights, 1689, p. 91 (1981) (Schwoerer). From 1629 to 1640, Charles I attempted to govern without convening Parliament, but "in the absence of parliamentary grants," he needed other ways of raising revenue. 4 H. Walter, A History of England 135 (1834); see 1 T. Macaulay, History of England 85 (1899). He thus turned "to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law." 1 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the

Death of George II 462 (1827) (Hallam); see 4 Walter, *supra*, at 135.

The Court of Star Chamber, for instance, "imposed heavy fines on the king's enemies," Schwoerer 91, in disregard "of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means . . . ." 2 Hallam *47. "[T]he strong interest of th[is] court in these fines . . . had a tendency to aggravate the punishment . . . ." 1 *id.*, at 490. "The statute abolishing" the Star Chamber in 1641 "specifically prohibited any court thereafter from . . . levying . . . excessive fines." Schwoerer 91.

"But towards the end of Charles II's reign" in the 1670s and early 1680s, courts again "imposed ruinous fines on the critics of the crown." *Ibid.* In 1680, a committee of the House of Commons "examined the transcripts of all the fines imposed in King's Bench since 1677," *ibid.*, and found that "the Court of King's Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists, and Persons popishly affected; and excessively oppressing his Majesty's Protestant Subjects," 9 Journals of the House of Commons 692 (Dec. 23, 1680). The House of Commons determined that the actions of the judges of the King's Bench, particularly the actions of Chief Justice William Scroggs, had been so contrary to law that it prepared articles of impeachment against him. The articles alleged that Scroggs had "most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors" without "any Regard to the Nature of the Offences, or the Ability of the Persons." *Id.*, at 698.

Yet "[o]ver the next few years fines became even more excessive and partisan." Schwoerer 91. The King's Bench, presided over by the infamous Chief Justice Jeffreys, fined Anglican cleric Titus Oates 2,000 marks (among other punishments) for perjury. *Id.*, at 93. For speaking against the Duke of York, the sheriff of London was fined £100,000 in

1682, which corresponds to well over $10 million in present-day dollars[1]—"an amount, which, as it extended to the ruin of the criminal, was directly contrary to the spirit of [English] law." R. Vaughan, The History of England Under the House of Stuart, pt. 2, p. 801 (1840). The King's Bench fined Sir Samuel Barnadiston £10,000 for allegedly seditious letters, a fine that was overturned by the House of Lords as "exorbitant and excessive." 14 Journals of the House of Lords 210 (May 14, 1689). Several members of the committees that would draft the Declaration of Rights—which included the prohibition on excessive fines that was enacted into the English Bill of Rights of 1689—had themselves "suffered heavy fines." Schwoerer 91–92. And in 1684, judges in the case of John Hampden held that Magna Carta did not limit "fines for great offences" against the King, and imposed a £40,000 fine. *Trial of Hampden*, 9 How. St. Tr. 1054, 1125 (K. B.); 1 J. Stephen, A History of the Criminal Law of England 490 (1883).

"Freedom from excessive fines" was considered "indisputably an ancient right of the subject," and the Declaration of Rights' indictment against James II "charged that during his reign judges had imposed excessive fines, thereby subverting the laws and liberties of the kingdom." Schwoerer 90. Article 10 of the Declaration declared "[t]hat excessive Bayle ought not to be required nor excessive fynes imposed nor cruel and unusuall Punishments inflicted." *Id.*, at 297.

Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £30,000 fine against the Earl of Devonshire as "excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." *Case of Earl of Devonshire*, 11 How. St. Tr. 1354, 1371 (K. B.

[1] See Currency Converter: 1270–2017 (estimating the 2017 equivalent of £100,000 in 1680), http://nationalarchives.gov.uk/currency-converter (as last visited Feb. 8, 2019)

1687). Although the House of Lords refused to reverse the judgments against Titus Oates, a minority argued that his punishments were " 'contrary to Law and ancient Practice' " and violated the prohibition on " 'excessive Fines.' " *Harmelin* v. *Michigan*, 501 U. S. 957, 971 (1991) (opinion of Scalia, J.); *Trial of Oates*, 10 How. St. Tr. 1080, 1325 (K. B. 1685). The House of Commons passed a bill to overturn Oates' conviction, and eventually, after a request from Parliament, the King pardoned Oates. *Id.*, at 1329–1330.

Writing a few years before our Constitution was adopted, Blackstone—"whose works constituted the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U. S. 706, 715 (1999)—explained that the prohibition on excessive fines contained in the English Bill of Rights "had a retrospect to some unprecedented proceedings in the court of king's bench." 4 Commentaries on the Laws of England 372 (1769). Blackstone confirmed that this prohibition was "only declaratory . . . of the old constitutional law of the land," which had long "regulated" the "discretion" of the courts in imposing fines. *Ibid.*

In sum, at the time of the founding, the prohibition on excessive fines was a longstanding right of Englishmen.

B

"As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen," *McDonald*, 561 U. S., at 816 (opinion of THOMAS, J.), including the prohibition on excessive fines. *E. g.*, J. Dummer, A Defence of the New-England Charters 16–17 (1721) ("The Subjects Abroad claim the Privilege of *Magna Charta*, which says that no Man shall be fin'd above the Nature of his Offence, and whatever his Miscarriage be, a *Salvo Contenemento suo* is to be observ'd by the Judge"). Thus, the text of the Eighth Amendment was " 'based directly on . . . the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of

Rights.'" *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 266 (1989) (quoting *Solem* v. *Helm*, 463 U. S. 277, 285, n. 10 (1983)); see *Jones* v. *Commonwealth*, 5 Va. 555, 557 (1799) (opinion of Carrington, J.) (explaining that the clause in the Virginia Declaration of Rights embodied the traditional legal understanding that any "fine or amercement ought to be according to the degree of the fault and the estate of the defendant").

When the States were considering whether to ratify the Constitution, advocates for a separate bill of rights emphasized the need for an explicit prohibition on excessive fines mirroring the English prohibition. In colonial times, fines were "the drudge-horse of criminal justice," "probably the most common form of punishment." L. Friedman, Crime and Punishment in American History 38 (1993). To some, this fact made a constitutional prohibition on excessive fines all the more important. As the well-known Anti-Federalist Brutus argued in an essay, a prohibition on excessive fines was essential to "the security of liberty" and was "as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, . . . and seizing . . . property . . . as the other." Brutus II (Nov. 1, 1787), in The Complete Bill of Rights 621 (N. Cogan ed. 1997). Similarly, during Virginia's ratifying convention, Patrick Henry pointed to Virginia's own prohibition on excessive fines and said that it would "depart from the genius of your country" for the Federal Constitution to omit a similar prohibition. Debate on Virginia Convention (June 14, 1788), in 3 Debates on the Federal Constitution 447 (J. Elliot 2d ed. 1854). Henry continued: "[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives" to "define punishments without this control." *Ibid.*

Governor Edmund Randolph responded to Henry, arguing that Virginia's charter was "nothing more than an investi-

ture, in the hands of the Virginia citizens, of those rights which belonged to British subjects." *Id.*, at 466. According to Randolph, "the exclusion of excessive bail and fines . . . would follow of itself, without a bill of rights," for such fines would never be imposed absent "corruption in the House of Representatives, Senate, and President," or judges acting "contrary to justice." *Id.*, at 467–468.

For all the debate about whether an explicit prohibition on excessive fines was necessary in the Federal Constitution, all agreed that the prohibition on excessive fines was a well-established and fundamental right of citizenship. When the Excessive Fines Clause was eventually considered by Congress, it received hardly any discussion before "it was agreed to by a considerable majority." 1 Annals of Cong. 754 (1789). And when the Bill of Rights was ratified, most of the States had a prohibition on excessive fines in their constitutions.[2]

Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines. Justice Story, writing a few decades before the ratification of the Fourteenth Amendment, explained that the Eighth Amendment was "adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken

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[2] Del. Const., Art. I, § 11 (1792), in 1 Federal and State Constitutions 569 (F. Thorpe ed. 1909); Md. Const., Decl. of Rights, Art. XXII (1776), in 3 *id.*, at 1688; Mass. Const., pt. 1, Art. XXVI (1780), in *id.*, at 1892; N. H. Const., pt. 1, Art. 1, § XXXIII (1784), in 4 *id.*, at 2457; N. C. Const., Decl. of Rights, Art. X (1776), in 5 *id.*, at 2788; Pa. Const., Art. IX, § 13 (1790), in *id.*, at 3101; S. C. Const., Art. IX, § 4 (1790), in 6 *id.*, at 3264; Va. Const., Bill of Rights, § 9 (1776), in 7 *id.*, at 3813. Vermont had a clause specifying that "all fines shall be proportionate to the offences." Vt. Const., ch. II, § XXIX (1786), in *id.*, at 3759. Georgia's 1777 Constitution had an excessive-fines clause, Art. LIX, but its 1789 Constitution did not. And the Northwest Territory Ordinance provided that "[a]ll fines shall be moderate; and no cruel or unusual punishments inflicted." Art. II, 1 Stat. 52, n. (*a*) (1787).

place in England in the arbitrary reigns of some of the Stuarts," when "[e]normous fines and amercements were . . . sometimes imposed." 3 J. Story, Commentaries on the Constitution of the United States § 1896, pp. 750–751 (1833). Story included the prohibition on excessive fines as a right, along with the "right to bear arms" and others protected by the Bill of Rights, that "operates, as a qualification upon powers, actually granted by the people to the government"; without such a "restrict[ion]," the government's "exercise or abuse" of its power could be "dangerous to the people." *Id.*, § 1858, at 718–719.

Chancellor Kent likewise described the Eighth Amendment as part of the "right of personal security . . . guarded by provisions which have been transcribed into the constitutions in this country from *magna carta*, and other fundamental acts of the English Parliament." 2 J. Kent, Commentaries on American Law 9 (1827). He understood the Eighth Amendment to "guard against abuse and oppression," and emphasized that "the constitutions of almost every state in the Unio[n] contain the same declarations in substance, and nearly in the same language." *Ibid.* Accordingly, "they must be regarded as fundamental doctrines in every state, for all the colonies were parties to the national declaration of rights in 1774, in which the . . . rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright." *Ibid.*; accord, W. Rawle, A View of the Constitution of the United States of America 125 (1825) (describing the prohibition on excessive fines as "founded on the plainest principles of justice").

C

The prohibition on excessive fines remained fundamental at the time of the Fourteenth Amendment. In 1868, 35 of 37 state constitutions "expressly prohibited excessive fines." *Ante*, at 152. Nonetheless, as the Court notes, abuses of

fines continued, especially through the Black Codes adopted in several States. *Ante*, at 153. The "centerpiece" of the Codes was their "attempt to stabilize the black work force and limit its economic options apart from plantation labor." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 199 (1988). Under the Codes, "the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers." *Ibid.* The Codes also included " 'antienticement' measures punishing anyone offering higher wages to an employee already under contract." *Id.*, at 200.

The 39th Congress focused on these abuses during its debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen's Bureau Act. During those well-publicized debates, Members of Congress consistently highlighted and lamented the "severe penalties" inflicted by the Black Codes and similar measures, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (Sen. Trumbull), suggesting that the prohibition on excessive fines was understood to be a basic right of citizenship.

For example, under Mississippi law, adult "freedmen, free negroes and mulattoes" "without lawful employment" faced $50 in fines and 10 days' imprisonment for vagrancy. Reports of Assistant Commissioners of Freedmen, and Synopsis of Laws on Persons of Color in Late Slave States, S. Exec. Doc. No. 6, 39th Cong., 2d Sess., 192 (1867). Those convicted had five days to pay or they would be arrested and leased to "any person who will, for the shortest period of service, pay said fine and forfeiture and all costs." *Ibid.* Members of Congress criticized such laws "for selling [black] men into slavery in punishment of crimes of the slightest magnitude." Cong. Globe, 39th Cong., 1st Sess., at 1123 (Rep. Cook); see *id.*, at 1124 ("It is idle to say these men will be protected by the States").

Similar examples abound. One congressman noted that Alabama's "aristocratic and anti-republican laws, almost reenacting slavery, among other harsh inflictions impose . . . a fine of fifty dollars and six months' imprisonment on any servant or laborer (white or black) who loiters away his time or is stubborn or refractory." *Id.*, at 1621 (Rep. Myers). He also noted that Florida punished vagrants with "a fine not exceeding $500 and imprison[ment] for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court." *Ibid.* At the time, such fines would have been ruinous for laborers. Cf. *id.*, at 443 (Sen. Howe) ("A thousand dollars! That sells a negro for his life").

These and other examples of excessive fines from the historical record informed the Nation's consideration of the Fourteenth Amendment. Even those opposed to civil-rights legislation understood the Privileges or Immunities Clause to guarantee those "fundamental principles" "fixed" by the Constitution, including "immunity from . . . excessive fines." 2 Cong. Rec. 384–385 (1874) (Rep. Mills); see also *id.*, at App. 241 (Sen. Norwood). And every post-1855 state constitution banned excessive fines. S. Calabresi & S. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008). The attention given to abusive fines at the time of the Fourteenth Amendment, along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship.

* * *

The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitution-

ally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment's prohibition on excessive fines applies in full to the States.

DAWSON ET UX. *v.* STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 17–419. Argued December 3, 2018—Decided February 20, 2019

After petitioner James Dawson retired from the U. S. Marshals Service, his home State of West Virginia taxed his federal pension benefits as it does all former federal employees. The pension benefits of certain former state and local law enforcement employees, however, are exempt from state taxation. See W. Va. Code Ann. § 11–21–12(c)(6). Mr. Dawson sued, alleging that the state statute violates the intergovernmental tax immunity doctrine as codified at 4 U. S. C. § 111. Under that statute, the United States consents to state taxation of the pay or compensation of federal employees, but only if the state tax does not discriminate on the basis of the source of the pay or compensation. A West Virginia trial court found no significant differences between Mr. Dawson's job duties as a federal marshal and those of the state and local law enforcement officers exempted from taxation and held that the state statute violates § 111's antidiscrimination provision. Reversing, the West Virginia Supreme Court of Appeals emphasized that the state tax exemption applies only to a narrow class of state retirees and was never intended to discriminate against former federal marshals.

Held: The West Virginia statute unlawfully discriminates against Mr. Dawson as § 111 forbids. A State violates § 111 when it treats retired state employees more favorably than retired federal employees and no "significant differences between the two classes" justify the differential treatment. *Davis* v. *Michigan Dept. of Treasury,* 489 U. S. 803, 814–816. Here, West Virginia expressly affords state law enforcement retirees a tax benefit that federal retirees cannot receive, and there are no "significant differences" between Mr. Dawson's former job responsibilities and those of the tax-exempt state law enforcement retirees.

The narrow preference should be permitted, the State argues, because it affects too few people to meaningfully interfere with federal government operations. Section 111, however, disallows *any* state tax that discriminates against a federal officer or employee—not just those that seem especially cumbersome. And in *Davis*, the Court refused a similar invitation to add unwritten qualifications to § 111. That is not to say

that the narrowness of a state tax exemption is irrelevant. If a State exempts only a narrow subset of state retirees, it can comply with § 111 by exempting only the comparable class of federal retirees. The State also argues that the statute is not intended to harm federal retirees but to help certain state retirees. The "State's interest in adopting the discriminatory tax," however, "is simply irrelevant." *Davis*, 489 U. S., at 816.

For reasons other than job responsibilities, the State insists, retired U. S. Marshals and tax-exempt state law enforcement retirees are not "similarly situated." But the State's statute does not draw any such lines. It singles out for preferential treatment retirement plans associated with particular state law enforcement officers. The distinguishing characteristic of the retirement plans is the nature of the jobs previously held by retirees who may participate in them. The state trial court found no "significant differences" between Mr. Dawson's former job responsibilities as a U. S. Marshal and those of the state law enforcement retirees who qualify for the tax exemption, and the West Virginia Supreme Court of Appeals did not upset that finding. By submitting that Mr. Dawson's former job responsibilities are also similar to those of other state law enforcement retirees who do not qualify for a tax exemption, the State mistakes the nature of the inquiry. The relevant question under § 111 is not whether federal retirees are similarly situated to state retirees who do not receive a tax break; it is whether they are similarly situated to those who do. Finally, the State says that the real distinction may not be based on job duties at all but on the relative generosity of pension benefits. The statute as enacted, however, does not classify persons or groups on that basis. And an implicit but lawful distinction cannot save an express and unlawful one. See, *e. g., id.*, at 817. Pp. 175–180.

Reversed and remanded.

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

Lawrence D. Rosenberg argued the cause for petitioners. With him on the briefs were *Victoria Dorfman*, *Mark C. Savignac*, *Meghan Sweeney Bean*, *Anne Marie Lofaso*, *John M. Allan*, and *David E. Cowling*.

Michael R. Huston argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Wall*, *Principal Deputy Assistant Attorney General Zuckerman*, *Deputy Solicitor*

General Stewart, *Gilbert S. Rothenberg*, *Bruce R. Ellisen*, and *Nathaniel S. Pollock*.

Lindsay S. See, Solicitor General of West Virginia, argued the cause for respondent. With her on the brief were *Patrick Morrisey*, Attorney General of West Virginia, *Katherine A. Schultz*, Senior Deputy Attorney General, and *Thomas T. Lampman* and *Sean M. Whelan*, Assistant Attorneys General.*

Justice Gorsuch delivered the opinion of the Court.

If you spent your career as a state law enforcement officer in West Virginia, you're likely to be eligible for a generous tax exemption when you retire. But if you served in federal law enforcement, West Virginia will deny you the same benefit. The question we face is whether a State may discriminate against federal retirees in that way.

For most of his career, James Dawson worked in the U. S. Marshals Service. After he retired, he began looking into the tax treatment of his pension. It turns out that his home State, West Virginia, doesn't tax the pension benefits of certain former state law enforcement employees. But it does tax the benefits of all former federal employees. So Mr. Dawson brought this lawsuit alleging that West Virginia violated 4 U. S. C. § 111. In that statute, the United States has consented to state taxation of the "pay or compensation" of "officer[s] or employee[s] of the United States," but only if the "taxation does not discriminate against the officer or employee because of the source of the pay or compensation." § 111(a).

Section 111 codifies a legal doctrine almost as old as the Nation. In *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), this Court invoked the Constitution's Supremacy Clause to invalidate Maryland's effort to levy a tax on the Bank of the United States. Chief Justice Marshall explained that "the

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**Michael A. Vatis* filed a brief for NARFE as *amicus curiae* urging reversal.

power to tax involves the power to destroy," and he reasoned that if States could tax the Bank they could "defeat" the federal legislative policy establishing it. *Id.*, at 431–432. For the next few decades, this Court interpreted *McCulloch* "to bar most taxation by one sovereign of the employees of another." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 810 (1989). In time, though, the Court softened its stance and upheld neutral income taxes—those that treated federal and state employees with an even hand. See *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938); *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939). So eventually the intergovernmental tax immunity doctrine came to be understood to bar only *discriminatory* taxes. It was this understanding that Congress "consciously . . . drew upon" when adopting § 111 in 1939. *Davis*, 489 U. S., at 813.

It is this understanding, too, that has animated our application of § 111. Since the statute's adoption, we have upheld an Alabama income tax that did not discriminate on the basis of the source of the employees' compensation. *Jefferson County* v. *Acker*, 527 U. S. 423 (1999). But we have invalidated a Michigan tax that discriminated "in favor of retired state employees and against retired federal employees." *Davis*, 489 U. S., at 814. We have struck down a Kansas law that taxed the retirement benefits of federal military personnel at a higher rate than state and local government retirement benefits. *Barker* v. *Kansas*, 503 U. S. 594, 599 (1992). And we have rejected a Texas scheme that imposed a property tax on a private company operating on land leased from the federal government, but a "less burdensome" tax on property leased from the State. *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376, 378, 380 (1960).

Mr. Dawson's own attempt to invoke § 111 met with mixed success. A West Virginia trial court found it "undisputed" that "there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and

duties of the state and local law enforcement officers" that West Virginia exempts from income tax. App. to Pet. for Cert. 22a. In the trial court's judgment, the State's statute thus represented "precisely the type of favoritism" § 111 prohibits. *Id.*, at 23a. But the West Virginia Supreme Court of Appeals saw it differently. In reversing, the court emphasized that relatively few state employees receive the tax break denied Mr. Dawson. The court stressed, too, that the statute's "intent . . . was to give a benefit to a narrow class of state retirees," not to harm federal retirees. *Id.*, at 15a. Because cases in this field have yielded inconsistent results, much as this one has, we granted certiorari to afford additional guidance. 585 U. S. 1015 (2018).

We believe the state trial court had it right. A State violates § 111 when it treats retired state employees more favorably than retired federal employees and no "significant differences between the two classes" justify the differential treatment. *Davis*, 489 U. S., at 814–816 (internal quotation marks omitted); *Phillips Chemical Co.*, 361 U. S., at 383. Here, West Virginia expressly affords state law enforcement retirees a tax benefit that federal retirees cannot receive. And before us everyone accepts the trial court's factual finding that there aren't any "significant differences" between Mr. Dawson's former job responsibilities and those of the tax-exempt state law enforcement retirees. Given all this, we have little difficulty concluding that West Virginia's law unlawfully "discriminate[s]" against Mr. Dawson "because of the source of [his] pay or compensation," just as § 111 forbids.

The State offers this ambitious rejoinder. Even if its statute favors some state law enforcement retirees, the favored class is very small. Most state retirees are treated no better than Mr. Dawson. And this narrow preference, the State suggests, should be permitted because it affects so few people that it couldn't meaningfully interfere with the operations of the federal government.

We are unpersuaded. Section 111 disallows *any* state tax that discriminates against a federal officer or employee—not just those that seem to us especially cumbersome. Nor are we inclined to accept West Virginia's invitation to adorn § 111 with a new and judicially manufactured qualification that cannot be found in its text. In fact, we have already refused an almost identical request. In *Davis*, we rejected Michigan's suggestion that a discriminatory state income tax should be allowed to stand so long as it treats federal employees or retirees the same as "the vast majority of voters in the State." 489 U. S., at 815, n. 4. We rejected, too, any suggestion that a discriminatory tax is permissible so long as it "does not interfere with the Federal Government's ability to perform its governmental functions." *Id.*, at 814. In fact, as long ago as *McCulloch*, Chief Justice Marshall warned against enmeshing courts in the "perplexing" business, "so unfit for the judicial department," of attempting to delineate "what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." 4 Wheat., at 430.

That's not to say the breadth or narrowness of a state tax exemption is irrelevant. Under § 111, the scope of a State's tax exemption may affect the scope of its resulting duties. So if a State exempts from taxation all state employees, it must likewise exempt all federal employees. Conversely, if the State decides to exempt only a narrow subset of state retirees, the State can comply with § 111 by exempting only the comparable class of federal retirees. But the narrowness of a discriminatory state tax law has never been enough to render it necessarily lawful.

With its primary argument lost, the State now proceeds more modestly. Echoing the West Virginia Supreme Court of Appeals, the State argues that we should uphold its statute because it isn't intended to harm federal retirees, only to help certain state retirees. But under the terms of § 111, the "State's interest in adopting the discriminatory tax, no

matter how substantial, is simply irrelevant." *Davis*, 489 U. S., at 816. We can safely assume that discriminatory laws like West Virginia's are almost always enacted with the purpose of benefiting state employees rather than harming their federal counterparts. Yet that wasn't enough to save the state statutes in *Davis*, *Barker*, or *Phillips*, and it can't be enough here. Under § 111 what matters isn't the intent lurking behind the law but whether the letter of the law "treat[s] those who deal with" the federal government "as well as it treats those with whom [the State] deals itself." *Phillips Chemical Co.*, 361 U. S., at 385.

If treatment rather than intent is what matters, the State suggests that it should still prevail for other reasons. Section 111 prohibits "discriminat[ion]," something we've often described as treating similarly situated persons differently. See *Davis*, 489 U. S., at 815–816; *Phillips Chemical Co.*, 361 U. S., at 383. And before us West Virginia insists that even if retired U. S. Marshals and tax-exempt state law enforcement retirees had similar job responsibilities, they aren't "similarly situated" for other reasons. Put another way, the State contends that the difference in treatment its law commands doesn't qualify as unlawful discrimination because it is "directly related to, and justified by," a lawful and "significant differenc[e]" between the two classes. *Davis*, 489 U. S., at 816 (internal quotation marks omitted).

In approaching this argument, everyone before us agrees on at least one thing. Whether a State treats similarly situated state and federal employees differently depends on how the State has defined the favored class. See *id.*, at 817. So if the State defines the favored class by reference to job responsibilities, a similarly situated federal worker will be one who performs comparable duties. But if the State defines the class by reference to some other criteria, our attention should naturally turn there. If a State gives a tax benefit to all retirees over a certain age, for example, the comparable federal retiree would be someone who is also over that age.

So how has West Virginia chosen to define the favored class in this case? The state statute singles out for preferential treatment retirement plans associated with West Virginia police, firefighters, and deputy sheriffs. See W. Va. Code Ann. § 11–21–12(c)(6) (Lexis 2017). The distinguishing characteristic of these plans is the nature of the jobs previously held by retirees who may participate in them; thus, a similarly situated federal retiree is someone who had similar job responsibilities to a state police officer, firefighter, or deputy sheriff. The state trial court correctly focused on this point of comparison and found no "significant differences" between Mr. Dawson's former job responsibilities as a U. S. Marshal and those of the state law enforcement retirees who qualify for the tax exemption. App. to Pet. for Cert. 22a. Nor did the West Virginia Supreme Court of Appeals upset this factual finding. So looking to how the State has chosen to define its favored class only seems to confirm that it has treated similarly situated persons differently because of the source of their compensation.

Of course, West Virginia sees it otherwise. It accepts (for now) that its statute distinguishes between persons based on their former job duties. It accepts, too, the trial court's finding that Mr. Dawson's former job responsibilities are materially identical to those of state retirees who qualify for its tax exemption. But, the State submits, Mr. Dawson's former job responsibilities are *also* similar to those of other state law enforcement retirees who *don't* qualify for its tax exemption. And, the State insists, the fact that it treats federal retirees no worse than (some) similarly situated state employees should be enough to save its statute.

But this again mistakes the nature of our inquiry. Under § 111, the relevant question isn't whether federal retirees are similarly situated to state retirees who *don't* receive a tax benefit; the relevant question is whether they are similarly situated to those who *do.* So, for example, in *Phillips* we compared the class of federal lessees with the *favored* class

of state lessees, even though the State urged us to focus instead on the disfavored class of private lessees. 361 U. S., at 381–382. In *Davis*, we likewise rejected the State's effort to compare the class of federal retirees with state residents who did not benefit from the tax exemption rather than those who did. See 489 U. S., at 815, n. 4.

At this point the State is left to play its final card. Now, it says, maybe the real distinction its statute draws isn't based on former job duties at all. Maybe its statute actually favors certain state law enforcement retirees only because their pensions are less generous than those of their federal law enforcement counterparts. At the least, the State suggests, we should remand the case to the West Virginia courts to explore this possibility.

The problem here is fundamental. While the State was free to draw whatever classifications it wished, the statute it enacted does not classify persons or groups based on the relative generosity of their pension benefits. Instead, it extends a special tax benefit to retirees who served as West Virginia police officers, firefighters, or deputy sheriffs—and it categorically denies that same benefit to retirees who served in similar federal law enforcement positions. Even if Mr. Dawson's pension turned out to be *identical* to a state law enforcement officer's pension, the law as written would deny him a tax exemption. West Virginia's law thus discriminates "because of the source of . . . pay or compensation" in violation of § 111. Whether the unlawful classification found in the text of a statute might serve as some sort of proxy for a lawful classification hidden behind it is neither here nor there. No more than a beneficent legislative intent, an implicit but lawful distinction cannot save an express and unlawful one.

Our precedent confirms this too. In *Davis*, Michigan argued that a state law expressly discriminating between federal and state retirees was really just distinguishing between those with more and less generous pensions. *Id.*, at

816. We rejected this attempt to rerationalize the statute, explaining that "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits" but "would discriminate on the basis of the amount of benefits received by individual retirees." *Id.*, at 817. The fact is, when States seek to tax the use of a fellow sovereign's property, the Constitution and Congress have always carefully constrained their authority. *Id.*, at 810–814. And in this sensitive field it is not too much to ask that, if a State *wants* to draw a distinction based on the generosity of pension benefits, it enact a law that actually *does* that.

Because West Virginia's statute unlawfully discriminates against Mr. Dawson, we reverse the judgment of the West Virginia Supreme Court of Appeals and remand the case for further proceedings not inconsistent with this opinion, including the determination of an appropriate remedy.

It is so ordered.

Syllabus

YOVINO, FRESNO COUNTY SUPERINTENDENT OF SCHOOLS *v.* RIZO

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

No. 18–272. Decided February 25, 2019

Aileen Rizo brought suit against the Fresno County superintendent of schools claiming, among other things, that the county was violating the Equal Pay Act of 1963, 77 Stat. 56–57, 29 U. S. C. § 206(d). After the District Court denied the county's motion for summary judgment, the Ninth Circuit granted the county's petition for interlocutory review. A three-judge panel of the Ninth Circuit vacated the decision of the District Court based on a prior Ninth Circuit decision, *Kouba* v. *Allstate Ins. Co.*, 691 F. 2d 873, and the court granted en banc review. Subsequently, on March 29, 2018, a Ninth Circuit judge, the Honorable Stephen Reinhardt, died. On April 9, 2018, the Ninth Circuit issued its en banc opinion in this case, and included the following footnote: "Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death." 887 F. 3d 453, 456, n. *.

Held: Because Judge Reinhardt was no longer a judge when the en banc decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. The Ninth Circuit's statement that the votes and opinions in the en banc case were inalterably final at least 12 days prior to the date on which the decision was "filed" and released to the public is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent. As for judicial practice, the Court is not aware of any rule or decision of the Ninth Circuit that renders judges' votes and opinions immutable prior to their public release. And it is generally understood that a judge may change his or her position up to the very moment when a decision is released. The Court endorsed this rule in *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, which interpreted an earlier version of 28 U. S. C. § 46(c), the statutory provision authorizing the courts of appeals to hear cases en banc. The current version of this provision permits a circuit to adopt a rule allowing a senior circuit judge to sit on an en banc case under certain circumstances, but at the time of the Court's decision in *American-Foreign S. S. Corp.*, only active judges could sit en banc. See 28 U. S. C. § 46(c) (1958 ed.). In *American-Foreign S. S. Corp.*,

Judge Harold Medina was one of the five active judges on the Second Circuit when the court granted a petition for rehearing en banc. After briefing was complete but before an opinion issued, Judge Medina took senior status. When the en banc court issued its decision, the majority opinion was joined by Judge Medina and two active Circuit Judges; the two other active Circuit Judges dissented. This Court vacated the judgment and remanded the case, holding that "[a]n 'active' judge is a judge who has not retired 'from regular active service,' " and "[a] case or controversy is 'determined' when it is decided." 363 U. S., at 688. Similarly here, when the Ninth Circuit issued its opinion in this case, Judge Reinhardt was neither an active judge nor a senior judge. For that reason, by statute he was without power to participate in the en banc court's decision at the time it was rendered. The Ninth Circuit's error is also shown by the innumerable courts of appeals that have invoked § 46(c) and § 46(d) to hold that when one of the judges on a three-judge panel dies, retires, or resigns after an appeal is argued or is submitted for decision without argument, the other two judges on the panel may issue a decision if they agree. The Court is not aware of any case still on the books in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time. By counting Judge Reinhardt as a member of the majority here, the Ninth Circuit effectively allowed a judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.

Certiorari granted; 887 F. 3d 453, vacated and remanded.

Per Curiam.

The petition in this case presents the following question: May a federal court count the vote of a judge who dies before the decision is issued?

A judge on the United States Court of Appeals for the Ninth Circuit, the Honorable Stephen Reinhardt, died on March 29, 2018, but the Ninth Circuit counted his vote in cases decided after that date.* In the present case, Judge

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*In *Altera Corp.* v. *Commissioner*, 2018 WL 3542989 (CA9, July 24, 2018), decided four months after Judge Reinhardt died, his vote was initially counted as one of the two judges in the majority. A footnote in the opinion stated: "Judge Reinhardt fully participated in this case and formally concurred in the majority opinion prior to his death." *Id.*, at

Reinhardt was listed as the author of an en banc decision issued on April 9, 2018, 11 days after he passed away. By counting Judge Reinhardt's vote, the court deemed Judge Reinhardt's opinion to be a majority opinion, which means that it constitutes a precedent that all future Ninth Circuit panels must follow. See *United States* v. *Caperna*, 251 F. 3d 827, 831, n. 2 (2001). Without Judge Reinhardt's vote, the opinion attributed to him would have been approved by only 5 of the 10 members of the en banc panel who were still living when the decision was filed. Although the other five living judges concurred in the judgment, they did so for different reasons. The upshot is that Judge Reinhardt's vote made a difference. Was that lawful?

I

Aileen Rizo, an employee of the Fresno County Office of Education, brought suit against the superintendent of schools, claiming, among other things, that the county was violating the Equal Pay Act of 1963, 77 Stat. 56–57, 29 U. S. C. § 206(d). The District Court denied the county's motion for summary judgment, and the Ninth Circuit granted the county's petition for interlocutory review. A three-judge panel of the Ninth Circuit vacated the decision of the District Court based on a prior Ninth Circuit decision, *Kouba* v. *Allstate Ins. Co.*, 691 F. 2d 873 (1982), that the panel "believed it was compelled to follow." 887 F. 3d 453, 459 (2018) (en banc). The court then granted en banc review "to clarify the law, including the vitality and effect of *Kouba*." *Ibid.* Like other courts of appeals, the Ninth Circuit takes the position that a panel decision like that in *Kouba* can be overruled only by a decision of the en banc court or this Court, see *Naruto* v. *Slater*, 888 F. 3d 418, 421 (2018), and therefore a clear purpose of the en banc decision issued on

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*1, n. **. Later, however, the court vacated the opinion and issued an order reconstituting the panel. *Altera Corp.* v. *Commissioner*, 898 F. 3d 1266 (CA9 2018). No similar action was taken in this case.

April 9 was to announce a new binding Ninth Circuit interpretation of the Equal Pay Act issue previously addressed by *Kouba*. The opinion authored by Judge Reinhardt and issued 11 days after his death purports to do that, but its status as a majority opinion of the en banc court depends on counting Judge Reinhardt's vote.

The opinions issued by the en banc Ninth Circuit state that they were "Filed April 9, 2018," and they were entered on the court's docket on that date. A footnote at the beginning of the en banc opinion states:

> "Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death." 887 F. 3d, at 456, n. *.

II

The Ninth Circuit did not expressly explain why it concluded that it could count Judge Reinhardt's opinion as "[t]he majority opinion" even though it was not endorsed by a majority of the living judges at the time of issuance, but the justification suggested by the footnote noted above is that the votes and opinions in the en banc case were inalterably fixed at least 12 days prior to the date on which the decision was "filed," entered on the docket, and released to the public. This justification is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent.

As for judicial practice, we are not aware of any rule or decision of the Ninth Circuit that renders judges' votes and opinions immutable at some point in time prior to their public release. And it is generally understood that a judge may change his or her position up to the very moment when a decision is released.

We endorsed this rule in *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685 (1960), which interpreted an earlier version of 28 U. S. C. § 46(c), the statutory provi-

sion authorizing the courts of appeals to hear cases en banc. The current version of this provision permits a circuit to adopt a rule allowing a senior circuit judge to sit on an en banc case under certain circumstances, but at the time of our decision in *American-Foreign S. S. Corp.*, this was not allowed. Instead, only active judges could sit en banc. See 28 U. S. C. § 46(c) (1958 ed.).

In *American-Foreign S. S. Corp.*, Judge Harold Medina was one of the five active judges on the Second Circuit when the court granted a petition for rehearing en banc. After briefing was complete but before an opinion issued, Judge Medina took senior status. When the en banc court issued its decision, the majority opinion was joined by Judge Medina and two active Circuit Judges; the two other active Circuit Judges dissented. We vacated the judgment and remanded the case, holding that "[a]n 'active' judge is a judge who has not retired 'from regular active service,'" and "[a] case or controversy is 'determined' when it is decided." 363 U. S., at 688. Because Judge Medina was not in regular active service when the opinion issued, he was "without power to participate" in the en banc decision. *Id.*, at 687, 691; cf. *id.*, at 691–692 (Harlan, J., dissenting).

Our holding in *American-Foreign S. S. Corp.* applies with equal if not greater force here. When the Ninth Circuit issued its opinion in this case, Judge Reinhardt was neither an active judge nor a senior judge. For that reason, by statute he was without power to participate in the en banc court's decision at the time it was rendered.

In addition to § 46(c), § 46(d) also shows that what the Ninth Circuit did here was unlawful. That provision states:

> "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

Under § 46(c), a court of appeals case may be decided by a panel of three judges, and therefore on such a panel

two judges constitute a quorum and are able to decide an appeal—provided, of course, that they agree. Invoking this rule, innumerable court of appeals decisions hold that when one of the judges on a three-judge panel dies, retires, or resigns after an appeal is argued or is submitted for decision without argument, the other two judges on the panel may issue a decision if they agree. See, *e. g., United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 927 (CA2 1957); *Murray* v. *National Broadcasting Co.*, 35 F. 3d 45, 47 (CA2 1994); *Singh* v. *Ashcroft*, 121 Fed. Appx. 471, 472, n. (CA3 2005); *ASW Allstate Painting & Constr. Co.* v. *Lexington Ins. Co.*, 188 F. 3d 307, 309, n. (CA5 1999); *Clark* v. *Metropolitan Life Ins. Co.*, 67 F. 3d 299, n. ** (CA6 1995); *Kulumani* v. *Blue Cross Blue Shield Assn*, 224 F. 3d 681, 683, n. ** (CA7 2000). See also *Nguyen* v. *United States*, 539 U. S. 69, 82 (2003) ("[S]ettled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified"). With the exception of one recent decision issued by the Ninth Circuit after Judge Reinhardt's death but subsequently withdrawn, see *supra*, at 182–183, n., we are aware of no cases in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time.

* * *

Because Judge Reinhardt was no longer a judge at the time when the en banc decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.

We therefore grant the petition for certiorari, vacate the judgment of the United States Court of Appeals for the

Ninth Circuit, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR concurs in the judgment.

Syllabus

NUTRACEUTICAL CORP. *v.* LAMBERT

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

No. 17–1094. Argued November 27, 2018—Decided February 26, 2019

Respondent Troy Lambert filed a class action in federal court alleging that petitioner Nutraceutical Corporation's marketing of a dietary supplement ran afoul of California consumer-protection law. On February 20, 2015, the District Court ordered the class decertified. Pursuant to Federal Rule of Civil Procedure 23(f), Lambert had 14 days from that point to ask the Court of Appeals for permission to appeal the order. Instead, he filed a motion for reconsideration on March 12, which the District Court denied on June 24. Fourteen days later, Lambert petitioned the Court of Appeals for permission to appeal the decertification order. Nutraceutical objected that Lambert's petition was untimely because it was filed far more than 14 days from the February 20 decertification order. The Ninth Circuit held, however, that Rule 23(f)'s deadline should be tolled under the circumstances because Lambert had "acted diligently." On the merits, the court reversed the decertification order.

Held: Rule 23(f) is not subject to equitable tolling. Pp. 191–198.

(a) Rule 23(f) is properly classified as a nonjurisdictional claim-processing rule, but that does not render it malleable in every respect. Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether its text leaves room for such flexibility. See *Carlisle* v. *United States*, 517 U. S. 416, 421. Here, the governing rules speak directly to the issue of Rule 23(f)'s flexibility and make clear that its deadline is not subject to equitable tolling. While Federal Rule of Appellate Procedure 2 authorizes a court of appeals for good cause to "suspend any provision . . . in a particular case," it does so with a caveat: "except as otherwise provided in Rule 26(b)." Rule 26(b), which generally authorizes extensions of time, in turn includes the carveout that a court of appeals "may not extend the time to file . . . a petition for permission to appeal"—the precise type of filing at issue here. The Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist. Precedent confirms this understanding. See *Carlisle*, 517 U. S. 416, and *United States* v. *Robinson*, 361 U. S. 220. Pp. 191–194.

(b) Lambert's counterarguments do not withstand scrutiny. Lambert argues that Rule 26(b)'s prohibition on extending the time to file a petition for permission to appeal should be understood to foreclose only formal extensions granted *ex ante* and to leave courts free to excuse late filings on equitable grounds after the fact. But this Court has already rejected an indistinguishable argument concerning Federal Rule of Criminal Procedure 45(b) in *Robinson*, and Lambert offers no sound basis for reading Rule 26(b) differently. Further, the 1998 Advisory Committee Notes to Rule 23(f) speak to a court of appeals' discretion to decide whether a particular certification decision warrants review in an interlocutory posture, not to its determination whether a petition is timely. Finally, Lambert notes that every Court of Appeals to have considered the question would accept a Rule 23(f) petition filed within 14 days of the resolution of a motion for reconsideration that was itself filed within 14 days of the original order. Although his own reconsideration motion was not filed until after the initial 14 days had run, he cites the lower courts' handling of such cases as evidence that Rule 23(f) is amenable to tolling. However, a timely motion for reconsideration affects the antecedent issue of when the 14-day limit begins to run, not the availability of tolling. See *United States* v. *Ibarra*, 502 U. S. 1, 4, n. 2. Pp. 194–197.

(c) On remand, the Court of Appeals can address other preserved arguments about whether Lambert's Rule 23(f) petition was timely even without resort to tolling. Pp. 197–198.

870 F. 3d 1170, reversed and remanded.

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

John C. Hueston argued the cause for petitioner. With him on the briefs were *Steven N. Feldman* and *Joseph A. Reiter*.

Jonathan A. Herstoff argued the cause for respondent. With him on the brief were *Ronald A. Marron* and *Michael Houchin*.

Justice Sotomayor delivered the opinion of the Court.

To take an immediate appeal from a federal district court's order granting or denying class certification, a party must first seek permission from the relevant court of appeals

"within 14 days after the order is entered." Fed. Rule Civ. Proc. 23(f). This case poses the question whether a court of appeals may forgive on equitable tolling grounds a failure to adhere to that deadline when the opposing party objects that the appeal was untimely. The applicable rules of procedure make clear that the answer is no.

I

In March 2013, respondent Troy Lambert sued petitioner Nutraceutical Corporation in federal court, alleging that its marketing of a dietary supplement ran afoul of California consumer-protection law. The District Court for the Central District of California initially permitted Lambert to litigate on behalf of a class of similarly situated consumers. On February 20, 2015, however, the District Court revisited that decision and ordered the class decertified. From that point, Lambert had 14 days to ask the Court of Appeals for the Ninth Circuit for permission to appeal the order. See *ibid.*

Instead of filing a petition for permission to appeal, Lambert informed the District Court at a status conference on March 2 (10 days after the decertification order) that he would "want to file a motion for reconsideration" in the near future. App. to Pet. for Cert. 74. The court told Lambert to file any such motion "no later than" March 12. *Id.*, at 76. Neither Lambert nor the District Court mentioned the possibility of an appeal.

Lambert filed his motion for reconsideration, in compliance with the District Court's schedule, on March 12 (20 days after the decertification order). The District Court denied the motion on June 24, 2015. Fourteen days later, on July 8, Lambert petitioned the Court of Appeals for permission to appeal the decertification order. Nutraceutical's response argued that Lambert's petition was untimely because more than four months had elapsed since the District Court's February

20 order decertifying the class, far more than the 14 days that Federal Rule of Civil Procedure 23(f) allows. App. 41.

Notwithstanding the petition's apparent untimeliness, the Court of Appeals "deem[ed] Lambert's petition timely" because, in its view, the Rule 23(f) deadline should be "tolled" under the circumstances. 870 F. 3d 1170, 1176 (CA9 2017). The Court of Appeals reasoned that Rule 23(f)'s time limit is "non-jurisdictional, and that equitable remedies softening the deadline are therefore generally available." *Ibid.* Tolling was warranted, the court concluded, because Lambert "informed the [District Court] orally of his intention to seek reconsideration" within Rule 23(f)'s 14-day window, complied with the District Court's March 12 deadline, and "otherwise acted diligently." *Id.*, at 1179. On the merits, the Court of Appeals held that the District Court abused its discretion in decertifying the class. *Id.*, at 1182–1184. It reversed the decertification order. *Id.*, at 1184.

In accepting Lambert's petition, the Court of Appeals "recognize[d] that other circuits would likely not toll the Rule 23(f) deadline in Lambert's case."[1] *Id.*, at 1179. We granted certiorari. 585 U. S. 1015 (2018).

II

When Lambert filed his petition, Federal Rule of Civil Procedure 23(f) authorized courts of appeals to "permit an appeal from an order granting or denying class-action certification . . . if a petition for permission to appeal is filed . . . within 14 days after the order is entered."[2] The Court of

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[1] See *Nucor Corp.* v. *Brown*, 760 F. 3d 341, 343 (CA4 2014); *Fleischman* v. *Albany Med. Ctr.*, 639 F. 3d 28, 31 (CA2 2011); *Gutierrez* v. *Johnson & Johnson*, 523 F. 3d 187, 193, and n. 5 (CA3 2008); *McNamara* v. *Felderhof*, 410 F. 3d 277, 281 (CA5 2005); *Gary* v. *Sheahan*, 188 F. 3d 891, 892 (CA7 1999).

[2] Rule 23(f) has since been amended and now reads, in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification . . . . A party must file a petition for permission

Appeals held that Rule 23(f)'s time limitation is nonjurisdictional and thus, necessarily, subject to equitable tolling. While we agree that Rule 23(f) is nonjurisdictional, we conclude that it is not subject to equitable tolling.

Because Rule 23(f)'s time limitation is found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule. See *Hamer* v. *Neighborhood Housing Servs. of Chicago*, 583 U. S. 17, 25 (2017).[3] It therefore can be waived or forfeited by an opposing party. See *Kontrick* v. *Ryan*, 540 U. S. 443, 456 (2004). The mere fact that a time limit lacks jurisdictional force, however, does not render it malleable in every respect. Though subject to waiver and forfeiture, some claim-processing rules are "mandatory"—that is, they are " 'unalterable' " if properly raised by an opposing party. *Manrique* v. *United States*, 581 U. S. 116, 121 (2017) (quoting *Eberhart* v. *United States*, 546 U. S. 12, 15 (2005) (*per curiam*)); see also *Kontrick*, 540 U. S., at 456. Rules in this mandatory camp are not susceptible of the equitable approach that the Court of Appeals applied here. Cf. *Manrique*, 581 U. S., at 125 ("By definition, mandatory claim-processing rules . . . are not subject to harmless-error analysis").

Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility. See *Carlisle* v. *United States*, 517 U. S. 416, 421 (1996). Where the pertinent rule or rules invoked show a clear intent to preclude tolling,

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to appeal . . . within 14 days after the order is entered . . . ." The difference is immaterial for purposes of this case.

[3] To be sure, this Court has previously suggested that time limits for taking an appeal are "mandatory and jurisdictional." *Budinich* v. *Becton Dickinson & Co.*, 486 U. S. 196, 203 (1988). As our more recent precedents have made clear, however, this Court once used that phrase in a " 'less than meticulous' " manner. *Hamer*, 583 U. S., at 27; *Kontrick* v. *Ryan*, 540 U. S. 443, 454 (2004). Those earlier statements did not necessarily signify that the rules at issue were formally "jurisdictional" as we use that term today.

courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving. *Ibid.*; see *Kontrick*, 540 U. S., at 458; *United States* v. *Robinson*, 361 U. S. 220, 229 (1960). Courts may not disregard a properly raised procedural rule's plain import any more than they may a statute's. See *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 255 (1988).

Here, the governing rules speak directly to the issue of Rule 23(f)'s flexibility and make clear that its deadline is not subject to equitable tolling. To begin with, Rule 23(f) itself conditions the possibility of an appeal on the filing of a petition "within 14 days" of "an order granting or denying class-action certification." Federal Rule of Appellate Procedure 5(a)(2) likewise says that a petition for permission to appeal "must be filed within the time specified." To be sure, the simple fact that a deadline is phrased in an unqualified manner does not necessarily establish that tolling is unavailable. See Fed. Rule App. Proc. 2 (allowing suspension of other Rules for "good cause"); Fed. Rule App. Proc. 26(b) (similar); Fed. Rule Crim. Proc. 45(b) (similar); Fed. Rule Civ. Proc. 6(b) (similar). Here, however, the Federal Rules of Appellate Procedure single out Civil Rule 23(f) for inflexible treatment. While Appellate Rule 2 authorizes a court of appeals for good cause to "suspend any provision of these rules in a particular case," it does so with a conspicuous caveat: "except as otherwise provided in Rule 26(b)." Appellate Rule 26(b), which generally authorizes extensions of time, in turn includes this express carveout: A court of appeals "may not extend the time to file . . . a petition for permission to appeal." Fed. Rule App. Proc. 26(b)(1). In other words, Appellate Rule 26(b) says that the deadline for the precise type of filing at issue here may not be extended. The Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist.

Precedent confirms this understanding. *Carlisle*, 517 U. S. 416, and *Robinson*, 361 U. S. 220, both centered on Federal Rule of Criminal Procedure 45(b), an extension-of-time provision that parallels Appellate Rule 26(b). *Carlisle* addressed Rule 45(b)'s interaction with the time limit in Criminal Rule 29 for filing a postverdict motion for judgment of acquittal. See 517 U. S., at 419–423. Rule 45(b), as it was then written, made clear that " 'the court may not extend the time for taking any action' " under Rule 29, " 'except to the extent and under the conditions' " stated therein. *Id.*, at 421. Because the Court found the text's purpose to foreclose acceptance of untimely motions "plain and unambiguous," the Court held that the District Court lacked that authority. *Ibid.* Likewise, in *Robinson*, the Court held that an earlier iteration of Rule 45(b) that said " 'the court may not enlarge . . . the period for taking an appeal' " prohibited a court from accepting a notice of appeal that was untimely filed. 361 U. S., at 224 (quoting Fed. Rule Crim. Proc. 45(b)).

Because Rule 23(f) is not amenable to equitable tolling, the Court of Appeals erred in accepting Lambert's petition on those grounds.

III

Lambert resists the foregoing conclusion on a variety of grounds. None withstands scrutiny.

Most pertinently, Lambert argues that the abovementioned Rules are less emphatic than they first appear. Rule 26(b)'s general grant of authority to relax time limits, he notes, refers both to "extend[ing]" the time to file a petition for permission to appeal and "permit[ting]" a petition to be filed after the deadline. See Fed. Rule App. Proc. 26(b) ("For good cause, the court may extend the time prescribed by these rules . . . to perform any act, *or* may permit an act to be done after that time expires" (emphasis added)). Rule 26(b)(1) then prohibits courts only from "extend[ing] the time to file," while making no further mention of "per-

mit[ting] an act to be done after that time expires." In Lambert's view, Rule 26(b)(1)'s prohibition on "extend[ing] the time to file" a petition for permission to appeal therefore should be understood to foreclose only formal extensions granted *ex ante*, and to leave courts free to excuse late filings on equitable grounds after the fact.

Whatever we would make of this contention were we writing on a blank slate, this Court has already rejected an indistinguishable argument in *Robinson*. There, Rule 45(b) generally authorized both " 'enlarg[ing]' " a filing period and " 'permit[ting] the act to be done after [its] expiration,' " then specifically forbade " 'enlarg[ing] . . . the period for taking an appeal.' " 361 U. S., at 223. The lower court had accepted a late filing on the ground that to do so "would not be to 'enlarge' the period for taking an appeal, but rather would be only to 'permit the act to be done' after the expiration of the specified period." *Ibid.*; see also *id.*, at 230 (Black and Douglas, JJ., dissenting). This Court reversed, explaining that acceptance of the late filing did, in fact, "enlarge" the relevant filing period. *Id.*, at 224. Lambert offers no sound basis for reading Rule 26(b) differently, and none is apparent. Cf. *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312, 315 (1988) ("Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal").[4]

Likewise unavailing is Lambert's reliance on the 1998 Advisory Committee Notes to Rule 23(f), which say that a petition "may be granted or denied on the basis of any con-

[4] Lambert's other textual arguments center on rules addressed to appeals as of right. See Brief for Respondent 9–12, 17–18, 36–38 (discussing, *e. g.*, Fed. Rules App. Proc. 3 and 4). As noted above, Rules 5 and 26 specifically address petitions for permission to appeal from nonfinal orders such as the one at issue here. Lambert's attempts to reason by implication from other, inapposite Rules therefore bear little weight. See *Manrique* v. *United States*, 581 U. S. 116, 123–124 (2017).

sideration that the court of appeals finds persuasive." Advisory Committee's Notes on 1998 Amendments to Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 815; see also *Microsoft Corp.* v. *Baker*, 582 U. S. 23, 31–33, and n. 6 (2017). That comment, however, speaks to a court of appeals' discretion to decide whether a particular certification decision warrants review in an interlocutory posture, not its determination whether a petition is timely. If anything, the comment serves as a reminder that interlocutory appeal is an exception to the general rule that appellate review must await final judgment—which is fully consistent with a conclusion that Rule 23(f)'s time limit is purposefully unforgiving. See *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 107 (2009) ("The justification for immediate appeal must . . . be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes"); cf. *Baker*, 582 U. S., at 31 (describing Rule 23(f) as "the product of careful calibration").[5]

Finally, Lambert notes that every Court of Appeals to have considered the question would accept a Rule 23(f) petition filed within 14 days of the resolution of a motion for reconsideration that was itself filed within 14 days of the original order. See 870 F. 3d, at 1177–1178, n. 3 (collecting cases). Although Lambert's own reconsideration motion was not filed until after the initial 14 days had run,[6] he cites the lower courts' handling of such cases as evidence that Rule 23(f) is indeed amenable to tolling. He further sug-

[5] Lambert also argues that interpreting Rule 23(f) flexibly would be consistent with the Rules' generally equitable approach. Brief for Respondent 21—27. But that simply fails to engage with the dispositive point here: Any such background preference for flexibility has been overcome by the clear text of the relevant rules. See, *e. g., Young* v. *United States*, 535 U. S. 43, 49 (2002).

[6] Lambert argues that his counsel's statements 10 days after the District Court's decertification order constituted an oral motion for reconsideration, but the transcript belies any such claim. See App. to Pet. for Cert. 71 (requesting only "leave to file"); *id.*, at 74 (informing the District Court that Lambert "will want to file" a reconsideration motion).

gests that there is no basis for relaxing the 14-day limit in one situation but not the other.

Lambert's argument relies on a mistaken premise. A timely motion for reconsideration filed within a window to appeal does not toll anything; it "renders an otherwise final decision of a district court not final" for purposes of appeal. *United States* v. *Ibarra*, 502 U. S. 1, 6 (1991) (*per curiam*). In other words, it affects the antecedent issue of when the 14-day limit begins to run, not the availability of tolling. See *id.*, at 4, n. 2 (noting that this practice is not "a matter of tolling").[7]

IV

Lambert devotes much of his merits brief to arguing the distinct question whether his Rule 23(f) petition was timely even without resort to tolling. First, he argues that, even if his motion for reconsideration was not filed within 14 days of the decertification order, it was filed within the time allowed (either by the Federal Rules or by the District Court at the March 2 hearing). The timeliness of that motion, Lambert contends, "cause[d] the time to appeal to run from the disposition of the reconsideration motion, not from the original order." Brief for Respondent 8; see *id.*, at 9–18. Alternatively, he argues that the District Court's order denying reconsideration was itself " 'an order granting or denying class-action certification' " under Rule 23(f). *Id.*, at 8–9,

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[7] We therefore have no occasion to address the effect of a motion for reconsideration filed within the 14-day window. Moreover, because nothing the District Court did misled Lambert about the appeal filing deadline, see *supra*, at 190, we similarly have no occasion to address the question whether his motion would be timely if that had occurred. See *Carlisle* v. *United States*, 517 U. S. 416, 428 (1996); *id.*, at 435–436 (Ginsburg, J., concurring) (discussing *Thompson* v. *INS*, 375 U. S. 384, 386–387 (1964) (*per curiam*), and *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, 216–217 (1962) (*per curiam*)). We also have no occasion to address whether an insurmountable impediment to filing timely might compel a different result. Cf. Fed. Rule App. Proc. 26(a)(3) (addressing computation of time when "the clerk's office is inaccessible").

19–20. The Court of Appeals did not rule on these alternative grounds, which are beyond the scope of the question presented. Mindful of our role, we will not offer the first word. See *United States* v. *Stitt*, 586 U. S. 27, 36 (2018); *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U. S. 438, 457 (2009). If the Court of Appeals concludes that these arguments have been preserved, it can address them in the first instance on remand.

* * *

The relevant Rules of Civil and Appellate Procedure clearly foreclose the flexible tolling approach on which the Court of Appeals relied to deem Lambert's petition timely. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JAM ET AL. *v.* INTERNATIONAL FINANCE CORP.

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

No. 17–1011. Argued October 31, 2018—Decided February 27, 2019

In 1945, Congress passed the International Organizations Immunities Act (IOIA), which, among other things, grants international organizations the "same immunity from suit . . . as is enjoyed by foreign governments." 22 U. S. C. § 288a(b). At that time, foreign governments were entitled to virtually absolute immunity as a matter of international grace and comity. In 1952, the State Department adopted a more restrictive theory of foreign sovereign immunity, which Congress subsequently codified in the Foreign Sovereign Immunities Act (FSIA), 28 U. S. C. § 1602. The FSIA gives foreign sovereign governments presumptive immunity from suit, § 1604, subject to several statutory exceptions, including, as relevant here, an exception for actions based on commercial activity with a sufficient nexus with the United States, § 1605(a)(2).

Respondent International Finance Corporation (IFC), an IOIA international organization, entered into a loan agreement with Coastal Gujarat Power Limited, a company based in India, to finance the construction of a coal-fired power plant in Gujarat. Petitioners sued the IFC, claiming that pollution from the plant harmed the surrounding air, land, and water. The District Court, however, held that the IFC was immune from suit because it enjoyed the virtually absolute immunity that foreign governments enjoyed when the IOIA was enacted. The D. C. Circuit affirmed in light of its decision in *Atkinson* v. *Inter-American Development Bank*, 156 F. 3d 1335.

Held: The IOIA affords international organizations the same immunity from suit that foreign governments enjoy today under the FSIA. Pp. 207–215.

(a) The IOIA "same as" formulation is best understood as making international organization immunity and foreign sovereign immunity continuously equivalent. The IOIA is thus like other statutes that use similar or identical language to place two groups on equal footing. See, *e. g.*, Civil Rights Act of 1866, 42 U. S. C. §§ 1981(a), 1982; Federal Tort Claims Act, 28 U. S. C. § 2674. Whatever the ultimate purpose of international organization immunity may be, the immediate purpose of the IOIA immunity provision is expressed in language that Congress

typically uses to make one thing continuously equivalent to another. Pp. 207–209.

(b) That reading is confirmed by the "reference canon" of statutory interpretation. When a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. In contrast, when a statute refers to another statute by specific title, the referenced statute is adopted as it existed when the referring statute was enacted, without any subsequent amendments. Federal courts have often relied on the reference canon to harmonize a statute with an external body of law that the statute refers to generally. The IOIA's reference to the immunity enjoyed by foreign governments is to an external body of potentially evolving law, not to a specific provision of another statute. Nor is it a specific reference to a common law concept with a fixed meaning. The phrase "immunity enjoyed by foreign governments" is not a term of art with substantive content but rather a concept that can be given scope and content only by reference to the rules governing foreign sovereign immunity. Pp. 209–211.

(c) The D. C. Circuit relied upon *Atkinson*'s conclusion that the reference canon's probative force was outweighed by an IOIA provision authorizing the President to alter the immunity of an international organization. But the fact that the President has power to modify otherwise applicable immunity rules is perfectly compatible with the notion that those rules might themselves change over time in light of developments in the law governing foreign sovereign immunity. The *Atkinson* court also did not consider the opinion of the State Department, whose views in this area ordinarily receive "special attention," *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U. S. 170, 181, and which took the position that immunity rules of the IOIA and the FSIA were linked following the FSIA's enactment. Pp. 211–213.

(d) The IFC contends that interpreting the IOIA immunity provision to grant only restrictive immunity would defeat the purpose of granting immunity in the first place, by subjecting international organizations to suit under the commercial activity exception of the FSIA for most or all of their core activities. This would be particularly true with respect to international development banks, which use the tools of commerce to achieve their objectives. Those concerns are inflated. The IOIA provides only default rules. An international organization's charter can always specify a different level of immunity, and many do. Nor is it clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA. But even if it does

qualify as commercial, that does not mean the organization is automatically subject to suit, since other FSIA requirements must also be met, see, *e. g.*, 28 U. S. C. §§ 1603, 1605(a)(2). Pp. 213–215.

860 F. 3d 703, reversed and remanded.

Roberts, C. J., delivered the opinion of the Court, in which Thomas, Ginsburg, Alito, Sotomayor, Kagan, and Gorsuch, JJ., joined. Breyer, J., filed a dissenting opinion, *post*, p. 216. Kavanaugh, J., took no part in the consideration or decision of the case.

Jeffrey L. Fisher argued the cause for petitioners. With him on the briefs were *Pamela S. Karlan*, *David T. Goldberg*, *Richard L. Herz*, *Marco B. Simons*, *Michelle C. Harrison*, *Anton Metlitsky*, *Jennifer Sokoler*, *Samantha Goldstein*, and *Jason Zarrow*.

Jonathan Y. Ellis argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Deputy Solicitor General Kneedler*, *Sharon Swingle*, *Lewis S. Yelin*, and *Jennifer G. Newstead*.

Donald B. Verrilli, Jr., argued the cause for respondent. With him on the brief were *Ginger D. Anders*, *Christopher M. Lynch*, *Jonathan S. Meltzer*, *Francis A. Vasquez, Jr.*, *Dana Foster*, and *Maxwell J. Kalmann*.*

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*Briefs of *amici curiae* urging reversal were filed for Bipartisan Members of Congress by *Nikesh Jindal*, *Jeremy M. Bylund*, *Justin A. Torres*, *Anne M. Voigts*, and *Samuel J. Dubbin*; for Center for International Environmental Law et al. by *Henry C. Su*; and for Professors of International Organization and International Law by *Patrick W. Pearsall* and *Lori F. Damrosch*.

Briefs of *amici curiae* urging affirmance were filed for the African Union et al. by *Jonathan I. Blackman*; for Former Executive Branch Attorneys by *Jonathan S. Franklin* and *Peter B. Siegal*; for Former Secretaries of State et al. by *Stephen M. Nickelsburg*; for International Bank for Reconstruction and Development et al. by *Jeffrey T. Green*, *Frank R. Volpe*, and *Jennifer J. Clark*; for International Law Experts by *Lawrence H. Martin* and *Peter R. Shults*; and for Member Countries et al. by *Paul D. Clement*, *Erin E. Murphy*, and *Ruthanne M. Deutsch*.

Chief Justice Roberts delivered the opinion of the Court.

The International Organizations Immunities Act of 1945 grants international organizations such as the World Bank and the World Health Organization the "same immunity from suit . . . as is enjoyed by foreign governments." 22 U. S. C. § 288a(b). At the time the IOIA was enacted, foreign governments enjoyed virtually absolute immunity from suit. Today that immunity is more limited. Most significantly, foreign governments are not immune from actions based upon certain kinds of commercial activity in which they engage. This case requires us to determine whether the IOIA grants international organizations the virtually absolute immunity foreign governments enjoyed when the IOIA was enacted, or the more limited immunity they enjoy today.

Respondent International Finance Corporation is an international organization headquartered in the United States. The IFC finances private-sector development projects in poor and developing countries around the world. About 10 years ago, the IFC financed the construction of a power plant in Gujarat, India. Petitioners are local farmers and fishermen and a small village. They allege that the power plant has polluted the air, land, and water in the surrounding area. Petitioners sued the IFC for damages and injunctive relief in Federal District Court, but the IFC claimed absolute immunity from suit. Petitioners argued that the IFC was entitled under the IOIA only to the limited or "restrictive" immunity that foreign governments currently enjoy. We agree.

I

A

In the wake of World War II, the United States and many of its allies joined together to establish a host of new international organizations. Those organizations, which included the United Nations, the International Monetary Fund, and the World Bank, were designed to allow member countries to

collectively pursue goals such as stabilizing the international economy, rebuilding war-torn nations, and maintaining international peace and security.

Anticipating that those and other international organizations would locate their headquarters in the United States, Congress passed the International Organizations Immunities Act of 1945, 59 Stat. 669. The Act grants international organizations a set of privileges and immunities, such as immunity from search and exemption from property taxes. 22 U. S. C. §§ 288a(c), 288c.

The IOIA defines certain privileges and immunities by reference to comparable privileges and immunities enjoyed by foreign governments. For example, with respect to customs duties and the treatment of official communications, the Act grants international organizations the privileges and immunities that are "accorded under similar circumstances to foreign governments." § 288a(d). The provision at issue in this case provides that international organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." § 288a(b).

The IOIA authorizes the President to withhold, withdraw, condition, or limit the privileges and immunities it grants in light of the functions performed by any given international organization. § 288. Those privileges and immunities can also be expanded or restricted by a particular organization's founding charter.

B

When the IOIA was enacted in 1945, courts looked to the views of the Department of State in deciding whether a given foreign government should be granted immunity from a particular suit. If the Department submitted a recommendation on immunity, courts deferred to the recommendation. If the Department did not make a recommendation, courts decided for themselves whether to grant immunity, although they did so by reference to State Department policy. *Samantar* v. *Yousuf*, 560 U. S. 305, 311–312 (2010).

Until 1952, the State Department adhered to the classical theory of foreign sovereign immunity. According to that theory, foreign governments are entitled to "virtually absolute" immunity as a matter of international grace and comity. At the time the IOIA was enacted, therefore, the Department ordinarily requested, and courts ordinarily granted, immunity in suits against foreign governments. *Ibid.*; *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983).[1]

In 1952, however, the State Department announced that it would adopt the newer "restrictive" theory of foreign sovereign immunity. Under that theory, foreign governments are entitled to immunity only with respect to their sovereign acts, not with respect to commercial acts. The State Department explained that it was adopting the restrictive theory because the "widespread and increasing practice on the part of governments of engaging in commercial activities" made it "necessary" to "enable persons doing business with them to have their rights determined in the courts." Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952).

In 1976, Congress passed the Foreign Sovereign Immunities Act. The FSIA codified the restrictive theory of foreign sovereign immunity but transferred "primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria* v. *Altmann*, 541 U. S. 677, 691 (2004); see 28 U. S. C. § 1602. Under the FSIA, foreign governments are presumptively immune from suit. § 1604. But a foreign government may be subject to suit under one of several statutory exceptions. Most perti-

[1] The immunity was "virtually" absolute because it was subject to occasional exceptions for specific situations. In *Republic of Mexico* v. *Hoffman*, 324 U. S. 30 (1945), for example, the State Department declined to recommend, and the Court did not grant, immunity from suit with respect to a ship that Mexico owned but did not possess.

nent here, a foreign government may be subject to suit in connection with its commercial activity that has a sufficient nexus with the United States. § 1605(a)(2).

C

The International Finance Corporation is an international development bank headquartered in Washington, D. C. The IFC is designated as an international organization under the IOIA. Exec. Order No. 10680, 3 CFR 86 (1957); see 22 U. S. C. §§ 282, 288. One hundred eighty-four countries, including the United States, are members of the IFC.

The IFC is charged with furthering economic development "by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of" the World Bank. Articles of Agreement of the International Finance Corporation, Art. I, Dec. 5, 1955, 7 U. S. T. 2198, T. I. A. S. No. 3620. Whereas the World Bank primarily provides loans and grants to developing countries for public-sector projects, the IFC finances private-sector development projects that cannot otherwise attract capital on reasonable terms. See Art. I(i), *ibid.* In 2018, the IFC provided some $23 billion in such financing.

The IFC expects its loan recipients to adhere to a set of performance standards designed to "avoid, mitigate, and manage risks and impacts" associated with development projects. IFC Performance Standards on Environmental and Social Sustainability, Jan. 1, 2012, p. 2, ¶ 1. Those standards are usually more stringent than any established by local law. The IFC includes the standards in its loan agreements and enforces them through an internal review process. Brief for Respondent 10.

In 2008, the IFC loaned $450 million to Coastal Gujarat Power Limited, a company located in India. The loan helped finance the construction of a coal-fired power plant in the state of Gujarat. Under the terms of the loan agree-

ment, Coastal Gujarat was required to comply with an environmental and social action plan designed to protect areas around the plant from damage. The agreement allowed the IFC to revoke financial support for the project if Coastal Gujarat failed to abide by the terms of the agreement.

The project did not go smoothly. According to the IFC's internal audit, Coastal Gujarat did not comply with the environmental and social action plan in constructing and operating the plant. The audit report criticized the IFC for inadequately supervising the project.

In 2015, a group of farmers and fishermen who live near the plant, as well as a local village, sued the IFC in the United States District Court for the District of Columbia. They claimed that pollution from the plant, such as coal dust, ash, and water from the plant's cooling system, had destroyed or contaminated much of the surrounding air, land, and water. Relying on the audit report, they asserted several causes of action against the IFC, including negligence, nuisance, trespass, and breach of contract. The IFC maintained that it was immune from suit under the IOIA and moved to dismiss for lack of subject matter jurisdiction.

The District Court, applying D. C. Circuit precedent, concluded that the IFC was immune from suit because the IOIA grants international organizations the virtually absolute immunity that foreign governments enjoyed when the IOIA was enacted. 172 F. Supp. 3d 104, 108–109 (DC 2016) (citing *Atkinson* v. *Inter-American Development Bank*, 156 F. 3d 1335 (CADC 1998)). The D. C. Circuit affirmed in light of its precedent. 860 F. 3d 703 (2017). Judge Pillard wrote separately to say that she would have decided the question differently were she writing on a clean slate. *Id.*, at 708 (concurring opinion). Judge Pillard explained that she thought the D. C. Circuit "took a wrong turn" when it "read the IOIA to grant international organizations a static, absolute immunity that is, by now, not at all the same 'as is enjoyed by foreign governments,' but substantially broader."

Ibid. Judge Pillard also noted that the Third Circuit had expressly declined to follow the D. C. Circuit's approach. See *OSS Nokalva, Inc.* v. *European Space Agency*, 617 F. 3d 756 (CA3 2010).

We granted certiorari. 584 U. S. 992 (2018).

II

The IFC contends that the IOIA grants international organizations the "same immunity" from suit that foreign governments enjoyed in 1945. Petitioners argue that it instead grants international organizations the "same immunity" from suit that foreign governments enjoy today. We think petitioners have the better reading of the statute.

A

The language of the IOIA more naturally lends itself to petitioners' reading. In granting international organizations the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations "shall enjoy absolute immunity from suit," or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations "immune from search," use such noncomparative language to define immunities in a static way. 22 U. S. C. § 288a(c). Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date. See, *e. g.*, Energy Policy Act of 1992, 30 U. S. C. § 242(c)(1) (certain land patents "shall provide for surface use to the same extent as is provided under applicable law prior to October 24, 1992"). Because the IOIA does neither of those things, we think the "same as" formulation is best un-

derstood to make international organization immunity and foreign sovereign immunity continuously equivalent.

That reading finds support in other statutes that use similar or identical language to place two groups on equal footing. In the Civil Rights Act of 1866, for instance, Congress established a rule of equal treatment for newly freed slaves by giving them the "same right" to make and enforce contracts and to buy and sell property "as is enjoyed by white citizens." 42 U. S. C. §§ 1981(a), 1982. That provision is of course understood to guarantee continuous equality between white and nonwhite citizens with respect to the rights in question. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 427–430 (1968). Similarly, the Federal Tort Claims Act states that the "United States shall be liable" in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. That provision is most naturally understood to make the United States liable in the same way as a private individual at any given time. See *Richards* v. *United States*, 369 U. S. 1, 6–7 (1962). Such "same as" provisions dot the statute books, and federal and state courts commonly read them to mandate ongoing equal treatment of two groups or objects. See, *e. g.*, *Adamson* v. *Bowen*, 855 F. 2d 668, 671–672 (CA10 1988) (statute making United States liable for fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute" interpreted to continuously tie liability of United States to that of any other party); *Kugler's Appeal*, 55 Pa. 123, 124–125 (1867) (statute making the procedure for dividing election districts "the same as" the procedure for dividing townships interpreted to continuously tie the former procedure to the latter).

The IFC objects that the IOIA is different because the purpose of international organization immunity is entirely distinct from the purpose of foreign sovereign immunity. Foreign sovereign immunity, the IFC argues, is grounded

in the mutual respect of sovereigns and serves the ends of international comity and reciprocity. The purpose of international organization immunity, on the other hand, is to allow such organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country. The IFC therefore urges that the IOIA should not be read to tether international organization immunity to changing foreign sovereign immunity.

But that gets the inquiry backward. We ordinarily assume, "absent a clearly expressed legislative intention to the contrary," that "the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982) (alterations omitted). Whatever the ultimate purpose of international organization immunity may be—the IOIA does not address that question—the immediate purpose of the immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another.

B

The more natural reading of the IOIA is confirmed by a canon of statutory interpretation that was well established when the IOIA was drafted. According to the "reference" canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. 2 J. Sutherland, Statutory Construction §§ 5207–5208 (3d ed. 1943). For example, a statute allowing a company to "collect the same tolls and enjoy the same privileges" as other companies incorporates the law governing tolls and privileges as it exists at any given moment. *Snell* v. *Chicago*, 133 Ill. 413, 437–439, 24 N. E. 532, 537 (1890). In contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent

amendments. See, *e. g.*, *Culver* v. *People ex rel. Kochersperger*, 161 Ill. 89, 95–99, 43 N. E. 812, 814–815 (1896) (tax-assessment statute referring to specific article of another statute does not adopt subsequent amendments to that article).

Federal courts have often relied on the reference canon, explicitly or implicitly, to harmonize a statute with an external body of law that the statute refers to generally. Thus, for instance, a statute that exempts from disclosure agency documents that "would not be *available by law* to a party . . . in litigation with the agency" incorporates the general law governing attorney work-product privilege as it exists when the statute is applied. *FTC* v. *Grolier Inc.*, 462 U. S. 19, 20, 26–27 (1983) (emphasis added); *id.*, at 34, n. 6 (Brennan, J., concurring in part and concurring in judgment). Likewise, a general reference to federal discovery rules incorporates those rules "as they are found on any given day, today included," *El Encanto, Inc.* v. *Hatch Chile Co.*, 825 F. 3d 1161, 1164 (CA10 2016), and a general reference to "the crime of piracy as defined by the law of nations" incorporates a definition of piracy "that changes with advancements in the law of nations," *United States* v. *Dire*, 680 F. 3d 446, 451, 467–469 (CA4 2012).

The same logic applies here. The IOIA's reference to the immunity enjoyed by foreign governments is a general rather than specific reference. The reference is to an external body of potentially evolving law—the law of foreign sovereign immunity—not to a specific provision of another statute. The IOIA should therefore be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other.

The IFC contends that the IOIA's reference to the immunity enjoyed by foreign governments is not a general reference to an external body of law, but is instead a specific reference to a common law concept that had a fixed meaning

when the IOIA was enacted in 1945. And because we ordinarily presume that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder* v. *United States*, 527 U. S. 1, 23 (1999), the IFC argues that we should read the IOIA to incorporate what the IFC maintains was the then-settled meaning of the "immunity enjoyed by foreign governments": virtually absolute immunity.

But in 1945, the "immunity enjoyed by foreign governments" did not *mean* "virtually absolute immunity." The phrase is not a term of art with substantive content, such as "fraud" or "forgery." See *id.*, at 22; *Gilbert* v. *United States*, 370 U. S. 650, 655 (1962). It is rather a concept that can be given scope and content only by reference to the rules governing foreign sovereign immunity. It is true that under the rules applicable in 1945, the *extent* of immunity from suit was virtually absolute, while under the rules applicable today, it is more limited. But in 1945, as today, the IOIA's instruction to grant international organizations the immunity "enjoyed by foreign governments" is an instruction to look up the applicable rules of foreign sovereign immunity, wherever those rules may be found—the common law, the law of nations, or a statute. In other words, it is a general reference to an external body of (potentially evolving) law.

C

In ruling for the IFC, the D. C. Circuit relied upon its prior decision in *Atkinson*, 156 F. 3d 1335. *Atkinson* acknowledged the reference canon, but concluded that the canon's probative force was "outweighed" by a structural inference the court derived from the larger context of the IOIA. *Id.*, at 1341. The *Atkinson* court focused on the provision of the IOIA that gives the President the authority to withhold, withdraw, condition, or limit the otherwise applicable privileges and immunities of an international organization, "in the light of the functions performed by any such international

organization." 22 U. S. C. § 288. The court understood that provision to "delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F. 3d, at 1341. That delegation, the court reasoned, "undermine[d]" the view that Congress intended the IOIA to in effect update itself by incorporating changes in the law governing foreign sovereign immunity. *Ibid.*

We do not agree. The delegation provision is most naturally read to allow the President to modify, on a case-by-case basis, the immunity rules that would otherwise apply to a particular international organization. The statute authorizes the President to take action with respect to a single organization—"any such organization"—in light of the functions performed by "such organization." 22 U. S. C. § 288. The text suggests retail rather than wholesale action, and that is in fact how authority under § 288 has been exercised in the past. See, *e. g.*, Exec. Order No. 12425, 3 CFR 193 (1984) (designating INTERPOL as an international organization under the IOIA but withholding certain privileges and immunities); Exec. Order No. 11718, 3 CFR 177 (1974) (same for INTELSAT). In any event, the fact that the President has power to modify otherwise applicable immunity rules is perfectly compatible with the notion that those rules might themselves change over time in light of developments in the law governing foreign sovereign immunity.

The D. C. Circuit in *Atkinson* also gave no consideration to the opinion of the State Department, whose views in this area ordinarily receive "special attention." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U. S. 170, 181 (2017). Shortly after the FSIA was enacted, the State Department took the position that the immunity rules of the IOIA and the FSIA were now "link[ed]." Letter from D. Vagts, Office of the Legal Adviser, to R. Carswell, Jr., Senior Legal Officer, Organization of American States, p. 2 (Mar. 24, 1977). The Department reaffirmed that view dur-

ing subsequent administrations, and it has reaffirmed it again here.[2] That longstanding view further bolsters our understanding of the IOIA's immunity provision.

D

The IFC argues that interpreting the IOIA's immunity provision to grant anything less than absolute immunity would lead to a number of undesirable results.

The IFC first contends that affording international organizations only restrictive immunity would defeat the purpose of granting them immunity in the first place. Allowing international organizations to be sued in one member country's courts would in effect allow that member to second-guess the collective decisions of the others. It would also expose international organizations to money damages, which would in turn make it more difficult and expensive for them to fulfill their missions. The IFC argues that this problem is especially acute for international development banks. Because those banks use the tools of commerce to achieve their objectives, they may be subject to suit under the FSIA's commercial activity exception for most or all of their core activities,

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[2] See Letter from Roberts B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), in Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l L. 917, 918 (1980) ("By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character."); Letter from Arnold Kanter, Acting Secretary of State, to President George H. W. Bush (Sept. 12, 1992), in Digest of United States Practice in International Law 1016–1017 (S. Cummins & D. Stewart eds. 2005) (explaining that the Headquarters Agreement of the Organization of American States affords the OAS "full immunity from judicial process, thus going beyond the usual United States practice of affording restrictive immunity," in exchange for assurances that OAS would provide for "appropriate modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the" FSIA); Brief for United States as *Amicus Curiae* 24–29.

unlike foreign sovereigns. According to the IFC, allowing such suits would bring a flood of foreign-plaintiff litigation into U. S. courts, raising many of the same foreign-relations concerns that we identified when considering similar litigation under the Alien Tort Statute. See *Jesner* v. *Arab Bank*, *PLC*, 584 U. S. 241, 270–272 (2018); *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 116–117 (2013).

The IFC's concerns are inflated. To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity. The charters of many international organizations do just that. See, *e. g.*, Convention on Privileges and Immunities of the United Nations, Art. II, § 2, Feb. 13, 1946, 21 U. S. T. 1422, T. I. A. S. No. 6900 ("The United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"); Articles of Agreement of the International Monetary Fund, Art. IX, § 3, Dec. 27, 1945, 60 Stat. 1413, T. I. A. S. No. 1501 (IMF enjoys "immunity from every form of judicial process except to the extent that it expressly waives its immunity"). Notably, the IFC's own charter does not state that the IFC is absolutely immune from suit.

Nor is there good reason to think that restrictive immunity would expose international development banks to excessive liability. As an initial matter, it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA. To be considered "commercial," an activity must be "the *type*" of activity "by which a private party engages in" trade or commerce. *Republic of Argentina* v. *Weltover*, *Inc.*, 504 U. S. 607, 614 (1992); see 28 U. S. C. § 1603(d). As the Government suggested at oral argument, the lending activity of at least some development banks, such as those that make condi-

tional loans to governments, may not qualify as "commercial" under the FSIA. See Tr. of Oral Arg. 27–30.

And even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit. The FSIA includes other requirements that must also be met. For one thing, the commercial activity must have a sufficient nexus to the United States. See 28 U. S. C. §§ 1603, 1605(a)(2). For another, a lawsuit must be "based upon" either the commercial activity itself or acts performed in connection with the commercial activity. See § 1605(a)(2). Thus, if the "gravamen" of a lawsuit is tortious activity abroad, the suit is not "based upon" commercial activity within the meaning of the FSIA's commercial activity exception. See *OBB Personenverkehr AG* v. *Sachs*, 577 U. S. 27, 35 (2015); *Saudi Arabia* v. *Nelson*, 507 U. S. 349, 356–359 (1993). At oral argument in this case, the Government stated that it has "serious doubts" whether petitioners' suit, which largely concerns allegedly tortious conduct in India, would satisfy the "based upon" requirement. Tr. of Oral Arg. 25–26. In short, restrictive immunity hardly means unlimited exposure to suit for international organizations.

* * *

The International Organizations Immunities Act grants international organizations the "same immunity" from suit "as is enjoyed by foreign governments" at any given time. Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international organizations. The International Finance Corporation is therefore not absolutely immune from suit.

The judgment of the United States Court of Appeals for the D. C. Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Kavanaugh took no part in the consideration or decision of this case.

Justice Breyer, dissenting.

The International Organizations Immunities Act of 1945 extends to international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U. S. C. § 288a(b). The majority, resting primarily upon the statute's language and canons of interpretation, holds that the statute's reference to "immunity" moves with the times. As a consequence, the statute no longer allows international organizations immunity from lawsuits arising from their commercial activities. In my view, the statute grants international organizations that immunity—just as foreign governments possessed that immunity when Congress enacted the statute in 1945. In reaching this conclusion, I rest more heavily than does the majority upon the statute's history, its context, its purposes, and its consequences. And I write in part to show that, in difficult cases like this one, purpose-based methods of interpretation can often shine a useful light upon opaque statutory language, leading to a result that reflects greater legal coherence and is, as a practical matter, more likely to prove sound.

I

The general question before us is familiar: Do the words of a statute refer to their subject matter "statically," as it was when the statute was written? Or is their reference to that subject matter "dynamic," changing in scope as the subject matter changes over time? It is hardly surprising, given the thousands of different statutes containing an untold number of different words, that there is no single, universally applicable answer to this question.

Fairly recent cases from this Court make that clear. Compare *New Prime Inc.* v. *Oliveira,* 586 U. S. 105, 114 (2019) (adopting the interpretation of " 'contracts of employ-

ment' " that prevailed at the time of the statute's adoption in 1925); *Wisconsin Central Ltd.* v. *United States*, 585 U. S. 274, 277 (2018) (adopting the meaning of " 'money' " that prevailed at the time of the statute's enactment in 1937); *Carcieri* v. *Salazar*, 555 U. S. 379, 388 (2009) (interpreting the statutory phrase " 'now under Federal jurisdiction' " to cover only those tribes that were under federal jurisdiction at the time of the statute's adoption in 1934); and *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 612–613 (1992) (adopting the meaning of " 'commercial' " that was "attached to that term under the restrictive theory" when the Foreign Sovereign Immunities Act was enacted in 1976), with *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 461 (2015) (noting that the words " 'restraint of trade' " in the Sherman Act have been interpreted dynamically); *West* v. *Gibson*, 527 U. S. 212, 218 (1999) (interpreting the term " 'appropriate' " in Title VII's remedies provision dynamically); and *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 275–276 (1995) (interpreting the term " 'involving commerce' " in the Federal Arbitration Act dynamically).

The Court, like petitioners, believes that the language of the statute itself helps significantly to answer the static/dynamic question. See *ante*, at 207–209. I doubt that the language itself helps in this case. Petitioners point to the words "as is" in the phrase that grants the international organizations the "same immunity from suit . . . *as is* enjoyed by foreign governments." Brief for Petitioners 23–24 (emphasis added). They invoke the Dictionary Act, which states that "words used in the present tense include the future" "unless the context indicates otherwise." 1 U. S. C. § 1. But that provision creates only a presumption. And it did not even appear in the statute until 1948, *after* Congress had passed the Immunities Act. Compare § 1, 61 Stat. 633, with § 6, 62 Stat. 859.

More fundamentally, the words "as is enjoyed" do not conclusively tell us *when* enjoyed. Do they mean "as is en-

joyed" at the time of the statute's enactment? Or "as is enjoyed" at the time a plaintiff brings a lawsuit? If the former, international organizations enjoy immunity from lawsuits based upon their commercial activities, for that was the scope of immunity that foreign governments enjoyed in 1945 when the Immunities Act became law. If the latter, international organizations do not enjoy that immunity, for foreign governments can no longer claim immunity from lawsuits based upon certain commercial activities. See 28 U. S. C. § 1605(a)(2).

Linguistics does not answer the temporal question. Nor do our cases, which are not perfectly consistent on the matter. Compare *McNeill* v. *United States*, 563 U. S. 816, 821 (2011) (present-tense verb in the Armed Career Criminal Act requires applying the law at the time of previous conviction, not the later time when the Act is applied), with *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 478 (2003) (present-tense verb requires applying the law "at the time suit is filed"). The problem is simple: "Without knowing the point in time at which the law speaks, it is impossible to tell what is past and what is present or future." *Carr* v. *United States*, 560 U. S. 438, 463 (2010) (ALITO, J., dissenting). It is *purpose*, not linguistics, that can help us here.

The words "same . . . as," in the phrase "same immunity . . . as," provide no greater help. The majority finds support for its dynamic interpretation in the Civil Rights Act of 1866, which gives all citizens the "*same* right" to make and enforce contracts and to buy and sell property "*as* is enjoyed by white citizens." 42 U. S. C. §§ 1981(a), 1982 (emphasis added). But it is *purpose*, not words, that readily resolves any temporal linguistic ambiguity in that statute. The Act's objective, like that of the Fourteenth Amendment itself, was a Nation that treated its citizens equally. Its purpose—revealed by its title, historical context, and other language in the statute—was "to guarantee the then newly freed slaves the same legal rights that other citizens enjoy."

CBOCS West, *Inc.* v. *Humphries*, 553 U. S. 442, 448 (2008). Given this purpose, its dynamic nature is obvious.

Similarly, judges interpreting the words "same . . . as" have long resolved ambiguity not by looking at the words alone, but by examining the statute's purpose as well. Compare, *e. g.*, *Kugler's Appeal*, 55 Pa. 123, 123–125 (1867) (adopting a dynamic interpretation of "same as" statute in light of "plain" and "manifest" statutory purpose); and *Gaston* v. *Lamkin*, 115 Mo. 20, 34, 21 S. W. 1100, 1104 (1893) (adopting a dynamic interpretation of "same as" election statute given the legislature's intent to achieve "simplicity and uniformity in the conduct of elections"), with *O'Flynn* v. *East Rochester*, 292 N. Y. 156, 162, 54 N. E. 2d 343, 346 (1944) (adopting a static interpretation of "same as" statute given that the legislature "did not contemplate" that subsequent changes to a referenced statute would apply (interpreting N. Y. Gen. Mun. Law Ann. § 360(5) (West 1934))). There is no hard-and-fast rule that the statutory words "as is" or the statutory words "same as" require applying the law as it stands today.

The majority wrongly believes that it can solve the temporal problem by bringing statutory canons into play. It relies on what it calls the "reference canon." That canon, as it appeared more than 75 years ago in Sutherland's book on statutory construction, says that "when a statute refers to a general subject, the statute adopts the law on that subject as it exists *whenever a question under the statute arises.*" *Ante*, at 209 (citing 2 J. Sutherland, Statutory Construction §§ 5207–5208 (3d ed. 1943); emphasis added).

But a canon is at most a rule of thumb. Indeed, Sutherland himself says that "[n]o single canon of interpretation can purport to give a certain and unerring answer." 2 *id.*, § 4501, p. 316. And hornbooks, summarizing case law, have long explained that whether a reference statute adopts the law as it stands on the date of enactment or includes subsequent changes in the law to which it refers is "fundamentally a question of legislative intent and purpose." Fox, Effect of

Modification or Repeal of Constitutional or Statutory Provision Adopted by Reference in Another Provision, 168 A. L. R. 627, 628 (1947); see also 82 C. J. S., Statutes § 485, p. 637 (2009) ("The question of whether a statute which has adopted another statute by reference will be affected by amendments made to the adopted statute is one of legislative intent and purpose"); *id.*, at 638 (statute that refers generally to another body of law will ordinarily include subsequent changes in the adopted law only "as far as the changes are consistent with the purpose of the adopting statute").

Thus, all interpretive roads here lead us to the same place, namely, to context, to history, to purpose, and to consequences. Language alone cannot resolve the statute's linguistic ambiguity.

II

"Statutory interpretation," however, "is not a game of blind man's bluff." *Dole Food Co.*, 538 U. S., at 484 (BREYER, J., concurring in part and dissenting in part). We are "free to consider statutory language in light of a statute's basic purposes," *ibid.*, as well as " 'the history of the times when it was passed,' " *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 669 (1979) (quoting *United States* v. *Union Pacific R. Co.*, 91 U. S. 72, 79 (1875)). In this case, historical context, purpose, and related consequences tell us a great deal about the proper interpretation of the Immunities Act.

Congressional reports explain that Congress, acting in the immediate aftermath of World War II, intended the Immunities Act to serve two related purposes. First, it would "enabl[e] this country to fulfill its commitments in connection with its membership in international organizations." S. Rep. No. 861, 79th Cong., 1st Sess., 3 (1945); see also *id.*, at 2–3 (explaining that the Immunities Act was "basic legislation" expected to "satisfy in full the requirements of . . . international organizations conducting activities in the United States"); H. R. Rep. No. 1203, 79th Cong., 1st Sess., 3 (1945) (similar). And second, it would "facilitate fully the

functioning of international organizations in this country." S. Rep. No. 861, at 3.

A

I first examine the international commitments that Congress sought to fulfill. By 1945, the United States had entered into agreements creating several important multilateral organizations, including the United Nations (UN), the International Monetary Fund (IMF), the World Bank, the UN Relief and Rehabilitation Administration (UNRRA), and the Food and Agriculture Organization (FAO). See *id.*, at 2.

The founding agreements for several of these organizations required member states to grant them broad immunity from suit. The Bretton Woods Agreements, for example, provided that the IMF "shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity." Articles of Agreement of the International Monetary Fund, Art. IX, § 3, Dec. 27, 1945, 60 Stat. 1413, T. I. A. S. No. 1501. UNRRA required members, absent waiver, to accord the organization "the facilities, privileges, immunities, and exemptions which they accord to each other, including . . . [i]mmunity from suit and legal process." 2 UNRRA, A Compilation of the Resolutions on Policy: First and Second Sessions of the UNRRA Council, Res. No. 32, p. 51 (1944). And the UN Charter required member states to accord the UN "such privileges and immunities as are necessary for the fulfillment of its purposes." Charter of the United Nations, Art. 105, 59 Stat. 1053, June 26, 1945, T. S. No. 993.

These international organizations expected the United States to provide them with essentially full immunity. And at the time the treaties were written, Congress understood that foreign governments normally enjoyed immunity with respect to their commercial, as well as their noncommercial, activities. Thus, by granting international organizations "the same immunity from suit" that foreign governments enjoyed, Congress expected that international organizations

would similarly have immunity in both commercial and noncommercial suits.

More than that, Congress likely recognized that immunity in the commercial area was even more important for many international organizations than it was for most foreign governments. Unlike foreign governments, international organizations are *not* sovereign entities engaged in a host of different activities. See R. Higgins, Problems & Process: International Law and How We Use It 93 (1994) (organizations do not act with " 'sovereign authority,' " and "to assimilate them to states . . . is not correct"). Rather, many organizations (including four of the five I mentioned above) have specific missions that often require them to engage in what U. S. law may well consider to be commercial activities. See *infra*, at 226–227.

Nonetheless, under the majority's view, the immunity of many organizations contracted in scope in 1952, when the State Department modified foreign government immunity to exclude commercial activities. Most organizations could not rely on the treaty provisions quoted above to supply the necessary immunity. That is because, unless the treaty provision granting immunity is "self-executing," *i. e.*, automatically applicable, the immunity will not be effective in U. S. courts until Congress enacts additional legislation to implement it. See *Medellín* v. *Texas*, 552 U. S. 491, 504–505 (2008); but see *id.*, at 546–547 (BREYER, J., dissenting). And many treaties are not self-executing. Thus, in the ordinary case, not even a treaty can guarantee immunity in cases arising from commercial activities.

The UN provides a good example. As noted, the UN Charter required the United States to grant the UN all "necessary" immunities, but it was not self-executing. In 1946, the UN made clear that it needed absolute immunity from suit, including in lawsuits based upon its commercial activities. See Convention on Privileges and Immunities of the United Nations, Art. II, §2, Feb. 13, 1946, 21 U. S. T. 1422,

T. I. A. S. No. 6900 (entered into force Apr. 29, 1970); see also App. to S. Exec. Rep. No. 91–17, p. 14 (1970) ("[T]he U. N.'s immunity from legal process extends to matters arising out of its commercial dealings . . . "). But until Congress ratified that comprehensive immunity provision in 1970, no U. S. law provided that immunity *but for* the Immunities Act. *Id.*, at 1. Both the UN and the United States found this circumstance satisfactory because they apparently assumed the Immunities Act extended immunity in cases involving both commercial and noncommercial activities: When Congress eventually (in 1970) ratified the UN's comprehensive immunity provision, the Senate reported that the long delay in ratification "appears to have been the result of the executive branch being content to operate under the provisions of the" Immunities Act. *Id.*, at 2.

In light of this history, how likely is it that Congress, seeking to "satisfy *in full* the requirements of . . . international organizations conducting activities in the United States," S. Rep. No. 861, at 3 (emphasis added), would have understood the statute to take from many international organizations with one hand the immunity it had given them with the other? If Congress wished the Act to carry out one of its core purposes—fulfilling the country's international commitments—Congress would not have wanted the statute to change over time, taking on a meaning that would fail to grant not only full, but even partial, immunity to many of those organizations.

B

Congress also intended to facilitate international organizations' ability to pursue their missions in the United States. To illustrate why that purpose is better served by a static interpretation, consider in greater detail the work of the organizations to which Congress wished to provide broad immunity. Put the IMF to the side, for Congress enacted a separate statute providing it with immunity (absent waiver) in all cases. See 22 U. S. C. § 286h. But UNRRA, the

World Bank, the FAO, and the UN itself all originally depended upon the Immunities Act for the immunity they sought.

Consider, for example, the mission of UNRRA. The United States and other nations created that organization in 1943, as the end of World War II seemed in sight. Its objective was, in the words of President Roosevelt, to " 'assure a fair distribution of available supplies among' " those liberated in World War II, and " 'to ward off death by starvation or exposure among these peoples.' " 1 G. Woodbridge, UNRRA: The History of the United Nations Relief and Rehabilitation Administration 3 (1950). By the time Congress passed the Immunities Act in 1945, UNRRA had obtained and shipped billions of pounds of food, clothing, and other relief supplies to children freed from Nazi concentration camps and to others in serious need. 3 *id.*, at 429; see generally L. Nicholas, Cruel World: The Children of Europe in the Nazi Web 442–513 (2005).

These activities involved contracts, often made in the United States, for transportation and for numerous commercial goods. See B. Shephard, The Long Road Home: The Aftermath of the Second World War 54, 57–58 (2012). Indeed, the United States conditioned its participation on UNRRA's spending what amounted to 67% of its budget on purchases of goods and services in the United States. *Id.*, at 57–58; see also Sawyer, Achievements of UNRRA as an International Health Organization, 37 Am. J. Pub. Health 41, 57 (1947) (describing UNRRA training programs for foreign doctors within the United States, which presumably required entering into contracts); *International Refugee Org.* v. *Republic S. S. Corp.*, 189 F. 2d 858, 860 (CA4 1951) (describing successor organization's transportation of displaced persons, presumably also under contract). Would Congress, believing that it had provided the absolute immunity that UNRRA sought and expected, also have intended that the statute be interpreted "dynamically," thereby removing most of the immunity that it had then provided—not only

potentially from UNRRA itself but also from other future international organizations with UNRRA-like objectives and tasks?

C

This history makes clear that Congress enacted the Immunities Act as part of an effort to encourage international organizations to locate their headquarters and carry on their missions in the United States. It also makes clear that Congress intended to enact "basic legislation" that would fulfill its broad immunity-based commitments to the UN, UNRRA, and other nascent organizations. S. Rep. No. 861, at 2. And those commitments, of necessity, included immunity from suit in commercial areas, since organizations were buying goods and making contracts in the United States.

To achieve these purposes, Congress enacted legislation that granted necessarily broad immunity. And that fact strongly suggests that Congress would not have wanted the statute to reduce significantly the scope of immunity that international organizations enjoyed, particularly organizations engaged in development finance, refugee assistance, or other tasks that U. S. law could well decide were "commercial" in nature. See *infra*, at 226–227.

To that extent, an examination of the statute's purpose supports a static, not a dynamic, interpretation of its cross-reference to the immunity of foreign governments. Unlike the purpose of the Civil Rights Act, the purpose here was not to ensure parity of treatment for international organizations and foreign governments. Instead, as the Court of Appeals for the D. C. Circuit pointed out years ago, the statute's reference to the immunities of "foreign governments" was a "shorthand" for the immunities those foreign governments enjoyed at the time the Act was passed. *Atkinson* v. *Inter-American Development Bank*, 156 F. 3d 1335, 1340, 1341 (1998).

III

Now consider the consequences that the majority's reading of the statute will likely produce—consequences that run

counter to the statute's basic purposes. Although the UN itself is no longer dependent upon the Immunities Act, many other organizations, such as the FAO and several multilateral development banks, continue to rely upon that Act to secure immunity, for the United States has never ratified treaties nor enacted statutes that might extend the necessary immunity, commercial and noncommercial alike.

A

The "commercial activity" exception to the sovereign immunity of foreign nations is broad. We have said that a foreign state engages in "commercial activity" when it exercises " 'powers that can also be exercised by private citizens.' " *Republic of Argentina*, 504 U. S., at 614. Thus, "a contract to buy army boots or even bullets is a 'commercial' activity," even if the government enters into the contract to "fulfil[l] uniquely sovereign objectives." *Ibid.*; see also H. R. Rep. No. 94–1487, p. 16 (1976) ("[A] transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an [Agency for International Development] program").

As a result of the majority's interpretation, many of the international organizations to which the United States belongs will discover that they are now exposed to civil lawsuits based on their (U. S.-law-defined) commercial activity. And because "commercial activity" may well have a broad definition, today's holding will at the very least create uncertainty for organizations involved in finance, such as the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency. The core functions of these organizations are at least arguably "commercial" in nature; the organizations exist to promote international development by investing in foreign companies and projects across the world. See Brief for International Bank for Reconstruction and Development et al. as *Amici Curiae*

1–4; Brief for Member Countries and the Multilateral Investment Guarantee Agency as *Amici Curiae* 13–15. The World Bank, for example, encourages development either by guaranteeing private loans or by providing financing from its own funds if private capital is not available. See Articles of Agreement of the International Bank for Reconstruction and Development, Art. I, Dec. 27, 1945, 60 Stat. 1440, T. I. A. S. No. 1502.

Some of these organizations, including the International Finance Corporation (IFC), themselves believe they do not need broad immunity in commercial areas, and they have waived it. See, *e. g.*, Articles of Agreement of the International Finance Corporation, Art. 6, § 3, Dec. 5, 1955, 7 U. S. T. 2214, 264 U. N. T. S. 118 (implemented by 22 U. S. C. § 282g); see also 860 F. 3d 703, 706 (CADC 2017). But today's decision will affect them nonetheless. That is because courts have long interpreted their waivers in a manner that protects their core objectives. See, *e. g.*, *Mendaro* v. *World Bank*, 717 F. 2d 610, 614–615 (CADC 1983). (This very case provides a good example. The D. C. Circuit held below that the IFC's waiver provision does not cover petitioners' claims because they "threaten the [IFC's] policy discretion." 860 F. 3d, at 708.) But today's decision exposes these organizations to potential liability in *all* cases arising from their commercial activities, without regard to the scope of their waivers.

Under the majority's interpretation, that broad exposure to liability is at least a reasonable possibility. And that being so, the interpretation undercuts Congress' original objectives and the expectations that it had when it enacted the Immunities Act in 1945.

B

The majority's opinion will have a further important consequence—one that more clearly contradicts the statute's objectives and overall scheme. It concerns the important goal of weeding out lawsuits that are likely bad or harmful—

those likely to produce rules of law that interfere with an international organization's public interest tasks.

To understand its importance, consider again that international organizations, unlike foreign nations, are multilateral, with members from many different nations. See H. R. Rep. No. 1203, at 1. That multilateralism is threatened if one nation alone, through application of its own liability rules (by nonexpert judges), can shape the policy choices or actions that an international organization believes it must take or refrain from taking. Yet that is the effect of the majority's interpretation. By restricting the immunity that international organizations enjoy, it "opens the door to divided decisions of the courts of different member states," including U. S. courts, "passing judgment on the rules, regulations, and decisions of the international bodies." *Broadbent* v. *Organization of Am. States*, 628 F. 2d 27, 35 (CADC 1980); cf. Singer, Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns, 36 Va. J. Int'l L. 53, 63–64 (1995) (recognizing that "[i]t would be inappropriate for municipal courts to cut deep into the region of autonomous decision-making authority of institutions such as the World Bank").

Many international organizations, fully aware of their moral (if not legal) obligations to prevent harm to others and to compensate individuals when they do cause harm, have sought to fulfill those obligations without compromising their ability to operate effectively. Some, as I have said, waive their immunity in U. S. courts at least in part. And the D. C. Circuit, for nearly 40 years, has interpreted those waivers in a way that protects the organization against interference by any single state. See, *e. g., Mendaro*, 717 F. 2d, at 615. The D. C. Circuit allows a lawsuit to proceed when "insistence on immunity would actually prevent or hinder the organization from conducting its activities." *Id.*, at 617. Thus, a direct beneficiary of a World Bank loan can generally sue the Bank, because "the commercial reliability of the

Bank's direct loans . . . would be significantly vitiated" if "beneficiaries were required to accept the Bank's obligations without recourse to judicial process." *Id.*, at 618. Where, however, allowing a suit would lead to "disruptive interference" with the organization's functions, the waiver does not apply. *Ibid.*

Other organizations have attempted to solve the liability/immunity problem by turning to multilateral, not single-nation, solutions. The UN, for instance, has agreed to "make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character." Convention on Privileges and Immunities of the United Nations, Art. VIII, § 29, 21 U. S. T. 1438, T. I. A. S. No. 6900. It generally does so by agreeing to submit commercial disputes to arbitration. See Restatement (Third) of Foreign Relations Law of the United States § 467, Reporters' Note 7 (1987). Other organizations, including the IFC, have set up alternative accountability schemes to resolve disputes that might otherwise end up in court. See World Bank, Inspection Panel: About Us (describing World Bank's three-member "independent complaints mechanism" for those "who believe that they have been . . . adversely affected by a World Bank-funded project"), https://inspectionpanel.org/about-us/about-inspection-panel (as last visited Feb. 25, 2019); Compliance Advisor Ombudsman, How We Work: CAO Dispute Resolution (describing IFC and Multilateral Investment Guarantee Agency dispute-resolution process, the main objective of which is to help resolve issues raised about the "social and environmental impacts of IFC/MIGA projects"), www.cao-ombudsman.org/howwework/ombudsman.

These alternatives may sometimes prove inadequate. And, if so, the Immunities Act itself offers a way for America's Executive Branch to set aside an organization's immunity and to allow a lawsuit to proceed in U. S. courts. The Act grants to the President the authority to "withhold," to

"withdraw," to "condition," or to "limit" any of the Act's "immunities" in "light of the functions performed by any such international organization." 22 U. S. C. § 288.

Were we to interpret the statute statically, then, the default rule would be immunity in suits arising from an organization's commercial activities. But the Executive Branch would have the power to withdraw immunity where immunity is not warranted, as the Act itself provides. And in making that determination, it could consider whether allowing the lawsuit would jeopardize the organization's ability to carry out its public interest tasks. In a word, the Executive Branch, under a static interpretation, would have the authority needed to separate lawsuit sheep from lawsuit goats.

Under the majority's interpretation, by contrast, there is no such flexibility. The Executive does not have the power to tailor immunity by taking into account the risk of a lawsuit's unjustified interference with institutional objectives or other institutional needs. Rather, the majority's holding takes away an international organization's immunity (in cases arising from "commercial" activities) across the board. And without a new statute, there is no way to restore it, in whole or in part. Nothing in the present statute gives the Executive, the courts, or the organization the power to restore immunity, or to tailor any resulting potential liability, where a lawsuit threatens seriously to interfere with an organization's legitimate needs and goals.

Thus, the static interpretation comes equipped with flexibility. It comes equipped with a means to withdraw immunity where justified. But the dynamic interpretation freezes potential liability into law. It withdraws immunity automatically and irretrievably, irrespective of institutional harm. It seems highly unlikely that Congress would have wanted this result.

* * *

At the end of World War II, many in this Nation saw international cooperation through international organization as

one way both to diminish the risk of conflict and to promote economic development and commercial prosperity. Congress at that time and at the request of many of those organizations enacted the Immunities Act. Given the differences between international organizations and nation states, along with the Act's purposes and the risk of untoward consequences, I would leave the Immunities Act where we found it—as providing for immunity in both commercial and noncommercial suits.

My decision rests primarily not upon linguistic analysis but upon basic statutory purposes. Linguistic methods alone, however artfully employed, too often can be used to justify opposite conclusions. Purposes, derived from context, informed by history, and tested by recognition of related consequences, will more often lead us to legally sound, workable interpretations—as they have consistently done in the past. These methods of interpretation can help voters hold officials accountable for their decisions and permit citizens of our diverse democracy to live together productively and in peace—basic objectives in America of the rule of law itself.

With respect, I dissent.

GARZA *v.* IDAHO

CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 17–1026. Argued October 30, 2018—Decided February 27, 2019

Petitioner Gilberto Garza, Jr., signed two plea agreements, each arising from state criminal charges and each containing a clause stating that Garza waived his right to appeal. Shortly after sentencing, Garza told his trial counsel that he wished to appeal. Instead of filing a notice of appeal, counsel informed Garza that an appeal would be "problematic" given Garza's appeal waiver. After the time period for Garza to preserve an appeal lapsed, he sought state postconviction relief, alleging that his trial counsel had rendered ineffective assistance by failing to file a notice of appeal despite his repeated requests. The Idaho trial court denied relief, and the Idaho Court of Appeals affirmed. Also affirming, the Idaho Supreme Court held that Garza could not show the requisite deficient performance by counsel and resulting prejudice. In doing so, the court concluded that the presumption of prejudice recognized in *Roe* v. *Flores-Ortega*, 528 U. S. 470, when trial counsel fails to file an appeal as instructed does not apply when the defendant has agreed to an appeal waiver.

Held: *Flores-Ortega*'s presumption of prejudice applies regardless of whether a defendant has signed an appeal waiver. Pp. 237–247.

(a) Under *Strickland* v. *Washington*, 466 U. S. 668, a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's representation fell below an objective standard of reasonableness," *id.*, at 687–688, and (2) that any such deficiency was "prejudicial to the defense," *id.*, at 692. However, "prejudice is presumed" in "certain Sixth Amendment contexts," *ibid.*, such as "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken," *Flores-Ortega*, 528 U. S., at 484. P. 237.

(b) This case hinges on two procedural devices: appeal waivers and notices of appeal. No appeal waiver serves as an absolute bar to all appellate claims. Because a plea agreement is essentially a contract, it does not bar claims outside its scope. And, like any contract, the language of appeal waivers can vary widely, leaving many types of claims unwaived. A waived appellate claim may also proceed if the prosecution forfeits or waives the waiver or if the government breaches the agreement. Separately, some claims are treated as unwaiveable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself was knowing and voluntary.

The filing of a notice of appeal is "a purely ministerial task that imposes no great burden on counsel." *Flores-Ortega*, 528 U. S., at 474. Filing requirements reflect that appellate claims are likely to be ill defined or unknown at the filing stage. And within the division of labor between defendants and their attorneys, the "ultimate authority" to decide whether to "take an appeal" belongs to the accused. *Jones* v. *Barnes*, 463 U. S. 745, 751. Pp. 238–240.

(c) Garza's attorney rendered deficient performance by not filing a notice of appeal in light of Garza's clear requests. Given the possibility that a defendant will end up raising claims beyond an appeal waiver's scope, simply filing a notice of appeal does not necessarily breach a plea agreement. Thus, counsel's choice to override Garza's instructions was not a strategic one. In any event, the bare decision whether to appeal is ultimately the defendant's to make. Pp. 241–242.

(d) Because there is no dispute that Garza wished to appeal, a direct application of *Flores-Ortega*'s language resolves this case. *Flores-Ortega* reasoned that because a presumption of prejudice applies whenever " 'the accused is denied counsel at a critical stage,' " it makes greater sense to presume prejudice when counsel's deficiency forfeits an "appellate proceeding altogether." 528 U. S., at 483. Because Garza retained a right to appeal at least some issues despite his waivers, he had a right to a proceeding and was denied that proceeding altogether as a result of counsel's deficient performance. That he surrendered many claims by signing appeal waivers does not change things. First, the presumption of prejudice does not bend because a particular defendant seems to have had poor prospects. See, *e. g.*, *Jae Lee* v. *United States*, 582 U. S. 357, 367–368. Second, while the defendant in *Flores-Ortega* did not sign an appeal waiver, he did plead guilty, which "reduces the scope of potentially appealable issues" on its own. 528 U. S., at 480. Pp. 242–244.

(e) Contrary to the argument by Idaho and the U. S. Government, as *amicus*, that Garza never "had a right" to his appeal and thus that any deficient performance by counsel could not have caused the loss of any such appeal, Garza did retain a right to his appeal; he simply had fewer possible claims than some other appellants. The Government also proposes a rule that would require a defendant to show—on a case-by-case basis—that he would have presented claims that would have been considered by the appellate court on the merits. This Court, however, has already rejected attempts to condition the restoration of a defendant's appellate rights forfeited by ineffective counsel on proof that the defendant's appeal had merit. See, *e. g.*, *Rodriquez* v. *United States*, 395 U. S. 327, 330. Moreover, it is not the defendant's role to decide what arguments to press, making it especially improper to impose that

role upon the defendant simply because his opportunity to appeal was relinquished by deficient counsel. And because there is no right to counsel in postconviction proceedings and, thus, most applicants proceed *pro se*, the Government's proposal would be unfair, ill advised, and unworkable. Pp. 244–247.

162 Idaho 791, 405 P. 3d 576, reversed and remanded.

Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ., joined. Thomas, J., filed a dissenting opinion, in which Gorsuch, J., joined, and in which Alito, J., joined as to Parts I and II, *post*, p. 248.

Amir H. Ali argued the cause for petitioner. With him on the briefs were *David M. Shapiro*, *Catherine E. Stetson*, *Colleen E. Roh Sinzdak*, *Mitchell P. Reich*, and *Maya P. Waldron*.

Kenneth K. Jorgensen, Deputy Attorney General of Idaho, argued the cause for respondent. With him on the brief were *Lawrence G. Wasden*, Attorney General of Idaho, and *Paul R. Panther* and *Kale D. Gans*, Deputy Attorneys General.

Allon Kedem argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, and *Sangita K. Rao.**

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*Briefs of *amici curiae* urging reversal were filed for the Cato Institute by *Clark M. Neily III* and *Jay R. Schweikert*; for the Ethics Bureau at Yale by *Lawrence J. Fox* and *Susan D. Reece Martyn*; and for the Idaho Association of Criminal Defense Lawyers et al. by *Lauren M. Weinstein*, *Robert K. Kry*, *Jonah Horwitz*, *Brian McComas*, and *Craig Durham*.

A brief of *amici curiae* urging affirmance was filed for the State of Louisiana et al. by *Jeff Landry*, Attorney General of Louisiana, *Elizabeth B. Murrill*, Solicitor General, and *Michelle Ghetti*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Doug Peterson* of Nebraska, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, *Sean Reyes* of Utah, *Brad Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming.

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000), this Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims." *Id.*, at 484. This case asks whether that rule applies even when the defendant has, in the course of pleading guilty, signed what is often called an "appeal waiver"—that is, an agreement forgoing certain, but not all, possible appellate claims. We hold that the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver.

I

In early 2015, petitioner Gilberto Garza, Jr., signed two plea agreements, each arising from criminal charges brought by the State of Idaho. Each agreement included a clause stating that Garza "waive[d] his right to appeal." App. to Pet. for Cert. 44a, 49a. The Idaho trial court accepted the agreements and sentenced Garza to terms of prison in accordance with the agreements.

Shortly after sentencing, Garza told his trial counsel that he wished to appeal.[1] In the days that followed, he would later attest, Garza "continuously reminded" his attorney of this directive "via phone calls and letters," Record 210, and Garza's trial counsel acknowledged in his own affidavit that Garza had "told me he wanted to appeal the sentence(s) of

[1] The record suggests that Garza may have been confused as to whether he had waived his appellate rights in the first place. See Record 97 (answering "No" on a court advisory form asking whether Garza had "waived [his] right to appeal [his] judgment of conviction and sentence as part of [his] plea agreement"); see also *id.*, at 118, 121, 132 (showing that Garza's sentencing judge and judgments of conviction provided, despite the appeal waiver, generalized notice of a "right to appeal"). Because our ruling does not turn on these facts, we do not address them further.

the court," *id.*, at 151.[2] Garza's trial counsel, however, did not file a notice of appeal. Instead, counsel "informed Mr. Garza that an appeal was problematic because he waived his right to appeal." *Ibid.* The period of time for Garza's appeal to be preserved came and went with no notice having been filed on Garza's behalf.

Roughly four months after sentencing, Garza sought postconviction relief in Idaho state court. As relevant here, Garza alleged that his trial counsel rendered ineffective assistance by failing to file notices of appeal despite Garza's requests. The Idaho trial court denied relief, and both the Idaho Court of Appeals and the Idaho Supreme Court affirmed that decision. See 162 Idaho 791, 793, 405 P. 3d 576, 578 (2017). The Idaho Supreme Court ruled that Garza, given the appeal waivers, needed to show both deficient performance and resulting prejudice; it concluded that he could not. See *id.*, at 798, 405 P. 3d, at 583.

In ruling that Garza needed to show prejudice, the Idaho Supreme Court acknowledged that it was aligning itself with the minority position among courts. For example, 8 of the 10 Federal Courts of Appeals to have considered the question have applied *Flores-Ortega*'s presumption of prejudice even when a defendant has signed an appeal waiver.[3] 162 Idaho, at 795, 405 P. 3d, at 580.

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[2] Garza's affidavit states that he wished to argue, at least in part, that he "was persuaded to plead guilty by [the] prosecuting attorney and [his] counsel which was not voluntarily [*sic*]." *Id.*, at 210.

[3] Compare *Campbell* v. *United States*, 686 F. 3d 353, 359 (CA6 2012); *Watson* v. *United States*, 493 F. 3d 960, 964 (CA8 2007); *United States* v. *Poindexter*, 492 F. 3d 263, 273 (CA4 2007); *United States* v. *Tapp*, 491 F. 3d 263, 266 (CA5 2007); *Campusano* v. *United States*, 442 F. 3d 770, 775 (CA2 2006); *Gomez-Diaz* v. *United States*, 433 F. 3d 788, 791–794 (CA11 2005); *United States* v. *Sandoval-Lopez*, 409 F. 3d 1193, 1195–1199 (CA9 2005); *United States* v. *Garrett*, 402 F. 3d 1262, 1266–1267 (CA10 2005), with *Nunez* v. *United States*, 546 F. 3d 450, 455 (CA7 2008); *United States* v. *Mabry*, 536 F. 3d 231, 241 (CA3 2008). At least two state courts have

We granted certiorari to resolve the split of authority. 585 U. S. 1002 (2018). We now reverse.

II

A

The Sixth Amendment guarantees criminal defendants "the right . . . to have the Assistance of Counsel for [their] defence." The right to counsel includes "'the right to the effective assistance of counsel.'" *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984) (quoting *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970)). Under *Strickland*, a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's representation fell below an objective standard of reasonableness," 466 U. S., at 687–688, and (2) that any such deficiency was "prejudicial to the defense," *id.*, at 692.

"In certain Sixth Amendment contexts," however, "prejudice is presumed." *Ibid.* For example, no showing of prejudice is necessary "if the accused is denied counsel at a critical stage of his trial," *United States* v. *Cronic*, 466 U. S. 648, 659 (1984), or left "entirely without the assistance of counsel on appeal," *Penson* v. *Ohio*, 488 U. S. 75, 88 (1988). Similarly, prejudice is presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U. S., at 659. And, most relevant here, prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." *Flores-Ortega*, 528 U. S., at 484. We hold today that this final presumption applies even when the defendant has signed an appeal waiver.

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declined to apply *Flores-Ortega* in the face of appeal waivers. See *Buettner* v. *State*, 382 Mont. 410, 363 P. 3d 1147 (2015) (Table); *Stewart* v. *United States*, 37 A. 3d 870, 877 (D. C. 2012); see also *Kargus* v. *State*, 284 Kan. 908, 922, 928, 169 P. 3d 307, 316, 320 (2007).

B

It is helpful, in analyzing Garza's case, to first address two procedural devices on which the case hinges: appeal waivers and notices of appeal.

1

We begin with the term "appeal waivers." While the term is useful shorthand for clauses like those in Garza's plea agreements, it can misleadingly suggest a monolithic end to all appellate rights.[4] In fact, however, no appeal waiver serves as an absolute bar to all appellate claims.

As courts widely agree, "[a] valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope." *United States* v. *Hardman*, 778 F. 3d 896, 899 (CA11 2014); see also *ibid.*, n. 2 (collecting cases from the 11 other Federal Courts of Appeals with criminal jurisdiction); *State* v. *Patton*, 287 Kan. 200, 228–229, 195 P. 3d 753, 771 (2008). That an appeal waiver does not bar claims outside its scope follows from the fact that, "[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts." *Puckett* v. *United States*, 556 U. S. 129, 137 (2009).

As with any type of contract, the language of appeal waivers can vary widely, with some waiver clauses leaving many types of claims unwaived.[5] Additionally, even a waived appellate claim can still go forward if the prosecution forfeits

[4] While this Court has never recognized a "constitutional right to an appeal," it has "held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent." *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983); see also *Douglas* v. *California*, 372 U. S. 353 (1963); *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956) (plurality opinion). Today, criminal defendants in nearly all States have a right to appeal either by statute or by court rule. See generally Robertson, The Right To Appeal, 91 N. C. L. Rev. 1219, 1222, and n. 8 (2013). Criminal defendants in federal court have appellate rights under 18 U. S. C. § 3742(a) and 28 U. S. C. § 1291.

[5] See generally Brief for Idaho Association of Criminal Defense Lawyers et al. as *Amici Curiae* 6–10 (collecting examples of appeal waivers that allowed challenges to the defendant's sentence or conviction or allowed claims based on prosecutorial misconduct or changes in law).

or waives the waiver. *E. g., United States* v. *Story*, 439 F. 3d 226, 231 (CA5 2006). Accordingly, a defendant who has signed an appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest.

Separately, all jurisdictions appear to treat at least some claims as unwaiveable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary.[6] Consequently, while signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain.

2

It is also important to consider what it means—and does not mean—for trial counsel to file a notice of appeal.

"Filing such a notice is a purely ministerial task that imposes no great burden on counsel." *Flores-Ortega*, 528 U. S., at 474. It typically takes place during a compressed

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[6] See, *e. g., United States* v. *Brown*, 892 F. 3d 385, 394 (CADC 2018) ("Like all other courts of appeals, our circuit holds that a defendant 'may waive his right to appeal his sentence as long as his decision is knowing, intelligent, and voluntary' "); *Spann* v. *State*, 704 N. W. 2d 486, 491 (Minn. 2005) ("Jurisdictions allowing a defendant to waive his or her right to appeal a conviction require that the waiver be made 'intelligently, voluntarily and with an understanding of the consequences' "). Lower courts have also applied exceptions for other kinds of claims, including "claims that a sentence is based on race discrimination, exceeds the statutory maximum authorized, or is the product of ineffective assistance of counsel." King & O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 Duke L. J. 209, 224 (2005) (footnotes omitted) (collecting federal cases); see also, *e. g., United States* v. *Puentes-Hurtado*, 794 F. 3d 1278, 1284 (CA11 2015) ("[A]ppellate review is also permitted when a defendant claims that the government breached the very plea agreement which purports to bar him from appealing or collaterally attacking his conviction and sentence"); *State* v. *Dye*, 291 Neb. 989, 999, 870 N. W. 2d 628, 634 (2015) (holding that appeal waivers are subject to a "miscarriage of justice" exception). We make no statement today on what particular exceptions may be required.

window: 42 days in Idaho, for example, and just 14 days in federal court. See Idaho Rule App. Proc. 14(a) (2017); Fed. Rule App. Proc. 4(b)(1)(A). By the time this window has closed, the defendant likely will not yet have important documents from the trial court, such as transcripts of key proceedings, see, *e. g.,* Idaho Rules App. Proc. 19 and 25; Fed. Rule App. Proc. 10(b), and may well be in custody, making communication with counsel difficult, see *Peguero* v. *United States*, 526 U. S. 23, 26 (1999). And because some defendants receive new counsel for their appeals, the lawyer responsible for deciding which appellate claims to raise may not yet even be involved in the case.

Filing requirements reflect that claims are, accordingly, likely to be ill defined or unknown at this stage. In the federal system, for example, a notice of appeal need only identify who is appealing; what "judgment, order, or part thereof" is being appealed; and "the court to which the appeal is taken." Fed. Rule App. Proc. 3(c)(1). Generally speaking, state requirements are similarly nonsubstantive.[7]

A notice of appeal also fits within a broader division of labor between defendants and their attorneys. While "the accused has the ultimate authority" to decide whether to "take an appeal," the choice of what specific arguments to make within that appeal belongs to appellate counsel. *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983); see also *McCoy* v. *Louisiana*, 584 U. S. 414, 421–422 (2018). In other words, filing a notice of appeal is, generally speaking, a simple, nonsubstantive act that is within the defendant's prerogative.

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[7] *E. g.,* Miss. Rule Crim. Proc. 29.1(b) (2017); Ohio Rule App. Proc. 3(D) (Lexis 2017). While Idaho requires a notice of appeal to "contain substantially . . . [a] preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal," the Rule in question also makes clear that "any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal." Idaho Rule App. Proc. 17(f).

C

With that context in mind, we turn to the precise legal issues here. As an initial matter, we note that Garza's attorney rendered deficient performance by not filing the notice of appeal in light of Garza's clear requests. As this Court explained in *Flores-Ortega*:

> "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." 528 U. S., at 477 (citations omitted); see also *id.,* at 478.

Idaho maintains that the risk of breaching the defendant's plea agreement renders counsel's choice to override the defendant's instructions a strategic one. See *Strickland,* 466 U. S., at 690–691 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . "). That is not so. While we do not address what constitutes a defendant's breach of an appeal waiver or any responsibility counsel may have to discuss the potential consequences of such a breach, it should be clear from the foregoing that simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver's scope. And in any event, the bare decision whether to appeal is ultimately the defendant's, not counsel's, to make.[8] See *McCoy,* 584 U. S., at 421–422; *Barnes,*

[8] That does not mean, of course, that appellate counsel must then make unsupportable arguments. After an appeal has been preserved and counsel has reviewed the case, counsel may always, in keeping with longstand-

463 U. S., at 751. Where, as here, a defendant has expressly requested an appeal, counsel performs deficiently by disregarding the defendant's instructions.[9]

D

We now address the crux of this case: whether *Flores-Ortega*'s presumption of prejudice applies despite an appeal waiver. The holding, principles, and facts of *Flores-Ortega* show why that presumption applies equally here.

With regard to prejudice, *Flores-Ortega* held that, to succeed in an ineffective-assistance claim in this context, a defendant need make only one showing: "that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." 528 U. S., at 484. So long as a defendant can show that "counsel's constitutionally deficient performance deprive[d him] of an appeal that he otherwise would have taken," courts are to "presum[e] prejudice with no further showing from the defendant of the merits of his underlying claims." *Ibid.* Because there is no dispute here that Garza wished to appeal, see *supra*, at 235–236, a direct application of *Flores-Ortega*'s language resolves this case. See 528 U. S., at 484.

Flores-Ortega's reasoning shows why an appeal waiver does not complicate this straightforward application. That case, like this one, involves a lawyer who forfeited an appellate proceeding by failing to file a notice of appeal. *Id.*, at 473–475. As the Court explained, given that past prece-

ing precedent, "advise the court and request permission to withdraw," while filing "a brief referring to anything in the record that might arguably support the appeal." *Anders* v. *California*, 386 U. S. 738, 744 (1967). The existence of this procedure reinforces that a defendant's appellate rights should not hinge "on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Penson* v. *Ohio*, 488 U. S. 75, 80 (1988).

[9] We leave undisturbed today *Flores-Ortega*'s separate discussion of how to approach situations in which a defendant's wishes are less clear. See 528 U. S., at 478–481.

dents call for a presumption of prejudice whenever " 'the accused is denied counsel at a critical stage,' " it makes even greater sense to presume prejudice when counsel's deficiency forfeits an "appellate proceeding altogether." *Id.*, at 483. After all, there is no disciplined way to "accord any ' "presumption of reliability" ' . . . to judicial proceedings that never took place." *Ibid.* (quoting *Smith* v. *Robbins*, 528 U. S. 259, 286 (2000)).

That rationale applies just as well here because, as discussed *supra*, at 238–239, and nn. 5, 6, Garza retained a right to appeal at least some issues despite the waivers he signed.[10] In other words, Garza had a right to a proceeding, and he was denied that proceeding altogether as a result of counsel's deficient performance.

That Garza surrendered many claims by signing his appeal waivers does not change things. First, this Court has made clear that when deficient counsel causes the loss of an entire proceeding, it will not bend the presumption-of-prejudice rule simply because a particular defendant seems to have had poor prospects. See, *e. g., Jae Lee* v. *United States*, 582 U. S. 357, 367–368 (2017). We hew to that principle again here.

Second, while the defendant in *Flores-Ortega* did not sign an appeal waiver, he did plead guilty, and—as the Court pointed out—"a guilty plea reduces the scope of potentially appealable issues" on its own. See 528 U. S., at 480. In other words, with regard to the defendant's appellate prospects, *Flores-Ortega* presented at most a difference of degree, not kind, and prescribed a presumption of prejudice regardless of how many appellate claims were foreclosed. See *id.*, at 484. We do no different today.

Instead, we reaffirm that, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that

[10] Or the State might not have invoked the waiver at all. *E. g., United States* v. *Archie*, 771 F. 3d 217, 223, n. 2 (CA4 2014); *State* v. *Rendon*, 2012 WL 9492805, *1, n. 1 (Idaho Ct. App., May 11, 2012).

he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal," with no need for a "further showing" of his claims' merit, *ibid.*, regardless of whether the defendant has signed an appeal waiver.

III

Flores-Ortega states, in one sentence, that the loss of the "entire [appellate] proceeding itself, which a defendant wanted at the time and to which he had a right, . . . demands a presumption of prejudice." *Id.*, at 483. Idaho and the U. S. Government, participating as an *amicus* on Idaho's behalf, seize on this language, asserting that Garza never "had a right" to his appeal and thus that any deficient performance by counsel could not have caused the loss of any such appeal. See Brief for Respondent 11, 23–26; Brief for United States as *Amicus Curiae* 7, 13, 21–22. These arguments miss the point. Garza did retain a right to his appeal; he simply had fewer possible claims than some other appellants. Especially because so much is unknown at the notice-of-appeal stage, see *supra*, at 239–240, it is wholly speculative to say that counsel's deficiency forfeits no proceeding to which a defendant like Garza has a right.[11]

The Government also takes its causation argument one step further. Arguing that, in the appeal-waiver context, "a generalized request that an attorney file an appeal . . . is not enough to show that appellate merits review would have followed," Brief for United States as *Amicus Curiae* 22, the Government proposes a rule that would require a defendant

[11] The possibility that an appellate court confronted with a waived claim (and a motion to enforce the waiver) would technically "dismiss the appeal without reaching the merits," see Brief for United States as *Amicus Curiae* 17; see also Brief for Respondent 26, does not alter this conclusion. Whatever the label, the defendant loses the opportunity to raise any appellate claims at all—including those that would, or at least could, be heard on the merits.

to show—on a "case-specific" basis, *id.*, at 23—either (1) "that he in fact requested, or at least expressed interest in, an appeal on a non-waived issue," *id.*, at 21–22, or alternatively (2) " 'that there were nonfrivolous grounds for appeal' despite the waiver," *id.*, at 22 (quoting *Flores-Ortega*, 528 U. S., at 485). We decline this suggestion, because it cannot be squared with our precedent and would likely prove both unfair and inefficient in practice.

This Court has already rejected attempts to condition the restoration of a defendant's appellate rights forfeited by ineffective counsel on proof that the defendant's appeal had merit. In *Flores-Ortega*, the Court explained that prejudice should be presumed "with no further showing from the defendant of the merits of his underlying claims." *Id.*, at 484; see also *id.*, at 486. In *Rodriquez* v. *United States*, 395 U. S. 327 (1969), similarly, the Court rejected a rule that required a defendant whose appeal had been forfeited by counsel "to specify the points he would raise were his right to appeal reinstated." *Id.*, at 330. So too here.

Moreover, while it is the defendant's prerogative whether to appeal, it is not the defendant's role to decide what arguments to press. See *Barnes*, 463 U. S., at 751, 754. That makes it especially improper to impose that role upon the defendant simply because his opportunity to appeal was relinquished by deficient counsel. "Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Rodriquez*, 395 U. S., at 330. We accordingly decline to place a pleading barrier between a defendant and an opportunity to appeal that he never should have lost.

Meanwhile, the Government's assumption that unwaived claims can reliably be distinguished from waived claims through case-by-case postconviction review is dubious. There is no right to counsel in postconviction proceedings,

see *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987), and most applicants proceed *pro se*.[12] That means that the Government effectively puts its faith in asking "an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal," *Flores-Ortega*, 528 U. S., at 486. We have already explained why this would be "unfair" and ill advised. See *ibid.*; see also *Rodriquez*, 395 U. S., at 330. Compounding the trouble, defendants would be asked to make these showings in the face of the heightened standards and related hurdles that attend many postconviction proceedings. See, *e. g.*, 28 U. S. C. §§ 2254, 2255; see also Brief for Idaho Association of Criminal Defense Lawyers et al. as *Amici Curiae* 22–25.

The Government's proposal is also unworkable. For one, it would be difficult and time consuming for a postconviction court to determine—perhaps years later—what appellate claims a defendant was contemplating at the time of conviction.[13] Moreover, because most postconviction petitioners will be *pro se*, courts would regularly have to parse both (1) what claims a *pro se* defendant seeks to raise and (2) whether each plausibly invoked claim is subject to the defendant's appeal waiver (which can be complex, see *supra*, at 238–239, and nn. 5, 6), all without the assistance of counseled briefing. We are not persuaded that this would be a more efficient or trustworthy process than the one we reaffirm today.

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[12] For example, researchers have found that over 90% of noncapital federal habeas petitioners proceed without counsel. See N. King et al., Final Technical Report: Habeas Litigation in U. S. District Courts 23 (2007).

[13] To the extent relief would turn on what precisely a defendant said to counsel regarding specific claims, moreover, Garza rightly points out the serious risk of "causing indigent defendants to forfeit their rights simply because they did not know what words to use." Reply Brief 17.

The more administrable and workable rule, rather, is the one compelled by our precedent: When counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken, the defendant gets a new opportunity to appeal. That is the rule already in use in 8 of the 10 Federal Circuits to have considered the question, see *supra*, at 236, and n. 3, and neither Idaho nor its *amici* have pointed us to any evidence that it has proved unmanageable there.[14] That rule does no more than restore the status quo that existed before counsel's deficient performance forfeited the appeal, and it allows an appellate court to consider the appeal as that court otherwise would have done—on direct review, and assisted by counsel's briefing.

IV

We hold today that the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether a defendant has signed an appeal waiver. This ruling follows squarely from *Flores-Ortega* and from the fact that even the broadest appeal waiver does not deprive a defendant of all appellate claims. Accordingly where, as here, an attorney performed deficiently in failing to file a notice of appeal despite the defendant's express instructions, prejudice is presumed "with no further showing from the defendant of the merits of his underlying claims." See *Flores-Ortega*, 528 U. S., at 484.

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

It is so ordered.

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[14] It is, of course, inevitable that some defendants under this rule will seek to raise issues that are within the scope of their appeal waivers. We are confident that courts can continue to deal efficiently with such cases via summary dispositions and the procedures outlined in *Anders*. See 386 U. S., at 744; n. 9, *supra*.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, and with whom JUSTICE ALITO joins as to Parts I and II, dissenting.

Petitioner Gilberto Garza avoided a potential life sentence by negotiating with the State of Idaho for reduced charges and a 10-year sentence. In exchange, Garza waived several constitutional and statutory rights, including "his right to appeal." App. to Pet. for Cert. 44a, 49a. Despite this express waiver, Garza asked his attorney to challenge on appeal the very sentence for which he had bargained. Garza's counsel quite reasonably declined to file an appeal for that purpose, recognizing that his client had waived this right and that filing an appeal would potentially jeopardize his plea bargain. Yet, the majority finds Garza's counsel constitutionally ineffective, holding that an attorney's performance is *per se* deficient and *per se* prejudicial any time the attorney declines a criminal defendant's request to appeal an issue that the defendant has waived. In effect, this results in a "defendant-always-wins" rule that has no basis in *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000), or our other ineffective-assistance precedents, and certainly no basis in the original meaning of the Sixth Amendment. I respectfully dissent.

I

In 2015, in accordance with two plea agreements, Garza entered an *Alford*[1] plea to aggravated assault and pleaded guilty to possession with intent to deliver methamphetamine. Under the terms of the plea agreements, Idaho agreed not to (1) file additional burglary and grand theft charges; (2) refer Garza for federal prosecution on a charge of unlawful possession of ammunition by a felon, see 18 U. S. C. § 922(g)(1); or (3) seek a "Persistent violator" sentencing enhancement that would expose Garza to a potential life sen-

[1] See *North Carolina* v. *Alford*, 400 U. S. 25, 37–38 (1970) (permitting courts to accept guilty pleas where defendants admit that there is a factual basis for the plea, but do not admit actual guilt).

tence, see Idaho Code Ann. § 19–2514 (2017). In exchange, Garza agreed to " 'waiv[e] his right to appeal' " and his right to file a motion for correction or reduction of his sentence.[2] *Ante*, at 235. And both parties agreed to specific sentences totaling 10 years of imprisonment, which would be binding on the District Court if it accepted the plea agreements. See Idaho Crim. Rules 11(f)(1)(C) and (f)(3) (2017) (allowing parties to agree to a binding sentence). Thus, the judge could impose no sentence other than the 10 years for which Garza had bargained.[3]

The trial court accepted the plea agreements and, as required, sentenced Garza to 10 years' imprisonment. However, the court noted that if the cases had been "considered individually," a "harsher sentence" might have been warranted due to Garza's "history of violent crime" and the "gratuitous aggression" displayed by Garza in the aggravated-assault case. Record 336.

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[2] The majority questions the validity of Garza's appellate waivers by suggesting that "Garza may have been confused as to whether he had waived his appellate rights in the first place." *Ante*, at 235, n. 1. I read the record differently. It is true that, in the guilty form related to his possession charge, Garza checked "no" as to whether he was waiving his appeal rights. But, in the guilty form related to his aggravated-assault charge, he checked "yes" to waiving his appeal rights. And at the plea hearing for that offense, he acknowledged under oath that he understood all the questions, had received enough time with the guilty form, and answered each question honestly. He also acknowledged at the sentencing hearing for both offenses that he would be "go[ing] away for ten years," as negotiated for in the signed plea agreements that included the appeal waivers. Record 131. Finally, the trial court in postconviction proceedings concluded that Garza had never contended "at any stage of these post-conviction cases" that "he did not appreciate or understand the appeal waivers when he entered his pleas." *Id.*, at 185.

[3] See *id.*, at 96, 108 ("I understand that my plea agreement is a binding plea agreement. This means that if the district court does not impose the specific sentence as recommended by both parties, I will be allowed to withdraw my plea of guilty pursuant to Rule 11(d)(4) of the Idaho Criminal Rules and proceed to a jury trial"); see also *id.*, at 128.

Four months later, Garza filed the petitions for postconviction relief at issue here. Among other things, he claimed that his pleas were not voluntary and that his counsel had been constitutionally ineffective for failing to file an appeal despite repeated requests that he do so. For relief, Garza requested that his sentences "run concurrent." *Id.*, at 207. The trial court appointed counsel to pursue Garza's collateral challenges. It subsequently dismissed Garza's claim that his plea was involuntary for "lack of supporting evidence," but it allowed the ineffective-assistance claim to proceed. App. to Pet for Cert. 29a; 162 Idaho 791, 793–794, 405 P. 3d 576, 578–579 (2017).

In response to Garza's ineffective-assistance claim, Idaho submitted an affidavit from Garza's trial counsel, which stated, "Garza indicated to me that he knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s)" anyway. Record 151. The trial counsel explained that he did not honor that request because "Garza received the sentence(s) he bargained for in his [Idaho Criminal Rule] 11(f)(1)(c) Agreement," and he told Garza "that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements." *Ibid.* Garza, through his newly appointed collateral counsel, admitted that the appeal waiver "was by the book," that he "received exactly what he bargained for in exchange for his plea," and that there was "no ambiguity" as to the appropriate sentence. *Id.*, at 161–162, 276–277. Garza also conceded that, if forced to identify an issue he would raise on appeal, "[t]he only issue that could be identified is sentencing review." *Id.*, at 176, 371.

The trial court granted summary judgment to Idaho. It explained that Garza needed to identify "non-frivolous grounds for contending on appeal either that (i) the appeal waiver is invalid or unenforceable, or (ii) the issues he wants to pursue on appeal are outside the waiver's scope." App. to Pet. for Cert. 38a. The Idaho Court of Appeals and the Idaho Supreme Court affirmed. Notably, the Idaho Su-

preme Court declined to presume negligent performance because state law imposes a duty on counsel not to file frivolous litigation and to avoid taking actions that will jeopardize the benefit his client gained from the plea bargain. The Idaho Supreme Court also found *Flores-Ortega* inapplicable, reasoning that once a defendant waives his appellate rights, he no longer has a right to an appellate proceeding at all.

II

As with most ineffective-assistance claims, a defendant seeking to show that counsel was constitutionally ineffective for failing to file an appeal must show deficient performance and prejudice. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). Relying on *Flores-Ortega*, the majority finds that Garza has satisfied both prongs. In so holding, it adopts a rule whereby a criminal defendant's invocation of the words "I want to appeal" can undo all sworn attestations to the contrary and resurrect waived statutory rights.

This rule is neither compelled by precedent nor consistent with the use of appeal waivers in plea bargaining. In my view, a defendant who has executed an appeal waiver cannot show prejudice arising from his counsel's decision not to appeal unless he (1) identifies claims he would have pursued that were outside the appeal waiver; (2) shows that the plea was involuntary or unknowing; or (3) establishes that the government breached the plea agreement. Garza has not made any such showing, so he cannot establish prejudice. Furthermore, because Garza's counsel acted reasonably, Garza also cannot establish deficient performance. I would therefore affirm.

A

The majority relies on *Flores-Ortega* to create its new rule, but if anything, that decision undermines the majority's *per se* approach. In *Flores-Ortega*, the defendant pleaded guilty to second-degree murder without waiving *any* of his appellate rights. 528 U. S., at 473–474. On federal collat-

eral review, the defendant alleged that his counsel was ineffective for failing to file a notice of appeal after she promised to do so. *Id.*, at 474. The record contained conflicting evidence as to whether the defendant had communicated his desire to appeal, and the District Court concluded that he failed to carry his burden. *Id.*, at 475. The Ninth Circuit reversed, reasoning that "a habeas petitioner need only show that his counsel's failure to file a notice of appeal was without the petitioner's consent." *Id.*, at 475–476.

This Court reversed. We first concluded that the Ninth Circuit's rule "effectively impose[d] an obligation on counsel in all cases either (1) to file a notice of appeal, or (2) to discuss the possibility of an appeal with the defendant, ascertain his wishes, and act accordingly." *Id.*, at 478. We rejected "this *per se* rule as inconsistent with *Strickland*'s holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *Ibid.* (quoting 466 U. S., at 688). We also faulted the Ninth Circuit for "fail[ing] to engage in the circumstance-specific reasonableness inquiry required by *Strickland*." 528 U. S., at 478. We concluded that this failure "alone mandates vacatur and remand." *Ibid.*

We further explained that counsel's failure to consult with the client about an appeal constitutes deficient performance only when counsel *should* have consulted. *Id.*, at 479. The Court was clear: "We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable." *Ibid.* In determining whether counsel has a duty to consult, we stated that "a highly relevant factor in this inquiry will be whether the conviction follows a trial or guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." *Id.*, at 480. Finally, "[e]ven in cases when the defendant pleads guilty,

the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Ibid.* We rejected the argument that choosing not to consult was outside the scope of valid, strategic decisionmaking, as "we have consistently declined to impose mechanical rules on counsel." *Id.*, at 481. In sum, we "reject[ed] a bright-line rule that counsel must always consult with the defendant regarding an appeal" and instructed courts to evaluate whether the decision to consult was "reasonable" under the circumstances. *Id.*, at 480–481.

We also rejected the Ninth Circuit's "*per se* prejudice rule" because it "ignore[d] the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Id.*, at 484. We held that, "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Ibid.* After the defendant makes that showing, we held that he was entitled to a presumption of prejudice because he was denied counsel during the entire appellate proceeding, rendering it presumptively unreliable. *Id.*, at 483–485.

The Court purports to follow *Flores-Ortega*, but glosses over the important factual and legal differences between that case and this one. The most obvious difference is also the most crucial: There was no appellate waiver in *Flores-Ortega*. The proximate cause of the defendant's failure to appeal in that case was his counsel's failure to file one. Not so here. Garza knowingly waived his appeal rights and never expressed a desire to withdraw his plea. It was thus Garza's agreement to waive his appeal rights, not his attorney's actions, that caused the forfeiture of his appeal. Thus, *Flores-Ortega* is inapposite.

B

Because *Flores-Ortega* does not control cases involving defendants who voluntarily waive their appeal rights, this case should be resolved based on a straightforward application of *Strickland*. Under that framework, Garza has failed to demonstrate either (1) that his counsel was deficient or (2) that he was prejudiced in any way by that alleged deficiency.

1

As to deficiency, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Strickland*, 466 U. S., at 688–689. Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential" and focus on "the reasonableness of counsel's challenged conduct on the facts of the particular case." *Id.*, at 689–690.

Counsel's choice not to appeal Garza's sentence—the only issue Garza asked his counsel to challenge—was not only not deficient; it was the only professionally reasonable course of action for counsel under the circumstances. That is because filing an appeal would have been worse than pointless even judging by Garza's own express desires; it would have created serious risks for Garza while having no chance at all of achieving Garza's stated goals for an appeal. Garza had pleaded guilty under Rule 11, expressly waived his right to appeal his sentence, and stated that his desire in appealing was to have his consecutive sentences "r[u]n concurrent." Record 207. But that kind of appeal challenges the defining feature of a Rule 11 plea: the agreed-upon sentence from which the trial court has no discretion to deviate. Here, that sentence includes the consecutive sentences that Garza agreed to, then sought to challenge. Had Garza's counsel reflexively filed an appeal and triggered resentencing, Garza might have faced life in prison, especially in light of the trial court's concern that the agreed-upon sentence (from which it could not deviate under Rule 11) might have been too lenient.

And Garza's admissions at the plea hearings and his written plea form could have been (and thus likely *would* have been) used against him if he had proceeded to trial on any additional charges filed by the State after breaching the plea agreements. See *id.*, at 104 ("[S]hould the court reinstate a plea of not guilty on his behalf, the State will use Defendant's testimony during his entry of plea of guilty and his written plea form, during the State's case at trial"); *id.*, at 92 (same).

Under these circumstances, it is eminently reasonable for an attorney to "respec[t] his client's formal waiver of appeal" and uphold his duty "to avoid taking steps that will cost the client the benefit of the plea bargain." *Nunez* v. *United States*, 546 F. 3d 450, 453, 455 (CA7 2008) (Easterbrook, C. J.). And because filing an appeal places the defendant's plea agreement in jeopardy, an attorney's decision not to file in the face of an appellate waiver does not amount to the failure to perform "a purely ministerial task" that "cannot be considered a strategic decision." *Flores-Ortega*, 528 U. S., at 477. Even where state law or a plea agreement preserves limited appeal rights, an attorney does not fail to "show up for appeal" by declining to challenge a waived issue. *Nunez*, *supra*, at 454.

The deficiency analysis in this case would likely be different if Garza had informed his counsel that he desired to breach the plea agreements and file an appeal—despite the waiver and in full awareness of the associated risks—for the sake of an identified goal that had any hope of being advanced by the filing of an appeal. But the record shows that Garza simply sought a more lenient sentence. Since that goal could not be advanced by an appeal in this case, counsel had no duty to file one. The Constitution does not compel attorneys to take irrational means to their client's stated ends when doing so only courts disaster.

Garza ultimately faults his plea-stage attorney for failing to put his plea agreements in jeopardy. But I have no doubt that if a similarly situated attorney breached a plea agree-

ment by appealing a waived issue and subjected his client to an increased prison term, that defendant would argue that his counsel was ineffective for filing the appeal. What Garza wants—and what the majority gives him—is a *per se* deficiency rule ensuring that criminal defendants can always blame their plea-stage counsel on collateral review, even where they did not ask counsel to appeal nonwaived claims or breach the plea agreement for the sake of some further (achievable) goal. Declining to file an appeal under these circumstances is reasonable, not deficient.

2

As for prejudice, Garza cannot benefit from a presumed-prejudice finding since he cannot establish that his counsel caused the forfeiture of his appeal, as *Flores-Ortega* requires. Garza knowingly and voluntarily bargained away his right to appeal in exchange for a lower sentence. If any prejudice resulted from that decision, it cannot be attributed to his counsel.

It does not matter that certain appellate issues—specifically, (1) the voluntariness of the plea agreement and (2) a breach of the agreement by the State—are not waivable. Garza did not ask his counsel to appeal those issues. In fact, Garza has not identified any nonwaived issue that he would have brought on direct appeal; he simply identified "sentencing review" as his primary objective. Moreover, declining to file an appeal raising these nonwaivable claims is unlikely to be prejudicial; this Court has repeatedly stated that collateral review is a better avenue to address involuntariness and ineffective-assistance claims, as these claims often require extra record materials and present conflicts with counsel. See generally *Massaro* v. *United States*, 538 U. S. 500 (2003).

The Court's decision in *McCoy* v. *Louisiana*, 584 U. S. 414 (2018), does not change the analysis. *McCoy* acknowledges that some decisions are "reserved for the client," including

the decision whether to "forgo an appeal." *Id.*, at 422. But Garza exercised his right to decide whether to appeal. He chose not to when he entered the plea agreements. Like many constitutional and statutory rights, the right to appeal can be waived by the defendant, and once that choice is finally made, the defendant is bound by the decision and cannot fault his attorney for the self-inflicted prejudicial effects that he suffers. For instance, a defendant cannot waive his right against self-incrimination by testifying at his trial, and then claim that his attorney prejudiced him by not moving to strike his damaging testimony from the record. Nor can a defendant waive his right to a jury trial, and then later claim prejudice when his attorney declines to seek a mistrial on the ground that the judge found him guilty. In the same way, Garza was not prejudiced by his attorney's refusal to file an appeal challenging his sentence, a right that he had expressly waived. The lack of prejudice is especially pronounced in this case, as Garza's instruction to appeal did not acknowledge that he wanted to challenge or rescind the plea agreements.

C

There is no persuasive reason to depart from an ordinary *Strickland* analysis in cases involving an attorney's decision to honor his client's agreement to waive his appeal rights. Garza contends that it is unfair to require *pro se* defendants to identify the issues they would have raised on appeal. But *pro se* defendants always bear the burden of showing ineffective assistance of counsel; I see no reason why this kind of ineffective-assistance claim should be any different. Regardless, Garza's fairness argument rings hollow because Garza has been represented by counsel at every stage of this collateral litigation and has yet to articulate a single nonfrivolous, nonwaived issue that he would have raised on appeal. His inability to identify any issues that he preserved simply underscores the fact that he waived them all.

The Court's rule may be easy to "administ[er]," *ante*, at 247, but it undermines the finality of criminal judgments—a primary purpose of plea agreements—and disadvantages the public by allowing defendants to relitigate issues that they waived in exchange for substantial benefits. The Court's rule also burdens the appellate courts that must address the new, meritless appeals authorized by today's decision. And, ironically, the Court's rule may prejudice the defendants it is designed to help, as prosecutors may understandably be less willing to offer generous plea agreements when courts refuse to afford the government the benefit of *its* bargain—fewer resources spent defending appeals.

Finally, because Garza's requested relief is categorically barred by the plea agreements, the majority offers Garza an appeal he is certain to lose. And should Garza accept the majority's invitation, he could give up much more. If Garza appeals his sentence and thereby breaches his plea agreements, Idaho will be free to file additional charges against him, argue for a "Persistent violator" sentencing enhancement that could land him in prison for life, and refer him for federal prosecution. It simply defies logic to describe counsel's attempt to avoid those consequences as deficient or prejudicial.

III

In addition to breaking from this Court's precedent, today's decision moves the Court another step further from the original meaning of the Sixth Amendment. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." That provision "as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel." *Padilla* v. *Kentucky,* 559 U. S. 356, 389 (2010) (Scalia, J., dissenting). Yet, the Court has read the Constitution to require not only a right to counsel at taxpayers' expense, but a right to *effective* counsel. The result is that

convicted criminals can relitigate their trial and appellate claims through collateral challenges couched as ineffective-assistance-of-counsel claims. Because little available evidence suggests that this reading is correct as an original matter, the Court should tread carefully before extending our precedents in this area.

A

The Sixth Amendment right to the assistance of counsel grew out of the Founders' reaction to the English common-law rule that denied counsel for treason and felony offenses with respect to issues of fact, while allowing counsel for misdemeanors. See 4 W. Blackstone, Commentaries on the Laws of England 349–350 (1769); 1 J. Stephen, A History of the Criminal Law of England 341 (1883); *Powell* v. *Alabama*, 287 U. S. 45, 60 (1932) ("Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest"). It was not until 1696 that England created a narrow exception to this rule for individuals accused of treason or misprision of treason—by statute, Parliament provided both that the accused may retain counsel and that the court must appoint counsel if requested. 7 & 8 Will. 3, ch. 3, § 1. Only in 1836 did England permit all criminally accused to appear and defend with counsel, and even then it did not require court-appointed counsel at government expense. 6 & 7 Will. 4, ch. 114, § 1. It would be another 67 years—112 years after the ratification of the Sixth Amendment, and 35 years after the ratification of the Fourteenth Amendment—before England provided court-appointed counsel for all felonies. Poor Prisoners' Defence Act, 1903, 3 Edw. 7, ch. 38, § 1.

The traditional common-law rule that there was no right to assistance of counsel for felony offenses received widespread criticism. As Blackstone noted, this rule "seems to be not at all of a piece with the rest of the humane treatment of

prisoners by the English law." 4 Commentaries on the Laws of England, at 349; see *ibid.* ("[U]pon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass"). The founding generation apparently shared this sentiment, as most States adopted some kind of statutory or constitutional provision providing the accused the right to retain counsel. W. Beaney, The Right to Counsel in American Courts 14–22 (1955). In fact, at least 12 of the 13 States at the ratification of the Constitution had rejected the English common-law rule, providing for the right to counsel in at least some circumstances. See *Powell*, 287 U. S., at 64–65; *id.*, at 61–64 (surveying the States' right-to-counsel provisions); see also *Betts* v. *Brady*, 316 U. S. 455, 465–467 (1942) (discussing early state constitutional provisions), overruled by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Read against this backdrop, the Sixth Amendment appears to have been understood at the time of ratification as a rejection of the English common-law rule that prohibited counsel, not as a guarantee of government-funded counsel.

This understanding—that the Sixth Amendment did not require appointed counsel for defendants—persisted in the Court's jurisprudence for nearly 150 years. See *United States* v. *Van Duzee*, 140 U. S. 169, 173 (1891) ("There is, however, no general obligation on the part of the government [to] retain counsel for defendants or prisoners"); *Bute* v. *Illinois*, 333 U. S. 640, 661, n. 17 (1948) ("'It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment . . . was not regarded as imposing on the trial judge in a Federal court the duty to appoint counsel for an indigent defendant'"). Nor evidently was there any suggestion that defendants could mount a constitutional attack based on their counsel's failure to render effective assistance.[4]

[4] A defendant could bring a state-law tort action against his attorney. As one commentator explained:

The Court began shifting direction in 1932, when it suggested that a right to appointed counsel might exist in at least some capital cases, albeit as a right guaranteed by the Due Process Clause. *Powell*, *supra*, at 71. Soon thereafter, the Court held that the Sixth Amendment secures a right to court-appointed counsel in all federal criminal cases. *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938). And in 1963, the Court applied this categorical rule to the States through the Fourteenth Amendment, stating "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, *supra*, at 344. Neither of these opinions attempted to square the expansive rights they recognized with the original meaning of the "right . . . to have the Assistance of Counsel." Amdt. 6.

B

After the Court announced a constitutional right to appointed counsel rooted in the Sixth Amendment, it went on to fashion a constitutional new-trial remedy for cases in which counsel performed poorly. The Courts of Appeals had initially adopted a "farce and mockery" standard that they rooted in the Due Process Clause. This standard permitted a defendant to make out an ineffective-assistance

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"An attorney is bound to exercise such skill, care and diligence in any matter entrusted to him, as members of the legal profession commonly possess and exercise in such matters. . . . He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession." 2 T. Cooley, Law of Torts 1389–1390 (3d ed. 1906).

Thus, reasonable choices not clearly foreclosed by law or precedent would apparently permit an attorney to successfully defend against the suit.

claim only "where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice." *Diggs* v. *Welch*, 148 F. 2d 667, 670 (CADC 1945); see *Bottiglio* v. *United States*, 431 F. 2d 930, 931 (CA1 1970) (*per curiam*); *Williams* v. *Beto*, 354 F. 2d 698, 704 (CA5 1965); *Frand* v. *United States*, 301 F. 2d 102, 103 (CA10 1962); *O'Malley* v. *United States*, 285 F. 2d 733, 734 (CA6 1961); *Snead* v. *Smyth*, 273 F. 2d 838, 842 (CA4 1959); *Cofield* v. *United States*, 263 F. 2d 686, 689 (CA9), vacated on other grounds, 360 U. S. 472 (1959); *Johnston* v. *United States*, 254 F. 2d 239, 240 (CA8 1958); *United States* v. *Wight*, 176 F. 2d 376, 379 (CA2 1949); *United States ex rel. Feeley* v. *Ragen*, 166 F. 2d 976, 980–981 (CA7 1948).

Beginning in 1970, the Courts of Appeals moved from the "farce and mockery" standard to a "reasonable competence" standard. See *Trapnell* v. *United States*, 725 F. 2d 149, 151–152 (CA2 1983) (collecting cases). That same year, this Court similarly held that defendants are "entitled to the effective assistance of competent counsel," defined as receipt of legal advice that is "within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970).

Then, in *Strickland*, the Court crafted the current standard for evaluating claims of ineffective assistance of counsel. Without discussing the original meaning of the Sixth Amendment, the Court stated that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." 466 U. S., at 685. The Court thus held that, to succeed on an ineffective-assistance claim, the defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at

688, 694. The Court applies this standard in most situations, but, as it does today, it has also created an increasing number of *per se* rules in lieu of applying *Strickland*'s fact-specific inquiry, thereby departing even further from the original meaning of the Sixth Amendment.

There are a few problems with these precedents that should cause us to pause before extending them. First, the ineffective-assistance standard apparently originated not in the Sixth Amendment, but in our Due Process Clause jurisprudence. See *McMann*, *supra*, at 771, n. 14. Second, "[t]he Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions." *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 157 (2006) (Alito, J., dissenting); cf. *Collins* v. *Virginia*, 584 U. S. 586, 602–606 (2018) (Thomas, J., concurring) (explaining that the exclusionary rule is not required by the Fourth Amendment). *Strickland* does not explain how the Constitution requires a new trial for violations of any right to counsel.

Third, our precedents seek to use the Sixth Amendment right to counsel to achieve an end it is not designed to guarantee. The right to counsel is not an assurance of an error-free trial or even a reliable result. It ensures fairness in a single respect: permitting the accused to employ the services of an attorney. The structural protections provided in the Sixth Amendment certainly seek to promote reliable criminal proceedings, but there is no substantive right to a particular level of reliability. In assuming otherwise, our ever-growing right-to-counsel precedents directly conflict with the government's legitimate interest in the finality of criminal judgments. I would proceed with far more caution than the Court has traditionally demonstrated in this area.

C

The Court should hesitate before further extending our precedents and imposing additional costs on the taxpayers

and the Judiciary.[5] History proves that the States and the Federal Government are capable of making the policy determinations necessary to assign public resources for appointed counsel. The Court has acknowledged as much. *Betts*, 316 U. S., at 471 (declining to extend the right to counsel to the States because "the matter has generally been deemed one of legislative policy"). Before the Court decided *Gideon*, the Court noted that "most of the States have by legislation authorized or even required the courts to assign counsel for the defense of indigent and unrepresented prisoners. As to capital cases, all the States so provide. Thirty-four States so provide for felonies and 28 for misdemeanors." *Bute*, 333 U. S., at 663 (internal quotation marks omitted). It is beyond our constitutionally prescribed role to make these policy choices ourselves. Even if we adhere to this line of precedents, our dubious authority in this area should give us pause before we extend these precedents further.

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[5] In 2018, the Federal Government's budget for defense counsel had grown to more than $1 billion. See Consolidated Appropriations Act, 2018, Pub. L. 115–141, Div. E, Tit. III, 132 Stat. 348. And the collateral challenges produced by the Court's right-to-counsel jurisprudence consume much of the federal courts' resources. Cf. Statistical Tables for the Federal Judiciary—June 2018, Table B–7 (for 12-month period ending June 30, 2018, roughly 24% of appeals filed in the courts of appeals—8,914 of 37,487—were categorized as "Habeas Corpus" or "Motions to Vacate Sentence"), https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2018 (as last visited Feb. 25, 2019); *id.*, Table C–2 (22,478 of 281,202 cases filed in federal district court, or roughly 8%).

MADISON *v.* ALABAMA

CERTIORARI TO THE CIRCUIT COURT OF ALABAMA, MOBILE COUNTY

No. 17–7505. Argued October 2, 2018—Decided February 27, 2019

In *Ford* v. *Wainwright*, 477 U. S. 399, this Court held that the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has "lost his sanity" after sentencing. *Id.*, at 406. And in *Panetti* v. *Quarterman*, 551 U. S. 930, the Court set out the appropriate competency standard: A State may not execute a prisoner whose "mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution." *Id.*, at 958–959.

Petitioner Vernon Madison was found guilty of capital murder and sentenced to death. While awaiting execution, he suffered a series of strokes and was diagnosed with vascular dementia. In 2016, Madison petitioned the state trial court for a stay of execution on the ground that he was mentally incompetent, stressing that he could not recollect committing the crime for which he had been sentenced to die. Alabama responded that Madison had a rational understanding of the reasons for his execution, even assuming he had no memory of committing his crime. And more broadly, the State claimed that Madison failed to implicate *Ford* and *Panetti* because both decisions concerned themselves with gross delusions, which Madison did not have. Following a competency hearing, the trial court found Madison competent to be executed. On federal habeas review, this Court summarily reversed the Eleventh Circuit's grant of relief, holding that, under the "demanding" and "deferential standard" of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), "[n]either *Panetti* nor *Ford* 'clearly established' that a prisoner is incompetent to be executed" because of a simple failure to remember his crime. *Dunn* v. *Madison*, 583 U. S. 10, 13. But the Court "express[ed] no view" on the question of Madison's competency outside of the AEDPA context. *Id.*, at 14. When Alabama set a 2018 execution date, Madison returned to state court, arguing once more that his mental condition precluded the State from going forward. The state court again found Madison mentally competent.

Held:

1. Under *Ford* and *Panetti*, the Eighth Amendment may permit executing a prisoner even if he cannot remember committing his crime. *Panetti* asks only about a person's comprehension of the State's reasons

for resorting to punishment, not his memory of the crime itself. And the one may exist without the other. Such memory loss, however, still may factor into the analysis *Panetti* demands. If that loss combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend why the State is exacting death as a punishment, then the *Panetti* standard will be satisfied. Pp. 274–277.

2. Under *Ford* and *Panetti*, the Eighth Amendment may prohibit executing a prisoner even though he suffers from dementia or another disorder rather than psychotic delusions. The *Panetti* standard focuses on whether a mental disorder has had a particular *effect*; it has no interest in establishing any precise *cause. Panetti*'s references to "gross delusions," 551 U. S., at 960, are no more than a predictable byproduct of that case's facts. *Ford* and *Panetti* hinge on the prisoner's "[in]comprehension of why he has been singled out" to die, 477 U. S., at 409, and kick in if and when that failure of understanding is present, irrespective of whether one disease or another is to blame. In evaluating competency, a judge must therefore look beyond any given diagnosis to a downstream consequence. Pp. 277–279.

3. Because this Court is uncertain whether the state court's decision was tainted by legal error, this case is remanded to that court for renewed consideration of Madison's competency. The state court's brief 2018 ruling—which states only that Madison "did not prove a substantial threshold showing of insanity[ ]"—does not provide any assurance that the court knew a person with dementia, and not psychotic delusions, might receive a stay of execution. Nor does that court's initial 2016 opinion. The sole question on which Madison's competency depends is whether he can reach a rational understanding of why the State wants to execute him. In answering that question—on which this Court again expresses no view—the state court may not rely on any arguments or evidence tainted with the legal errors addressed by this Court. Pp. 280–283.

Vacated and remanded.

Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed a dissenting opinion, in which Thomas and Gorsuch, JJ., joined, *post,* p. 283. Kavanaugh, J., took no part in the consideration or decision of the case.

Bryan A. Stevenson argued the cause for petitioner. With him on the briefs were *Angela L. Setzer* and *Randall S. Susskind.*

Thomas R. Govan, Jr., Deputy Attorney General of Alabama, argued the cause for respondent. On the brief were

Steve Marshall, Attorney General of Alabama, *Clay Crenshaw*, Chief Deputy Attorney General, *Eric Palmer*, Assistant Solicitor General, and *James R. Houts*, Deputy Attorney General.*

Justice Kagan delivered the opinion of the Court.

The Eighth Amendment, this Court has held, prohibits the execution of a prisoner whose mental illness prevents him from "rational[ly] understanding" why the State seeks to impose that punishment. *Panetti* v. *Quarterman*, 551 U. S. 930, 959 (2007). In this case, Vernon Madison argued that his memory loss and dementia entitled him to a stay of execution, but an Alabama court denied the relief. We now address two questions relating to the Eighth Amendment's bar, disputed below but not in this Court. First, does the Eighth Amendment forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime? We (and, now, the parties) think not, because a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence. Second, does the Eighth Amendment apply similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions? We (and, now, the parties)

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

Briefs of *amici curiae* urging affirmance 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 *Rance Craft*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *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, *Jim Hood* of Mississippi, *Josh Hawley* of Missouri, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, and *Herbert H. Slatery III* of Tennessee; and for the National Association of Police Organizations by *Thomas R. McCarthy, J. Michael Connolly,* and *William J. Johnson*.

think so, because either condition may—or, then again, may not—impede the requisite comprehension of his punishment. The only issue left, on which the parties still disagree, is what those rulings mean for Madison's own execution. We direct that issue to the state court for further consideration in light of this opinion.

I

A

This Court decided in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), that the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has "lost his sanity" after sentencing. *Id.*, at 406. While on death row, Alvin Ford was beset by "pervasive delusion[s]" associated with "[p]aranoid [s]chizophrenia." *Id.*, at 402–403. Surveying both the common law and state statutes, the Court found a uniform practice against taking the life of such a prisoner. See *id.*, at 406–409. Among the reasons for that time-honored bar, the Court explained, was a moral "intuition" that "killing one who has no capacity" to understand his crime or punishment "simply offends humanity." *Id.*, at 407, 409; see *id.*, at 409 (citing the "natural abhorrence civilized societies feel" at performing such an act). Another rationale rested on the lack of "retributive value" in executing a person who has no comprehension of the meaning of the community's judgment. *Ibid.*; see *id.*, at 421 (Powell, J., concurring in part and concurring in judgment) (stating that the death penalty's "retributive force[ ] depends on the defendant's awareness of the penalty's existence and purpose"). The resulting rule, now stated as a matter of constitutional law, held "a category of defendants defined by their mental state" incompetent to be executed. *Id.*, at 419.

The Court clarified the scope of that category in *Panetti* v. *Quarterman* by focusing on whether a prisoner can "reach a rational understanding of the reason for [his] execution." 551 U. S., at 958. Like Alvin Ford, Scott Panetti suffered

from "gross delusions" stemming from "extreme psychosis." *Id.*, at 936, 960. In reversing a ruling that he could still be executed, the *Panetti* Court set out the appropriate "standard for competency." *Id.*, at 957. *Ford*, the Court now noted, had not provided "specific criteria." 551 U. S., at 957. But *Ford* had explored what lay behind the Eighth Amendment's prohibition, highlighting that the execution of a prisoner who cannot comprehend the reasons for his punishment offends moral values and "serves no retributive purpose." 551 U. S., at 958. Those principles, the *Panetti* Court explained, indicate how to identify prisoners whom the State may not execute. The critical question is whether a "prisoner's mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution." *Id.*, at 958–959. Or similarly put, the issue is whether a "prisoner's concept of reality" is "so impair[ed]" that he cannot grasp the execution's "meaning and purpose" or the "link between [his] crime and its punishment." *Id.*, at 958, 960.

B

Vernon Madison killed a police officer in 1985 during a domestic dispute. An Alabama jury found him guilty of capital murder, and the trial court sentenced him to death. He has spent most of the ensuing decades on the State's death row.

In recent years, Madison's mental condition has sharply deteriorated. Madison suffered a series of strokes, including major ones in 2015 and 2016. See Tr. 19, 46–47 (Apr. 14, 2016). He was diagnosed as having vascular dementia, with attendant disorientation and confusion, cognitive impairment, and memory loss. See *id.*, at 19–20, 52–54. In particular, Madison claims that he can no longer recollect committing the crime for which he has been sentenced to die. See Tr., Pet. Exh. 2, p. 8.

After his 2016 stroke, Madison petitioned the trial court for a stay of execution on the ground that he had become

mentally incompetent. Citing *Ford* and *Panetti*, he argued that "he no longer understands" the "status of his case" or the "nature of his conviction and sentence." Pet. for Suspension in No. CC–85–1385.80 (C. C. Mobile Cty., Ala., Feb. 12, 2016), pp. 11, 14. And in a later filing, Madison emphasized that he could not "independently recall the facts of the offense he is convicted of." Brief Pursuant to Order (Apr. 21, 2016), p. 8. Alabama countered that Madison had "a rational understanding of [the reasons for] his impending execution," as required by *Ford* and *Panetti*, even assuming he had no memory of committing his crime. Brief on Madison's Competency (April 21, 2016), pp. 4–5, 8. And more broadly, the State claimed that Madison could not possibly qualify as incompetent under those two decisions because both "concerned themselves with '[g]ross delusions' "—which all agree Madison does not have. *Id.*, at 2; see *ibid.* (Madison "failed to implicate" *Ford* and *Panetti* because he "does not suffer from psychosis or delusions").

Expert reports from two psychologists largely aligned with the parties' contending positions. Dr. John Goff, Madison's expert, found that although Madison "underst[ood] the nature of execution" in the abstract, he did not comprehend the "reasoning behind" Alabama's effort to execute *him*. Tr., Pet. Exh. 2 (Apr. 14, 2016), p. 8; see *id.*, at 9. Goff stated that Madison had "Major Vascular Neurological Disorder"—also called vascular dementia—which had caused "significant cognitive decline." *Ibid.* And Goff underscored that Madison "demonstrate[d] retrograde amnesia" about his crime, meaning that he had no "independent recollection[ ]" of the murder. *Id.*, at 8; see *id.*, at 9. For his part, Dr. Karl Kirkland, the court-appointed expert, reported that Madison "was able to discuss his case" accurately and "appear[ed] to understand his legal situation." Tr., Ct. Exh. 1, pp. 10–11. Although Kirkland acknowledged that Madison's strokes had led to cognitive decline, see *id.*, at 10, the psychologist made no mention of Madison's diagnosed vascular dementia.

Rather, Kirkland highlighted that "[t]here was no evidence of psychosis, paranoia, or delusion." *Id.*, at 9; see *ibid.* (Madison "did not seem delusional at all").

At a competency hearing, Alabama similarly stressed Madison's absence of psychotic episodes or delusions. The State asked both experts to affirm that Madison was "neither delusional [n]or psychotic." Tr. 56; see *id.*, at 22. And its closing argument focused on their agreement that he was not. As the State summarized: "He's not psychotic. He's not delusional." *Id.*, at 81. On the State's view, that fact answered the competency question because "[t]he Supreme Court is looking at whether someone's delusions or someone's paranoia or someone's psychosis is standing in the way of" rationally understanding his punishment. *Id.*, at 82. Madison's counsel disputed that point. "[T]he State would like to say, well, he's not delusional, he's not psychotic," the attorney recapped. *Id.*, at 83. But, she continued, "[t]hat's not really the criteria" under *Panetti*. Tr. 83. Rather, the Court there barred executing a person with any mental illness—"dementia" and "brain injuries" no less than psychosis and delusions—that prevents him from comprehending "why he is being executed." *Ibid.*

The trial court found Madison competent to be executed. Its order first recounted the evidence given by each expert witness. The summary of Kirkland's report and testimony began by stating that the psychologist had "found no evidence of paranoia[,] delusion [or] psychosis." Order (Apr. 29, 2016), p. 5 (2016 Order). The court then noted Kirkland's view that Madison could "give details of the history of his case" and "appear[ed] to understand his legal situation." *Ibid.* Turning to the Goff report, the court noted the expert's finding that Madison was "amnesic" and could not recollect his crime. *Id.*, at 6; see *id.*, at 7. In a single, final paragraph, the court provided both its ruling and its reasoning. Madison had failed to show, the court wrote, that he did not "rationally understand the punishment he is about

to suffer and why he is about to suffer it." *Id.*, at 10. The court "accept[ed] the testimony of Dr. Kirkland as to the understanding Madison has concerning the situation." *Ibid.* "Further," the court concluded, "the evidence does not support that Mr. Madison is delusional." *Ibid.*

Madison next sought habeas relief in federal court, where he faced the heavy burden of showing that the state-court ruling "involved an unreasonable application of[ ] clearly established federal law" or rested on an "unreasonable determination of the facts." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d). The District Court rejected his petition, but the Court of Appeals for the Eleventh Circuit ruled that Madison had demonstrated both kinds of indisputable error. See *Madison* v. *Commissioner*, 851 F. 3d 1173 (2017). This Court then summarily reversed the appeals court's decision. See *Dunn* v. *Madison*, 583 U. S. 10 (2017) (*per curiam*). We explained, contrary to the Eleventh Circuit's principal holding, that "[n]either *Panetti* nor *Ford* 'clearly established' that a prisoner is incompetent to be executed" because of a simple failure to remember his crime. *Id.*, at 13. And we found that the state court did not act unreasonably—otherwise put, did not err "beyond any possibility for fairminded disagreement"—when it found that Madison had the necessary understanding to be executed. *Id.*, at 14 (internal quotation marks omitted). But we made clear that our decision was premised on AEDPA's "demanding" and "deferential standard." *Id.*, at 12, 14. "We express[ed] no view" on the question of Madison's competency "outside of the AEDPA context." *Id.*, at 14.[1]

[1] Neither did we opine on—or even mention—the subsidiary legal question whether a mental disorder other than delusions may render a person incompetent to be executed. Alabama told the Eleventh Circuit that it could not, thus reprising the claim the State had made in the trial court. See *Madison*, 851 F. 3d, at 1188 (describing Alabama's argument that "only a prisoner suffering from gross delusions can show incompetency under

When Alabama set an execution date in 2018, Madison returned to state court to argue again that his mental condition precluded the State from going forward. In his petition, Madison reiterated the facts and arguments he had previously presented to the state court. But Madison also claimed that since that court's decision (1) he had suffered further cognitive decline and (2) a state board had suspended Kirkland's license to practice psychology, thus discrediting his prior testimony. See Pet. to Suspend Execution in No. CC–85–1385.80 (C. C. Mobile Cty., Ala., Dec. 18, 2017), pp. 1–2, 16–19.[2] Alabama responded that nothing material had changed since the court's first competency hearing. See Motion to Dismiss (Dec. 20, 2017), p. 9. The State also repeated its argument that *Panetti* permits executing Madison, pointing to the experts' agreement that he is "not delusional or psychotic" and asserting that neither "memory impairment [n]or dementia [could] suffice to satisfy the *Panetti* and *Ford* standards" without "an expansion" of those decisions. Motion to Dismiss 4, 10. A week before the scheduled execution, the state court again found Madison mentally competent. Its brief order stated only that Madison "did not

Panetti"); Recording of Oral Arg. in No. 16–12279 (CA11, June 23, 2016), at 26:36–26:45 ("In this case, what we have is someone who claims to have a mental illness, dementia," but does not have "delusions, which is what *Panetti* requires"); *id.*, at 26:48–27:21 (When asked if someone with "severe dementia" but no delusions could be executed, the State responded "I think so because . . . they don't have delusions"). (Alabama *alternatively* argued that the state court's decision was not based on that view, see Brief for Appellee in No. 16–12279 (CA11), pp. 37–38; the quotations the dissent picks out, see *post*, at 292–294, n. 4, come from that additional argument.) The Eleventh Circuit rejected the State's contention that dementia could not preclude an execution as "inconsistent with the principles underlying" *Ford* and *Panetti*. 851 F. 3d, at 1188. But we had no reason to address that holding in light of the errors we saw in other parts of the appeals court's analysis.

[2] As Madison's petition recounted, the license suspension followed the opening of a criminal investigation into whether Kirkland had committed narcotics offenses. See Pet. to Suspend Execution 17–19.

provide a substantial threshold showing of insanity[ ] sufficient to convince this Court to stay the execution." App. A to Pet. for Cert.

Madison then filed in this Court a request to stay his execution and a petition for certiorari. We ordered the stay on the scheduled execution date and granted the petition a few weeks later. See 583 U. S. 1108 and 1155 (2018). Because the case now comes to us on direct review of the state court's decision (rather than in a habeas proceeding), AEDPA's deferential standard no longer governs. (And for that reason—contrary to the dissent's suggestion, *post*, at 294—our decision on Madison's habeas petition cannot help resolve the questions raised here.)

II

Two issues relating to *Panetti*'s application are before us. Recall that our decision there held the Eighth Amendment to forbid executing a prisoner whose mental illness makes him unable to "reach a rational understanding of the reason for [his] execution." 551 U. S., at 958; see *supra*, at 268. The first question presented is whether *Panetti* prohibits executing Madison merely because he cannot remember committing his crime. The second question raised is whether *Panetti* permits executing Madison merely because he suffers from dementia, rather than psychotic delusions.[3] In

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[3] The dissent is in high dudgeon over our taking up the second question, arguing that it was not presented in Madison's petition for certiorari. See *post*, at 283–289. But that is incorrect. The petition presented two questions—the same two we address here. The first question asked whether the Eighth Amendment bars executing Madison because he has no "memory of his commission of the capital offense." Pet. for Cert. iii. The second question asked whether that Amendment bars his execution because his "vascular dementia" and "severe cognitive dysfunction" prevent him from either remembering his crime "or understanding the circumstances of his scheduled execution." *Ibid.* So the first question concerned whether memory loss alone could form the basis of a *Panetti* claim and the second whether the varied consequences of dementia could do so. The

prior stages of this case, as we have described, the parties disagreed about those matters. See *supra,* at 270–274. But at this Court, Madison accepted Alabama's position on the first issue and Alabama accepted Madison's on the second. See, *e. g.*, Tr. of Oral Arg. 11, 36. And rightly so. As the parties now recognize, the standard set out in *Panetti* supplies the answers to both questions. First, a person lacking memory of his crime may yet rationally understand why the State seeks to execute him; if so, the Eighth Amendment poses no bar to his execution. Second, a person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution. What matters is whether a person has the "rational understanding" *Panetti* requires—not whether he has any particular memory or any particular mental illness.

A

Consider initially a person who cannot remember his crime because of a mental disorder, but who otherwise has full cognitive function. The memory loss is genuine: Let us say the person has some kind of amnesia, which has produced a black hole where that recollection should be. But the person remains oriented in time and place; he can make logical connections and order his thoughts; and he comprehends familiar concepts of crime and punishment. Can the State execute

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body of the petition, to be sure, devoted more space to the first question. But it clearly referenced the second. See Pet. for Cert. 18 ("[T]his Court has never sought to constrain the world of maladies that can give rise to a finding that a prisoner is incompetent to be executed"); *id.*, at 25 ("[C]ourts have recognized dementia and attendant cognitive decline and memory impairment as a basis for a finding of incompetency to be executed"). And in any event, the number of words spent on each is not what matters. Our Rule states that the Court will consider "[o]nly the questions set out in the petition, or fairly included therein." This Court's Rule 14.1(a). Here, we consider, in order, the two questions set out in Madison's petition.

him for a murder? When we considered this case before, using the deferential standard applicable in habeas, we held that a state court could allow such an execution without committing inarguable error. See *Madison*, 583 U. S., at 13 (stating that no prior decision had "clearly established" the opposite); *supra*, at 272. Today, we address the issue straight-up, sans any deference to a state court. Again, is the failure to remember committing a crime alone enough to prevent a State from executing a prisoner?

It is not, under *Panetti*'s own terms. That decision asks about understanding, not memory—more specifically, about a person's understanding of why the State seeks capital punishment for a crime, not his memory of the crime itself. And the one may exist without the other. Do you have an independent recollection of the Civil War? Obviously not. But you may still be able to reach a rational—indeed, a sophisticated—understanding of that conflict and its consequences. Do you recall your first day of school? Probably not. But if your mother told you years later that you were sent home for hitting a classmate, you would have no trouble grasping the story. And similarly, if you somehow blacked out a crime you committed, but later learned what you had done, you could well appreciate the State's desire to impose a penalty. Assuming, that is, no other cognitive impairment, loss of memory of a crime does not prevent rational understanding of the State's reasons for resorting to punishment. And that kind of comprehension is the *Panetti* standard's singular focus.

The same answer follows from the core justifications *Panetti* offered for framing its Eighth Amendment test as it did. Echoing *Ford, Panetti* reasoned that execution has no retributive value when a prisoner cannot appreciate the meaning of a community's judgment. See 551 U. S., at 958–959 (citing 477 U. S., at 407–408); *supra*, at 269. But as just explained, a person who can no longer remember a crime

may yet recognize the retributive message society intends to convey with a death sentence. Similarly, *Ford* and *Panetti* stated that it "offends humanity" to execute a person so wracked by mental illness that he cannot comprehend the "meaning and purpose of the punishment." 477 U. S., at 407; 551 U. S., at 960; see *id.*, at 958. But that offense to morality must be much less when a person's mental disorder causes nothing more than an episodic memory loss. Moral values do not exempt the simply forgetful from punishment, whatever the neurological reason for their lack of recall.

But such memory loss still may factor into the "rational understanding" analysis that *Panetti* demands. If that loss combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend why the State is exacting death as punishment, then the *Panetti* standard will be satisfied. That may be so when a person has difficulty preserving any memories, so that even newly gained knowledge (about, say, the crime and punishment) will be quickly forgotten. Or it may be so when cognitive deficits prevent the acquisition of such knowledge at all, so that memory gaps go forever uncompensated. As *Panetti* indicated, neurologists, psychologists, and other experts can contribute to a court's understanding of issues of that kind. See *id.*, at 962. But the sole inquiry for the court remains whether the prisoner can rationally understand the reasons for his death sentence.

B

Next consider a prisoner who suffers from dementia or a similar disorder, rather than psychotic delusions. The dementia, as is typical, has compromised this prisoner's cognitive functions. But it has not resulted in the kind of delusional beliefs that Alvin Ford and Scott Panetti held. May the prisoner nonetheless receive a stay of execution under *Ford* and *Panetti*? Or instead, is a delusional disorder a prerequisite to declaring a mentally ill person incompetent

to be executed? We did not address that issue when we last considered this case, on habeas review; in that sense, the question is one of first impression. See *supra,* at 272–273, n. 1.

But here too, *Panetti* has already answered the question. Its standard focuses on whether a mental disorder has had a particular *effect*: an inability to rationally understand why the State is seeking execution. See *supra,* at 268–269. Conversely, that standard has no interest in establishing any precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti,* so long as they produce the requisite lack of comprehension. To be sure, *Panetti* on occasion spoke of "gross delusions" in explaining its holding. 551 U. S., at 960. And similarly, *Ford* talked about the "insane," which sometimes refers to persons holding such irrational beliefs. See, *e. g.,* 477 U. S., at 401, 410.[4] But those references are no more than a predictable byproduct of the two cases' facts. At the same time (and interchangeably), *Panetti* used more inclusive terms, such as "mental illness," "mental disorder," and "psychological dysfunction." 551 U. S., at 936, 959, 960; see *Ford,* 477 U. S., at 408–409, n. 2 (referring to prisoners with "mental illness"). And most important, *Panetti* framed its test, as just described, in a way utterly indifferent to a prisoner's specific mental illness. The *Panetti* standard concerns, once again, not the diagnosis of such illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment.

And here too, the key justifications *Ford* and *Panetti* offered for the Eighth Amendment's bar confirm our conclusion

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[4] Alternatively, however, the term may also be used to encompass persons with other mental conditions, so long as they are "severe enough [to] prevent[ ] a person from having legal capacity and excuse[ ] the person from criminal or civil responsibility." Black's Law Dictionary 914 (10th ed. 2014). In that different understanding, "insanity" connotes a general standard of legal competency rather than a more limited description of delusional disorders.

about its reach. As described above, those decisions stated that an execution lacks retributive purpose when a mentally ill prisoner cannot understand the societal judgment underlying his sentence. See *Panetti*, 551 U. S., at 958–959; *Ford*, 477 U. S., at 409; *supra*, at 268–269. And they indicated that an execution offends morality in the same circumstance. See 551 U. S., at 958, 960; 477 U. S., at 409; *supra*, at 268–269. Both rationales for the constitutional bar thus hinge (just as the *Panetti* standard deriving from them does) on the prisoner's "[in]comprehension of why he has been singled out" to die. 477 U. S., at 409; see *supra*, at 268–269. Or said otherwise, if and when that failure of understanding is present, the rationales kick in—irrespective of whether one disease or another (say, psychotic delusions or dementia) is to blame.

In evaluating competency to be executed, a judge must therefore look beyond any given diagnosis to a downstream consequence. As *Ford* and *Panetti* recognized, a delusional disorder can be of such severity—can "so impair the prisoner's concept of reality"—that someone in its thrall will be unable "to come to grips with" the punishment's meaning. *Panetti*, 551 U. S., at 958; *Ford*, 477 U. S., at 409. But delusions come in many shapes and sizes, and not all will interfere with the understanding that the Eighth Amendment requires. See *Panetti*, 551 U. S., at 962 (remanding the case to consider expert evidence on whether the prisoner's delusions did so). And much the same is true of dementia. That mental condition can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the State wants to execute him. See *supra*, at 277–278. But dementia also has milder forms, which allow a person to preserve that understanding. Hence the need—for dementia as for delusions as for any other mental disorder—to attend to the particular circumstances of a case and make the precise judgment *Panetti* requires.

III

The only question left—and the only one on which the parties now disagree—is whether Madison's execution may go forward based on the state court's decision below. Madison's counsel says it cannot because that ruling was tainted by legal error—specifically, the idea that only delusions, and not dementia, can support a finding of mental incompetency. See Tr. of Oral Arg. 12, 21, 25, 27. Alabama counters that the state court did not rely on that (concededly) incorrect view of the law. See *id.*, at 37–41. But we come away at the least unsure whether that is so—especially given Alabama's evidence and arguments in the state court.

As noted earlier, the 2018 ruling we review today contains only one sentence of explanation. See *supra*, at 273–274. It states that Madison "did not provide a substantial threshold showing of insanity[ ] sufficient to convince this Court to stay the execution." App. A to Pet. for Cert. If the state court used the word "insanity" to refer to a delusional disorder, then error occurred: The court would have denied a stay on the ground that Madison did not have that specific kind of mental illness. And the likelihood that the court made that mistake is heightened by the State's emphasis, at that stage of the proceedings (as at others), that Madison was "not delusional or psychotic" and that "dementia" could not suffice to bar his execution absent "an expansion of *Ford* and *Panetti*." Motion to Dismiss 4, 10; see *supra*, at 270–274; but see *post*, at 291–292, and n. 4 (disregarding those arguments).[5] Alabama argues, however, that the court spoke of "insanity" only because the state statute under which Madison sought relief uses that term. See Tr. of Oral Arg. 37; Ala. Code § 15–16–23 (2011) (allowing a stay of execution "on account

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[5] The State once again repeated that argument in its brief in opposition to Madison's certiorari petition. See Brief in Opposition 11–12 ("Madison does not argue that he is insane. Instead, he argues that he suffers from dementia" and that his execution should be barred "under a yet-unannounced expansion of *Ford* and *Panetti*").

of the [convict's] insanity"). But even if so, that does not advance the State's view that the state court properly understood the Eighth Amendment bar when assessing Madison's competency. Alabama told this Court in opposing certiorari that its statute covers only those with delusional disorders, and not those with dementia. See Brief in Opposition 12 ("[T]he sole question to be answered under the state statute was whether Madison was insane, not whether he suffered from dementia"). The state court's (supposed) echoing of statutory language understood in that way cannot provide assurance that the court knew a person with dementia might receive a stay of execution; indeed, it suggests exactly the opposite. The court's 2018 order thus calls out for a do-over.

Alabama further contends, however, that we should look past the state court's 2018 decision to the court's initial 2016 determination of competency. (The dissent similarly begins with the 2016 ruling, see *post,* at 289, even though that is not the decision under review here.) According to the State, nothing material changed in the interim period, see *supra,* at 273; thus, we may find the meaning of the later ruling in the earlier one, see Tr. of Oral Arg. 36–37. And, the State continues, the 2016 opinion gets the law right. Alabama's proof is that the court, after summarizing the psychologists' testimony, found that "Madison has a rational[ ] understanding, as required by *Panetti,*" concerning the "punishment he is about to suffer and why he is about to suffer it." 2016 Order, at 10; see Tr. of Oral Arg. 39; *supra,* at 271–272. (The dissent quotes the same passage. See *post,* at 289.)

But the state court's initial decision does not aid Alabama's cause. First, we do not know that the court in 2018 meant to incorporate everything in its prior opinion. The order says nothing to that effect; and though it came out the same way as the earlier decision, it need not have rested on all the same reasoning. Second, the 2016 opinion itself does not show that the state court realized that persons suffering from dementia could satisfy the *Panetti* standard. True

enough, as Alabama says, that the court accurately stated that standard in its decision. But as described above, Alabama had repeatedly argued to the court (over Madison's objection) that only prisoners suffering from delusional disorders could qualify as incompetent under *Panetti*. See, *e. g.*, Brief on Madison's Competency 2 (Madison "failed to implicate" *Ford* and *Panetti* because he "does not suffer from psychosis or delusions"); Tr. 82 ("The Supreme Court [in *Panetti*] is looking at whether someone's delusions or someone's paranoia or someone's psychosis is standing in the way of" rationally understanding his punishment); see also *supra*, at 270–271; but see *post*, at 291–292, and n. 4 (disregarding those arguments). And Alabama relied on the expert opinion of a psychologist who highlighted Madison's lack of "psychosis, paranoia, or delusion," while never mentioning his dementia. Tr., Ct. Exh. 1 (Apr. 14, 2016), p. 9. That too-limited understanding of *Panetti*'s compass is reflected in the court's 2016 opinion. In its single paragraph of analysis, the court "accept[ed] the testimony" of the State's preferred psychologist.[6] And the court further found that "the evidence does not support that Mr. Madison is delusional"—without ever considering his undisputed dementia. 2016 Order, at 10.

For those reasons, we must return this case to the state court for renewed consideration of Madison's competency (assuming Alabama sets a new execution date). See, *e. g.*, *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. 246, 256 (2017) (remanding when "uncertain" whether "an impermissible taint occurred"); *Clemons* v. *Mississippi*, 494 U. S. 738, 751–752 (1990) (similar). In that proceeding, two matters disputed below should now be clear. First, under *Ford* and *Pa-*

[6] The court well understood that expert's exclusive focus on whether Madison had psychotic delusions. In summarizing his testimony, the court began as follows: "Dr. Kirkland in his exam found no evidence of paranoia or delusion at the time of his examin[ation], on March 31, 2016. He also found that there was no psychosis present." 2016 Order, at 5; see *supra*, at 271.

netti, the Eighth Amendment may permit executing Madison even if he cannot remember committing his crime. Second, under those same decisions, the Eighth Amendment may prohibit executing Madison even though he suffers from dementia, rather than delusions. The sole question on which Madison's competency depends is whether he can reach a "rational understanding" of why the State wants to execute him. *Panetti*, 551 U. S., at 958. In answering that question—on which we again express no view, see *supra*, at 272—the state court may not rely on any arguments or evidence tainted with the legal errors we have addressed. And because that is so, the court should consider whether it needs to supplement the existing record. Some evidence in that record, including portions of the experts' reports and testimony, expressly reflects an incorrect view of the relevance of delusions or memory; still other evidence might have implicitly rested on those same misjudgments. The state court, we have little doubt, can evaluate such matters better than we. It must do so as the first step in assessing Madison's competency—and ensuring that if he is to be executed, he understands why.

We accordingly vacate the judgment of the state court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Kavanaugh took no part in the consideration or decision of this case.

Justice Alito, with whom Justice Thomas and Justice Gorsuch join, dissenting.

What the Court has done in this case makes a mockery of our Rules.

Petitioner's counsel convinced the Court to stay his client's execution and to grant his petition for a writ of certiorari for the purpose of deciding a clear-cut constitu-

tional question: Does the Eighth Amendment prohibit the execution of a murderer who cannot recall committing the murder for which the death sentence was imposed? The petition strenuously argued that executing such a person is unconstitutional.

After persuading the Court to grant review of this question, counsel abruptly changed course. Perhaps because he concluded (correctly) that petitioner was unlikely to prevail on the question raised in the petition, he conceded that the argument advanced in his petition was wrong, and he switched to an entirely different argument, namely, that the state court had rejected petitioner's claim that he is incompetent to be executed because the court erroneously thought that dementia, as opposed to other mental conditions, cannot provide a basis for such a claim. See Brief for Petitioner 16.

This was not a question that the Court agreed to hear; indeed, there is no mention whatsoever of this argument in the petition—not even a hint. Nor is this question fairly included within those on which the Court granted review. On the contrary, it is an entirely discrete and independent question.

Counsel's tactics flagrantly flouted our Rules. Our Rules make it clear that we grant certiorari to decide the specific question or questions of law set out in a petition for certiorari. See this Court's Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court"). Our whole certiorari system would be thrown into turmoil if we allowed counsel to obtain review of one question and then switch to an entirely different question after review is granted. In the past when counsel have done this, we have dismissed the writ as improvidently granted. See, *e. g., Visa, Inc.* v. *Osborn*, 580 U. S. 993 (2016); *City and County of San Francisco* v. *Sheehan*, 575 U. S. 600 (2015). We should do that here.

Instead, the majority rewards counsel's trick. It vacates the judgment below because it is unsure whether the state

court committed the error claimed in petitioner's merits brief. But not only was there no trace of this argument in the petition; there is nothing in the record showing that the state court ever adopted the erroneous view that petitioner claims it took.

I

The question on which we granted review was an outgrowth of our *per curiam* decision in *Dunn* v. *Madison*, 583 U. S. 10 (2017), which concerned an Eleventh Circuit decision granting petitioner federal habeas relief. Prior to that decision, this Court had held in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), that the Eighth Amendment prohibits the execution of a person who is "insane," and in *Panetti* v. *Quarterman*, 551 U. S. 930 (2007), the Court elaborated on this rule, explaining that a person cannot be executed if he lacks a rational understanding of the reason for the execution. The Eleventh Circuit interpreted those cases to mean that petitioner could not be executed because he did not remember killing his victim, Mobile, Alabama, police officer Julius Schulte.

We summarily reversed. Under the relevant provision of the federal habeas statute, 28 U. S. C. § 2254(d), which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), petitioner could not obtain federal habeas relief unless the state court's rejection of his memory-loss claim represented an unreasonable application of federal law as clearly established at the time by decisions of this Court. We held that neither *Ford* nor *Panetti* clearly established that a person cannot be executed if he does not remember committing the crime for which the death sentence was imposed.

Our opinion stated, however, that it "express[ed] no view on the merits of the underlying question outside of the AEDPA context." *Dunn*, 583 U. S., at 14. And a concurring opinion authored by JUSTICE GINSBURG and joined by JUSTICES BREYER and SOTOMAYOR teed up this question for

review in a later case. *Ibid.* ("The issue whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense is a substantial question not yet addressed by the Court. Appropriately presented, the issue would warrant full airing").

Taking this cue, petitioner then sought relief in state court based on his inability to remember his crime, and when that effort failed, he filed the petition at issue now.

II

The centerpiece of the petition and petitioner's eleventh-hour application for a stay of execution[1] was the argument that he could not constitutionally be executed because he did not remember killing Officer Schulte. The petition repeatedly noted petitioner's inability to remember his crime. See Pet. for Cert. i, iii, 1, 2, 8, 10, 11, 12, 18, 22, 23, 25, 26, 27, 28. And the petition was very clear about the question on which review was sought:

> "[T]his case presents this Court with the appropriate vehicle to consider the substantial question of whether the execution of a prisoner with no memory of the underlying offense is consistent with the evolving standards of decency inherent in this Court's Eighth Amendment jurisprudence." *Id.*, at 2.

This same point was made time and again:

- "[B]ecause [petitioner's] disability renders him unable to remember the underlying offense for which he is to be punished, his execution does not comport with the

[1] Petitioner sought and obtained a stay of execution based on this same argument. See Application for Stay of Execution 2, 6 (moving the Court to stay petitioner's execution so that it could address the "substantial" and "critical" question whether executing petitioner, "whose severe cognitive dysfunction leaves him without memory of his commission of the capital offense," would violate the Eighth Amendment).

evolving standards of decency required by this Court's Eighth Amendment jurisprudence." *Id.*, at 18.

- "[I]mposing death on a prisoner, who, like Mr. Madison, suffers from substantial memory deficits by virtue of multiple stroke and resulting vascular dementia serves no retributive or deterrent purpose." *Id.*, at 22.
- [E]xecuting an individual with no memory of the underlying offense serves no retributive purpose." *Ibid.*
- "[W]here the person being punished has no memory of the commission of the offense for which he is to be executed, the 'moral quality' of that punishment is lessened and unable to match outrage over the offense." *Id.*, at 22–23.
- "Mr. Madison's severe memory impairments as a result of vascular dementia render him incompetent to be executed under the Eight Amendment." *Id.*, at 25 (quotation altered).

In sum, the body of the petition makes it clear that review was sought on the question invited by the *Dunn* concurrence, and the thrust of the wording of the two questions was the same. They read as follows:

> "1. Consistent with the Eighth Amendment, and this Court's decisions in *Ford* and *Panetti*, may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense? See *Dunn* v. *Madison*, [583 U. S. 10, 14 (2017) (Ginsburg, J., joined by Breyer and Sotomayor, JJ., concurring).]
>
> "2. Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a

> degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?" Pet. for Cert. iii.

With the exception of the final phrase in question two ("or understanding the circumstances of his scheduled execution"), both questions solely concern the effect of memory loss on an Eighth Amendment analysis. The final phrase in question two and certain passages in the petition, if read with an exceedingly generous eye, *might* be seen as a basis for considering whether the evidence in the state-court record shows that petitioner's dementia rendered him incapable of having a rational understanding of the reason for his execution. But that is the sort of factbound question on which we rarely grant review, see this Court's Rule 10, and it is questionable whether we did so here.

But whether or not the petition may be fairly read to present that factbound question, it is a travesty to read it as challenging the state-court order on the ground that the state court erroneously believed that dementia cannot provide a basis for a *Ford*/*Panetti* claim. There is no inkling of that argument in the petition. Although the petition described the state-court order at numerous places, the petition never claimed that the order was based on an impermissible distinction between dementia and other mental conditions. See, *e. g.,* Pet. for Cert. ii, 2–3, 16. And in fact, there is a point in the petition where such an interpretation of the state-court order would surely have been mentioned if the petition had intended to raise it as a ground for review. The petition noted that "courts have recognized dementia and attendant cognitive decline and memory impairment as a basis for a finding of incompetency to be executed," *id.,* at 25, but the petition did not follow that statement by claiming that the state court in this case took a contradictory position.

Because the petition did not raise—indeed, did not even hint at—the argument on which the Court now grants relief,

the Court's decision is insupportable.[2] It violates our Rule that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Rule 14.1(a).

III

Even if it were proper for us to consider whether the order below was based on an erroneous distinction between dementia and other mental conditions, there is little reason to think that it was. After a full evidentiary hearing in 2016, the state court rejected petitioner's *Ford/Panetti* claim based on a correct statement of the holding of those decisions. It found that petitioner "ha[d] not carried his burden [of showing] by a preponderance of the evidence . . . that he . . . does not rationally understand the punishment he is about to suffer and why he is about to suffer it." Order (Apr. 29, 2016), p. 10. The court's order went on to say that it "specifically [found] that Madison has a rationa[l] understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rationa[l] understanding that the State is seeking retribution and that he will die when he is executed." *Ibid.*

In concluding that the state court might have drawn a distinction between dementia and other mental conditions, the majority seizes upon the wording of the order issued after a subsequent hearing in 2018. *Ante*, at 280. In that order, the same judge wrote: "Defendant did not provide a substantial threshold showing of *insanity*, a requirement set out by the United States Supreme Court, sufficient to convince this Court to stay the execution." Order (Jan. 16, 2018) (emphasis added). The majority worries that the state-court judge might not have applied the same standard in 2018 as he had two years earlier and might have viewed "in-

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[2] The Court is unable to cite a single place in the petition that makes any reference to the argument that the state court failed to understand that dementia could satisfy the *Ford/Panetti* test.

sanity" as something narrower than the standard mandated by *Ford* and *Panetti*. This concern is unfounded.

Taken out of context, the term "insanity" might not be read to encompass dementia, but in context, it is apparent that the state court's use of that term was based on the way in which it was used in *Ford* and *Panetti*. The state court did not simply refer to "insanity." It referred to "insanity, a requirement set out by the United States Supreme Court." Thus, it followed the term "insanity" with an appositive, which is a word or phrase that renames the word or phrase that precedes it. In other words, what the state court clearly meant by "insanity" was what this Court termed insanity in *Ford* and *Panetti*. What was that?

In *Ford*, the Court held that the Eighth Amendment prohibits the execution of a person who is "insane," and in the portion of Justice Marshall's lead opinion that was joined by a plurality, Justice Marshall equated insanity with a mental condition that "prevents [a person] from comprehending the reasons for the penalty or its implications." 477 U. S., at 417. Justice Powell, who provided the fifth vote for the decision, took a similar position. See *id.*, at 422–423 (opinion concurring in part and concurring in judgment). In *Panetti*, which built on the holding in *Ford*, the Court used the term in a similar way. See 551 U. S., at 958–960. Accordingly, a defendant suffers from "insanity," as the term is used in *Ford* and *Panetti*, if the prisoner does not understand the reason for his execution.

Today's decision does not reject this interpretation of the state-court order; it says only that it is vacating and remanding because it is "at the least unsure" whether the state court used the term " 'insanity' " in this way. *Ante,* at 280. The majority cites two reasons for its uncertainty, but both are weak.

First, the majority attributes to the state court an interpretation of the term "insanity" that was advanced by the State in this Court in its brief in opposition to the petition

for certiorari. *Ibid.* In that submission, the State argued that certiorari should be denied because petitioner had sought relief in state court under the wrong provision of state law, namely, Ala. Code § 15–16–23 (2011), which authorizes the suspension of the execution of an inmate who is "insane." The State argued that petitioner's memory loss did not render him "insane" within the meaning of this statute and that if he wished to argue that the Eighth Amendment bars the execution of an inmate who cannot remember his crime, he "should have filed a petition for post-conviction relief" under Alabama Rule of Criminal Procedure 32.4. Brief in Opposition 11–12.

The majority's argument based on the State's brief in opposition suffers from multiple defects. For one thing, nothing suggests that the state court rejected petitioner's application on the ground that he invoked the wrong provision of state law; the State's filing in the state court made no mention of the argument set out in its brief in opposition filed here. Moreover, if the state court had rejected petitioner's application on the ground that he moved under the wrong provision of state law, it is doubtful that we could review that decision, for then it would appear to rest on an adequate and independent state-law ground. And to top things off, the majority's argument distorts what the State's brief in opposition attempted to say about the term "insane." The State did not argue that a defendant who lacks a rational understanding of the reason for his execution due to dementia is not "insane" under Ala. Code § 15–16–23. Instead, the State's point was that a defendant is not "insane" in that sense merely because he cannot remember committing the crime for which he was convicted.

The majority's other proffered basis for doubt is that the State "repeatedly argued to the [state] court (over Madison's objection) that only prisoners suffering from delusional disorders could qualify as incompetent under *Panetti*." *Ante,* at 282. The majority, however, cites no place where the State

actually made such an argument. To be sure, the State, in contending that petitioner was not entitled to relief under *Ford* and *Panetti*, argued strenuously that he was not delusional. (The State made this argument because petitioner's counsel claimed that petitioner was in fact delusional and fell within *Ford* and *Panetti* for that reason.[3]) But arguing, as the State did, that petitioner was not entitled to relief because the claim that he was delusional was untrue is not the same as arguing that petitioner could be executed even if his dementia rendered him incapable of understanding the reason for his execution. The majority cites no place where the State made the latter argument in the state court.[4] And

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[3] Petitioner's papers emphasized again and again that he suffers from delusions. See Pet. for Suspension in No. CC–85–1385.80 (C. C. Mobile Cty., Ala., Feb. 12, 2016), p. 1 ("Mr. Madison has long suffered from serious mental illness, marked by paranoid delusions and other disabilities"); *id.*, at 5 ("At Mr. Madison's trial, Dr. Barry Amyx established that Mr. Madison suffers from a delusional disorder that has existed since he was an adolescent"); *ibid.* ("This well-documented history of paranoia was one of the reasons Dr. Amyx concluded that Mr. Madison had a delusional disorder in a paranoid, really a persecutory type" (internal quotation marks omitted)); *ibid.* ("Dr. Amyx noted that Mr. Madison exhibited delusional thinking about . . . medication and believed that he was being used as a guinea pig in medical experiments"); *id.*, at 6 (emphasizing a "more recent observation" that " 'Mr. Madison consistently presented with paranoid delusions' "); *id.*, at 8 ("Mr. Madison exhibited delusional and disoriented behavior in June 2015"); *id.*, at 14 ("decades of delusional thinking and psychotropic medications"); see also Pet. for Suspension in No. CC–85–1385.80 (C. C. Mobile Cty., Ala., Dec. 18, 2017), pp. 6–7 (detailing similar statements).

This line of argument fell apart when petitioner's own expert testified that he found no indication that petitioner was "[e]ither delusional or psychotic." Tr. 56 (Apr. 14, 2016).

[4] Unable to cite any place where the State made this argument to the state court, the Court claims that the State did so in the Eleventh Circuit. *Ante*, at 272–273, n. 1. But even if that were so, it is hard to see what that would have to do with the question whether the state court thought that dementia could not satisfy the *Ford*/*Panetti* test. And in any event, the Court does not fairly describe the State's argument in the Eleventh Circuit. The State's Eleventh Circuit brief argued that merely suffering

even if the State had made such an argument, what matters is the basis for the state court's decision, not what counsel for the State wrote or said.

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from a mental condition like dementia is not enough to render a prisoner incompetent to be executed; instead, the prisoner must also establish that he lacks a rational understanding of the reason for his execution. See Brief for Appellee in No. 16–12279 (CA11), pp. 37–38 (Brief for Appellee) ("The fairest reading of the state court's opinion is that it assumed that dementia and memory loss caused by strokes is a mental illness and went straight to the rational understanding question. Thus, it is not that the trial court refused to consider Madison's claims pertaining to dementia—Madison cannot point to any portion of the state court order that says this—it is that the trial court correctly noted that Madison failed to prove that any dementia interfered with Madison's ability to have a rational understanding of his execution, including the reasons therefor"); *id.*, at 27 ("The Supreme Court has not held that a petitioner can show incompetence without demonstrating a mental illness or that dementia and memory loss definitively preclude rational understanding"); *id.*, at 29 ("To the extent the state court followed the lead of the Supreme Court, this Court, and the ABA and required Madison to show that a mental illness prevented him from having a rational understanding of his punishment, doing so was not an unreasonable application of clearly established federal law").

It is true that the State's brief, in addressing the standard for granting federal habeas relief under 28 U. S. C. § 2254(d), stated that this Court "ha[d] never held that dementia or memory loss is sufficient to show a lack of rational understanding," Brief for Appellee 29, but that was because a claim under § 2254(d) must be based on a clearly established Supreme Court holding. See Recording of Oral Arg. in No. 16–12279 (CA11, June 23, 2016), at 32:37–33:30 (State rejecting a suggestion that *Panetti* holds "if you don't remember committing the crime at all, and it is clear based on the medical testimony that you don't remember committing this crime, then you don't have a rational understanding of the factual basis for the imposition of the death penalty"; "First of all, under AEDPA deference, I think that that is not the holding of *Panetti*. . . . I think under AEDPA deference, it's pretty clear that the holding of *Panetti* is very narrow. . . . I would say the holding in *Panetti* is that documented mental illness that results in a delusion has to be considered when talking about rational understanding"); *id.*, at 36:00–36:30 ("I think the Supreme Court has never held that not remembering something is equivalent to not having a rational understanding. I think that is just undeniably true. And if AEDPA deference applies, then I don't think the state court could have

I add one more comment regarding the majority's uncertainty about the basis for the state-court decision: Our decision two years ago in *Dunn* evinced no similar doubts. There, we said that the state court "held that, under this Court's decisions in *Ford* and *Panetti*, Madison was entitled to relief if he could show" that he lacks a rational understanding of the circumstances of his punishment. 583 U. S., at 12 (quotation altered). And we said that the state court "determined that Madison is competent to be executed because—notwithstanding his memory loss—he recognizes that he will be put to death as punishment for the murder he was found to have committed." *Id.*, at 13; see also *ibid.* (referring to the state court's "finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime"). Why the majority cannot now see what it understood without any apparent difficulty two years ago is hard to grasp.

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been unreasonable in rejecting the view that memory is required"). The State did not argue either that dementia cannot satisfy *Ford* and *Panetti* or that the state court based its decision on that ground. On the contrary, Alabama wrote that "even if the trial court had determined that dementia and severe memory loss—or even total amnesia—are insufficient to meet the rational understanding test, that finding would not contradict clearly established federal law." Brief for Appellee 29; see also *id.*, at 30 ("Even assuming the state court held, as a matter of law, that amnesia is not sufficient to show a lack of rational understanding, that determination was not unreasonable in light of clearly established federal law").

The majority acknowledges that the State made this concededly correct habeas argument, but then oddly writes it off as an "additional" or alternative argument. *Ante*, at 272–273, n. 1. Yet, as the State's brief and oral argument illustrate, the State's core contention was that the state court did not unreasonably apply clearly established law under *Panetti*'s "very narrow" holding. (And as we later held in *Dunn*, the State was correct.) The majority simply cannot escape the inconvenient fact that the State never argued, as a non-AEDPA matter, that petitioner could be executed even if his dementia precluded a rational understanding.

For all these reasons, what the Court has done in this case cannot be defended, and therefore it is hard to escape thinking that the real reason for today's decision is doubt on the part of the majority regarding the correctness of the state court's factual finding on the question whether Madison has a rational understanding of the reason for his execution. There is no question that petitioner suffers from severe physical and mental problems, and the question whether he is capable of understanding the reason for his execution was vigorously litigated below. But if the Court thinks it is proper for us to reach that question and to reverse the state court's finding based on a cold record, it should own up to what it is doing.

* * *

Petitioner has abandoned the question on which he succeeded in persuading the Court to grant review, and it is highly improper for the Court to grant him relief on a ground not even hinted at in his petition. The writ should be dismissed as improvidently granted, and I therefore respectfully dissent.

FOURTH ESTATE PUBLIC BENEFIT CORP. *v.* WALL-STREET.COM, LLC, ET AL.

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

No. 17–571. Argued January 8, 2019—Decided March 4, 2019

Petitioner Fourth Estate Public Benefit Corporation (Fourth Estate), a news organization, licensed works to respondent Wall-Street.com, LLC (Wall-Street), a news website. Fourth Estate sued Wall-Street and its owner for copyright infringement of news articles that Wall-Street failed to remove from its website after canceling the parties' license agreement. Fourth Estate had filed applications to register the articles with the Copyright Office, but the Register of Copyrights had not acted on those applications. Title 17 U. S. C. § 411(a) states that "no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title." The District Court dismissed the complaint, and the Eleventh Circuit affirmed, holding that "registration . . . has [not] been made" under § 411(a) until the Copyright Office registers a copyright.

Held: Registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright. Upon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration. Pp. 300–309.

(a) Under the Copyright Act of 1976, as amended, a copyright author gains "exclusive rights" in her work immediately upon the work's creation. 17 U. S. C. § 106. A copyright owner may institute a civil action for infringement of those exclusive rights, § 501(b), but generally only after complying with § 411(a)'s requirement that "registration . . . has been made." Registration is thus akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights. Pp. 300–302.

(b) In limited circumstances, copyright owners may file an infringement suit before undertaking registration. For example, a copyright owner who is preparing to distribute a work of a type vulnerable to predistribution infringement—*e. g.*, a movie or musical composition—may apply to the Copyright Office for preregistration. § 408(f)(2). A copyright owner may also sue for infringement of a live broadcast before "registration . . . has been made." § 411(c). Outside of statutory ex-

ceptions not applicable here, however, § 411(a) bars a copyright owner from suing for infringement until "registration . . . has been made." Fourth Estate advances the "application approach" to this provision, arguing that registration occurs when a copyright owner submits a proper application for registration. Wall-Street advocates the "registration approach," urging that registration occurs only when the Copyright Office grants registration of a copyright. The registration approach reflects the only satisfactory reading of § 411(a)'s text. Pp. 302–309.

(1) Read together, § 411(a)'s first two sentences focus on action by the Copyright Office—namely, its registration or refusal to register a copyright claim. If application alone sufficed to "ma[ke]" registration, § 411(a)'s second sentence—which permits a copyright claimant to file suit when the Register has refused her application—would be superfluous. Similarly, § 411(a)'s third sentence—which allows the Register to "become a party to the action with respect to the issue of registrability of the copyright claim"—would be negated if an infringement suit could be filed and resolved before the Register acted on an application. The registration approach reading of § 411(a) is supported by other provisions of the Copyright Act. In particular, § 410 confirms that application is discrete from, and precedes, registration, while § 408(f)'s preregistration option would have little utility if a completed application sufficed to make registration. Pp. 302–304.

(2) Fourth Estate primarily contends that the Copyright Act uses the phrases "make registration" and "registration has been made" to describe submissions by the copyright owner. Fourth Estate therefore insists that § 411(a)'s requirement that "registration . . . has been made in accordance with this title" most likely refers to a copyright owner's compliance with statutory requirements for registration applications. Fourth Estate points to other Copyright Act provisions that appear to use the phrase "make registration" or one of its variants to describe what a copyright claimant does. Fourth Estate acknowledges, however, that determining how the Copyright Act uses the word "registration" in a particular provision requires examining the "specific context" in which the term is used. The "specific context" of § 411(a) permits only one sensible reading: The phrase "registration . . . has been made" refers to the Copyright Office's act granting registration, not to the copyright claimant's request for registration.

Fourth Estate's contrary reading stems in part from its misapprehension of the significance of certain 1976 revisions to the Copyright Act. But in enacting § 411(a), Congress both reaffirmed the general rule that registration must precede an infringement suit and added an exception in that provision's second sentence to cover instances in which registra-

tion is refused. That exception would have no work to do if Congress intended the 1976 revisions to clarify that a copyright claimant may sue immediately upon applying for registration. Noteworthy, too, in years following the 1976 revisions, Congress resisted efforts to eliminate § 411(a), which contains the registration requirement.

Fourth Estate also argues that, because "registration is not a condition of copyright protection," § 408(a), § 411(a) should not bar a copyright claimant from enforcing that protection in court once she has applied for registration. But the Copyright Act safeguards copyright owners by vesting them with exclusive rights upon creation of their works and prohibiting infringement from that point forward. To recover for such infringement, copyright owners must simply apply for registration and await the Register's decision. Further, Congress has authorized preregistration infringement suits with respect to works vulnerable to predistribution infringement, and Fourth Estate's fear that a copyright owner might lose the ability to enforce her rights entirely is overstated. True, registration processing times have increased from one to two weeks in 1956 to many months today. Delays, in large part, are the result of Copyright Office staffing and budgetary shortages that Congress can alleviate, but courts cannot cure. Unfortunate as the current administrative lag may be, that factor does not allow this Court to revise § 411(a)'s congressionally composed text. Pp. 304–309.

856 F. 3d 1338, affirmed.

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

Aaron M. Panner argued the cause for petitioner. With him on the briefs were *Gregory G. Rapawy, Joel B. Rothman*, and *Jerold I. Schneider.*

Peter K. Stris argued the cause for respondents. With him on the brief were *Brendan S. Maher*, *Elizabeth Brannen*, *Rachana A. Pathak*, *Douglas D. Geyser*, and *Victor O'Connell.*

Jonathan Y. Ellis argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, and *Regan A. Smith.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert M. Carlson*, *Dale M. Cendali*, and *Joshua L. Simmons*; for Authors Guild, Inc., et al. by *Eleanor M. Lackman* and

Justice Ginsburg delivered the opinion of the Court.

Impelling prompt registration of copyright claims, 17 U. S. C. § 411(a) states that "no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title." The question this case presents: Has "registration . . . been made in accordance with [Title 17]" as soon as the claimant delivers the required application, copies of the work, and fee to the Copyright Office; or has "registration . . . been made" only after the Copyright Office reviews and registers the copyright? We hold, in accord with the United States Court of Appeals for the Eleventh Circuit, that registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright. Upon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration.

Petitioner Fourth Estate Public Benefit Corporation (Fourth Estate) is a news organization producing online journalism. Fourth Estate licensed journalism works to respondent Wall-Street.com, LLC (Wall-Street), a news website. The license agreement required Wall-Street to remove from its website all content produced by Fourth Estate before canceling the agreement. Wall-Street canceled, but continued to display articles produced by Fourth Estate. Fourth Estate sued Wall-Street and its owner, Jerrold Burden, for copyright infringement. The complaint alleged that

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Cheryl L. Davis; for the Copyright Alliance by *J. Matthew Williams* and *Eric J. Schwartz*; for the International Trademark Association by *Lawrence K. Nodine*, *Noel M. Cook*, and *Jason P. Bloom*; and for the National Music Publishers' Association et al. by *Beth S. Brinkmann*, *Kevin F. King*, and *Jacqueline C. Charlesworth*.

Briefs of *amici curiae* urging affirmance were filed for Authors and Educators by *Peter Jaszi* and *Hillary Brill*; for Public Knowledge et al. by *Charles Duan* and *Harold Feld*; and for Washington Legal Foundation by *Cory L. Andrews* and *Corbin K. Barthold*.

Fourth Estate had filed "applications to register [the] articles [licensed to Wall-Street] with the Register of Copyrights." App. to Pet. for Cert. 18a.[1] Because the Register had not yet acted on Fourth Estate's applications,[2] the District Court, on Wall-Street and Burden's motion, dismissed the complaint, and the Eleventh Circuit affirmed. 856 F. 3d 1338 (2017). Thereafter, the Register of Copyrights refused registration of the articles Wall-Street had allegedly infringed.[3]

We granted Fourth Estate's petition for certiorari to resolve a division among U. S. Courts of Appeals on when registration occurs in accordance with § 411(a). 585 U. S. 1029 (2018). Compare, *e. g.*, 856 F. 3d, at 1341 (case below) (registration has been made under § 411(a) when the Register of Copyrights registers a copyright), with, *e. g.*, *Cosmetic Ideas, Inc.* v. *IAC/InteractiveCorp*, 606 F. 3d 612, 621 (CA9 2010) (registration has been made under § 411(a) when the copyright claimant's "complete application" for registration is received by the Copyright Office).

I

Under the Copyright Act of 1976, as amended, copyright protection attaches to "original works of authorship"—prominent among them, literary, musical, and dramatic works—"fixed in any tangible medium of expression." 17 U. S. C. § 102(a). An author gains "exclusive rights" in her

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[1] The Register of Copyrights is the "director of the Copyright Office of the Library of Congress" and is appointed by the Librarian of Congress. 17 U. S. C. § 701(a). The Copyright Act delegates to the Register "[a]ll administrative functions and duties under [Title 17]." *Ibid.*

[2] Consideration of Fourth Estate's filings was initially delayed because the check Fourth Estate sent in payment of the filing fee was rejected by Fourth Estate's bank as uncollectible. App. to Brief for United States as *Amicus Curiae* 1a.

[3] The merits of the Copyright Office's decision refusing registration are not at issue in this Court.

work immediately upon the work's creation, including rights of reproduction, distribution, and display. See § 106; *Eldred* v. *Ashcroft*, 537 U. S. 186, 195 (2003) ("[F]ederal copyright protection . . . run[s] from the work's creation."). The Copyright Act entitles a copyright owner to institute a civil action for infringement of those exclusive rights. § 501(b).

Before pursuing an infringement claim in court, however, a copyright claimant generally must comply with § 411(a)'s requirement that "registration of the copyright claim has been made." § 411(a). Therefore, although an owner's rights exist apart from registration, see § 408(a), registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights, see Tr. of Oral Arg. 35.

In limited circumstances, copyright owners may file an infringement suit before undertaking registration. If a copyright owner is preparing to distribute a work of a type vulnerable to predistribution infringement—notably, a movie or musical composition—the owner may apply for preregistration. § 408(f)(2); 37 CFR § 202.16(b)(1) (2018). The Copyright Office will "conduct a limited review" of the application and notify the claimant "[u]pon completion of the preregistration." § 202.16(c)(7), (c)(10). Once "preregistration . . . has been made," the copyright claimant may institute a suit for infringement. 17 U. S. C. § 411(a). Preregistration, however, serves only as "a preliminary step prior to a full registration." Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 42286 (2005). An infringement suit brought in reliance on preregistration risks dismissal unless the copyright owner applies for registration promptly after the preregistered work's publication or infringement. § 408(f)(3)–(4). A copyright owner may also sue for infringement of a live broadcast before "registration . . . has been made," but faces dismissal of her suit if she fails to "make registration for the work" within three months of its first transmission. § 411(c). Even in these exceptional scenar-

ios, then, the copyright owner must eventually pursue registration in order to maintain a suit for infringement.

II

All parties agree that, outside of statutory exceptions not applicable here, § 411(a) bars a copyright owner from suing for infringement until "registration . . . has been made." Fourth Estate and Wall-Street dispute, however, whether "registration . . . has been made" under § 411(a) when a copyright owner submits the application, materials, and fee required for registration, or only when the Copyright Office grants registration. Fourth Estate advances the former view—the "application approach"—while Wall-Street urges the latter reading—the "registration approach." The registration approach, we conclude, reflects the only satisfactory reading of § 411(a)'s text. We therefore reject Fourth Estate's application approach.

A

Under § 411(a), "registration . . . has been made," and a copyright owner may sue for infringement, when the Copyright Office registers a copyright.[4] Section 411(a)'s first sentence provides that no civil infringement action "shall be instituted until preregistration or registration of the copyright claim has been made." The section's next sentence sets out an exception to this rule: When the required "deposit, application, and fee . . . have been delivered to the Copyright

[4] Section 411(a) provides, in principal part: "[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim . . . ."

Office in proper form and registration has been refused," the claimant "[may] institute a civil action, if notice thereof . . . is served on the Register." Read together, § 411(a)'s opening sentences focus not on the claimant's act of applying for registration, but on action by the Copyright Office—namely, its registration or refusal to register a copyright claim.

If application alone sufficed to "ma[ke]" registration, § 411(a)'s second sentence—allowing suit upon refusal of registration—would be superfluous. What utility would that allowance have if a copyright claimant could sue for infringement immediately after applying for registration without awaiting the Register's decision on her application? Proponents of the application approach urge that § 411(a)'s second sentence serves merely to require a copyright claimant to serve "notice [of an infringement suit] . . . on the Register." See Brief for Petitioner 29–32. This reading, however, requires the implausible assumption that Congress gave "registration" different meanings in consecutive, related sentences within a single statutory provision. In § 411(a)'s first sentence, "registration" would mean the claimant's act of filing an application, while in the section's second sentence, "registration" would entail the Register's review of an application. We resist this improbable construction. See, *e. g.*, *Mid-Con Freight Systems, Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 440, 448 (2005) (declining to read "the same words" in consecutive sentences as "refer[ring] to something totally different").

The third and final sentence of § 411(a) further persuades us that the provision requires action by the Register before a copyright claimant may sue for infringement. The sentence allows the Register to "become a party to the action with respect to the issue of registrability of the copyright claim." This allowance would be negated, and the court conducting an infringement suit would lack the benefit of the Register's assessment, if an infringement suit could be filed and resolved before the Register acted on an application.

Other provisions of the Copyright Act support our reading of "registration," as used in § 411(a), to mean action by the Register. Section 410 states that, "after examination," if the Register determines that "the material deposited constitutes copyrightable subject matter" and "other legal and formal requirements . . . [are] met, the Register shall register the claim and issue to the applicant a certificate of registration." § 410(a). But if the Register determines that the deposited material "does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration." § 410(b). Section 410 thus confirms that application is discrete from, and precedes, registration. Section 410(d), furthermore, provides that if the Copyright Office registers a claim, or if a court later determines that a refused claim was registrable, the "effective date of [the work's] copyright registration is the day on which" the copyright owner made a proper submission to the Copyright Office. There would be no need thus to specify the "effective date of a copyright registration" if submission of the required materials qualified as "registration."

Section 408(f)'s preregistration option, too, would have little utility if a completed application constituted registration. Preregistration, as noted *supra,* at 301–302, allows the author of a work vulnerable to predistribution infringement to enforce her exclusive rights in court before obtaining registration or refusal thereof. A copyright owner who fears prepublication infringement would have no reason to apply for preregistration, however, if she could instead simply complete an application for registration and immediately commence an infringement suit. Cf. *TRW Inc.* v. *Andrews,* 534 U. S. 19, 29 (2001) (rejecting an interpretation that "would in practical effect render [a provision] superfluous in all but the most unusual circumstances").

B

Challenging the Eleventh Circuit's judgment, Fourth Estate primarily contends that the Copyright Act uses "the

phrase ‘make registration’ and its passive-voice counterpart ‘registration has been made’ ” to describe submissions by the copyright owner, rather than Copyright Office responses to those submissions. Brief for Petitioner 21. Section 411(a)’s requirement that “registration . . . has been made in accordance with this title,” Fourth Estate insists, most likely refers to a copyright owner’s compliance with the statutory specifications for registration applications. In support, Fourth Estate points to Copyright Act provisions that appear to use the phrase “make registration” or one of its variants to describe what a copyright claimant does. See *id.*, at 22–26 (citing 17 U. S. C. §§ 110, 205(c), 408(c)(3), 411(c), 412(2)). Furthermore, Fourth Estate urges that its reading reflects the reality that, eventually, the vast majority of applications are granted. See Brief for Petitioner 41.

Fourth Estate acknowledges, however, that the Copyright Act sometimes uses “registration” to refer to activity by the Copyright Office, not activity undertaken by a copyright claimant. See *id.*, at 27–28 (citing 17 U. S. C. § 708(a)). Fourth Estate thus agrees that, to determine how the statute uses the word “registration” in a particular prescription, one must “look to the specific context” in which the term is used. Brief for Petitioner 29. As explained *supra*, at 302–304, the “specific context” of § 411(a) permits only one sensible reading: The phrase “registration . . . has been made” refers to the Copyright Office’s act granting registration, not to the copyright claimant’s request for registration.

Fourth Estate’s contrary reading of § 411(a) stems in part from its misapprehension of the significance of certain 1976 revisions to the Copyright Act. Before that year, § 411(a)’s precursor provided that “[n]o action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.” 17 U. S. C. § 13 (1970 ed.). Fourth Estate urges that this provision posed the very question we resolve today—

namely, whether a claimant's application alone effects registration. The Second Circuit addressed that question, Fourth Estate observes, in *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F. 2d 637 (1958). Brief for Petitioner 32–34. In that case, in an opinion by Judge Learned Hand, the court held that a copyright owner who completed an application could not sue for infringement immediately upon the Copyright Office's refusal to register. *Vacheron*, 260 F. 3d, at 640–641. Instead, the owner first had to obtain a registration certificate by bringing a mandamus action against the Register. The Second Circuit dissenter would have treated the owner's application as sufficient to permit commencement of an action for infringement. *Id.*, at 645.

Fourth Estate sees Congress' 1976 revision of the registration requirement as an endorsement of the *Vacheron* dissenter's position. Brief for Petitioner 34–36. We disagree. The changes made in 1976 instead indicate Congress' agreement with Judge Hand that it is the Register's action that triggers a copyright owner's entitlement to sue. In enacting 17 U. S. C. § 411(a), Congress both reaffirmed the general rule that registration must precede an infringement suit, and added an exception in that provision's second sentence to cover instances in which registration is refused. See H. R. Rep. No. 94–1476, p. 157 (1976). That exception would have no work to do if, as Fourth Estate urges, Congress intended the 1976 revisions to clarify that a copyright claimant may sue immediately upon applying for registration. A copyright claimant would need no statutory authorization to sue after refusal of her application if she could institute suit as soon as she has filed the application.

Noteworthy, too, in years following the 1976 revisions, Congress resisted efforts to eliminate § 411(a) and the registration requirement embedded in it. In 1988, Congress removed foreign works from § 411(a)'s dominion in order to comply with the Berne Convention for the Protection of Lit-

erary and Artistic Works' bar on copyright formalities for such works. See § 9(b)(1), 102 Stat. 2859. Despite proposals to repeal § 411(a)'s registration requirement entirely, however, see S. Rep. No. 100–352, p. 36 (1988), Congress maintained the requirement for domestic works, see § 411(a). Subsequently, in 1993, Congress considered, but declined to adopt, a proposal to allow suit immediately upon submission of a registration application. See H. R. Rep. No. 103–338, p. 4 (1993). And in 2005, Congress made a preregistration option available for works vulnerable to predistribution infringement. See Artists' Rights and Theft Prevention Act of 2005, § 104, 119 Stat. 221. See also *supra,* at 301–302. Congress chose that course in face of calls to eliminate registration in cases of predistribution infringement. 70 Fed. Reg. 42286. Time and again, then, Congress has maintained registration as prerequisite to suit, and rejected proposals that would have eliminated registration or tied it to the copyright claimant's application instead of the Register's action.[5]

Fourth Estate additionally argues that, as "registration is not a condition of copyright protection," 17 U. S. C. § 408(a), § 411(a) should not be read to bar a copyright claimant from enforcing that protection in court once she has submitted a proper application for registration. Brief for Petitioner 37. But as explained *supra,* at 300–301, the Copyright Act safeguards copyright owners, irrespective of registration, by vesting them with exclusive rights upon creation of their works and prohibiting infringement from that point forward. If infringement occurs before a copyright owner applies for reg-

[5] Fourth Estate asserts that, if a copyright owner encounters a lengthy delay in the Copyright Office, she may be forced to file a mandamus action to compel the Register to rule on her application, the very problem exposed in *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.,* 260 F. 2d 637 (CA2 1958), see *supra,* at 306. But Congress' answer to *Vacheron,* codified in § 411(a)'s second sentence, was to permit an infringement suit upon refusal of registration, not to eliminate Copyright Office action as the trigger for an infringement suit.

istration, that owner may eventually recover damages for the past infringement, as well as the infringer's profits. § 504. She must simply apply for registration and receive the Copyright Office's decision on her application before instituting suit. Once the Register grants or refuses registration, the copyright owner may also seek an injunction barring the infringer from continued violation of her exclusive rights and an order requiring the infringer to destroy infringing materials. §§ 502, 503(b).

Fourth Estate maintains, however, that if infringement occurs while the Copyright Office is reviewing a registration application, the registration approach will deprive the owner of her rights during the waiting period. Brief for Petitioner 41. See also 1 P. Goldstein, Copyright § 3.15, p. 3:154.2 (3d ed. 2018 Supp.) (finding application approach "the better rule"); 2 M. Nimmer & D. Nimmer, Copyright § 7.16[B][3][a], [b][ii] (2018) (infringement suit is conditioned on application, while prima facie presumption of validity depends on certificate of registration). The Copyright Act's explicit carveouts from § 411(a)'s general registration rule, however, show that Congress adverted to this concern. In the preregistration option, § 408(f), Congress provided that owners of works especially susceptible to prepublication infringement should be allowed to institute suit before the Register has granted or refused registration. See § 411(a). Congress made the same determination as to live broadcasts. § 411(c); see *supra*, at 301–302.[6] As to all other works, however, § 411(a)'s gen-

[6] Further, in addition to the Act's provisions for preregistration suit, the Copyright Office allows copyright claimants to seek expedited processing of a claim for an additional $800 fee. See U. S. Copyright Office, Special Handling: Circular No. 10, pp. 1–2 (2017). The Copyright Office grants requests for special handling in situations involving, *inter alia*, "[p]ending or prospective litigation," and "make[s] every attempt to examine the application . . . within five working days." Compendium of U. S. Copyright Practices § 623.2, 623.4 (3d ed. 2017).

eral rule requires owners to await action by the Register before filing suit for infringement.

Fourth Estate raises the specter that a copyright owner may lose the ability to enforce her rights if the Copyright Act's three-year statute of limitations runs out before the Copyright Office acts on her application for registration. Brief for Petitioner 41. Fourth Estate's fear is overstated, as the average processing time for registration applications is currently seven months, leaving ample time to sue after the Register's decision, even for infringement that began before submission of an application. See U. S. Copyright Office, Registration Processing Times (Oct. 2, 2018) (Registration Processing Times), https://www.copyright.gov/registration/docs/processing-times-faqs.pdf (as last visited Mar. 1, 2019).

True, the statutory scheme has not worked as Congress likely envisioned. Registration processing times have increased from one or two weeks in 1956 to many months today. See GAO, Improving Productivity in Copyright Registration 3 (GAO–AFMD–83–13, 1982); Registration Processing Times. Delays in Copyright Office processing of applications, it appears, are attributable, in large measure, to staffing and budgetary shortages that Congress can alleviate, but courts cannot cure. See 5 W. Patry, Copyright § 17:83 (2019). Unfortunate as the current administrative lag may be, that factor does not allow us to revise § 411(a)'s congressionally composed text.

* * *

For the reasons stated, we conclude that "registration . . . has been made" within the meaning of 17 U. S. C. § 411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application. The judgment of the Court of Appeals for the Eleventh Circuit is accordingly

Affirmed.

BNSF RAILWAY CO. *v.* LOOS

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

No. 17–1042. Argued November 6, 2018—Decided March 4, 2019

Respondent Michael Loos sued petitioner BNSF Railway Company under the Federal Employers' Liability Act (FELA) for injuries he received while working at BNSF's railyard. A jury awarded him $126,212.78, ascribing $30,000 of that amount to wages lost during the time Loos was unable to work. BNSF asserted that the lost wages constituted "compensation" taxable under the Railroad Retirement Tax Act (RRTA) and asked to withhold $3,765 of the $30,000 to cover Loos's share of the RRTA taxes. The District Court and the Eighth Circuit rejected the requested offset, holding that an award of damages compensating an injured railroad worker for lost wages is not taxable under the RRTA.

Held: A railroad's payment to an employee for working time lost due to an on-the-job injury is taxable "compensation" under the RRTA. Pp. 313–325.

(a) In 1937, Congress created a self-sustaining retirement benefits system for railroad workers. The RRTA funds the program by imposing a payroll tax on both railroads and their employees, referring to the railroad's contribution as an "excise" tax, 26 U. S. C. § 3221, and the employee's share as an "income" tax, § 3201. The Railroad Retirement Act (RRA) entitles railroad workers to various benefits. Taxes under the RRTA and benefits under the RRA are measured by the employee's "compensation," which both statutes define as "any form of money remuneration paid to an individual for services rendered as an employee." § 3231(e)(1); 45 U. S. C. § 231(h)(1).

The statutory foundation of the railroad retirement system mirrors that of the Social Security system. The Federal Insurance Contributions Act (FICA) taxes employers and employees to fund benefits distributed pursuant to the Social Security Act (SSA). Tax and benefit amounts are determined by the worker's "wages," the Social Security equivalent to "compensation." Both the FICA and the SSA define "wages" employing language resembling the RRTA and the RRA definitions of "compensation." The term "wages" means "all remuneration" for "any service, of whatever nature, performed . . . by an employee." 26 U. S. C. § 3121(a)–(b) (FICA); see 42 U. S. C. §§ 409(a), 410(a) (SSA). Pp. 313–315.

(b) Given the textual similarity between the definitions of "compensation" and "wages," the decisions on the meaning of "wages" in *Social*

Security Bd. v. *Nierotko*, 327 U. S. 358, and *United States* v. *Quality Stores, Inc.*, 572 U. S. 141, inform this Court's comprehension of the RRTA term "compensation." In *Nierotko*, the Court held that "wages" embraced pay for active service as well as pay received for periods of absence from active service, 327 U. S., at 366, and concluded that backpay for time lost due to "the employer's wrong" counted as "wages," *id.*, at 364. In *Quality Stores*, the Court held that severance payments qualified as "wages" taxable under the FICA. 572 U. S., at 146–147. In line with these decisions, the Court holds that "compensation" under the RRTA encompasses not simply pay for active service but also pay for periods of absence from active service—provided that the remuneration in question stems from the "employer-employee relationship." *Nierotko*, 327 U. S., at 366.

Damages awarded under the FELA for lost wages fit comfortably within this definition. See *BNSF R. Co.* v. *Tyrrell*, 581 U. S. 402, 404. If a railroad negligently fails to maintain a safe railyard and a worker is injured as a result, the FELA requires the railroad to compensate the injured worker for working time lost due to the employer's wrongdoing. FELA damages for lost wages, like backpay, are "compensation" taxable under the RRTA. Pp. 315–317.

(c) The Eighth Circuit construed "compensation" for RRTA purposes to mean only pay for active service, but this reading cannot be reconciled with *Nierotko* and *Quality Stores.* In addition, the RRTA's pinpointed exclusions for certain types of payments for time lost signal that nonexcluded pay for time lost remains RRTA-taxable "compensation." Pp. 317–321.

(d) Loos contends that "compensation" does not include payments made to compensate for an injury. This reading, however, is at odds with *Nierotko*, which held that "wages" included backpay awarded to redress "the loss of wages" occasioned by "the employer's wrong." 327 U. S., at 364.

Loos also argues that the exclusion of personal injury damages from "gross income" for federal income tax purposes, see 26 U. S. C. § 104(a)(2), should carry over to the RRTA's tax on the "income" of railroad workers. The RRTA, however, uses the term "income" merely to distinguish the "income" tax on an employee from the matching "excise" tax on a railroad. Further, Congress specified not "gross income" but employee "compensation" as the tax base for RRTA taxes. Congress did not exclude personal injury damages from "compensation." Pp. 321–324.

865 F. 3d 1106, reversed and remanded.

Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Breyer, Alito, Sotomayor, Kagan, and Kavanaugh, JJ.,

joined. GORSUCH, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 325.

Lisa S. Blatt argued the cause for petitioner. With her on the briefs were *Charles G. Cole*, *Alice E. Loughran*, *William Brasher*, *Elisabeth S. Theodore*, and *R. Reeves Anderson*.

Rachel P. Kovner argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Principal Deputy Assistant Attorney General Zuckerman*, *Deputy Solicitor General Stewart*, *Gilbert S. Rothenberg*, *Francesca Ugolini*, and *Marion E. M. Erickson*.

David C. Frederick argued the cause for respondent. With him on the brief were *Brendan J. Crimmins*, *David M. Burke*, *Michael A. Wolff*, *Jerome J. Schlichter*, *Nelson G. Wolff*, and *Michael F. Tello*.*

JUSTICE GINSBURG delivered the opinion of the Court.

Respondent Michael Loos was injured while working at petitioner BNSF Railway Company's railyard. Loos sued BNSF under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, and gained a $126,212.78 jury verdict. Of that amount the jury ascribed $30,000 to wages lost during the time Loos was unable to work. BNSF moved for an offset against the judgment. The lost wages awarded Loos, BNSF asserted, constituted "compensation" taxable under the Railroad Retirement Tax Act (RRTA), 26 U. S. C. § 3201 *et seq.* Therefore, BNSF urged, the railway was required to withhold a portion of the $30,000 attributable to lost wages to cover Loos's share of RRTA taxes, which came to $3,765. The District Court and the Court of Appeals for the Eighth Circuit rejected the re-

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**Daniel Saphire* filed a brief for the Association of American Railroads as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *Jeffrey R. White* and *Elise Sanguinetti*; and for SMART et al. by *Robert P. Marcus*.

quested offset, holding that an award of damages compensating an injured railroad worker for lost wages is not taxable under the RRTA.

The question presented: Is a railroad's payment to an employee for working time lost due to an on-the-job injury taxable "compensation" under the RRTA, 26 U. S. C. § 3231(e)(1)? We granted review to resolve a division of opinion on the answer to that question. 584 U. S. 976 (2018). Compare *Hance* v. *Norfolk S. R. Co.*, 571 F. 3d 511, 523 (CA6 2009) ("compensation" includes pay for time lost); *Phillips* v. *Chicago Central & Pacific R. Co.*, 853 N. W. 2d 636, 650–651 (Iowa 2014) (agency reasonably interpreted "compensation" as including pay for time lost); *Heckman* v. *Burlington N. Santa Fe R. Co.*, 286 Neb. 453, 463, 837 N. W. 2d 532, 540 (2013) ("compensation" includes pay for time lost), with 865 F. 3d 1106, 1117–1118 (CA8 2017) (case below) ("compensation" does not include pay for time lost); *Mickey* v. *BNSF R. Co.*, 437 S. W. 3d 207, 218 (Mo. 2014) ("compensation" does not include FELA damages for lost wages). We now hold that an award compensating for lost wages is subject to taxation under the RRTA.

I

In 1937, Congress created a self-sustaining retirement benefits system for railroad workers. The system provides generous pensions as well as benefits "correspon[ding] . . . to those an employee would expect to receive were he covered by the Social Security Act." *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 575 (1979).

Two statutes operate in concert to ensure that retired railroad workers receive their allotted pensions and benefits. The first, the RRTA, funds the program by imposing a payroll tax on both railroads and their employees. The RRTA refers to the railroad's contribution as an "excise" tax, 26 U. S. C. § 3221, and describes the employee's share as an "income" tax, § 3201. Congress assigned to the Internal Revenue Service (IRS) responsibility for collecting both taxes.

§§ 3501, 7801.[1] The second statute, the Railroad Retirement Act (RRA), 50 Stat. 307, as restated and amended, 45 U. S. C. § 231 *et seq.*, entitles railroad workers to various benefits and prescribes eligibility requirements. The RRA is administered by the Railroad Retirement Board. See § 231f(a).

Taxes under the RRTA and benefits under the RRA are measured by the employee's "compensation." 26 U. S. C. §§ 3201, 3221; 45 U. S. C. § 231b. The RRTA and RRA separately define "compensation," but both statutes state that the term means "any form of money remuneration paid to an individual for services rendered as an employee." 26 U. S. C. § 3231(e)(1); 45 U. S. C. § 231(h)(1). This language has remained basically unchanged since the RRTA's enactment in 1937. See Carriers Taxing Act of 1937 (1937 RRTA), § 1(e), 50 Stat. 436 (defining "compensation" as "any form of money remuneration earned by an individual for services rendered as an employee"). The RRTA excludes from "compensation" certain types of sick pay and disability pay. See 26 U. S. C. § 3231(e)(1), (4)(A).

The IRS's reading of the word "compensation" as it appears in the RRTA has remained constant. One year after the RRTA's adoption, the IRS stated that "compensation" is not limited to pay for active service but reaches, as well, pay for periods of absence. See 26 CFR § 410.5 (1938). This understanding has governed for more than eight decades. As restated in the current IRS regulations, "[t]he term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer." § 31.3231(e)–1(a)(3) (2017). In 1994, the IRS added, specifically, that "compensation" includes "pay for time lost." § 31.3231(e)–1(a)(4); see 59 Fed. Reg. 66188 (1994).

[1] The railroad remits both taxes to the IRS. As to the income tax, the railroad deducts the amount owed by the employee from her earnings and then forwards that amount to the IRS. See Tr. of Oral Arg. 22–23. See also 26 U. S. C. § 3402(a)(1) (employers must "deduct and withhold" income taxes from earnings).

Congress created both the railroad retirement system and the Social Security system during the Great Depression primarily to ensure the financial security of members of the workforce when they reach old age. See *Wisconsin Central Ltd.* v. *United States*, 585 U. S. 274, 276 (2018); *Helvering* v. *Davis*, 301 U. S. 619, 641 (1937). Given the similarities in timing and purpose of the two programs, it is hardly surprising that their statutory foundations mirror each other. Regarding Social Security, the Federal Insurance Contributions Act (FICA), 26 U. S. C. § 3101 *et seq.*, taxes employers and employees to fund benefits, which are distributed pursuant to the Social Security Act (SSA), 49 Stat. 620, as amended, 42 U. S. C. § 301 *et seq.* Tax and benefit amounts are determined by the worker's "wages," the Social Security equivalent to "compensation." See *Davis*, 301 U. S., at 635–636. Both the FICA and the SSA define "wages" employing language resembling the RRTA and the RRA definitions of "compensation." "Wages" under the FICA and the SSA mean "all remuneration for employment," and "employment," in turn, means "any service, of whatever nature, performed . . . by an employee." 26 U. S. C. § 3121(a)–(b) (FICA); see 42 U. S. C. §§ 409(a), 410(a) (SSA). Reading these prescriptions together, the term "wages" encompasses "all remuneration" for "any service, of whatever nature, performed . . . by an employee." *Ibid.*

II

A

To determine whether RRTA-qualifying "compensation" includes an award of damages for lost wages, we begin with the statutory text.[2] The RRTA defines "compensation" as

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[2] Before turning to the language of the RRTA, the dissent endeavors to unearth the reason why BNSF has pursued this case. The railroad's "gambit," the dissent surmises, is to increase pressure on injured workers to settle their claims. *Post*, at 327. Contrast with the dissent's conjecture, BNSF's entirely plausible account of a railroad's stake in this dispute. Because the RRA credits lost wages toward an employee's benefits,

"remuneration paid to an individual for services rendered as an employee." 26 U. S. C. § 3231(e)(1). This definition, as just noted, is materially indistinguishable from the FICA's definition of "wages" to include "remuneration" for "any service, of whatever nature, performed . . . by an employee." § 3121.

Given the textual similarity between the definitions of "compensation" for railroad retirement purposes and "wages" for Social Security purposes, our decisions on the meaning of "wages" in *Social Security Bd.* v. *Nierotko*, 327 U. S. 358 (1946), and *United States* v. *Quality Stores, Inc.*, 572 U. S. 141 (2014), inform our comprehension of the RRTA term "compensation." In *Nierotko*, the National Labor Relations Board found that an employee had been "wrongfully discharged for union activity" and awarded him backpay. 327 U. S., at 359. The Social Security Board refused to credit the backpay award in calculating the employee's benefits. *Id.*, at 365–366. In the Board's view, "wages" covered only pay for active service. *Ibid.* We disagreed. Emphasizing that the phrase "any service . . . performed" denotes "breadth of coverage," we held that "wages" means remuneration for "the entire employer-employee relationship"; in other words, "wages" embraced pay for active service plus pay received for periods of absence from active service. *Id.*, at 366. Backpay, we reasoned, counts as "wages" because it compensates for "the loss of wages which the employee suffered from the employer's wrong." *Id.*, at 364.

In *Quality Stores*, we again trained on the meaning of "wages," reiterating that "Congress chose to define wages . . . broadly." 572 U. S., at 146 (internal quotation marks omitted). Guided by *Nierotko*, *Quality Stores* held that severance payments qualified as "wages" taxable under the FICA. "[C]ommon sense," we observed, "dictates that em-

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see 45 U. S. C. § 231(h)(1), BNSF posits that immunizing those payments from RRTA taxes would expose the system to "a long-term risk of insolvency." Tr. of Oral Arg. 4; see Reply Brief for Petitioner 14.

ployees receive th[ose] payments 'for employment.' " 572 U. S., at 146. Severance payments, the Court spelled out, "are made to employees only," "are made in consideration for employment," and are calculated "according to the function and seniority of the [terminated] employee." *Id.*, at 146–147.

In line with *Nierotko*, *Quality Stores*, and the IRS's long held construction, we hold that "compensation" under the RRTA encompasses not simply pay for active service but, in addition, pay for periods of absence from active service—provided that the remuneration in question stems from the "employer-employee relationship." *Nierotko*, 327 U. S., at 366.

B

Damages awarded under the FELA for lost wages fit comfortably within this definition. The FELA "makes railroads liable in money damages to their employees for on-the-job injuries." *BNSF R. Co.* v. *Tyrrell*, 581 U. S. 402, 404 (2017); see 45 U. S. C. § 51. If a railroad negligently fails to maintain a safe railyard and a worker is injured as a result, the FELA requires the railroad to compensate the injured worker for, *inter alia*, working time lost due to the employer's wrongdoing. FELA damages for lost wages, then, are functionally equivalent to an award of backpay, which compensates an employee "for a period of time during which" the employee is "wrongfully separated from his job." *Nierotko*, 327 U. S., at 364. Just as *Nierotko* held that backpay falls within the definition of "wages," *ibid.*, we conclude that FELA damages for lost wages qualify as "compensation" and are therefore taxable under the RRTA.

III

A

The Eighth Circuit construed "compensation" for RRTA purposes to mean only pay for "services that an employee actually renders," in other words, pay for active service. Consequently, the court held that "compensation" within the

RRTA's compass did not reach pay for periods of absence. 865 F. 3d, at 1117. In so ruling, the Court of Appeals attempted to distinguish *Nierotko* and *Quality Stores*. The Social Security decisions, the court said, were inapposite because the FICA "taxes payment for 'employment,'" whereas the RRTA "tax[es] payment for 'services.'" 865 F. 3d, at 1117. As noted, however, *supra*, at 314–315, the FICA defines "employment" in language resembling the RRTA in all relevant respects. Compare 26 U. S. C. § 3121(b) (FICA) ("any service, of whatever nature, performed . . . by an employee") with § 3231(e)(1) (RRTA) ("services rendered as an employee"). Construing RRTA "compensation" as less embracive than "wages" covered by the FICA would introduce an unwarranted disparity between terms Congress appeared to regard as equivalents. The reasoning of *Nierotko* and *Quality Stores*, as we see it, resists the Eighth Circuit's swift writeoff.[3]

Nierotko and *Quality Stores* apart, we would in any event conclude that the RRTA term "compensation" covers pay for time lost. Restricting "compensation" to pay for active service, the Court of Appeals relied on statutory history and, in particular, the eventual deletion of two references to pay for time lost contained in early renditions of the RRTA. See also *post*, at 329–330 (presenting the Eighth Circuit's statutory history argument). To understand the Eighth Circuit's position, and why, in our judgment, that position does not withstand scrutiny, some context is in order.

On enactment of the RRTA in 1937, Congress made "compensation" taxable at the time it was earned and provided specific guidance on when pay for time lost should be "deemed earned." Congress instructed: "The term 'com-

[3] The dissent's reduction of *Nierotko*'s significance fares no better. *Nierotko*, the dissent urges, is distinguishable because it involved "a different factual context." *Post*, at 331. But as just explained, *supra*, at 317 and this page, the facts in *Nierotko* resemble those here in all material respects.

pensation' means any form of money remuneration *earned by* an individual for services rendered as an employee . . . , including remuneration paid for time lost as an employee, but [such] remuneration . . . *shall be deemed earned* in the month in which such time is lost." 1937 RRTA, § 1(e), 50 Stat. 436 (emphasis added). In 1946, Congress clarified that the phrase "pa[y] for time lost" meant payment for "an identifiable period of absence from the active service of the employer, including absence on account of personal injury." Act of July 31, 1946 (1946 Act), § 2, 60 Stat. 722.

Thus, originally, the RRTA stated that "compensation" included pay for time lost, and the language added in 1946 presupposed the same. In subsequent amendments, however, Congress removed the references to pay for time lost. First, in 1975, Congress made "compensation" taxable when paid rather than when earned. Congress simultaneously removed the 1937 language that both referred to pay for time lost and specified when such pay should be "deemed earned." So amended, the definitional sentence, in its current form, reads: "The term 'compensation' means any form of money remuneration *paid to* an individual for services rendered as an employee . . . ." Act of Aug. 9, 1975 (1975 Act), § 204, 89 Stat. 466 (emphasis added).

Second, in 1983, Congress shifted the wage base for RRTA taxes from monthly "compensation" to annual "compensation." See Railroad Retirement Solvency Act of 1983 (1983 Act), § 225, 97 Stat. 424–425. Because the "monthly wage bases for railroad retirement taxes [were being] changed to annual amounts," the House Report explained, the RRTA required "[s]everal technical and conforming amendments." H. R. Rep. No. 98–30, pt. 2, p. 29 (1983). In a section of the 1983 Act titled "Technical Amendments," Congress struck the subsection containing, among other provisions, the 1946 Act's clarification of pay for time lost. 1983 Act, § 225, 97 Stat. 424–425. In lieu of the deleted subsection, Congress

inserted detailed instructions concerning the new annual wage base.

As the Court of Appeals and the dissent see it, the 1975 and 1983 deletions show that "compensation" no longer includes pay for time lost. 865 F. 3d, at 1119; see *post,* at 329–330. We are not so sure. The 1975 Act left unaltered the language at issue here, "remuneration . . . for services rendered as an employee." That Act also left intact the 1946 Act's description of pay for time lost. Continuing after the 1975 Act, then, such pay remained RRTA-taxable "compensation." The 1983 Act, as billed by Congress, effected only "[t]echnical [a]mendments" relating to the change from monthly to annual computation of "compensation." Concerning the 1975 and 1983 alterations, the IRS concluded that Congress revealed no "inten[tion] to exclude payments for time lost from compensation." 59 Fed. Reg. 66188 (1994). We credit the IRS reading. It would be passing strange for Congress to restrict substantially what counts as "compensation" in a manner so oblique.

Moreover, the text of the RRTA continues to indicate that "compensation" encompasses pay for time lost. The RRTA excludes from "compensation" a limited subset of payments for time lost, notably certain types of sick pay and disability pay. See 26 U. S. C. § 3231(e)(1), (4). These enumerated exclusions would be entirely superfluous if, as the Court of Appeals held, the RRTA broadly excludes from "compensation" any and all pay received for time lost.

In justification of its confinement of RRTA-taxable receipts to pay for active service, the Court of Appeals also referred to the RRA. The RRA, like the RRTA as enacted in 1937, states that "compensation" "includ[es] remuneration paid for time lost as an employee" and specifies that such pay "shall be deemed earned in the month in which such time is lost." 45 U. S. C. § 231(h)(1). Pointing to the discrepancy between the RRA and the amended RRTA, which no longer contains the above-quoted language, the Court of Appeals

concluded that Congress intended the RRA, but not the RRTA, to include pay for time lost. Accord *post*, at 330. Although "[w]e usually 'presume differences in language . . . convey differences in meaning,'" *Wisconsin Central*, 585 U. S., at 279, Congress' failure to reconcile the RRA and the amended RRTA is inconsequential. As just explained, the RRTA's pinpointed exclusions from RRTA taxation signal that nonexcluded pay for time lost remains RRTA-taxable "compensation."

B

Instead of adopting lockstep the Court of Appeals' interpretation, Loos takes a different approach. In his view, echoed by the dissent, "remuneration . . . for services rendered" means the "package of benefits" an employer pays "to retain the employee." Brief for Respondent 37; *post*, at 327–328. He therefore agrees with BNSF that benefits like sick pay and vacation pay are taxable "compensation." He contends, however, that FELA damages for lost wages are of a different order. They are not part of an employee's "package of benefits," he observes, and therefore should not count as "compensation." Such damages, Loos urges, "compensate for an injury" rather than for services rendered. Brief for Respondent 20; *post*, at 327–328. Loos argues in the alternative that even if voluntary settlements qualify as "compensation," "involuntary payment[s]" in the form of damages do not. Brief for Respondent 33.

Our decision in *Nierotko* undermines Loos's argument that, unlike sick pay and vacation pay, payments "compensat[ing] for an injury," Brief for Respondent 20, are not taxable under the RRTA. We held in *Nierotko* that an award of backpay compensating an employee for his wrongful discharge ranked as "wages" under the SSA. That was so, we explained, because the backpay there awarded to the employee redressed "the loss of wages" occasioned by "the employer's wrong." 327 U. S., at 364; see *supra*, at 316. Applying that reasoning here, there should be no dispositive

difference between a payment voluntarily made and one required by law.[4]

Nor does *United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200 (2001), aid Loos's argument, repeated by the dissent. See *post*, at 331. Indeed, *Cleveland Indians* reasserted *Nierotko*'s holding that "backpay for a time in which the employee was not on the job" counts as pay for services, and therefore ranks as wages. 532 U. S., at 210. *Cleveland Indians* then took up a discrete, "secondary issue" *Nierotko* presented, one not in contention here, *i. e.*, whether for taxation purposes backpay is allocable to the tax period when paid rather than an earlier time-earned period. 532 U. S., at 211, 213–214, 219–220. Moreover, *Quality Stores*, which postdated *Cleveland Indians*, left no doubt that what qualifies under *Nierotko* as "wages" for benefit purposes also qualifies as such for taxation purposes. 572 U. S., at 146–147.

C

Loos presses a final reason why he should not owe RRTA taxes on his lost wages award. Loos argues, and the District Court held, that the RRTA's tax on employees does not apply to personal injury damages. He observes that the RRTA taxes "the *income* of each employee." 26 U. S. C. § 3201(a)–(b) (emphasis added). He then cites a provision of

[4] The dissent, building on Loos's argument, tenders an inapt analogy between passengers and employees. If BNSF were ordered to pay damages for lost wages to an injured passenger, the dissent asserts, one would not say the passenger had been compensated "for services rendered." There is no reason, the dissent concludes, to "reach a different result here simply because the victim of BNSF's negligence happened to be one of its own workers." *Post*, at 329. Under the RRTA, however, this distinction is of course critical. The passenger's damages for lost wages are not taxable under the RRTA, for she has no employment relationship with the railroad. In contrast, FELA damages for lost wages are taxable because they are paid only if the injured person previously "rendered [services] as an employee," 26 U. S. C. § 3231(e)(1), and, indeed, was working for the railroad when the injury occurred, see 45 U. S. C. § 51.

the Internal Revenue Code, 26 U. S. C. § 104(a)(2). This provision exempts "damages . . . received . . . on account of personal physical injuries" from federal income taxation by excluding such damages from "gross income." Loos urges that the exclusion of personal injury damages from "gross income" should carry over to the RRTA's tax on the "income" of railroad workers, § 3201(a)–(b).

The argument is unconvincing. As the Government points out, the District Court, echoed by Loos, conflated "the distinct concepts of 'gross income,' [a prime component of] the tax base on which income tax is collected, and 'compensation,' the separately defined category of payments that are taxable under the RRTA." Brief for United States as *Amicus Curiae* 15. Blending tax bases that Congress kept discrete, the District Court and Loos proffer a scheme in which employees pay no tax on damages compensating for personal injuries; railroads pay the full excise tax on such compensation; and employees receive full credit for the compensation in determining their retirement benefits. That scheme, however, is not plausibly attributable to Congress.

For federal income tax purposes, "gross income" means "all income" "[e]xcept as otherwise provided." 26 U. S. C. § 61; see §§ 1, 63 (imposing a tax on "taxable income," defined as "gross income minus . . . deductions"). Congress provided detailed prescriptions on the scope of "gross income," excluding from its reach numerous items, among them, personal injury damages. See §§ 101–140. Conspicuously absent from the RRTA, however, is any reference to "gross income." As employed in the RRTA, the word "income" merely distinguishes the tax on the employee, an "income . . . tax," § 3201, from the matching tax on the railroad, called an "excise tax." §§ 3201, 3221. See also 1937 RRTA, §§ 2–3 (establishing an "income tax on employees" and an "excise tax on employers"); S. Rep. No. 818, 75th Cong., 1st Sess., 5 (1937) (stating that the RRTA imposes an "income tax on

employees" and an "excise tax on employers"); H. R. Rep. No. 1071, 75th Cong., 1st Sess., 6 (1937) (same).

Congress, we reiterate, specified not "gross income" but employee "compensation" as the tax base for the RRTA's income and excise taxes. §§ 3201, 3221. Congress then excepted certain payments from the calculation of "compensation." See § 3231(e); *supra*, at 320. Congress adopted by cross-reference particular Internal Revenue Code exclusions from "gross income," thereby carving out those specified items from RRTA coverage. See § 3231(e)(5)–(6), (9)–(11). Tellingly, Congress did not adopt for RRTA purposes the exclusion of personal injury damages from federal income taxation set out in § 104(a)(2). We note, furthermore, that if RRTA taxes were based on "income" or "gross income" rather than "compensation," the RRTA tax base would sweep in *nonrailroad* income, including, for example, dividends, interest accruals, even lottery winnings. Shifting from "compensation" to "income" as the RRTA tax base would thus saddle railroad workers with *more* RRTA taxes.

Given the multiple flaws in Loos's last ditch argument, we conclude that § 104(a)(2) does not exempt FELA damages from the RRTA's income and excise taxes.

* * *

In harmony with this Court's decisions in *Nierotko* and *Quality Stores*, we hold that "compensation" for RRTA purposes includes an employer's payments to an employee for active service and for periods of absence from active service. It is immaterial whether the employer chooses to make the payment or is legally required to do so. Either way, the payment is remitted to the recipient because of his status as a service-rendering employee. See 26 U. S. C. § 3231(e)(1); 45 U. S. C. § 231(h)(1).

For the reasons stated, FELA damages for lost wages qualify as RRTA-taxable "compensation." The judgment of the Court of Appeals for the Eighth Circuit is accordingly

reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice Gorsuch, with whom Justice Thomas joins, dissenting.

BNSF Railway's negligence caused one of its employees a serious injury. After a trial, a court ordered the company to pay damages. But instead of sending the full amount to the employee, BNSF asserted that it had to divert a portion to the Internal Revenue Service. Why? BNSF said the money represented taxable "compensation" for "services rendered as an employee." 26 U. S. C. § 3231(e)(1). Today, the Court agrees with the company. Respectfully, I do not. When an employee suffers a physical injury due to his employer's negligence and has to sue in court to recover damages, it seems more natural to me to describe the final judgment as compensation for his injury than for services (never) rendered.

The Court does not lay out the facts of the case, but they are relevant to my analysis and straightforward enough. Years ago, Michael Loos was working for BNSF in a train yard when he fell into a hidden drainage grate and injured his knee. He missed work for many months, and upon his return he had a series of absences, many of which he attributed to knee-injury flareups. When the company moved to fire him for allegedly violating its attendance policies, Mr. Loos sued. Among other things, Mr. Loos sought damages for BNSF's negligence in maintaining the train yard. He brought his claim under the Federal Employers' Liability Act (FELA), an analogue to traditional state-law tort suits that makes an interstate railroad "liable in damages to any person suffering injury while he is employed" by the railroad "for such injury . . . resulting in whole or in part from the [railroad's] negligence." 45 U. S. C. § 51. Ultimately, and again much like in any other tort suit, the jury awarded dam-

ages in three categories: $85,000 in pain and suffering, $11,212.78 in medical expenses, and $30,000 in lost wages—the final category representing the amount Mr. Loos was unable to earn because of the injury BNSF's negligence caused.

Then a strange thing happened. BNSF argued that the lost wages portion of Mr. Loos's judgment represented "compensation" to him "for services rendered as an employee" and was thus taxable income under the Railroad Retirement Tax Act (RRTA). 26 U. S. C. § 3201 *et seq.* In much the same way the Social Security Act taxes other citizens' incomes to fund their retirement benefits, the RRTA taxes railroad employees' earnings to pay for their public pensions. And BNSF took the view that, because Mr. Loos owed the IRS taxes on the lost wages portion of his judgment, it had to withhold an appropriate sum and redirect it to the government. The company took this position even though it meant BNSF would owe corresponding excise taxes. See 26 U. S. C. § 3221. It took this position, too, even though no one has identified for us a single case where the IRS has sought to collect RRTA taxes on a FELA judgment in the 80 years the two statutes have coexisted. The company even persisted in its view after, first, the district court and, then, the Eighth Circuit ruled that Mr. Loos's award wasn't subject to RRTA taxes. Even after all that, BNSF went to the trouble of seeking review in this Court to win the right to pay the IRS.

What's the reason for BNSF's tireless campaign? Is the company really moved by a selfless desire to protect a federal program from " 'a long-term risk of insolvency' "? *Ante,* at 315–316, n. 2. Several *amici* offer a more prosaic possibility. Under the rule BNSF seeks and wins today, RRTA taxes will be due on (but only on) the portion of a FELA settlement or judgment designated as lost wages. Taxes will not attach to other amounts attributed to, say, pain and suffering or medical costs. At trial, of course, a plaintiff's damages are what they are, and often juries will attribute a

significant portion of damages to lost wages. But with the help of the asymmetric tax treatment they secure today, railroads like BSNF can now sweeten their settlement offers while offering less money. Forgo trial and accept a lower settlement, they will tell injured workers, and in return we will designate a small fraction (maybe even none) of the payments as taxable lost wages. In this way, the Court's decision today may do precisely nothing to increase the government's tax collections or protect the solvency of any federal program. Instead, it may only mean that employees will pay a tax for going to trial—and railroads will succeed in buying cheaper settlements in the future at the bargain basement price of a few thousand dollars in excise taxes in one case today. See Brief for American Association for Justice as *Amicus Curiae* 34–36; Brief for SMART et al. as *Amici Curiae* 5–7.

Whatever the reason for BNSF's gambit, the problems with it start for me at the first step of the statutory interpretation analysis—with the text of the law itself. The RRTA taxes an employee's "compensation," which it defines as "money remuneration . . . for services rendered as an employee to one or more employers." 26 U. S. C. § 3231(e)(1). A "service" refers to "duty or labor . . . by one person . . . bound to submit his will to the direction and control of [another]." Black's Law Dictionary 1607 (3d ed. 1933). And "remuneration" means "a *quid pro quo*," "recompense" or "reward" for such services. *Id.*, at 1528. So the words "remuneration for services rendered" naturally cover things like an employee's salary or hourly wage. Nor do they stop there, as the Court correctly notes. Rather, and contrary to the court of appeals' view, those words also fairly encompass benefits like sick or disability pay. After all, an employer offers those benefits to attract and keep employees working on its behalf. In that way, these benefits form part of the "*quid pro quo*" (compensation) the employer pays to secure the "duty or labor" (services) the employee renders. Cf.

United States v. *Quality Stores, Inc.*, 572 U. S. 141, 146 (2014).

But damages for negligence are different. No one would describe a dangerous fall or the wrenching of a knee as a "service rendered" to the party who negligently caused the accident. BNSF hardly directed Mr. Loos to fall or offered to pay him for doing so. In fact, BNSF didn't even pay Mr. Loos voluntarily; he had to wrest a judgment from the railroad at the end of a legal battle. So Mr. Loos's FELA judgment seems to me, as it did to every judge in the proceedings below, unconnected to any service Mr. Loos rendered to BNSF. Instead of being "compensation" for "services rendered as an employee," it seems more natural to say that the negligence damages BNSF paid are "compensation" to Mr. Loos for his injury. That's exactly how we usually understand tort damages—as "compensation" for an "injury" caused by "the unlawful act or omission or negligence of another." Black's Law Dictionary 314 (2d ed. 1910). And that's exactly how FELA describes the damages it provides—stating that it renders a railroad "liable" not for services rendered but for any "injury" caused by the defendant's "negligence." 45 U. S. C. § 51; see also *New York Central R. Co.* v. *Winfield*, 244 U. S. 147, 164 (1917) (Brandeis, J., dissenting) (FELA liability is "a penalty for wrong doing," a "remedy" that "mak[es] the wrongdoer indemnify him whom he has wronged").

Of course, BNSF isn't without a reply. Time and again it highlights the fact that the district court measured the lost wages portion of Mr. Loos's award by reference to what he could have earned but for his injury. But if BNSF's negligence had injured a passenger on a train instead of an employee in a train yard, a jury could have measured the passenger's tort damages in exactly the same way, taking account of the wages she could have earned from her own employer but for the railroad's negligence. *Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U. S. 545, 554 (1886). In

those circumstances, I doubt any of us would say the passenger's damages award represented compensation for "services rendered" to her employer rather than compensation for her injury. And I don't see why we would reach a different result here simply because the victim of BNSF's negligence happened to be one of its own workers. Of course, as the Court points out, *ante*, at 322, n. 4, FELA suits may be brought only by railroad employees against their employers. But in cases like ours a FELA suit simply serves in the interstate railroad industry as a federalized substitute for a traditional state negligence tort claim of the sort that could be brought by *anyone* the railroad injured, employee or not. Inescapably, "the basis of liability under [FELA] is and remains negligence." *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 (1949) (Douglas, J., concurring).

Looking beyond the statute's text to its history only compounds BNSF's problems. To be clear, the statutory history I have in mind here isn't the sort of unenacted legislative history that often is neither truly legislative (having failed to survive bicameralism and presentment) nor truly historical (consisting of advocacy aimed at winning in future litigation what couldn't be won in past statutes). Instead, I mean here the record of *enacted* changes Congress made to the relevant statutory text over time, the sort of textual evidence everyone agrees can sometimes shed light on meaning. See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653–654 (1898).

The RRTA's statutory history is long and instructive. Beginning in 1937, the statute defined taxable "compensation" to include remuneration "for services rendered," but with the further instruction that this *included* compensation "for time lost." Carriers Taxing Act of 1937, § 1(e), 50 Stat. 436. Courts applying the RRTA's sister statute, the Railroad Retirement Act (RRA), understood this language to capture settlement payments for personal injury claims that would not otherwise qualify as "remuneration . . . for services ren-

dered." See, *e. g.*, *Jacques* v. *Railroad Retirement Bd.*, 736 F. 2d 34, 39–40 (CA2 1984); *Grant* v. *Railroad Retirement Bd.*, 173 F. 2d 385, 386–387 (CA10 1949). Congress itself seemed to agree, explaining in 1946 that remuneration for "time lost" includes payments made "with respect to an . . . absence on account of personal injury." § 3(f), 60 Stat. 725. But then Congress reversed field. In 1975, it removed payments "for time lost" from the RRTA's definition of "compensation." § 204, 89 Stat. 466. And in 1983, Congress overwrote the last remaining reference to payments "for time lost" in a nearby section. § 225, 97 Stat. 424–426. To my mind, Congress's decision to remove the *only* language that could have fairly captured the damages here cannot be easily ignored.

Yet BNSF would have us do exactly that. On its account, the RRTA's discussions about compensation for time lost and personal injuries only ever served to illustrate what has qualified all along as remuneration for "services rendered." So, on its view, when Congress first added and then removed language about time lost and personal injuries, it quite literally wasted its time because none of its additions and subtractions altered the statute's meaning. Put another way, BNSF asks us to read back into the law words (time lost, personal injury) that Congress deliberately removed on the assumption they were never really needed in the first place. As I see it, that is less " 'a construction of a statute [than] an enlargement of it by the court, so that what was omitted, [BNSF] presum[es] by inadvertence, may be included within its scope. To supply omissions [like that] transcends the judicial function.' " *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 101 (1991) (quoting *Iselin* v. *United States*, 270 U. S. 245, 251 (1926) (Brandeis, J.)).

Looking beyond the text and history of this statute to compare it with others confirms the conclusion. Where the RRTA directs the taxation of railroad employee income to fund retirement benefits, the RRA controls the calculation of

those benefits. And, unlike the RRTA, that statute continues to include "pay for time lost" in the definition of "compensation" it uses to calculate benefits. 45 U. S. C. § 231(h)(1). Normally, when Congress chooses to exclude terms in one statute while introducing or retaining them in another closely related law, we give effect to rather than pass a blind eye over the difference. Nor is there any question that Congress knows exactly how to tax a favorable tort judgment when it wants. See, *e. g.*, 26 U. S. C. § 104(a)(2) (punitive damages are not deductible). Its failure to offer any comparably clear command here should, once more, tell us something.

With so much in the statute's text, history, and surroundings now pointing for Mr. Loos, BNSF is left to lean heavily on case law. The company says we must rule its way primarily because of *Social Security Bd.* v. *Nierotko*, 327 U. S. 358 (1946). But I do not see anything in that case dictating a victory for BNSF. *Nierotko* concerned a different statute, a different legal claim, and a different factual context. There, the plaintiff brought a wrongful termination claim before the National Labor Relations Board, claiming that his employer fired him in retaliation for union activity. The NLRB ordered the employee reinstated to his former job and paid as if he had never left. Under those circumstances, this Court held that for purposes of calculating the plaintiff's Social Security Act benefits, his "wages" should include his backpay award, allocated to the period when he would have been working but for the employer's misconduct. Since then, however, the Court has suggested that at least one of *Nierotko*'s holdings was likely motivated more by a policy concern with protecting the employee's full retirement to Social Security benefits than by a careful reading of the Social Security Act. See *United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 212–213 (2001); *id.*, at 220–221 (Scalia, J., concurring in judgment). Besides, in this case we're simply not faced with a wrongful termination claim, an

award of backpay, or the interpretation of the Social Security Act—let alone reason to worry that ruling for Mr. Loos would inequitably shortchange an employee. So whatever light *Nierotko* might continue to shed on the question it faced, and whatever superficial similarities one might point to here, that decision simply doesn't dictate an answer to the question whether a tort victim's damages for a physical injury qualify as "compensation for services rendered" under the RRTA.

By this point BNSF is left with only one argument, which it treats as no more than a last resort: *Chevron* deference. In the past, the briefs and oral argument in this case likely would have centered on whether we should defer to the IRS's administrative interpretation of the RRTA. After all, the IRS (at least today) agrees with BNSF's interpretation that "compensation . . . for services rendered" includes damages for personal injuries. And the *Chevron* doctrine, if it retains any force, would seem to allow BNSF to parlay any statutory ambiguity into a colorable argument for judicial deference to the IRS's view, regardless of the Court's best independent understanding of the law. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Of course, any *Chevron* analysis here would be complicated by the government's change of heart. For if *Nierotko* is as relevant as BNSF contends, then it must also be relevant that, back when *Nierotko* was decided, the IRS took the view that the term "wages" in the Social Security Act did *not* include backpay awards for wrongful termination. See 327 U. S., at 366–367. And if "wages" don't include backpay awards for wrongful terminations, it's hard to see how "compensation . . . for services rendered" might include damages for an act of negligence. Still, even with the complications that follow from executive agencies' penchant for changing their views about the law's meaning almost as often as they change administrations, a plea for

deference surely would have enjoyed pride of place in BNSF's submission not long ago.

But nothing like that happened here. BNSF devoted scarcely any of its briefing to *Chevron*. At oral argument, BNSF's lawyer didn't even mention the case until the final seconds—and even then "hate[d] to cite" it. Tr. of Oral Arg. 58. No doubt, BNSF proceeded this way well aware of the mounting criticism of *Chevron* deference. See, *e. g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 221 (2018) (Kennedy, J., concurring). And no doubt, too, this is all to the good. Instead of throwing up our hands and letting an interested party—the federal government's executive branch, no less—dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute, the Court today buckles down to its job of saying what the law is in light of its text, its context, and our precedent. Though I may disagree with the result the Court reaches, my colleagues rightly afford the parties before us an independent judicial interpretation of the law. They deserve no less.

Syllabus

RIMINI STREET, INC., ET AL. *v.* ORACLE USA, INC., ET AL.

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

No. 17–1625. Argued January 14, 2019—Decided March 4, 2019

A jury awarded Oracle damages after finding that Rimini Street had infringed various Oracle copyrights. After judgment, the District Court also awarded Oracle fees and costs, including $12.8 million for litigation expenses such as expert witnesses, e-discovery, and jury consulting. In affirming the $12.8 million award, the Ninth Circuit acknowledged that it covered expenses not included within the six categories of costs that the general federal statute authorizing district courts to award costs, 28 U. S. C. §§ 1821 and 1920, provides may be awarded against a losing party. The court nonetheless held that the award was appropriate because the Copyright Act gives federal district courts discretion to award "full costs" to a party in copyright litigation, 17 U. S. C. § 505.

Held: The term "full costs" in § 505 of the Copyright Act means the costs specified in the general costs statute codified at §§ 1821 and 1920. Pp. 338–346.

(a) Sections 1821 and 1920 define what the term "costs" encompasses in subject-specific federal statutes such as § 505. Congress may authorize awards of expenses beyond the six categories specified in the general costs statute, but courts may not award litigation expenses that are not specified in §§ 1821 and 1920 absent explicit authority. This Court's precedents have consistently adhered to that approach. See *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437; *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83; *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291. The Copyright Act does not explicitly authorize the award of litigation expenses beyond the six categories specified in §§ 1821 and 1920, which do not authorize an award for expenses such as expert witness fees, e-discovery expenses, and jury consultant fees. Pp. 338–341.

(b) Oracle's counterarguments are not persuasive. First, Oracle argues that the word "full" authorizes courts to award expenses beyond the costs specified in §§ 1821 and 1920. The term "full" is an adjective that means the complete measure of the noun it modifies. It does not, therefore, alter the meaning of the word "costs" in § 505. Rather, "full costs" are all the "costs" otherwise available under the relevant law.

Second, Oracle maintains that the term "full costs" in the Copyright Act is a historical term of art that encompasses more than the "costs" listed in §§ 1821 and 1920. Oracle argues that Congress imported the meaning of the term "full costs" from the English copyright statutes into the Copyright Act in 1831. It contends that the 1831 meaning of "full costs" allows the transfer of all expenses of litigation, beyond those specified in any costs schedule, and overrides anything that Congress enacted in the Fee Act of 1853 or any subsequent costs statute. Courts need not, however, undertake extensive historical excavation to determine the meaning of costs statutes. See *Crawford Fitting Co.*, 482 U. S., at 445. In any event, Oracle has not shown that the phrase "full costs" had an established meaning in English or American law that covered more than the full amount of the costs listed in the applicable costs schedule. Case law since 1831 also refutes Oracle's historical argument.

Third, Oracle advances a variety of surplusage arguments. According to Oracle, after Congress made the costs award discretionary in 1976, district courts could award any amount of costs up to 100 percent, and so Rimini's reading of the word "full" now adds nothing to "costs." Because Congress would not have intended "full" to be surplusage, Oracle contends, Congress must have employed the term "full" to mean expenses beyond the costs specified in §§ 1821 and 1920. But even if the term "full" lacked any continuing significance after 1976, the meaning of "costs" did not change. Oracle's interpretation would also create its own redundancy problem by rendering the second sentence of § 505—which covers attorney's fees—largely redundant because § 505's first sentence presumably would already cover those fees. Finally, Oracle's argument, even if correct, overstates the significance of statutory surplusage and redundancy. See, *e. g.*, *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 385. Pp. 341–346.

879 F. 3d 948, reversed in part and remanded.

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

Mark A. Perry argued the cause for petitioners. With him on the briefs were *Jeremy M. Christiansen*, *Blaine H. Evanson*, and *Joseph A. Gorman*.

Allon Kedem argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General*

Hunt, *Deputy Solicitor General Stewart*, *Charles W. Scarborough*, *Megan Barbero*, *Casen B. Ross*, *Regan A. Smith*, and *Kevin R. Amer*.

Paul D. Clement argued the cause for respondents. With him on the brief were *Erin E. Murphy*, *Matthew D. Rowen*, *William A. Isaacson*, *David B. Salmons*, *Dale M. Cendali*, and *Joshua L. Simmons*.*

Justice Kavanaugh delivered the opinion of the Court.

The Copyright Act gives federal district courts discretion to award "full costs" to a party in copyright litigation. 17 U. S. C. § 505. In the general statute governing awards of costs, Congress has specified six categories of litigation expenses that qualify as "costs." See 28 U. S. C. §§ 1821, 1920. The question presented in this case is whether the Copyright Act's reference to "full costs" authorizes a court to award litigation expenses beyond the six categories of "costs" specified by Congress in the general costs statute. The statutory text and our precedents establish that the answer is no. The term "full" is a term of quantity or amount; it does not expand the categories or kinds of expenses that may be awarded as "costs" under the general costs statute. In copyright cases, § 505's authorization for the award of "full costs" therefore covers only the six categories specified in

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*Briefs of *amici curiae* urging reversal were filed for Scholars of Corpus Linguistics by *Gene C. Schaerr*, *Erik S. Jaffe*, and *Michael T. Worley*; and for Patrick T. Gillen by *Joshua C. McDaniel*, *Barry R. Levy*, and *Eric S. Boorstin*.

Briefs of *amici curiae* urging affirmance were filed for BSA|The Software Alliance by *Andrew J. Pincus*, *Paul W. Hughes*, and *Matthew A. Waring*; for Copyright Alliance by *Eleanor M. Lackman*; for the National Music Publishers' Association et al. by *Beth S. Brinkmann* and *Jacqueline C. Charlesworth*; for Scholars of Linguistics by *Stephen M. Nickelsburg*; for Steven Baicker-McKee by *Robert S. Friedman* and *Daniel L. Brown*; and for Ralph Oman by *Melissa Arbus Sherry* and *Sarang Vijay Damle*.

Stefan Mentzer and *Sheldon H. Klein* filed a brief for the American Intellectual Property Law Association as *amicus curiae*.

the general costs statute, codified at §§ 1821 and 1920. We reverse in relevant part the judgment of the U. S. Court of Appeals for the Ninth Circuit, and we remand the case for further proceedings consistent with this opinion.

I

Oracle develops and licenses software programs that manage data and operations for businesses and non-profit organizations. Oracle also offers its customers software maintenance services.

Rimini Street sells third-party software maintenance services to Oracle customers. In doing so, Rimini competes with Oracle's software maintenance services.

Oracle sued Rimini and its CEO in Federal District Court in Nevada, asserting claims under the Copyright Act and various other federal and state laws. Oracle alleged that Rimini, in the course of providing software support services to Oracle customers, copied Oracle's software without licensing it.

A jury found that Rimini had infringed various Oracle copyrights and that both Rimini and its CEO had violated California and Nevada computer access statutes. The jury awarded Oracle $35.6 million in damages for copyright infringement and $14.4 million in damages for violations of the state computer access statutes. After judgment, the District Court ordered the defendants to pay Oracle an additional $28.5 million in attorney's fees and $4.95 million in costs; the Court of Appeals reduced the latter award to $3.4 million. The District Court also ordered the defendants to pay Oracle $12.8 million for litigation expenses such as expert witnesses, e-discovery, and jury consulting.

That $12.8 million award is the subject of the dispute in this case. As relevant here, the U. S. Court of Appeals for the Ninth Circuit affirmed the District Court's $12.8 million award. The Court of Appeals recognized that the general federal statute authorizing district courts to award costs, 28

U. S. C. §§ 1821 and 1920, lists only six categories of costs that may be awarded against the losing party. And the Court of Appeals acknowledged that the $12.8 million award covered expenses not included within those six categories. But the Court of Appeals, relying on Circuit precedent, held that the District Court's $12.8 million award for additional expenses was still appropriate because § 505 permits the award of "full costs," a term that the Ninth Circuit said was not confined to the six categories identified in §§ 1821 and 1920. 879 F. 3d 948, 965–966 (2018).

We granted certiorari to resolve disagreement in the Courts of Appeals over whether the term "full costs" in § 505 authorizes awards of expenses other than those costs identified in §§ 1821 and 1920. 585 U. S. 1058 (2018). Compare 879 F. 3d, at 965–966; *Twentieth Century Fox Film Corp.* v. *Entertainment Distributing*, 429 F. 3d 869 (CA9 2005), with *Artisan Contractors Assn. of Am., Inc.* v. *Frontier Ins. Co.*, 275 F. 3d 1038 (CA11 2001); *Pinkham* v. *Camex, Inc.*, 84 F. 3d 292 (CA8 1996).

II

A

Congress has enacted more than 200 subject-specific federal statutes that explicitly authorize the award of costs to prevailing parties in litigation. The Copyright Act is one of those statutes. That Act provides that a district court in a copyright case "in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof." 17 U. S. C. § 505.

In the general "costs" statute, codified at §§ 1821 and 1920 of Title 28, Congress has specified six categories of litigation expenses that a federal court may award as "costs,"[1] and

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[1] The six categories that a federal court may award as costs are:

"(1) Fees of the clerk and marshal;

"(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

"(3) Fees and disbursements for printing and witnesses;

Congress has detailed how to calculate the amount of certain costs. Sections 1821 and 1920 in essence define what the term "costs" encompasses in the subject-specific federal statutes that provide for an award of costs.

Sections 1821 and 1920 create a default rule and establish a clear baseline against which Congress may legislate. Consistent with that default rule, some federal statutes simply refer to "costs." In those cases, federal courts are limited to awarding the costs specified in §§ 1821 and 1920. If, for particular kinds of cases, Congress wants to authorize awards of expenses beyond the six categories specified in the general costs statute, Congress may do so. For example, some federal statutes go beyond §§ 1821 and 1920 to expressly provide for the award of expert witness fees or attorney's fees. See *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 89, n. 4 (1991). Indeed, the Copyright Act expressly provides for awards of attorney's fees as well as costs. 17 U. S. C. § 505. And the same Congress that enacted amendments to the Copyright Act in 1976 enacted several other statutes that expressly authorized awards of expert witness fees. See *Casey*, 499 U. S., at 88. But absent such express authority, courts may not award litigation expenses that are not specified in §§ 1821 and 1920.

Our precedents have consistently adhered to that approach. Three cases illustrate the point.

In *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, the question was whether courts could award expert witness fees under Rule 54(d) of the Federal Rules of Civil Procedure. Rule

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"(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

"(5) Docket fees under section 1923 of this title;

"(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." 28 U. S. C. § 1920.

In addition, § 1821 provides particular reimbursement rates for witnesses' "[p]er diem and mileage" expenses.

54(d) authorizes an award of "costs" but does not expressly refer to expert witness fees. 482 U. S. 437, 441 (1987). In defining what expenses qualify as "costs," §§1821 and 1920 likewise do not include expert witness fees. We therefore held that the prevailing party could not obtain expert witness fees: When "a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of §1821(b), absent contract or explicit statutory authority to the contrary." *Id.*, at 439.

In *Casey*, we interpreted 42 U. S. C. §1988, the federal statute authorizing an award of "costs" in civil rights litigation. We described *Crawford Fitting* as holding that §§1821 and 1920 "define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further." 499 U. S., at 86. In accord with *Crawford Fitting*, we concluded that §1988 does not authorize awards of expert witness fees because §1988 supplies no " 'explicit statutory authority' " to award expert witness fees. 499 U. S., at 87 (quoting *Crawford Fitting*, 482 U. S., at 439).

In *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, we considered the Individuals with Disabilities Education Act, which authorized an award of costs. The question was whether that Act's reference to "costs" encompassed expert witness fees. We again explained that "costs" is " 'a term of art that generally does not include expert fees.' " 548 U. S. 291, 297 (2006); see also *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U. S. 560, 573 (2012). We stated: "[N]o statute will be construed as authorizing the taxation of witness fees as costs unless the statute 'refer[s] explicitly to witness fees.' " *Murphy*, 548 U. S., at 301 (quoting *Crawford Fitting*, 482 U. S., at 445).

Our cases, in sum, establish a clear rule: A statute awarding "costs" will not be construed as authorizing an award of litigation expenses beyond the six categories listed in §§1821 and 1920, absent an explicit statutory instruction to that ef-

fect. See *Murphy*, 548 U. S., at 301 (requiring " 'explici[t]' " authority); *Casey*, 499 U. S., at 86 (requiring " 'explicit' " authority); *Crawford Fitting*, 482 U. S., at 439 (requiring "explicit statutory authority").

Here, the Copyright Act does not explicitly authorize the award of litigation expenses beyond the six categories specified in §§ 1821 and 1920. And §§ 1821 and 1920 in turn do not authorize an award for expenses such as expert witness fees, e-discovery expenses, and jury consultant fees, which were expenses encompassed by the District Court's $12.8 million award to Oracle here. Rimini argues that the $12.8 million award therefore cannot stand.

B

To sustain its $12.8 million award, Oracle advances three substantial arguments. But we ultimately do not find those arguments persuasive.

First, although Oracle concedes that it would lose this case if the Copyright Act referred only to "costs," Oracle stresses that the Copyright Act uses the word "full" before "costs." Oracle argues that the word "full" authorizes courts to award expenses beyond the costs specified in §§ 1821 and 1920. We disagree. "Full" is a term of quantity or amount. It is an adjective that means the complete measure of the noun it modifies. See American Heritage Dictionary 709 (5th ed. 2011); Oxford English Dictionary 247 (2d ed. 1989). As we said earlier this Term: "Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality." *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 19 (2018).

The adjective "full" in § 505 therefore does not alter the meaning of the word "costs." Rather, "full costs" are all the "costs" otherwise available under law. The word "full" operates in the phrase "full costs" just as it operates in other common phrases: A "full moon" means the moon, not Mars.

A "full breakfast" means breakfast, not lunch. A "full season ticket plan" means tickets, not hot dogs. So too, the term "full costs" means *costs*, not other expenses.

The dispute here, therefore, turns on the meaning of the word "costs." And as we have explained, the term "costs" refers to the costs generally available under the federal costs statute—§§ 1821 and 1920. "Full costs" are all the costs generally available under that statute.

Second, Oracle maintains that the term "full costs" in the Copyright Act is a historical term of art that encompasses more than the "costs" listed in the relevant costs statute—here, §§ 1821 and 1920. We again disagree.

Some general background: From 1789 to 1853, federal courts awarded costs and fees according to the relevant state law of the forum State. See *Crawford Fitting*, 482 U. S., at 439–440; *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247–250 (1975). In 1853, Congress departed from that state-focused approach. That year, Congress passed and President Fillmore signed a comprehensive federal statute establishing a federal schedule for the award of costs in federal court. *Crawford Fitting*, 482 U. S., at 440; 10 Stat. 161. Known as the Fee Act of 1853, that 1853 statute has "carried forward to today" in §§ 1821 and 1920 " 'without any apparent intent to change the controlling rules.' " *Crawford Fitting*, 482 U. S., at 440. As we have said, §§ 1821 and 1920 provide a comprehensive schedule of costs for proceedings in federal court.

Now some copyright law background: The term "full [c]osts" appeared in the first copyright statute in England, the Statute of Anne. 8 Anne c.19, § 8 (1710). In the United States, the Federal Copyright Act of 1831 borrowed the phrasing of English copyright law and used the same term, "full costs." Act of Feb. 3, 1831, § 12, 4 Stat. 438–439. That term has appeared in subsequent revisions of the Copyright Act, through the Act's most recent substantive alterations in 1976. See Act of July 8, 1870, § 108, 16 Stat. 215; Copyright

Act of 1909, § 40, 35 Stat. 1084; Copyright Act of 1976, § 505, 90 Stat. 2586.

Oracle argues that English copyright statutes awarding "full costs" allowed the transfer of all expenses of litigation, beyond what was specified in any costs schedule. According to Oracle, Congress necessarily imported that meaning of the term "full costs" into the Copyright Act in 1831. And according to Oracle, that 1831 meaning overrides anything that Congress enacted in any costs statute in 1853 or later.

To begin with, our decision in *Crawford Fitting* explained that courts should not undertake extensive historical excavation to determine the meaning of costs statutes. We said that §§ 1821 and 1920 apply regardless of when individual subject-specific costs statutes were enacted. 482 U. S., at 445. The *Crawford Fitting* principle eliminates the need for that kind of historical analysis and confirms that the Copyright Act's reference to "full costs" must be interpreted by reference to §§ 1821 and 1920.

In any event, Oracle's historical argument fails even on its own terms. Oracle has not persuasively demonstrated that as of 1831, the phrase "full costs" had an established meaning in English or American law that covered more than the full amount of the costs listed in the applicable costs schedule. On the contrary, the federal courts as of 1831 awarded costs in accord with the costs schedule of the relevant state law. See *id.*, at 439–440; *Alyeska Pipeline*, 421 U. S., at 250. And state laws at the time tended to use the term "full costs" to refer to, among other things, full cost awards as distinguished from the half, double, or treble cost awards that were also commonly available under state law at the time.[2] That usage accorded with the ordinary meaning of the term.

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[2] See, *e. g.*, 1 Laws of Pa., ch. DCXLV, pp. 371, 373 (1810) ("full costs" and "double costs"); 2 Rev. Stat. N. Y., pt. III, ch. X, Tit. 1, §§ 16, 25 (1846) ("full," "double," and "treble" costs); Rev. Stat. Mass., pt. III, Tit. VI, ch. 121, §§ 4, 7, 8, 11, 18 (1836) ("one quarter," "full," "double," and "treble" costs).

At the time, the word "full" conveyed the same meaning that it does today: "Complete; entire; not defective or partial." 1 N. Webster, An American Dictionary of the English Language 89 (1828); see also 1 S. Johnson, A Dictionary of the English Language 817 (1773) ("Complete, such as that nothing further is desired or wanted; Complete without abatement; at the utmost degree"). Full costs did not encompass expenses beyond those costs that otherwise could be awarded under the applicable state law.

The case law since 1831 also refutes Oracle's historical argument. If Oracle's account of the history were correct, federal courts starting in 1831 presumably would have interpreted the term "full costs" in the Copyright Act to allow awards of litigation expenses that were not ordinarily available as costs under the applicable costs schedule. But Rimini points out that none of the more than 800 available copyright decisions awarding costs from 1831 to 1976—that is, from the year the term "full costs" first appeared in the Copyright Act until the year that the Act was last significantly amended—awarded expenses other than those specified by the applicable state or federal law. Tr. of Oral Arg. 7. Oracle has not refuted Rimini's argument on that point. Oracle cites no § 505 cases where federal courts awarded expert witness fees or other litigation expenses of the kind at issue here until the Ninth Circuit's 2005 decision adopting the interpretation of § 505 that the Ninth Circuit followed in this case. See *Twentieth Century Fox*, 429 F. 3d 869.

In light of the commonly understood meaning of the term "full costs" as of 1831 and the case law since 1831, Oracle's historical argument falls short. The best interpretation is that the term "full costs" meant in 1831 what it means now: the full amount of the costs specified by the applicable costs schedule.

Third, Oracle advances a variety of surplusage arguments. Oracle contends, for example, that the word "full" would be unnecessary surplusage if Rimini's argument were correct.

We disagree. The award of costs in copyright cases was *mandatory* from 1831 to 1976. See § 40, 35 Stat. 1084; § 12, 4 Stat. 438–439. During that period, the term "full" fixed both a floor and a ceiling for the amount of "costs" that could be awarded. In other words, the term "full costs" required an award of 100 percent of the costs available under the applicable costs schedule.

Oracle says that even if that interpretation of "full costs" made sense before 1976, the meaning of the term "full costs" changed in 1976. That year, Congress amended the Copyright Act to make the award of costs discretionary rather than mandatory. See § 505, 90 Stat. 2586. According to Oracle, after Congress made the costs award discretionary, district courts could award any amount of costs up to 100 percent and so Rimini's reading of the word "full" now adds nothing to "costs." If we assume that Congress in 1976 did not intend "full" to be surplusage, Oracle argues that Congress must have employed the term "full" to mean expenses beyond the costs specified in §§ 1821 and 1920.

For several reasons, that argument does not persuade us.

To begin with, even if the term "full" lacked any continuing significance after 1976, the meaning of "costs" did not change. The term "costs" still means those costs specified in §§ 1821 and 1920. It makes little sense to think that Congress in 1976, when it made the award of full costs discretionary rather than mandatory, silently expanded the kinds of expenses that a court may otherwise award as costs in copyright suits.[3]

Moreover, Oracle's interpretation would create its own redundancy problem by rendering the second sentence of § 505 largely redundant. That second sentence provides: "Except

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[3] Rimini further suggests that "full" still has meaning after 1976 because the statute gives the district court discretion to award either full costs or no costs, unlike statutes that refer only to "costs," which allow courts to award any amount of costs up to full costs. In light of our disposition of the case, we need not and do not consider that argument.

as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U. S. C. § 505. If Oracle were right that "full costs" covers all of a party's litigation expenditures, then the first sentence of § 505 would presumably already cover attorney's fees and the second sentence would be largely unnecessary. In order to avoid some redundancy, Oracle's interpretation would create other redundancy.

Finally, even if Oracle is correct that the term "full" has become unnecessary or redundant as a result of the 1976 amendment, Oracle overstates the significance of statutory surplusage or redundancy. Redundancy is not a silver bullet. We have recognized that some "redundancy is 'hardly unusual' in statutes addressing costs." *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 385 (2013). If one possible interpretation of a statute would cause some redundancy and another interpretation would avoid redundancy, that difference in the two interpretations can supply a clue as to the better interpretation of a statute. But only a clue. Sometimes the better overall reading of the statute contains some redundancy.

* * *

The Copyright Act authorizes federal district courts to award "full costs" to a party in copyright litigation. That term means the costs specified in the general costs statute, §§ 1821 and 1920. We reverse in relevant part the judgment of the Court of Appeals, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

WASHINGTON STATE DEPARTMENT OF LICENSING *v.* COUGAR DEN, INC.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 16–1498. Argued October 30, 2018—Decided March 19, 2019

The State of Washington taxes "motor vehicle fuel importer[s]" who bring large quantities of fuel into the State by "ground transportation." Wash. Rev. Code §§ 82.36.010(4), (12), (16). Respondent Cougar Den, Inc., a wholesale fuel importer owned by a member of the Yakama Nation, imports fuel from Oregon over Washington's public highways to the Yakama Reservation to sell to Yakama-owned retail gas stations located within the reservation. In 2013, the Washington State Department of Licensing assessed Cougar Den $3.6 million in taxes, penalties, and licensing fees for importing motor vehicle fuel into the State. Cougar Den appealed, arguing that the Washington tax, as applied to its activities, is pre-empted by an 1855 treaty between the United States and the Yakama Nation that, among other things, reserves the Yakamas' "right, in common with citizens of the United States, to travel upon all public highways," 12 Stat. 953. A Washington Superior Court held that the tax was pre-empted, and the Washington Supreme Court affirmed.

Held: The judgment is affirmed.

188 Wash. 2d 55, 392 P. 3d 1014, affirmed.

Justice Breyer, joined by Justice Sotomayor and Justice Kagan, concluded that the 1855 treaty between the United States and the Yakama Nation pre-empts the State of Washington's fuel tax as applied to Cougar Den's importation of fuel by public highway. Pp. 353–367.

(a) The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute "taxes the importation of fuel, which is the transportation of fuel." 188 Wash. 2d 55, 69, 392 P. 3d 1014, 1020. It added that "travel on public highways is directly at issue because the tax [is] an importation tax." *Id.*, at 67, 392 P. 3d, at 1019. The incidence of a tax is a question of state law, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 461, and this Court is bound by the Washington Supreme Court's interpretation of Washington law, *Johnson* v. *United States*, 559 U. S. 133, 138. Nor is there any reason to doubt that the Washington Supreme Court meant what it said when it interpreted the statute. In the statute's own words, Washington "impose[s] upon motor vehicle fuel

licensees," including "licensed importer[s]," a tax for "each gallon of motor vehicle fuel" that "enters into this state," but only "if . . . entry is" by means of "a railcar, trailer, truck, or other equipment suitable for ground transportation." Wash. Rev. Code §§ 82.36.010(4), 82.36.020(1), (2), 82.36.026(3). Thus, Cougar Den owed the tax because Cougar Den traveled with fuel by public highway. See App. 10a–26a; App. to Pet. for Cert. 55a. Pp. 353–359.

(b) The State of Washington's application of the tax to Cougar Den's importation of fuel is pre-empted by the Yakama Nation's reservation of "the right, in common with citizens of the United States, to travel upon all public highways." This conclusion rests upon three considerations taken together. First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language now before the Court; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. See *United States* v. *Winans*, 198 U. S. 371, 380–381; *Seufert Brothers Co.* v. *United States*, 249 U. S. 194, 196–198; *Tulee* v. *Washington*, 315 U. S. 681, 683–685; *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 677–678. Thus, although the words "in common with" on their face could be read to permit application to the Yakamas of general legislation (like the legislation at issue here) that applies to all citizens, this Court has refused to read "in common with" in this way because that is not what the Yakamas understood the words to mean in 1855. See *Winans*, 198 U. S., at 379, 381; *Seufert Brothers*, 249 U. S., at 198–199; *Tulee*, 315 U. S., at 684; *Fishing Vessel*, 443 U. S., at 679, 684–685. Second, the historical record adopted by the agency and the courts below indicates that the treaty negotiations and the United States' representatives' statements to the Yakamas would have led the Yakamas to understand that the treaty's protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is just what the treaty protects. Therefore, precedent tells the Court that the tax must be pre-empted. In *Tulee*, for example, the fishing right reserved by the Yakamas in the treaty was held to pre-empt the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U. S., at 684. The Court concluded that "such exaction of fees as a prerequisite to the enjoyment of" a right reserved in the treaty "cannot be reconciled with a fair construction of the treaty." *Id.*, at 685. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel. Pp. 359–367.

Justice Gorsuch, joined by Justice Ginsburg, concluded that the 1855 treaty guarantees tribal members the right to move their goods, including fuel, to and from market freely. When dealing with a tribal treaty, a court must "give effect to the terms as the Indians themselves would have understood them." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 196. The Yakamas' understanding of the terms of the 1855 treaty can be found in a set of unchallenged factual findings in *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, which are binding here and sufficient to resolve this case. They provide "no evidence [suggesting] that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.*, at 1247. Instead, they suggest that the Yakamas understood the treaty's right-to-travel provision to provide them "with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." *Id.*, at 1262. A wealth of historical evidence confirms this understanding. "Far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture," and travel for purposes of trade was so important to their "way of life that they could not have performed and functioned as a distinct culture" without it. *Id.*, at 1238. Everyone then understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout its traditional trading area. The State reads the treaty only as a promise to tribal members of the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied—millions of acres desperately wanted by the United States to settle the Washington Territory—was worth far more than an abject promise they would not be made prisoners on their reservation. This Court's cases interpreting the treaty's neighboring and parallel right-to-fish provision further confirm this understanding. See, *e. g.*, *United States* v. *Winans*, 198 U. S. 371. Pp. 367–377.

Breyer, J., announced the judgment of the Court and delivered an opinion, in which Sotomayor and Kagan, JJ., joined. Gorsuch, J., filed an opinion concurring in the judgment, in which Ginsburg, J., joined, *post*, p. 367. Roberts, C. J., filed a dissenting opinion, in which Thomas, Alito, and Kavanaugh, JJ., joined, *post*, p. 377. Kavanaugh, J., filed a dissenting opinion, in which Thomas, J., joined, *post*, p. 386.

Noah G. Purcell, Solicitor General of Washington, argued the cause for petitioner. With him on the briefs were *Rob-*

ert W. Ferguson, Attorney General of Washington, *Jay D. Geck* and *Anne E. Egeler*, Deputy Solicitors General, and *Fronda C. Woods*, Assistant Attorney General.

Ann O'Connell argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Wood*, *Deputy Solicitor General Kneedler*, *Elizabeth Ann Peterson*, and *Rachel Heron*.

Adam G. Unikowsky argued the cause for respondent. With him on the brief were *Ian H. Gershengorn*, *Sam Hirsch*, *Mathew L. Harrington*, *Lance A. Pelletier*, and *Brendan V. Monahan*.*

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which JUSTICE SOTOMAYOR and JUSTICE KAGAN join.

The State of Washington imposes a tax upon fuel importers who travel by public highway. The question before us is whether an 1855 treaty between the United States and

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*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *Lawrence G. Wasden*, Attorney General of Idaho, and *Darrell G. Early* and *Steven W. Strack*, Deputy Attorneys General, by *Zachary W. Carter*, Corporation Counsel of New York City, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *Derek Schmidt* of Kansas, *Jeffrey Martin Landry* of Louisiana, *Maura Healey* of Massachusetts, *Barbara D. Underwood* of New York, *Peter F. Kilmartin* of Rhode Island, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for Multistate Tax Commission et al. by *Helen Hecht*, *Sheldon Laskin*, *Gregory S. Matson*, and *Gale Garriott*; for Public Health Organizations by *Mark Greenwold* and *Dennis A. Henigan*; and for the Washington Oil Marketers Association et al. by *Philip A. Talmadge*.

Briefs of *amici curiae* urging affirmance were filed for the Confederated Tribes and Bands of the Yakama Nation by *Ethan Jones* and *Marcus Shirzad*; for the National Congress of American Indians by *Virginia A. Seitz* and *Kathleen M. Mueller*; for the Nez Perce Tribe et al. by *David J. Cummings* and *John T. Harrison*; and for Sacred Ground Legal Services by *Jack Warren Fiander*.

the Yakama Nation forbids the State of Washington to impose that tax upon fuel importers who are members of the Yakama Nation. We conclude that it does, and we affirm the Washington Supreme Court's similar decision.

I

A

A Washington statute applies to "motor vehicle fuel importer[s]" who bring large quantities of fuel into the State by "ground transportation" such as a "railcar, trailer, [or] truck." Wash. Rev. Code §§ 82.36.010(4), (12), (16) (2012). The statute requires each fuel importer to obtain a license, and it says that a fuel tax will be "levied and imposed upon motor vehicle fuel licensees" for "each gallon of motor vehicle fuel" that the licensee brings into the State. §§ 82.36.020(1), (2)(c). Licensed fuel importers who import fuel by ground transportation become liable to pay the tax as of the time the "fuel enters into this [S]tate." § 82.36.020(2)(c); see also §§ 82.38.020(4), (12), (15), (26), 82.38.030(1), (7)(c)(ii) (equivalent regulation of diesel fuel importers).

But *only* those licensed fuel importers who import fuel *by ground transportation* are liable to pay the tax. §§ 82.36.026(3), 82.36.020(2)(c). For example, if a licensed fuel importer brings fuel into the State by pipeline, that fuel importer need not pay the tax. §§ 82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, if a licensed fuel importer brings fuel into the State by vessel, that fuel importer need not pay the tax. §§ 82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Instead, in each of those instances, the next purchaser or possessor of the fuel will pay the tax. §§ 82.36.020(2)(a), (b), (d). The only licensed fuel importers who must pay *this* tax are the fuel importers who bring fuel into the State by means of ground transportation.

B

The relevant treaty provides for the purchase by the United States of Yakama land. See Treaty Between the

United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951. Under the treaty, the Yakamas granted to the United States approximately 10 million acres of land in what is now the State of Washington, *i. e.*, about one-fourth of the land that makes up the State today. Art. I, *id.*, at 951–952; see also Brief for Respondent 4, 9. In return for this land, the United States paid the Yakamas $200,000, made improvements to the remaining Yakama land, such as building a hospital and schools for the Yakamas to use, and agreed to respect the Yakamas' reservation of certain rights. Arts. III–V, 12 Stat. 952–953. Those reserved rights include "the right, in common with citizens of the United States, to travel upon all public highways," "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory," and other rights, such as the right to hunt, to gather roots and berries, and to pasture cattle on open and unclaimed land. Art. III, *id.*, at 953.

C

Cougar Den, Inc., the respondent, is a wholesale fuel importer owned by a member of the Yakama Nation, incorporated under Yakama law, and designated by the Yakama Nation as its agent to obtain fuel for members of the Tribe. App. to Pet. for Cert. 63a–64a; App. 99a. Cougar Den buys fuel in Oregon, trucks the fuel over public highways to the Yakama Reservation in Washington, and then sells the fuel to Yakama-owned retail gas stations located within the reservation. App. to Pet. for Cert. 50a, 55a. Cougar Den believes that Washington's fuel import tax, as applied to Cougar Den's activities, is pre-empted by the treaty. App. 15a. In particular, Cougar Den believes that requiring it to pay the tax would infringe the Yakamas' reserved "right, in common with citizens of the United States, to travel upon all public highways." Art. III, 12 Stat. 953.

In December 2013, the Washington State Department of Licensing (Department), believing that the state tax was not

pre-empted by the treaty, assessed Cougar Den $3.6 million in taxes, penalties, and licensing fees. App. to Pet. for Cert. 65a; App. 10a. Cougar Den appealed the assessment to higher authorities within the state agency. App. 15a. An Administrative Law Judge agreed with Cougar Den that the tax was pre-empted. App. to Brief in Opposition 14a. The Department's director, however, disagreed and overturned the ALJ's order. App. to Pet. for Cert. 59a. A Washington Superior Court in turn disagreed with the director and held that the tax was pre-empted. *Id.*, at 34a. The director appealed to the Washington Supreme Court. 188 Wash. 2d 55, 58, 392 P. 3d 1014, 1015 (2017). And that court, agreeing with Cougar Den, upheld the Superior Court's determination of pre-emption. *Id.*, at 69, 392 P. 3d, at 1020.

The Department filed a petition for certiorari asking us to review the State Supreme Court's determination. And we agreed to do so.

II

A

The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute "taxes the importation of fuel, which is the transportation of fuel." *Ibid.* It added that "travel on public highways is directly at issue because the tax [is] an importation tax." *Id.*, at 67, 392 P. 3d, at 1019.

Nor is there any reason to doubt that the Washington Supreme Court means what it said when it interpreted the Washington statute. We read the statute the same way. In the statute's own words, Washington "impose[s] upon motor vehicle fuel licensees," including "licensed importer[s]," a tax for "each gallon of motor vehicle fuel" that "enters into this state," but *only* "if . . . entry is" by means of "a railcar, trailer, truck, or other equipment suitable for ground transportation." Wash. Rev. Code §§ 82.36.010(4),

82.36.020(1), (2), 82.36.026(3). As is true of most tax laws, the statute is long and complex, and it is easy to stumble over this technical language. But if you are able to walk slowly through its provisions, the statute is easily followed. We need take only five steps.

We start our journey at the beginning of the statute which first declares that "[t]here is hereby levied and imposed upon motor vehicle fuel licensees, other than motor vehicle fuel distributors, a tax at the rate . . . provided in [the statute] on each gallon of motor vehicle fuel." § 82.36.020(1). That is simple enough. Washington imposes a tax on a group of persons called "motor vehicle fuel licensees" for "each gallon of motor vehicle fuel."

Who are the "motor vehicle fuel licensees" that Washington taxes? We take a second step to find out. As the definitions section of the statute explains, the "motor vehicle fuel licensees" upon whom the tax is imposed are "person[s] holding a . . . motor vehicle fuel importer, motor vehicle fuel exporter, motor vehicle fuel blender, motor vehicle distributor, or international fuel tax agreement license." § 82.36.010(12). This, too, is easy to grasp. Not everyone who possesses motor vehicle fuel owes the tax. Instead, only motor vehicle fuel importers (and other similar movers and shakers within the motor vehicle fuel industry) who are licensed by the State to deal in fuel, must pay the tax.

But must each of these motor vehicle fuel licensees pay the tax, so that the fuel is taxed as it passes from blender, to importer, to exporter, and so on? We take a third step, and learn that the answer is "no." As the statute explains, "the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state." § 82.36.022. Reading that, we understand that only the first licensee who can be taxed, will be taxed.

So, we ask, who is the first taxable licensee? Who must actually pay this tax? We take a fourth step to find out. Logic tells us that the first licensee who can be taxed will

likely be the licensee who brings fuel into the State. But the statute tells us that a "licensed importer" is "liable for and [must] pay tax to the department" when "[m]otor vehicle fuel enters into this state *if* . . . [t]he entry is *not* by bulk transfer." §§ 82.36.020(2)(c), 82.36.026(3) (emphasis added). That is, a licensed importer can only be the first taxable licensee (and therefore the licensee that must pay the tax) if the importer brings fuel into the State by a method other than "bulk transfer."

But what is "bulk transfer"? What does it mean to say that licensed fuel importers need only pay the tax if they do not bring in fuel by "bulk transfer"? We take a fifth, and final, step to find out. "[B]ulk transfer," the definitions section explains, "means a transfer of motor vehicle fuel by pipeline or vessel," as opposed to "railcar, trailer, truck, or other equipment suitable for ground transportation." §§ 82.36.010(3), (4). So, we learn that if the licensed fuel importer brings fuel into the State by ground transportation, then the fuel importer owes the tax. But if the licensed fuel importer brings fuel into the State by pipeline or vessel, then the importer will not be the first taxable person to possess the fuel, and he will not owe the tax.

In sum, Washington taxes travel by ground transportation with fuel. That feature sets the Washington statute apart from other statutes with which we are more familiar. It is not a tax on possession or importation. A statute that taxes possession would ordinarily require all people who own a good to pay the tax. A good example of that would be a State's real estate property tax. That statute would require all homeowners to pay the tax, every year, regardless of the specifics of their situation. And a statute that taxes importation would ordinarily require all people who bring a good into the State to pay a tax. A good example of that would be a federal tax on newly manufactured cars. That statute would ordinarily require all people who bring a new car into the country to pay a tax. But Washington's statute is differ-

ent because it singles out ground transportation. That is, Washington does not just tax possession of fuel, or even importation of fuel, but instead taxes importation by ground transportation.

The facts of this case provide a good example of the tax in operation. Each of the assessment orders that the Department sent to Cougar Den explained that Cougar Den owed the tax because Cougar Den traveled by highway. See App. 10a–26a; App. to Pet. for Cert. 55a. As the director explained, Cougar Den owed the tax because Cougar Den had caused fuel to enter "into this [S]tate at the Washington-Oregon boundary on the Highway 97 bridge" by means of a "tank truck" destined for "the Yakama Reservation." *Ibid.* The director offers this explanation in addition to quoting the quantity of fuel that Cougar Den possessed because the element of travel by ground transportation is a necessary prerequisite to the imposition of the tax. Put another way, the State must prove that Cougar Den *traveled by highway* in order to apply its tax.

B

We are not convinced by the arguments raised to the contrary. The Department claims, and THE CHIEF JUSTICE agrees, that the state tax has little or nothing to do with the treaty because it is not a tax on *travel with fuel* but rather a tax on the *possession of fuel*. See Brief for Petitioner 26–28; *post*, at 380–381 (dissenting opinion).

We cannot accept that characterization of the tax, however, for the Washington Supreme Court has authoritatively held that the statute is a tax on travel. The Washington Supreme Court held that the Washington law at issue here "taxes the importation of fuel, which is the transportation of fuel." 188 Wash. 2d, at 69, 392 P. 3d, at 1020. It added that "travel on public highways is directly at issue because the tax [is] an importation tax." *Id.*, at 67, 392 P. 3d, at 1019. In so doing, the State Supreme Court heard, considered, and rejected the construction of the fuel tax that the Department

advances here. See *id.*, at 66–67, 392 P. 3d, at 1019 ("The Department argues, and the director agreed, that the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways. . . . The Department's argument is unpersuasive. . . . Here, travel on public highways is directly at issue because the tax was an importation tax"). The incidence of a tax is a question of state law, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 461 (1995), and this Court is bound by the Washington Supreme Court's interpretation of Washington law, *Johnson* v. *United States*, 559 U. S. 133, 138 (2010). We decline the Department's invitation to overstep the bounds of our authority and construe the tax to mean what the Washington Supreme Court has said it does not.

Nor would it make sense to construe the tax's incidence differently. The Washington Supreme Court's conclusion follows directly from its (and our) interpretation of how the tax operates. See *supra*, at 353–356. To be sure, it is generally true that fuel imported into the State by trucks driving the public highways *can also* be described as fuel that is *possessed for the first time* in the State. But to call the Washington statute a tax on "first possession" would give the law an overinclusive label. As explained at length above, there are several ways in which a company could be a "first possessor" of fuel without incurring the tax. See *supra*, at 354–355. For example, Cougar Den would not owe the tax had Cougar Den "first possessed" fuel by piping fuel from out of State into a Washington refinery. First possession is not taxed if the fuel is brought into the State by pipeline and bound for a refinery. §§ 82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, Cougar Den would not owe the tax had Cougar Den "first possessed" fuel by bringing fuel into Washington through its waterways rather than its highways. First possession is not taxed if the fuel is brought into the State by vessel. §§ 82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Thus, it seems rather clear that the tax cannot

accurately be described as a tax on the *first possession of fuel*.

But even if the contrary were true, the tax would still have the practical effect of burdening the Yakamas' travel. Here, the Yakamas' lone off-reservation act within the State is traveling along a public highway with fuel. The tax thus operates on the Yakamas exactly like a tax on transportation would: It falls upon them only because they happened to transport goods on a highway while en route to their reservation. And it is the practical effect of the state law that we have said makes the difference. We held, for instance, that the fishing rights reserved in the treaty pre-empted the State's enforcement of a trespass law against Yakama fishermen crossing private land to access the river. See, *e. g.*, *United States* v. *Winans*, 198 U. S. 371, 381 (1905). That was so even though the trespass law was not limited to those who trespass in order to fish but applied more broadly to any trespasser. Put another way, it mattered not that the tax was "on" trespassing rather than fishing because the tax operated upon the Yakamas when they were exercising their treaty-protected right. *Ibid.*; see also *Tulee* v. *Washington*, 315 U. S. 681, 685 (1942) (holding that the fishing rights reserved in the treaty pre-empted the State's application of a fishing licensing fee to a Yakama fisherman, even though the fee also applied to types of fishing not practiced by the Yakamas). And this approach makes sense. When the Yakamas bargained in the treaty to protect their right to travel, they could only have cared about preventing the State from burdening their exercise of that right. To the Yakamas, it is thus irrelevant whether the State's tax might apply to other activities beyond transportation. The only relevant question is whether the tax "act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Id.*, at 685. And the State's tax here acted upon Cougar Den in exactly that way.

For the same reason, we are unpersuaded by the Department's insistence that it adopted this tax after a District Court, applying this Court's decision in *Chickasaw Nation*, barred the State from taxing the sale of fuel products on tribal land. See Brief for Petitioner 6–7; *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (WD Wash. 2005). Although a State "generally is free to amend its law to shift the tax's legal incidence," *Chickasaw Nation*, 515 U. S., at 460, it may not burden a treaty-protected right in the process, as the State has done here.

Thus, we must turn to the question whether this fuel tax, falling as it does upon members of the Tribe who travel on the public highways, violates the treaty.

III

A

In our view, the State of Washington's application of the fuel tax to Cougar Den's importation of fuel is pre-empted by the treaty's reservation to the Yakama Nation of "the right, in common with citizens of the United States, to travel upon all public highways." We rest this conclusion upon three considerations taken together.

First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language before us; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. See *Winans*, 198 U. S., at 380–381; *Seufert Brothers Co.* v. *United States*, 249 U. S. 194, 196–198 (1919); *Tulee*, 315 U. S., at 683–685; *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 677–678 (1979).

The treaty language at issue in each of the four cases is similar, though not identical, to the language before us. The cases focus upon language that guarantees to the Yakamas

"the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Art. III, para. 2, 12 Stat. 953. Here, the language guarantees to the Yakamas "the right, in common with citizens of the United States, to travel upon all public highways." Art. III, para. 1, *ibid.* The words "in common with" on their face could be read to permit application to the Yakamas of general legislation (like the legislation before us) that applies to all citizens, Yakama and non-Yakama alike. But this Court concluded the contrary because that is not what the Yakamas understood the words to mean in 1855. See *Winans*, 198 U. S., at 379, 381; *Seufert Brothers*, 249 U. S., at 198–199; *Tulee*, 315 U. S., at 684; *Fishing Vessel*, 443 U. S., at 679, 684–685.

The cases base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the Yakamas at a significant disadvantage. See, *e. g.*, *Winans*, 198 U. S., at 380; *Seufert Brothers*, 249 U. S., at 198; *Fishing Vessel*, 443 U. S., at 667, n. 10. The parties negotiated the treaty in Chinook jargon, a trading language of about 300 words that no tribe used as a primary language. App. 65a; *Fishing Vessel*, 443 U. S., at 667, n. 10. The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write. And many of the representations that the United States made about the treaty had no adequate translation in the Yakamas' own language. App. 68a–69a.

Thus, in the year 1905, in *Winans*, this Court wrote that, to interpret the treaty, courts must focus upon the historical context in which it was written and signed. 198 U. S., at 381; see also *Tulee*, 315 U. S., at 684 ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"); cf. *Water Splash, Inc.* v. *Menon*, 581 U. S. 271, 280 (2017) (noting that, to ascertain the meaning of a treaty, courts "may look beyond the written words to the history of the

treaty, the negotiations, and the practical construction adopted by the parties" (internal quotation marks omitted)).

The Court added, in light of the Yakamas' understanding in respect to the reservation of fishing rights, the treaty words "in common with" do not limit the reservation's scope to a right against discrimination. *Winans*, 198 U. S., at 380–381. Instead, as we explained in *Tulee*, *Winans* held that "Article III [of the treaty] conferred upon the Yakimas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places' in the ceded area." *Tulee*, 315 U. S., at 684 (citing *Winans*, 198 U. S. 371; emphasis added). Also compare, *e. g.*, *Fishing Vessel*, 443 U. S., at 677, n. 22 ("Whatever opportunities the treaties assure Indians with respect to fish are admittedly *not 'equal' to*, *but are to some extent greater than*, those afforded other citizens" (emphasis added)), with *post*, at 389 (KAVANAUGH, J., dissenting) (citing this same footnote in *Fishing Vessel* as support for the argument that the treaty guarantees the Yakamas only a right against discrimination). Construing the treaty as giving the Yakamas only antidiscrimination rights, rights that any inhabitant of the territory would have, would amount to "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans*, 198 U. S., at 380.

Second, the historical record adopted by the agency and the courts below indicates that the right to travel includes a right to travel with goods for sale or distribution. See App. to Pet. for Cert. 33a; App. 56a–74a. When the United States and the Yakamas negotiated the treaty, both sides emphasized that the Yakamas needed to protect their freedom to travel so that they could continue to fish, to hunt, to gather food, and to trade. App. 65a–66a. The Yakamas maintained fisheries on the Columbia River, following the salmon runs as the fish moved through Yakama territory. *Id.*, at 62a–63a. The Yakamas traveled to the nearby plains region to hunt buffalo. *Id.*, at 61a. They traveled to the moun-

tains to gather berries and roots. *Ibid.* The Yakamas' religion and culture also depended on certain goods, such as buffalo byproducts and shellfish, which they could often obtain only through trade. *Id.*, at 61a–62a. Indeed, the Yakamas formed part of a great trading network that stretched from the Indian tribes on the Northwest coast of North America to the plains tribes to the east. *Ibid.*

The United States' representatives at the treaty negotiations well understood these facts, including the importance of travel and trade to the Yakamas. *Id.*, at 63a. They repeatedly assured the Yakamas that under the treaty the Yakamas would be able to travel outside their reservation on the roads that the United States built. *Id.*, at 66a–67a; see also, *e. g.*, *id.*, at 66a ("'[W]e give you the privilege of traveling over roads'"). And the United States repeatedly assured the Yakamas that they could travel along the roads for trading purposes. *Id.*, at 65a–67a. Isaac Stevens, the Governor of the Washington Territory, told the Yakamas, for example, that, under the terms of the treaty, "You will be allowed to go on the roads, to take your things to market, your horses and cattle." App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 68a (record of the treaty proceedings). He added that the Yakamas "will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation." *Ibid.* Governor Stevens further urged the Yakamas to accept the United States' proposals for reservation boundaries in part because the proposal put the Yakama Reservation in close proximity to public highways that would facilitate trade. He said, "'You will be near the great road and can take your horses and your cattle down the river and to the [Puget] Sound to market.'" App. 66a. In a word, the treaty negotiations and the United States' representatives' statements to the Yakamas would have led the Yakamas to understand that the treaty's protec-

tion of the right to travel on the public highways included the right to travel with goods for purposes of trade. We consequently so construe the relevant treaty provision.

Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects. Therefore, our precedents tell us that the tax must be pre-empted. In *Tulee*, for example, we held that the fishing right reserved by the Yakamas in the treaty pre-empted the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U. S., at 684. We concluded that "such exaction of fees as a prerequisite to the enjoyment of" a right reserved in the treaty "cannot be reconciled with a fair construction of the treaty." *Id.*, at 685. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel.

We consequently conclude that Washington's fuel tax "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Ibid.* Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Treaties with federally recognized Indian tribes—like the treaty at issue here—constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians. Cf. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973).

B

Again, we are not convinced by the arguments raised to the contrary. THE CHIEF JUSTICE concedes that "the right to travel with goods is just an application of the Yakamas' right to travel." *Post*, at 378 (dissenting opinion); see also *ibid.* ("It ensures that the Yakamas enjoy the same privileges when they travel with goods as when they travel without them"). But he nevertheless insists that, because of the way in which the Washington statute taxes fuel, the statute

does not interfere with the right to travel reserved by the Yakamas in the treaty. *Post*, at 379–380.

First, THE CHIEF JUSTICE finds it significant that "[t]he tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled." *Post*, at 379; see also *ibid.* ("The tax before us does not resemble a blockade or a toll"). But that argument fails on its own terms. A toll on highway travel is no less a toll when the toll varies based on the number of axles on a vehicle traveling the highway, or on the number of people traveling in the vehicle. We cannot, therefore, see why the number of gallons of fuel that the vehicle carries should make all the difference. Put another way, the fact that a tax on travel varies based on the features of that travel does not mean that the tax is not a tax on travel.

Second, THE CHIEF JUSTICE argues that it "makes no sense," for example, to hold that "a tax on certain luxury goods" that is assessed the first time the goods are possessed in Washington cannot apply to a Yakama member "who buys" a mink coat "over the state line in Portland and then drives back to the reservation," but the tax can apply to a Yakama member who "buys a mink coat at an off-reservation store in Washington." *Post*, at 380. The short, conclusive answer to this argument is that there is a treaty that forbids taxing Yakama travel on highways with goods (*e. g.*, fuel, or even furs) for market; and there is no treaty that forbids taxing Yakama off-reservation purchases of goods. Indeed, if our precedents supported THE CHIEF JUSTICE's rule, then our fishing rights cases would have turned on whether Washington also taxed fish purchased in the grocery store. Cf., *e. g.*, *Tulee*, 315 U. S., at 682, n. 1 (holding that the fishing right reserved by the Yakamas in the treaty pre-empted the application to the Yakamas of a state law which prohibited " 'catch[ing] . . . fish for food' " without having purchased a license). But in those cases, we did not look to whether fish were taxed elsewhere in Washington. That is because the treaty does not protect the Yakamas from state sales

taxes imposed on the off-reservation sale of goods. Instead, the treaty protects the Yakamas' right to travel the public highways without paying state taxes on that activity, much like the treaty protects the Yakamas' right to fish without paying state taxes on that activity.

Third, THE CHIEF JUSTICE argues that only a law that "punished or charged the Yakamas" for an "integral feature" of a treaty right could be pre-empted by the treaty. *Post*, at 382. But that is true of the Washington statute at issue here. The treaty protects the right to travel with goods, see *supra*, at 359–363, and the Washington statute taxes travel with goods, see *supra*, at 353–356. Therefore, the statute charges the Yakamas for an "integral feature" of a treaty right. But even if the statute indirectly burdened a treaty right, under our precedents, the statute would still be pre-empted. One of the Washington statutes at issue in *Winans* was not a fishing regulation, but instead a trespassing statute. That trespassing statute indirectly burdened the right to fish by preventing the Yakamas from crossing privately owned land so that the Yakamas could reach their traditional fishing places and camp on that private property during the fishing season. See 198 U. S., at 380–381. It cannot be true that a law prohibiting trespassing imposed a burden on the right to fish that is "integral" enough to be pre-empted by the treaty, while a law taxing goods carried to the reservation on the public highway imposes a burden on the right to travel that is too attenuated to be pre-empted by the treaty.

C

Although we hold that the treaty protects the right to travel on the public highway with goods, we do not say or imply that the treaty grants protection to carry any and all goods. Nor do we hold that the treaty deprives the State of the power to regulate, say, when necessary for conservation. To the contrary, we stated in *Tulee* that, although the treaty "forecloses the [S]tate from charging the Indians a fee

of the kind in question here," the State retained the "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature . . . as are necessary for the conservation of fish." 315 U. S., at 684. Indeed, it was crucial to our decision in *Tulee* that, although the licensing fees at issue were "regulatory as well as revenue producing," "their regulatory purpose could be accomplished otherwise," and "the imposition of license fees [was] not indispensable to the effectiveness of a state conservation program." *Id.*, at 685. See also *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 402, n. 14 (1968) ("As to a 'regulation' concerning the time and manner of fishing outside the reservation (as opposed to a 'tax'), we said that the power of the State was to be measured by whether it was 'necessary for the conservation of fish' " (quoting *Tulee*, 315 U. S., at 684)).

Nor do we hold that the treaty deprives the State of the power to regulate to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights. The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 20a–21a, 31a–32a. Governor Stevens explained, at length, the United States' awareness of crimes committed by United States citizens who settled amongst the Yakamas, and the United States' intention to enact laws that would restrain both the United States citizens and the Yakamas alike for the safety of both groups. See *id.*, at 31a.

Nor do we here interpret the treaty as barring the State from collecting revenue through sales or use taxes (applied outside the reservation). Unlike the tax at issue here, which applies explicitly to transport by "railcar, trailer, truck, or other equipment suitable for ground transportation," see *supra*, at 355, a sales or use tax normally applies irrespective of transport or its means. Here, however, we

deal with a tax applicable simply to importation by ground transportation. Moreover, it is a tax designed to secure revenue that, as far as the record shows here, the State might obtain in other ways.

IV

To summarize, our holding rests upon three propositions: First, a state law that burdens a treaty-protected right is pre-empted by the treaty. See *supra*, at 363–367. Second, the treaty protects the Yakamas' right to travel on the public highway with goods for sale. See *supra*, at 359–363. Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway. See *supra*, at 353–359. For these three reasons, Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Therefore, the judgment of the Supreme Court of Washington is affirmed.

It is so ordered.

Justice Gorsuch, with whom Justice Ginsburg joins, concurring in the judgment.

The Yakamas have lived in the Pacific Northwest for centuries. In 1855, the United States sought and won a treaty in which the Tribe agreed to surrender 10 million acres, land that today makes up nearly a quarter of the State of Washington. In return, the Yakamas received a reservation and various promises, including a guarantee that they would enjoy "the right, in common with citizens of the United States, to travel upon all public highways." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. Today, the parties offer dueling interpretations of this language. The State argues that it merely allows the Yakamas to travel on public highways like everyone else. And because everyone else importing gasoline from out of State by highway must pay a tax on that good, so must tribal members. Meanwhile, the Tribe submits that the treaty guarantees tribal members the right to move their goods to and from market freely. So

that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way.

Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty's original meaning. *Eastern Airlines, Inc.* v. *Floyd,* 499 U. S. 530, 534–535 (1991). When we're dealing with a tribal treaty, too, we must "give effect to the terms as the Indians themselves would have understood them." *Minnesota* v. *Mille Lacs Band of Chippewa Indians,* 526 U. S. 172, 196 (1999). After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case. During the negotiations "English words were translated into Chinook jargon . . . although that was not the primary language" of the Tribe. *Yakama Indian Nation* v. *Flores,* 955 F. Supp. 1229, 1243 (ED Wash. 1997). After the parties reached agreement, the U. S. negotiators wrote the treaty in English—a language that the Yakamas couldn't read or write. And like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its free choice.

When it comes to the Yakamas' understanding of the treaty's terms in 1855, we have the benefit of a set of unchallenged factual findings. The findings come from a separate case involving the Yakamas' challenge to certain restrictions on their logging operations. *Id.,* at 1231. The state Superior Court relied on these factual findings in this case and held Washington collaterally estopped from challenging them. Because the State did not challenge the Superior Court's estoppel ruling either in the Washington Supreme Court or here, these findings are binding on us as well.

They also tell us all we need to know to resolve this case. To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to

the same taxes and regulations as everyone else. *Post*, at 386–388 (Kavanaugh, J., dissenting). But that is not how the Yakamas understood the treaty's terms. To the Yakamas, the phrase " 'in common with' . . . implie[d] that the Indian and non-Indian use [would] be joint but [did] not imply that the Indian use [would] be in any way restricted." *Yakama Indian Nation*, 955 F. Supp., at 1265. In fact, "[i]n the Yakama language, the term 'in common with' . . . suggest[ed] public use or general use without restriction." *Ibid.* So "[t]he most the Indians would have understood . . . of the term[s] 'in common with' and 'public' was that they would share the use of the road with whites." *Ibid.* Significantly, there is "no evidence [to] sugges[t] that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.*, at 1247. Instead, the evidence suggests that the Yakamas understood the right-to-travel provision to provide them "with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." *Id.*, at 1262.

Applying these factual findings to our case requires a ruling for the Yakamas. As the Washington Supreme Court recognized, the treaty's terms permit regulations that allow the Yakamas and non-Indians to share the road in common and travel along it safely together. But they do not permit encumbrances on the ability of tribal members to bring their goods to and from market. And by everyone's admission, the state tax at issue here isn't about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market—exactly what the treaty forbids.

A wealth of historical evidence confirms this understanding. The *Yakama Indian Nation* decision supplies an admirably rich account of the history, but it is enough to recount just some of the most salient details. "Prior to and at the

time the treaty was negotiated," the Yakamas "engaged in a system of trade and exchange with other plateau tribes" and tribes "of the Northwest coast and plains of Montana and Wyoming." *Ibid.* This system came with no restrictions; the Yakamas enjoyed "free and open access to trade networks in order to maintain their system of trade and exchange." *Id.*, at 1263. They traveled to Oregon and maybe even to California to trade "fir trees, lava rocks, horses, and various species of salmon." *Id.*, at 1262–1263. This extensive travel "was necessary to obtain goods that were otherwise unavailable to [the Yakamas] but important for sustenance and religious purposes." *Id.*, at 1262. Indeed, "far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture." *Id.*, at 1238. Travel for purposes of trade was so important to the "Yakamas' way of life that they could not have performed and functioned as a distinct culture . . . without extensive travel." *Ibid.* (internal quotation marks omitted).

Everyone understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout their traditional trading area. "At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to . . . trade." *Id.*, at 1264. Isaac Stevens, the Governor of the Washington Territory, specifically promised the Yakamas that they would " 'be allowed to go on the roads to take [their] things to market.' " *Id.*, at 1244 (emphasis deleted). Governor Stevens called this the " 'same libert[y]' " to travel with goods free of restriction " 'outside the reservation' " that the Tribe would enjoy within the new reservation's boundaries. *Ibid.* Indeed, the U. S. representatives' "statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." *Id.*, at 1265. Before the treaty, then, the Yakamas traveled extensively without paying taxes to

bring goods to and from market, and the record suggests that the Yakamas would have understood the treaty to preserve that liberty.

None of this can come as much of a surprise. As the State reads the treaty, it promises tribal members only the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. U. S. treaty negotiators were "under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory." *Id.*, at 1240. Settlers were flooding into the Pacific Northwest and building homesteads without any assurance of lawful title. The government needed "to obtain title to Indian lands" to place these settlements on a more lawful footing. *Ibid.* The government itself also wanted to build "wagon and military roads through Yakama lands to provide access to the settlements on the west side of the Cascades." *Ibid.* So "obtaining Indian lands east of the Cascades became a central objective" for the government's own needs. *Id.*, at 1241. The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.

Our cases interpreting the treaty's neighboring and parallel right-to-fish provision further confirm this understanding. The treaty "secure[s] . . . the right of taking fish at all usual and accustomed places, *in common with* citizens of the Territory." Art. III, 12 Stat. 953 (emphasis added).

Initially, some suggested this guaranteed tribal members only the right to fish according to the same regulations and subject to the same fees as non-Indians. But long ago this Court refused to impose such an "impotent" construction on the treaty. *United States* v. *Winans*, 198 U. S. 371, 380 (1905). Instead, the Court held that the treaty language prohibited state officials from imposing many nondiscriminatory fees and regulations on tribal members. While such laws "may be both convenient and, in [their] general impact, fair," this Court observed, they act "upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Tulee* v. *Washington*, 315 U. S. 681, 685 (1942). Interpreting the same treaty right in *Winans*, we held that, despite arguments otherwise, "the phrase '*in common with* citizens of the Territory'" confers "upon the Yak[a]mas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places.'" *Tulee*, 315 U. S., at 684 (citing *Winans*, 198 U. S., at 371; emphasis added). Today, we simply recognize that the same language should yield the same result.

With its primary argument now having failed, the State encourages us to labor through a series of backups. It begins by pointing out that the treaty speaks of allowing the Tribe "free access" from local roads to the public highways, but indicates that tribal members are to use those highways "in common with" non-Indians. On the State's account, these different linguistic formulations must be given different meanings. And the difference the State proposes? No surprise: It encourages us to read the former language as allowing goods to be moved tax-free along local roads to the highways but the latter language as authorizing taxes on the Yakamas' goods once they arrive there. See also *post*, at 388 (KAVANAUGH, J., dissenting).

The trouble is that nothing in the record supports this interpretation. Uncontested factual findings reflect the Yaka-

mas' understanding that the treaty would allow them to use the highways to bring goods to and from market freely. These findings bind us under the doctrine of collateral estoppel, and no one has proposed any lawful basis for ignoring them. Nor, for that matter, has anyone even tried to offer a reason why the Tribe might have bargained for the right to move its goods freely only part of the way to market. Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact.

If that alternative won't work, the State offers another. It admits that the Yakamas personally may have a right to travel the highways free of most restrictions on their movement. See also *post*, at 379 (Roberts, C. J., dissenting) (acknowledging that the treaty prohibits the State from "charg[ing] . . . a toll" on Yakamas traveling on the highway). But, the State continues, the law at issue here doesn't offend that right. It doesn't, we are told, because the "object" of the State's tax isn't *travel* but the *possession* of fuel; the fact that the State happens to assess its tax when fuel is possessed on a public highway rather than someplace else is neither here nor there. And just look, we are told, at the anomalies that might arise if we ruled otherwise. A tribal member who buys a "mink coat" in a Washington store would have to pay the State's sales tax, but a tribal member who purchases the same coat at market in Oregon could not be taxed for possessing it on the highway when reentering Washington. See *post*, at 378–383.

This argument suffers from much the same problem as its predecessors. Now, at least, the State may acknowledge that the Yakamas personally have a right to travel free of most restrictions. But the State still fails to give full effect to the treaty's terms and the Yakamas' original understanding of them. After all and as we've seen, the treaty doesn't just guarantee tribal members the right to *travel* on the

highways free of most restrictions on their movement; it also guarantees tribal members the right to *move goods* freely to and from market using those highways. And it's impossible to *transport* goods without *possessing* them. So a tax that falls on the Yakamas' possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would.

Consider the alternative. If the State could save the tax here simply by labeling it a fee on the "possession" of a good, the State might just as easily revive the fishing license fee *Tulee* struck down simply by calling it a fee on the "possession" of fish. That, of course, would be ridiculous. The Yakamas' right to fish includes the right to *possess* the fish they catch—just like their right to *move* goods on the highways embraces the right to *possess* them there. Nor does the State's reply solve the problem. It accepts, as it must, that possessing fish is "integral" to the right to fish. *Post*, at 382–383, n. 2 (Roberts, C. J., dissenting). But it stands pat on its assertion that the treaty protects nothing more than a personal right to travel, ignoring all of the facts and binding findings before us establishing that the treaty *also* guarantees a right to move (and so possess) goods freely as they travel to and from market. *Ibid.*

What about the supposed "mink coat" anomaly? Under the terms of the treaty before us, it's true that a Yakama who buys a mink coat (or perhaps some more likely item) at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there. And it is also true that a Yakama who buys the same coat right over the state line, pays any taxes due at market there, and then drives back to the reservation using the public highways is entitled to move that good tax-free from market back to the reservation. But that is hardly anomalous—*that* is the treaty right the Yakamas reserved. And it's easy to see why. Imagine the Yakama Reservation reached the Washington/Oregon state line (as it did before the 1855 Treaty). In that case,

Washington would have no basis to tax the Yakamas' transportation of goods from Oregon (whether they might be fuel, mink coats, or anything else), as all of the Yakamas' conduct would take place outside of the State or on the reservation. The only question here is whether the result changes because the Tribe must now use Washington's highways to make the trek home. And the answer is no. The Tribe bargained for a right to travel with goods off reservation just as it could on reservation and just as it had for centuries. If the State and federal governments do not like that result, they are free to bargain for more, but they do not get to rewrite the existing bargain in this Court.

Alternatively yet, the State warns us about the dire consequences of a ruling against it. Highway speed limits, reckless driving laws, and much more, the State tells us, will be at risk if we rule for the Tribe. See also *post*, at 383–386 (Roberts, C. J., dissenting). But notice. Once you acknowledge (as the State and primary dissent just have) that the Yakamas *themselves* enjoy a right to travel free of at least some nondiscriminatory state regulations, this "problem" inevitably arises. It inevitably arises, too, once you concede that the Yakamas enjoy a right to travel freely at least on local roads. See *post*, at 388 (Kavanaugh, J., dissenting). Whether you read the treaty to afford the Yakamas the further right to bring goods to and from market is beside the point.

It turns out, too, that the State's parade of horribles isn't really all that horrible. While the treaty supplies the Yakamas with special rights to travel with goods to and from market, we have seen already that its "in common with" language *also* indicates that tribal members knew they would have to "share the use of the road with whites" and accept regulations designed to allow the two groups' safe coexistence. *Yakama Indian Nation*, 955 F. Supp., at 1265. Indeed, the Yakamas *expected* laws designed to "protec[t]" their ability to travel safely alongside non-Indians on the

highways. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 21a, 31a. Maybe, too, that expectation goes some way toward explaining why the State's hypothetical parade of horribles has yet to take its first step in the real world. No one before us has identified a single challenge to a state highway speed limit, reckless driving law, or other critical highway safety regulation in the entire life of the Yakama treaty.

Retreating now, the State suggests that the real problem isn't so much about the Yakamas themselves traveling freely as it is with their goods doing so. We are told we should worry, for example, about limiting Washington's ability to regulate the transportation of diseased apples from Oregon. See also *post*, at 386 (ROBERTS, C. J., dissenting). But if bad apples prove to be a public menace, Oregon and its localities may regulate them when they are grown or picked at the orchard. Oregon, its localities, and maybe even the federal government may regulate the bad apples when they arrive at market for sale in Oregon. The Tribe and again, perhaps, the federal government may regulate the bad apples when they arrive on the reservation. And if the bad apples somehow pose a threat to safe travel on the highways, even Washington may regulate them as they make their way from Oregon to the reservation—just as the State may require tribal members to abide nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation along public highways. The only thing that Washington may not do is reverse the promise the United States made to the Yakamas in 1855 by imposing a tax or toll on tribal members or their goods as they pass to and from market.

Finally, some worry that, if we recognize the potential permissibility of state highway safety laws, we might wind up impairing the interests of "tribal members across the country." *Post*, at 385 (ROBERTS, C. J., dissenting). But our decision today is based on unchallenged factual findings about

how the Yakamas themselves understood this treaty in light of the negotiations that produced it. And the Tribe itself has expressly acknowledged that its treaty, while extending real and valuable rights to tribal members, does not preclude laws that merely facilitate the safe use of the roads by Indians and non-Indians alike. Nor does anything we say here necessarily apply to other tribes and other treaties; each must be taken on its own terms. In the end, then, the only true threat to tribal interests today would come from replacing the meaningful right the Yakamas thought they had reserved with the trivial promise the State suggests.

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

Chief Justice Roberts, with whom Justice Thomas, Justice Alito, and Justice Kavanaugh join, dissenting.

In the 1855 treaty in which the Yakamas surrendered most of their lands to the United States, the Tribe sought to protect its way of life by reserving, among other rights, "the right, in common with citizens of the United States, to travel upon all public highways." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. Cougar Den, a Yakama corporation that uses public highways to truck gas into Washington, contends that the treaty exempts it from Washington's fuel tax, which the State assesses upon the importation of fuel into the State. The plurality agrees, concluding that Washington cannot impose the tax on Cougar Den because doing so would "have the practical effect of burdening" Cougar Den's exer-

cise of its right to travel on the highways. *Ante*, at 358. The concurrence reaches the same result, reasoning that, because the Yakamas' right to travel includes the right to travel with goods, the State cannot tax or regulate the Yakamas' goods on the highways. *Ante*, at 372–374 (GORSUCH, J., concurring in judgment).

But the mere fact that a state law has an effect on the Yakamas *while* they are exercising a treaty right does not establish that the law impermissibly burdens the right itself. And the right to travel with goods is just an application of the Yakamas' right to travel. It ensures that the Yakamas enjoy the same privileges when they travel with goods as when they travel without them. It is not an additional right to possess whatever goods they wish on the highway, immune from regulation and taxation. Under our precedents, a state law violates a treaty right only if the law imposes liability upon the Yakamas "for exercising the very right their ancestors intended to reserve." *Tulee* v. *Washington*, 315 U. S. 681, 685 (1942). Because Washington is taxing Cougar Den for possessing fuel, not for traveling on the highways, the State's method of administering its fuel tax is consistent with the treaty. I respectfully dissent from the contrary conclusion of the plurality and concurrence.[1]

We have held on three prior occasions that a nondiscriminatory state law violated a right the Yakamas reserved in the 1855 treaty. All three cases involved the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Art. III, 12 Stat. 953. In *United States* v. *Winans*, 198 U. S. 371 (1905), and later again in

[1] There is something of an optical illusion in this case that may subtly distort analysis. It comes from the fact that the tax here happens to be on motor fuel. There is no claim, however, that the tax inhibits the treaty right to travel because of the link between motor fuel and highway travel. The question presented must be analyzed as if the tax were imposed on goods of any sort.

Seufert Brothers Co. v. *United States*, 249 U. S. 194 (1919), we held that state trespass law could not be used to prevent tribe members from reaching a historic fishing site. And in *Tulee* v. *Washington*, we held that Washington could not punish a Yakama member for fishing without a license. We concluded that the license law was preempted because the required fee "act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve"—the right to fish. 315 U. S., at 685.

These three cases found a violation of the treaty when the challenged action—application of trespass law and enforcement of a license requirement—actually blocked the Yakamas from fishing at traditional locations. Applying the reasoning of those decisions to the Yakamas' right to travel, it follows that a State could not bar Yakama members from traveling on a public highway, or charge them a toll to do so.

Nothing of the sort is at issue here. The tax before us does not resemble a blockade or a toll. It is a tax on a product imported into the State, not a tax on highway travel. The statute says as much: "There is hereby levied and imposed . . . a tax . . . *on each gallon of motor vehicle fuel*." Wash. Rev. Code § 82.36.020(1) (2012) (emphasis added). It is difficult to imagine how the legislature could more clearly identify the object of the tax. The tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled. It is imposed on the owner of the fuel, not the driver or owner of the vehicle—separate entities in this case. And it is imposed at the same rate on fuel that enters the State by methods other than a public highway—whether private road, rail, barge, or pipeline. §§ 82.36.010(4), 020(1), (2). Had Cougar Den filled up its trucks at a refinery or pipeline terminal in Washington, rather than trucking fuel in from Oregon, there would be no dispute that it was subject to the exact same tax. See §§ 82.36.020(2)(a), (b)(ii). Washington is taxing the fuel that Cougar Den imports, not Cougar Den's

travel on the highway; it is not charging the Yakamas "for exercising the very right their ancestors intended to reserve." *Tulee*, 315 U. S., at 685.

It makes no difference that Washington happens to impose that charge when Cougar Den's drivers cross into Washington on a public highway. The time and place of the imposition of the tax does not change what is taxed, and thus what activity—possession of goods or travel—is burdened. Say Washington imposes a tax on certain luxury goods, assessed upon first possession of the goods by a retail customer. A Yakama member who buys a mink coat at an off-reservation store in Washington will pay the tax. Yet, as the plurality acknowledges, under its view a tribal member who buys the same coat right over the state line in Portland and then drives back to the reservation will owe no tax—all because of a reserved right to travel on the public highways. *Ante*, at 364. That makes no sense. The tax charges individuals for possessing expensive furs. It in no way burdens highway travel.

The plurality devotes five pages to planting trees in hopes of obscuring the forest: to delving into irrelevancies about how the tax is assessed or collected, instead of the substance of what is taxed. However assessed or collected, the tax on 10,000 gallons of fuel is the same whether the tanker carrying it travels three miles in Washington or three hundred. The tax varies only with the amount of fuel. Why? Because the tax is on fuel, not travel. If two tankers travel 200 miles together from the same starting point to the same destination—one empty, one full of fuel—the full tanker will pay the fuel tax, the empty tanker will pay nothing. Their travel has been identical, but only the full one pays tax. Why? Because the tax is on fuel, not travel. The tax is on the owner of the fuel, not the owner of the vehicle. Why? You get the point.

The plurality responds that, even though the tax is calculated per gallon of fuel, it remains a tax on travel because it

taxes a "feature" of travel. *Ante*, at 364. It is of course true that tanker trucks can be seen from time to time on the highways, but that hardly makes them a regular "feature" of travel, like the plurality's examples of axles or passengers. And we know that Washington is not taxing the gas insofar as it is a feature of Cougar Den's travel, because Washington imposes the exact same tax on gas that is not in transit on the highways.

Rather than grappling with the substance of the tax, the plurality fixates on variations in the time and place of its assessment. The plurality thinks it significant that Washington does not impose the tax at the moment of entry on fuel that enters the State by pipeline or by a barge bound for a refinery, but instead when a tanker truck withdraws the fuel from the refinery or pipeline terminal. This may demonstrate that the tax is not on *first* possession of fuel in the State, as the plurality stresses, but it hardly demonstrates that the tax is not on possession of fuel *at all*. Regardless of how fuel enters the State, someone will eventually pay a per-gallon charge for possessing it. Washington simply assesses the fuel tax in each case upon the wholesaler. See 188 Wash. 2d 55, 60, 392 P. 3d 1014, 1016 (2017). This variation does not indicate, as the plurality suggests, that the fuel tax is somehow *targeted* at highway travel.

The plurality also says that it is bound by the Washington Supreme Court's references to the tax as an "importation tax" and tax on "the importation of fuel," *ante*, at 356 (quoting 188 Wash. 2d, at 67, 69, 392 P. 3d, at 1019, 1020), but these two references to the point at which the tax is *assessed* are not authoritative constructions of the *object* of the tax. The state court did not reject Washington's argument that this is a tax on fuel; instead, like the plurality today, it ignored that argument and concluded that the tax was invalid simply because Washington imposed it while Cougar Den was traveling on the highway. In any event, the state court more

often referred to the tax as a "tax on fuels" or "fuel tax[ ]." *Id.*, at 58–61, 392 P. 3d, at 1015–1016.

After the five pages arguing that a tax expressly labeled as on "motor vehicle fuel" is actually a tax on something else, the plurality concludes . . . it doesn't matter. As the plurality puts it at page nine of its opinion, "even if" the tax is on fuel and not travel, it is preempted because it has "the practical effect of burdening" the Yakamas' right to travel on the highways. The plurality's rule—that States may not enforce general legislation that has an effect on the Yakamas while they are traveling—has no basis in our precedents, which invalidated laws that punished or charged the Yakamas simply for exercising their reserved rights. The plurality is, of course, correct that the trespass law in *Winans* did not target fishing, but it effectively made illegal the very act of fishing at a traditional location. Here, it is the possession of commercial quantities of fuel that exposes the Yakamas to liability, not travel itself or any integral feature of travel.

The concurrence reaches the same result as the plurality, but on different grounds. Rather than holding that the treaty preempts any law that burdens the Yakamas while traveling on the highways, the concurrence reasons that the fuel tax is preempted because it regulates the possession of goods, and the Yakamas' right to travel includes the right to travel with goods. *Ante*, at 373–374. But the right to travel with goods is just an application of the right to travel. It means the Yakamas enjoy the same privileges whether they travel with goods or without. It does not provide the Yakamas with an additional right to carry any and all goods on the highways, tax free, in any manner they wish.[2] The con-

[2] The plurality simply assumes that the right to travel with goods is an additional, substantive right when it reasons that the fuel tax is preempted because it taxes an "integral feature" of travel with goods. *Ante*, at 365. The concurrence makes the same assumption when it compares the fuel tax to a tax on " 'possession' of fish." *Ante*, at 374. That tax would be preempted because "taking possession of fish" is just another way of

currence purports to find this additional right in the record of the treaty negotiations, but the record shows only that the Yakamas wanted to ensure they could continue to travel to the places where they traded. They did not, and did not intend to, insulate the goods they carried from all regulation and taxation.

Nothing in the text of the treaty, the historical record, or our precedents supports the conclusion that the right "to travel upon all public highways" transforms the Yakamas' vehicles into mobile reservations, immunizing their contents from any state interference. Before it reaches the reservation, the fuel in Cougar Den's tanker trucks is always susceptible to state regulation—it does not pass in and out of state authority with every exit off or entry onto the road.

Recognizing the potentially broad sweep of its new rule, the plurality cautions that it does not intend to deprive the State of the power to regulate when necessary "to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights." *Ante*, at 366. This escape hatch ensures, the plurality suggests, that the treaty will not preempt essential regulations that burden highway travel. *Ante*, at 359. I am not so confident.

First, by its own terms, the plurality's health and safety exception is limited to laws that regulate dangers "occasioned by" a Yakama's travel. That would seem to allow speed limits and other rules of the road. But a law against possession of drugs or illegal firearms—the dangers of which have nothing to do with travel—does not address a health or safety risk "occasioned by" highway driving. I do not see how, under the plurality's rule or the concurrence's, a Washington police officer could burden a Yakama's travel by pulling him over on suspicion of carrying such contraband on the highway.

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describing the act of fishing. But possession of a tanker full of fuel is not an integral feature of travel, which is the relevant activity protected by the treaty.

But the more fundamental problem is that this Court has never recognized a health and safety exception to reserved treaty rights, and the plurality today mentions the exception only in passing. Importantly, our precedents—all of which concern hunting and fishing rights—acknowledge the authority of the States to regulate Indians' exercise of their reserved rights only in the interest of *conservation.* See *Tulee*, 315 U. S., at 684 ("[T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions . . . as are necessary for the conservation of fish . . . ."); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 205 (1999) ("We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation."); *Confederated Tribes of Colville Reservation* v. *Anderson*, 903 F. Supp. 2d 1187, 1197 (ED Wash. 2011) ("Notably absent from the binding Supreme Court and Ninth Circuit cases dealing with state regulation of 'in common' usufructuary rights is any reference to a state's exercise of its public-safety police power."). Indeed, this Court had previously assured the Yakamas that "treaty fishermen are *immune from all regulation save that required for conservation.*" *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 682 (1979) (emphasis added). Adapted to the travel right, the conservation exception would presumably protect regulations that preserve the subject of the Yakamas' right by maintaining safe and orderly travel on the highways. But many regulations that burden highway travel (such as emissions standards, noise restrictions, or the plurality's hypothetical ban on the importation of plutonium) do not fit that description.

The need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence. Today's decision digs such a deep hole that the future promises

a lot of backing and filling. Perhaps there are good reasons to revisit our long-held understanding of reserved treaty rights as the plurality does, and adopt a broad health and safety exception to deal with the inevitable fallout. Hard to say, because no party or *amicus* has addressed the question.

The plurality's response to this important issue is the following, portentous sentence: "The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety." *Ante*, at 366. A lot of weight on two words, "may not." The plurality cites assurances from the territorial Governor of Washington that the United States would make laws to prevent "bad white men" from harming the Yakamas, and that the United States expected the Yakamas to exercise similar restraint in return. App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 31a; *ante*, at 366. What this has to do with health and safety regulations affecting the highways (or fishing or hunting) is not clear.

In the meantime, do not assume today's decision is good news for tribal members across the country. Application of state safety regulations, for example, could prevent Indians from hunting and fishing in their traditional or preferred manner, or in particular "usual and accustomed places." I fear that, by creating the need for this untested exception, the unwarranted expansion of the Yakamas' right to travel may undermine rights that the Yakamas and other tribes really did reserve.

The concurrence does not mention the plurality's possible health and safety exception, but observes that the Yakamas expected to follow laws that "facilitate the safe use of the roads by Indians and non-Indians alike." *Ante*, at 377. The State is therefore wrong, the concurrence says, to contend that a decision exempting Cougar Den's fuel from taxation would call into question speed limits and reckless driving laws. But that is not the State's principal argument. The State acknowledges that laws facilitating safe travel on the

highways would fall within the long-recognized conservation exception. See Tr. of Oral Arg. 12–13. The problem is that today's ruling for Cougar Den preempts the enforcement of any regulation of *goods* on the highway that does not concern *travel* safety—such as a prohibition on the possession of potentially contaminated apples taken from a quarantined area (a matter of vital concern in Washington). See *id.*, at 13; Brief for Petitioner 44.

The concurrence says not to worry, the apples could be regulated and inspected where they are grown, or when they arrive at a market. Or, if the Yakamas are taking the apples back to the reservation, perhaps the Federal Government or the Tribe itself could address the problem there. *Ante*, at 376. What the concurrence does not say is that the State could regulate the contraband apples on the highway. And there is no reason offered why other contraband should be treated any differently.

Surely the concurrence does not mean to suggest that the parties to the 1855 treaty intended to confer on the Tribe the right to travel with illegal goods, free of any regulation. But if that is not the logical consequence of the decision today, the plurality and the concurrence should explain why. It is the least they should do.

I respectfully dissent.

Justice Kavanaugh, with whom Justice Thomas joins, dissenting.

The text of the 1855 treaty between the United States and the Yakama Tribe affords the Tribe a "right, in common with citizens of the United States, to travel upon all public highways." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. The treaty's "in common with" language means what it says. The treaty recognizes tribal members' right to travel on off-reservation public highways on equal terms with other U. S. citizens. Under the text of the treaty, the tribal members,

like other U. S. citizens, therefore still remain subject to *nondiscriminatory* state highway regulations—that is, to regulations that apply equally to tribal members and other U. S. citizens. See *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973). That includes, for example, speed limits, truck restrictions, and reckless driving laws.

The Washington law at issue here imposes a nondiscriminatory fuel tax. The Chief Justice concludes that the fuel tax is not a highway regulation and, for that reason, he says that the fuel tax does not infringe the Tribe's treaty right to travel on the public highways. I agree with The Chief Justice and join his dissent.

Even if the fuel tax is a highway regulation, it is a *nondiscriminatory* highway regulation. For that reason as well, the fuel tax does not infringe the Tribe's treaty right to travel on the public highways on equal terms with other U. S. citizens.

The plurality, as well as the concurrence in the judgment, suggests that the treaty, if construed that way, would not have been important to the Yakamas. For that reason, the plurality and the concurrence would not adhere to that textual meaning and would interpret "in common with" other U. S. citizens to mean, in essence, "exempt from regulations that apply to" other U. S. citizens.

I respectfully disagree with that analysis. The treaty right to travel on the public highways "in common with"—that is, on equal terms with—other U. S. citizens was important to the Yakama tribal members at the time the treaty was signed. That is because, as of 1855, States and the Federal Government sometimes required tribal members to seek permission before leaving their reservations or even prohibited tribal members from leaving their reservations altogether. See, *e. g.,* Treaty Between the United States of America and the Utah Indians, Art. VII, Dec. 30, 1849, 9 Stat 985; Mo. Rev. Stat., ch. 80, § 10 (1845). The Yakamas needed to travel to sell their goods and trade for other goods.

As a result, those kinds of laws would have devastated the Yakamas' way of life. Importantly, the terms of the 1855 treaty made crystal clear that those kinds of travel restrictions could not be imposed on the Yakamas.

In particular, the treaty afforded Yakama tribal members two relevant rights. First was "free access" on roads from the reservation to "the nearest public highway." Art. III, 12 Stat. 953. Second was a right to travel "in common with" other U. S. citizens on "all public highways." *Ibid.* The right to free access from the reservation to public highways, combined with the right to travel off reservation on public highways, facilitated the Yakama tribal members' extensive trading network.

In determining the meaning of the "in common with" language, we must recognize that the treaty used different language in defining (1) the right to "free access," which applies only on roads connecting the reservation to the off-reservation public highways, and (2) the right to travel "in common with" other U. S. citizens, which applies on those off-reservation public highways. The approach of the plurality and the concurrence would collapse that distinction between the "free access" and "in common with" language and thereby depart from the text of the treaty. I would stick with the text. The treaty's "in common with" language—both at the time the treaty was signed and now—means what it says: the right for Yakama tribal members to travel on public highways on equal terms with other U. S. citizens.

To be sure, the treaty as negotiated and written may not have turned out to be a particularly good deal for the Yakamas. As a matter of separation of powers, however, courts are bound by the text of the treaty. See *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753, 774 (1985). It is for Congress and the President, not the courts, to update a law and provide additional compensation or benefits to tribes beyond those provided by an old law. And since 1855, and especially since 1968, Congress has in fact

taken many steps to assist tribes through a variety of significant legislative measures. In short, lament about the terms of the treaty negotiated by the Federal Government and the Tribe in 1855 does not support the Judiciary (as opposed to Congress and the President) rewriting the law in 2019.

What about precedent? It is true that some of our older precedents interpreted similar "in common with" treaty language regarding fishing rights to grant tribal members an exemption from certain fishing regulations, even when the fishing regulations were nondiscriminatory. But as we explained in the most recent of those fishing cases, those nondiscriminatory fishing regulations had the effect of preventing the Tribes from catching a fair share of the fish in the relevant area. In other words, the fishing regulations at issue were discriminatory in effect even though nondiscriminatory on their face. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676, n. 22 (1979).

That rationale for departing from the treaty text in the narrow context of the fishing cases does not apply in the highway context. Facially nondiscriminatory highway regulations—such as speed limits, truck restrictions, and reckless driving laws—are also nondiscriminatory in effect, as relevant here. They do not deprive tribal members of use of the public highways or deprive tribal members of a fair share of the public highways.

Washington's facially nondiscriminatory fuel tax is likewise nondiscriminatory in effect. The Washington fuel tax therefore does not violate the key principle articulated in the fishing cases. I would adhere to the text of the treaty and hold that the tribal members, like other citizens of the State of Washington, are subject to the nondiscriminatory fuel tax.

The Court (via the plurality opinion and the concurrence) disagrees. The Court relies on the fishing cases and fashions a new right for Yakama tribal members to disregard

even nondiscriminatory highway regulations, such as the Washington fuel tax and perhaps also Washington's similarly structured cigarette tax. The Court's newly created right will allow Yakama businesses not to pay state taxes that must be paid by other competing businesses, including by businesses run by members of the many other tribes in the State of Washington. As a result, the State of Washington (along with other States) stands to lose millions of dollars annually in tax revenue, which will necessarily mean fewer services or increased taxes for other citizens and tribes in the State.

In addition, the Court's newly created right—if applied across the board—would seem to afford Yakama tribal members an exemption from all manner of highway regulations, ranging from speed limits to truck restrictions to reckless driving laws. No doubt because of those negative real-world consequences, the Court simultaneously fashions a new health and safety exception.* But neither the right nor the exception comes from the text of the treaty. As THE CHIEF JUSTICE explains, the Court's "need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence." *Ante*, at 384.

I share THE CHIEF JUSTICE's concern that the Court's new right for tribal members to disregard even nondiscriminatory highway regulations and the Court's new exception to that right for health and safety regulations could generate significant uncertainty and unnecessary litigation for States and tribes. THE CHIEF JUSTICE says it well: The Court "digs such a deep hole that the future promises a lot of backing and filling." *Ante*, at 384–385.

Instead of judicially creating a new atextual right for tribal members to disregard nondiscriminatory highway regulations and then backfilling by judicially creating a new

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*I understand both the plurality opinion and the concurrence to approve of a health and safety exception.

atextual exception to that right for health and safety regulations, I would adhere to the text of the treaty and leave it to Congress, if it chooses, to provide additional benefits for the Yakamas. In my respectful view, even when we interpret any ambiguities in the treaty in favor of the Tribe, the treaty phrase "in common with" cannot properly be read to exempt tribal members from nondiscriminatory highway regulations.

In sum, under the treaty, Washington's nondiscriminatory fuel tax may be imposed on Yakama tribal members just as it may be imposed on other citizens and tribes in the State of Washington. I respectfully dissent.

Syllabus

NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL. *v.* PREAP ET AL.

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

No. 16–1363. Argued October 10, 2018—Decided March 19, 2019*

Federal immigration law empowers the Secretary of Homeland Security to arrest and hold a deportable alien pending a removal decision, and generally gives the Secretary the discretion either to detain the alien or to release him on bond or parole. 8 U. S. C. § 1226(a). Another provision, § 1226(c)—enacted out of "concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings," *Demore* v. *Kim*, 538 U. S. 510, 513—sets out four categories of aliens who are inadmissible or deportable for bearing certain links to terrorism or for committing specified crimes. Section 1226(c)(1) directs the Secretary to arrest any such criminal alien "when the alien is released" from jail, and § 1226(c)(2) forbids the Secretary to release any "alien described in paragraph (1)" pending a determination on removal (with one exception not relevant here).

Respondents, two classes of aliens detained under § 1226(c)(2), allege that because they were not immediately detained by immigration officials after their release from criminal custody, they are not aliens "described in paragraph (1)," even though all of them fall into at least one of the four categories covered by §§ 1226(c)(1)(A)–(D). Because the Government must rely on § 1226(a) for their detention, respondents argue, they are entitled to bond hearings to determine if they should be released pending a decision on their status. The District Courts ruled for respondents, and the Ninth Circuit affirmed.

Held: The judgments are reversed, and the cases are remanded.

831 F. 3d 1193 and 667 Fed. Appx. 966, reversed and remanded.

Justice Alito delivered the opinion of the Court with respect to Parts I, III–A, III–B–1, and IV, concluding that the Ninth Circuit's interpretation of § 1226(c) is contrary to the plain text and structure of the statute. Pp. 404–410, 414–420.

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*Together with *Wilcox, Acting Field Office Director, Immigration and Customs Enforcement, et al.* v. *Khoury et al.* (see this Court's Rule 12.4), also on certiorari to the same court.

(a) The statute's text does not support the argument that because respondents were not arrested immediately after their release, they are not "described in" § 1226(c)(1). Since an adverb cannot modify a noun, § 1226(c)(1)'s adverbial clause "when . . . released" does not modify the noun "alien," which is modified instead by the adjectival clauses appearing in subparagraphs (A)–(D). Respondents contend that an adverb can "describe" a person even though it cannot modify the noun used to denote that person, but this Court's interpretation is not dependent on a rule of grammar. The grammar merely complements what is conclusive here: the meaning of "described" as it appears in § 1226(c)(2)—namely, "to communicate verbally . . . an account of salient identifying features," Webster's Third New International Dictionary 610. That is the relevant definition since the indisputable job of the "descri[ption] in paragraph (1)" is to "identif[y]" for the Secretary which aliens she must arrest immediately "when [they are] released." Yet the "when . . . released" clause could not possibly describe aliens in that sense. If it did, the directive given to the Secretary in § 1226(c)(1) would be incoherent. Moreover, Congress's use of the definite article in "when the alien is released" indicates that the scope of the word "alien" "has been previously specified in context." Merriam-Webster's Collegiate Dictionary 1294. For that noun to have been previously specified, its scope must have been settled by the time the "when . . . released" clause appears at the end of paragraph (1). Thus, the class of people to whom "the alien" refers must be fixed by the predicate offenses identified in subparagraphs (A)–(D). Pp. 404–408.

(b) Subsections (a) and (c) do not establish separate sources of arrest and release authority; subsection (c) is a limit on the authority conferred by subsection (a). Accordingly, all the relevant detainees will have been arrested by authority that springs from subsection (a), and that fact alone will not spare them from subsection (c)(2)'s prohibition on release. The text of § 1226 itself contemplates that aliens arrested under subsection (a) may face mandatory detention under subsection (c). If § 1226(c)'s detention mandate applied only to those arrested pursuant to subsection (c)(1), there would have been no need for subsection (a)'s sentence on the release of aliens to include the words "[e]xcept as provided in subsection (c)." It is also telling that subsection (c)(2) does not limit mandatory detention to those arrested "pursuant to" subsection (c)(1) or "under authority created by" subsection (c)(1), but to anyone so much as "described in" subsection (c)(1). Pp. 408–410.

(c) This reading of § 1226(c) does not flout the interpretative canon against surplusage. The "when . . . released" clause still functions to clarify when the duty to arrest is triggered and to exhort the Secretary

to act quickly. Nor does this reading have the incongruous result of forbidding the release of a set of aliens whom there is no duty to arrest in the first place. Finally, the canon of constitutional avoidance does not apply where there is no ambiguity. See *Warger* v. *Shauers*, 574 U. S. 40, 50. Pp. 414–420.

Justice Alito, joined by The Chief Justice and Justice Kavanaugh, concluded in Parts II and III–B–2:

(a) This Court has jurisdiction to hear these cases. The limitation on review in § 1226(e) applies only to "discretionary" decisions about the "application" of § 1226 to particular cases. It does not block lawsuits over "the extent of the Government's detention authority under the 'statutory framework' as a whole." *Jennings* v. *Rodriguez*, 583 U. S. 281, 295–296. For reasons stated in *Jennings*, "§ 1252(b)(9) does not present a jurisdictional bar." *Id.*, at 295. Whether the District Court in the *Preap* case had jurisdiction under § 1252(f)(1) to grant injunctive relief is irrelevant because the court had jurisdiction to entertain the plaintiffs' request for declaratory relief. And the fact that by the time of class certification the named plaintiffs had obtained either cancellation of removal or bond hearings did not make these cases moot. At least one named plaintiff in both cases could have been returned to detention and then denied a subsequent bond hearing. Even if that had not been so, these cases would not be moot because the harms alleged are transitory enough to elude review. *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 52. Pp. 401–404.

(b) Even assuming that § 1226(c)(1) requires immediate arrest, the result below would be wrong, because a statutory rule that officials " 'shall' act within a specified time" does not by itself "preclud[e] action later," *Barnhart* v. *Peabody Coal Co.*, 537 U. S. 149, 158. This principle for interpreting time limits on statutory mandates was a fixture of the legal backdrop when Congress enacted § 1226(c). Cf. *Woodford* v. *Garceau*, 538 U. S. 202, 209. Pp. 410–414.

Justice Thomas, joined by Justice Gorsuch, concluded that three statutory provisions—8 U. S. C. §§ 1252(b)(9), 1226(e), and 1252(f)(1)—limit judicial review in these cases and it is unlikely that the District Courts had Article III jurisdiction to certify the classes. Pp. 422–427.

Alito, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–A, III–B–1, and IV, in which Roberts, C. J., and Thomas, Gorsuch, and Kavanaugh, JJ., joined, and an opinion with respect to Parts II and III–B–2, in which Roberts, C. J.,

and KAVANAUGH, J., joined. KAVANAUGH, J., filed a concurring opinion, *post*, p. 420. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined, *post*, p. 422. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 427.

Zachary D. Tripp argued the cause for petitioners. With him on the briefs were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*, and *Troy D. Liggett.*

Cecillia Wang argued the cause for respondents. With her on the brief were *Michael K. T. Tan*, *Judy Rabinovitz*, *Omar C. Jadwat*, *David D. Cole*, *Lucas Guttentag*, *Matt Adams*, *Robert Pauw*, *Devin T. Theriot-Orr*, *Vasudha Talla*, *Anoop Prasad*, and *Jenny Zhao.*†

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–A, III–B–1, and IV, and an opinion with respect to Parts II and III–B–2, in which THE CHIEF JUSTICE and JUSTICE KAVANAUGH join.

Aliens who are arrested because they are believed to be deportable may generally apply for release on bond or parole while the question of their removal is being decided. These aliens may secure their release by proving to the satisfaction

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†Briefs of *amici curiae* urging reversal were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton*; for Immigration Reform Law Institute by *Christopher J. Hajec*; and for Rep. Andy Biggs et al. by *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for Advancement Project et al. by *Alina Das*; for Constitutional and Immigration Law Professors by *Mark C. Fleming*; for Former INS and DHS General Counsels by *Matthew E. Price*; for Members of Congress by *Jayashri Srikantiah*, *Jennifer L. Stark*, and *Ward A. Penfold*; and for the National Immigrant Justice Center by *Elaine J. Goldenberg* and *Charles G. Roth.*

Anton Metlitsky and *Deanna M. Rice* filed a brief for Administrative and Immigration Law Professors as *amici curiae.*

of a Department of Homeland Security officer or an immigration judge that they would not endanger others and would not flee if released from custody.

Congress has decided, however, that this procedure is too risky in some instances. Congress therefore adopted a special rule for aliens who have committed certain dangerous crimes and those who have connections to terrorism. Under a statutory provision enacted in 1996, 110 Stat. 3009–585, 8 U. S. C. § 1226(c), these aliens must be arrested "when [they are] released" from custody on criminal charges and (with one narrow exception not involved in these cases) must be detained without a bond hearing until the question of their removal is resolved.

In these cases, the United States Court of Appeals for the Ninth Circuit held that this mandatory-detention requirement applies only if a covered alien is arrested by immigration officials as soon as he is released from jail. If the alien evades arrest for some short period of time—according to respondents, even 24 hours is too long—the mandatory-detention requirement is inapplicable, and the alien must have an opportunity to apply for release on bond or parole. Four other Circuits have rejected this interpretation of the statute, and we agree that the Ninth Circuit's interpretation is wrong. We therefore reverse the judgments below and remand for further proceedings.

I

A

Under federal immigration law, aliens present in this country may be removed if they fall "within one or more . . . classes of deportable aliens." 8 U. S. C. § 1227(a). In these cases, we focus on two provisions governing the arrest, detention, and release of aliens who are believed to be subject to removal.

The first provision, § 1226(a),[1] applies to most such aliens, and it sets out the general rule regarding their arrest and detention pending a decision on removal. Section 1226(a) contains two sentences, one dealing with taking an alien into custody and one dealing with detention. The first sentence empowers the Secretary of Homeland Security[2] to arrest and hold an alien "pending a decision on whether the alien is to be removed from the United States." The second sentence *generally* gives the Secretary the discretion either to detain the alien or to release him on bond or parole. If the alien is detained, he may seek review of his detention by an officer at the Department of Homeland Security and then by an immigration judge (both exercising power delegated by the Secretary), see 8 CFR §§ 236.1(c)(8) and (d)(1), 1003.19, 1236.1(d)(1) (2018); and the alien may secure his release if he

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[1] This provision states:

"(a) Arrest, detention, and release

"On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

"(1) may continue to detain the arrested alien; and

"(2) may release the alien on—

"(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

"(B) conditional parole; but

"(3) may not provide the alien with work authorization (including an 'employment authorized' endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization."

[2] We replace "Attorney General" with "Secretary" because Congress has empowered the Secretary to enforce the Immigration and Nationality Act, 8 U. S. C. § 1101 *et seq.*, though the Attorney General retains the authority to administer removal proceedings and decide relevant questions of law. See, *e. g.*, 6 U. S. C. §§ 202(3), 251, 271(b), 542 note, 557; 8 U. S. C. §§ 1103(a)(1) and (g), 1551 note.

can convince the officer or immigration judge that he poses no flight risk and no danger to the community. See §§ 1003.19(a), 1236.1(d); *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006). But while 8 U. S. C. § 1226(a) generally permits an alien to seek release in this way, that provision's sentence on release states that all this is subject to an exception that is set out in § 1226(c).

Section 1226(c) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and it sprang from a "concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U. S. 510, 513 (2003). To address this problem, Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole.

Section 1226(c) consists of two paragraphs, one on the decision to take an alien into "[c]ustody" and another on the alien's subsequent "[r]elease."[3] The first paragraph (on custody) sets out four categories of covered aliens, namely, those who are inadmissible or deportable on specified grounds. It then provides that the Secretary must take any alien falling into one of these categories "into custody" "when the alien is released" from criminal custody.

The second paragraph (on release from immigration custody) states that "an alien described in paragraph (1)" may be released "only if [the Secretary] decides" that release is "necessary to provide protection" for witnesses or others cooperating with a criminal investigation, or their relatives or associates. That exception is not implicated in the present cases.

The categories of predicates for mandatory detention identified in subparagraphs (A)–(D) generally involve the commission of crimes. As will become relevant to our anal-

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[3] The full text of § 1226(c) is set out *infra*, at 404–405.

ysis, however, some who satisfy subparagraph (D)—*e. g.*, close relatives of terrorists and those who are thought likely to engage in terrorist activity, see 8 U. S. C. § 1182(a)(3)(B)(i)(IX)—may never have been charged with any crime in this country.[4] Still, since the vast majority of mandatory-detention cases do involve convictions, we follow the heading of subsection (c), as well as our cases and the courts below, in referring to aliens who satisfy subparagraphs (A)–(D) collectively as "criminal aliens."

The Board of Immigration Appeals has held that subsection (c)(2), which requires the detention of aliens "described in" subsection (c)(1), applies to all aliens who fall within subparagraphs (A)–(D), whether or not they were arrested immediately "when [they were] released" from criminal custody. *Matter of Rojas*, 23 I. & N. Dec. 117 (2001) (en banc).

B

Respondents in the two cases before us are aliens who were detained under § 1226(c)(2)'s mandatory-detention requirement—and thus denied a bond hearing—pending a decision on their removal. See *Preap* v. *Johnson*, 831 F. 3d 1193 (CA9 2016); *Khoury* v. *Asher*, 667 Fed. Appx. 966 (CA9 2016). Though all respondents had been convicted of criminal offenses covered in §§ 1226(c)(1)(A)–(D), none were arrested by immigration officials immediately after their release from criminal custody. Indeed, some were not arrested until several years later.

Respondent Mony Preap, the lead plaintiff in the case that bears his name, is a lawful permanent resident with two drug convictions that qualify him for mandatory detention under

[4] Nevertheless, such cases appear to be rare. See *Straker* v. *Jones*, 986 F. Supp. 2d 345, 357, n. 8 (SDNY 2013) (citing *Gomez* v. *Napolitano*, 2012 U. S. App. LEXIS 27076 (CA2, June 5, 2012)). But see *Alafyouny* v. *Chertoff*, 2006 WL 1581959, *3, *24 (ND Tex., May 19, 2006) (an alien was subject to mandatory detention based on a determination that the alien had solicited funds for a terrorist group).

§ 1226(c). Though he was released from criminal custody in 2006, immigration officials did not detain him until 2013, when he was released from jail after an arrest for another offense. His co-plaintiffs Juan Lozano Magdaleno and Eduardo Vega Padilla were taken into immigration detention, respectively, 5 and 11 years after their release from custody for a § 1226(c) predicate offense. Preap, Magdaleno, and Padilla filed habeas petitions and a class-action complaint alleging that because they were not arrested "immediately" after release from criminal custody, they are exempt from mandatory detention under § 1226(c) and are entitled to a bond hearing to determine if they should be released pending a decision on their status.

Although the named plaintiffs in *Preap* were not taken into custody on immigration grounds until years after their release from criminal custody, the District Court certified a broad class comprising all aliens in California " 'who are or will be subjected to mandatory detention under 8 U. S. C. section 1226(c) and who were not or will not have been taken into custody by the government *immediately* upon their release from criminal custody for a [s]ection 1226(c)(1) offense.' " 831 F. 3d, at 1198 (emphasis added). The District Court granted a preliminary injunction against the mandatory detention of the members of this class, holding that criminal aliens are exempt from mandatory detention under § 1226(c) (and are thus entitled to a bond hearing) unless they are arrested " 'when [they are] released,' and no later." *Preap* v. *Johnson*, 303 F. R. D. 566, 577 (ND Cal. 2014) (quoting 8 U. S. C. § 1226(c)(1)). The Court of Appeals for the Ninth Circuit affirmed.

Khoury, the other case now before us, involves habeas petitions and a class-action complaint filed in the Western District of Washington. The District Court certified a class comprising all aliens in that district "who were subjected to mandatory detention under 8 U. S. C. § 1226(c) even though they were not detained immediately upon their release from

criminal custody." 667 Fed. Appx., at 967. The District Court granted summary judgment for respondents, and the Ninth Circuit again affirmed, citing its decision on the same day in *Preap*.

Because *Preap* and *Khoury* created a split with four other Courts of Appeals, we granted certiorari to review the Ninth Circuit's ruling that criminal aliens who are not arrested immediately upon release are thereby exempt from mandatory detention under § 1226(c). 583 U. S. 1179 (2018). We now reverse.

II

Before addressing the merits of the Court of Appeals' interpretation, we resolve four questions regarding our jurisdiction to hear these cases.

The first potential hurdle concerns § 1226(e), which states:

> "The [Secretary's] *discretionary judgment* regarding the *application* of [§ 1226] shall not be subject to review. No court may set aside any action or decision by the [Secretary] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." (Emphasis added.)

As we have held, this limitation applies only to "discretionary" decisions about the "application" of § 1226 to particular cases. It does not block lawsuits over "the extent of the Government's detention authority under the 'statutory framework' as a whole." *Jennings* v. *Rodriguez*, 583 U. S. 281, 295–296 (2018) (quoting *Demore*, 538 U. S., at 517). And the general extent of the Government's authority under § 1226(c) is precisely the issue here. Respondents' argument is not that the Government exercised its statutory authority in an unreasonable fashion. Instead, they dispute the extent of the statutory authority that the Government claims. Because this claim of authority does not constitute a mere "discretionary" "application" of the relevant statute, our review is not barred by § 1226(e).

Nor are we stripped of jurisdiction by § 1252(b)(9), which provides:

> "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter [including §§ 1225 and 1226] shall be available only in judicial review of a final order under this section." (Emphasis added.)

As in *Jennings*, respondents here "are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal [as opposed to the decision to deny them bond hearings]; and they are not even challenging any part of the process by which their removability will be determined. Under these circumstances," we held in *Jennings*, see 583 U. S., at 294–295, "§ 1252(b)(9) does not present a jurisdictional bar."

The Government raised a third concern before the District Court in *Preap*: that under 8 U. S. C. § 1252(f)(1), that court lacked jurisdiction to enter the requested injunction. As § 1252(f)(1) cautions:

> "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221–1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."

Did the *Preap* court overstep this limit by granting injunctive relief for a class of aliens that includes some who have not yet faced—but merely "will face"—mandatory detention? The District Court said no, but we need not decide. Whether the *Preap* court had jurisdiction to enter such an injunction is irrelevant because the District Court had jurisdiction to entertain the plaintiffs' request for declaratory re-

lief, and for independent reasons given below, we are ordering the dissolution of the injunction that the District Court ordered.

Finally, and again before the *Preap* District Court, the Government raised a fourth potential snag: mootness. Class actions are "[n]ormally . . . moot if no named class representative with an unexpired claim remain[s] at the time of class certification." *United States* v. *Sanchez-Gomez*, 584 U. S. 381, 386 (2018). But that general norm is no hurdle here.

The suggestion of mootness in these cases was based on the fact that by the time of class certification the named plaintiffs had obtained either cancellation of removal or bond hearings. See 831 F. 3d, at 1197–1198; *Khoury* v. *Asher*, 3 F. Supp. 3d 877, 879–880 (WD Wash. 2014). But those developments did not make the cases moot because at least one named plaintiff in both cases had obtained release on bond, as opposed to cancellation of removal, and that release had been granted following a preliminary injunction in a separate case. Unless that preliminary injunction was made permanent and was not disturbed on appeal, these individuals faced the threat of re-arrest and mandatory detention. And indeed, we later ordered that that injunction be dissolved. See *Jennings*, 583 U. S., at 314. Thus, in both cases, there was at least one named plaintiff with a live claim when the class was certified.

Even if that had not been so, these cases would not be moot because the fact that a class "was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction" when, as in these cases, the harms alleged are transitory enough to elude review. *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 52 (1991) (affirming jurisdiction over a class action challenging a county's failure to provide "prompt" determinations of probable cause for those subjected to warrantless arrest and detention). Respondents claim that they would be harmed by detention

without a hearing pending a decision on their removal. Because this type of injury ends as soon as the decision on removal is made, it is transitory. So the fact that the named plaintiffs obtained some relief before class certification does not moot their claims.

III

Having assured ourselves of our jurisdiction, we turn to the merits. Respondents contend that they are not properly subject to § 1226(c)'s mandatory-detention scheme, but instead are entitled to the bond hearings available to those held under the general arrest and release authority provided in § 1226(a). Respondents' primary textual argument turns on the interaction of paragraphs (1) and (2) of § 1226(c). Recall that those paragraphs govern, respectively, the "[c]ustody" and "[r]elease" of criminal aliens guilty of a predicate offense. Paragraph (1) directs the Secretary to arrest any such alien "when the alien is released," and paragraph (2) forbids the Secretary to release any "alien described in paragraph (1)" pending a determination on removal (with one exception not relevant here). Because the parties' arguments about the meaning of § 1226(c) require close attention to the statute's terms and structure, we reproduce the provision in full below. But only the portions of the statute that we have highlighted are directly relevant to respondents' argument. Section 1226(c) provides:

"(c) Detention of criminal aliens

"(1) Custody

"*The [Secretary] shall take into custody any alien who—*

"(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

"(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

"(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or

"(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

"*when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

"(2) Release

"*The [Secretary] may release an alien described in paragraph (1) only if* the [Secretary] decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien." (Emphasis added.)

Respondents argue that they are not subject to mandatory detention because they are not "described in" § 1226(c)(1), even though they (and all the other members of the classes they represent) fall into at least one of the categories of aliens covered by subparagraphs (A)–(D) of that provision. An alien covered by these subparagraphs is not "described in" § 1226(c)(1), respondents contend, unless the alien was also arrested "when [he or she was] released" from crimi-

nal custody. Indeed, respondents insist that the alien must have been arrested *immediately* after release. Since they and the other class members were not arrested immediately, respondents conclude, they are not "described in" § 1226(c)(1). So to detain them, the Government must rely not on § 1226(c) but on the general provisions of § 1226(a). And thus, like others detained under § 1226(a), they are owed bond hearings in which they can earn their release by proving that they pose no flight risk and no danger to others—or so they claim. But neither the statute's text nor its structure supports this argument. In fact, both cut the other way.

A

First, respondents' position runs aground on the plain text of § 1226(c). Respondents are right that only an alien "described in paragraph (1)" faces mandatory detention, but they are wrong about which aliens are "described in" paragraph (1).

Paragraph (1) provides that the Secretary "shall take" into custody any "alien" having certain characteristics and that the Secretary must do this "when the alien is released" from criminal custody. The critical parts of the provision consist of a verb ("shall take"), an adverbial clause ("when . . . released"), a noun ("alien"), and a series of adjectival clauses ("who . . . is inadmissible," "who . . . is deportable," etc.). As an initial matter, no one can deny that the adjectival clauses modify (and in that sense "describ[e]") the noun "alien" or that the adverbial clause "when . . . released" modifies the verb "shall take." And since an adverb cannot modify a noun, the "when released" clause cannot modify "alien." Again, what modifies (and in that sense "describe[s]") the noun "alien" are the adjectival clauses that appear in subparagraphs (A)–(D).

Respondents and the dissent contend that this grammatical point is not the end of the matter—that an adverb can "describe" a person even though it cannot modify the noun

used to denote that person. See *post*, at 431–432 (opinion of Breyer, J.). But our interpretation is not dependent on a rule of grammar. The preliminary point about grammar merely complements what is critical, and indeed conclusive, in these cases: the particular meaning of the term "described" as it appears in § 1226(c)(2). As we noted in *Luna Torres* v. *Lynch*, 578 U. S. 452, 459 (2016), the term " 'describe' takes on different meanings in different contexts." A leading definition of the term is "to communicate verbally . . . an account of salient *identifying* features," Webster's Third New International Dictionary 610 (1976), and that is clearly the meaning of the term used in the phrase "an alien *described* in paragraph (1)." (Emphasis added.) This is clear from the fact that the indisputable job of the "descri[ption] in paragraph (1)" is to "identif[y]" for the Secretary—to list the "salient . . . features" by which she can pick out—which aliens she must arrest immediately "when [they are] released."

And here is the crucial point: The "when . . . released" clause could not possibly describe aliens in that sense; it plays no role in identifying for the Secretary *which* aliens she must immediately arrest. If it did, the directive in § 1226(c)(1) would be nonsense. It would be ridiculous to read paragraph (1) as saying: "The Secretary must arrest, upon their release from jail, a particular subset of criminal aliens. Which ones? Only those who are arrested upon their release from jail." Since it is the Secretary's action that *determines* who is arrested upon release, "being arrested upon release" cannot be one of her criteria in figuring out whom to arrest. So it cannot "describe"—it cannot give the Secretary an "identifying featur[e]" of—the relevant class of aliens. On any other reading of paragraph (1), the command that paragraph (1) gives the Secretary would be downright incoherent.

Our reading is confirmed by Congress's use of the definite article in "when the alien is released." Because "[w]ords are

to be given the meaning that proper grammar and usage would assign them," A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012), the "rules of grammar govern" statutory interpretation "unless they contradict legislative intent or purpose," *ibid.* (citing *Costello* v. *INS*, 376 U. S. 120, 122–126 (1964)). Here grammar and usage establish that "the" is "a function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context." Merriam-Webster's Collegiate Dictionary 1294 (11th ed. 2005). See also *Work* v. *United States ex rel. McAlester-Edwards Co.*, 262 U. S. 200, 208 (1923) (Congress's "use of the definite article [in a reference to 'the appraisement' means an appraisement specifically provided for"). For "the alien"—in the clause "when the alien is released"—to have been previously specified, its scope must have been settled by the time the "when . . . released" clause appears at the tail end of paragraph (1).

For these reasons, we hold that the scope of "the alien" is fixed by the predicate offenses identified in subparagraphs (A)–(D).[5] And since only those subparagraphs settle who is "described in paragraph (1)," anyone who fits *their* description falls under paragraph (2)'s detention mandate—even if (as with respondents) the Secretary did not arrest them immediately "when" they were "released."

B

In reaching the contrary conclusion, the Ninth Circuit thought that the very structure of § 1226 favors respondents' reading. In particular, the Ninth Circuit reasoned, each subsection's arrest and release provisions must work together. Thus, aliens must be arrested under the general arrest authority in subsection (a) in order to get a bond hearing

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[5] For this reason, it is irrelevant that (as the dissent notes, see *post*, at 433–434) paragraph (2) applies to aliens described in "paragraph (1)" and not "subparagraphs (A)–(D)." These two phrases denote the same category, so nothing can be gleaned from Congress's choice of one over the other.

under subsection (a)'s release provision. And in order to face mandatory detention under subsection (c), criminal aliens must have been arrested under subsection (c). But since subsection (c) authorizes only immediate arrest, the argument continues, those arrested later fall under subsection (a), not (c). Accordingly, the court concluded, those arrested well after release escape subsection (c)'s detention mandate. See 831 F. 3d, at 1201–1203. But this argument misreads the structure of § 1226; and in any event, the Ninth Circuit's conclusion would not follow even if we granted all its premises about statutory structure.

1

Although the Ninth Circuit viewed subsections (a) and (c) as establishing separate sources of arrest and release authority, in fact subsection (c) is simply a limit on the authority conferred by subsection (a).

Recall that subsection (a) has two sentences that provide the Secretary with general discretion over the arrest and release of aliens, respectively. We read each of subsection (c)'s two provisions—paragraph (1) on arrest and paragraph (2) on release—as modifying its counterpart sentence in subsection (a). In particular, subsection (a) creates authority for *anyone's* arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions—while subsection (c)'s job is to *subtract* some of that discretion when it comes to the arrest and release of criminal aliens. Thus, subsection (c)(1) limits subsection (a)'s first sentence by curbing the discretion to arrest: The Secretary *must* arrest those aliens guilty of a predicate offense. And subsection (c)(2) limits subsection (a)'s second sentence by cutting back the Secretary's discretion over the decision to release: The Secretary may *not* release aliens "described in" subsection (c)(1)—that is, those guilty of a predicate offense. Accordingly, all the relevant detainees will have been arrested by authority that springs from subsection (a), and so, contrary

to the Court of Appeals' view, that fact alone will not spare them from subsection (c)(2)'s prohibition on release. This reading comports with the Government's practice of applying to the arrests of all criminal aliens certain procedural requirements, such as the need for a warrant, that appear only in subsection (a). See Tr. of Oral Arg. 13–14.

The text of § 1226 itself contemplates that aliens arrested under subsection (a) may face mandatory detention under subsection (c). The second sentence in subsection (a)— which generally authorizes the Secretary to *release* an alien pending removal proceedings—features an exception "as provided in subsection (c)." But if the Court of Appeals were right that subsection (c)(2)'s prohibition on release applies only to those arrested pursuant to subsection (c)(1), there would have been no need to specify that such aliens are exempt from subsection *(a)*'s release provision. This shows that it is possible for those arrested under subsection (a) to face mandatory detention under subsection (c). We draw a similar inference from the fact that subsection (c)(2), for its part, does not limit mandatory detention to those arrested "pursuant to" subsection (c)(1) or "under authority created by" subsection (c)(1)—but to anyone so much as "described in" subsection (c)(1). This choice of words marks a contrast with Congress's reference—in the immediately preceding subsection—to actions by the Secretary that are "authorized under" subsection (a). See § 1226(b). Cf. 18 U. S. C. § 3262(b) (referring to "a person *arrested under* subsection (a)" (emphasis added)). These textual cues indicate that even if an alien was not arrested under authority bestowed by subsection (c)(1), he may face mandatory detention under subsection (c)(2).

2

But even if the Court of Appeals were right to reject this reading, the result below would be wrong. To see why, assume with the Court of Appeals that only someone arrested

under authority created by § 1226(c)(1)—rather than the more general § 1226(a)—may be detained without a bond hearing. And assume that subsection (c)(1) requires *immediate* arrest. Even then, the Secretary's failure to abide by this time limit would not cut off her power to arrest under subsection (c)(1). That is so because, as we have held time and again, an official's crucial duties are better carried out late than never. See *Sylvain* v. *Attorney Gen. of U. S.*, 714 F. 3d 150, 158 (CA3 2013) (collecting cases). Or more precisely, a statutory rule that officials " 'shall' act within a specified time" does not by itself "preclud[e] action later." *Barnhart* v. *Peabody Coal Co.*, 537 U. S. 149, 158 (2003).

Especially relevant here is our decision in *United States* v. *Montalvo-Murillo*, 495 U. S. 711 (1990). There we held that "a provision that a detention hearing ' "shall be held immediately upon the [detainee's] first appearance before the judicial officer" ' did not bar detention after a tardy hearing." *Barnhart*, 537 U. S., at 159 (quoting *Montalvo-Murillo*, 495 U. S., at 714). In that case, we refused to "bestow upon the defendant a windfall" and "visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the [statutory] strictures . . . occur[red]." *Id.*, at 720. Instead, we gave effect to the principle that " 'if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.' " *Barnhart*, 537 U. S., at 159 (quoting *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 63 (1993)).

This principle for interpreting time limits on statutory mandates was a fixture of the legal backdrop when Congress enacted § 1226(c). Cf. *Woodford* v. *Garceau*, 538 U. S. 202, 209 (2003) (relying on the "legal backdrop" against which "Congress legislated" to clarify what Congress enacted). Indeed, we have held of a statute enacted just four years

before § 1226(c) that because of our case law at the time—never since abrogated—Congress was "presumably aware that we do not readily infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." *Barnhart*, 537 U. S., at 160 (relying on *Brock* v. *Pierce County*, 476 U. S. 253 (1986)). Here this principle entails that even if subsection (c)(1) were the sole source of authority to arrest aliens without granting them hearings, that authority would not evaporate just because officials had transgressed subsection (c)(1)'s command to arrest aliens immediately "when . . . released."

Respondents object that the rule invoked in *Montalvo-Murillo* and related cases does not apply here. In those cases, respondents argue, the governmental authority at issue would have disappeared entirely if time limits were enforced—whereas here the Secretary could still arrest aliens well after their release under the general language in § 1226(a).

But the whole premise of respondents' argument is that if the Secretary could no longer act under § 1226(c), she *would* lose a specific power—the power to arrest and detain criminal aliens without a bond hearing. If that is so, then as in other cases, accepting respondents' deadline-based argument would be inconsistent with "the design and function of the statute." *Montalvo-Murillo*, 495 U. S., at 719. From Congress's perspective, after all, it is irrelevant that the Secretary could go on detaining criminal aliens subject to a bond hearing. Congress enacted mandatory detention precisely out of concern that such individualized hearings could not be trusted to reveal which "deportable criminal aliens who are not detained" might "continue to engage in crime [or] fail to appear for their removal hearings." *Demore*, 538 U. S., at 513. And having thus required the Secretary to impose mandatory detention without bond hearings immediately, for safety's sake, Congress could not have meant for judges to "enforce" this duty in case of delay by—of all things—

forbidding its execution. Cf. *Montalvo-Murillo*, 495 U. S., at 720 ("The end of exacting compliance with the letter" of the Bail Reform Act's requirement that a defendant receive a hearing immediately upon his first appearance before a judicial officer "cannot justify the means of exposing the public to an increased likelihood of violent crime by persons on bail, an evil the statute aims to prevent").

Especially hard to swallow is respondents' insistence that for an alien to be subject to mandatory detention under § 1226(c), the alien must be arrested on the day he walks out of jail (though respondents allow that it need not be at the jailhouse door—the "parking lot" or "bus stop" would do). Tr. of Oral Arg. 44. "Assessing the situation in realistic and practical terms, it is inevitable that" respondents' unsparing deadline will often be missed for reasons beyond the Federal Government's control. *Montalvo-Murillo*, 495 U. S., at 720. Cf. *Regions Hospital* v. *Shalala*, 522 U. S. 448, 459, n. 3 (1998) ("The Secretary's failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that [she] lacked power to act beyond it"). To give just one example, state and local officials sometimes rebuff the Government's request that they give notice when a criminal alien will be released. Indeed, over a span of less than three years (from January 2014 to September 2016), the Government recorded "a total of 21,205 declined [requests] in 567 counties in 48 states including the District of Columbia." ICE, Fiscal Year 2016 ICE Enf. and Removal Operations Rep. 9. Nor was such local resistance unheard of when Congress enacted the language of § 1226(c) in 1996. See S. Rep. No. 104–48, p. 28 (1995). Under these circumstances, it is hard to believe that Congress made the Secretary's mandatory-detention authority vanish at the stroke of midnight after an alien's release.

In short, the import of our case law is clear: Even if subsection (c) were the only font of authority to detain aliens without bond hearings, we could not read its "when . . . re-

leased" clause to defeat officials' duty to impose such mandatory detention when it comes to aliens who are arrested well after their release.

IV

Respondents protest that reading § 1226(c) in the manner set forth here would render key language superfluous, lead to anomalies, and violate the canon of constitutional avoidance. We answer these objections in turn.

A

According to respondents, the Government's reading of § 1226(c) flouts the interpretive canon against surplusage—the idea that "every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Scalia, Reading Law, at 174. See *Kungys* v. *United States*, 485 U. S. 759, 778 (1988) (plurality opinion of Scalia, J.) (citing the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). Respondents' surplusage argument has two focal points.

First, respondents claim that if they face mandatory detention even though they were arrested well after their release, then "when . . . released" adds nothing to paragraph (1). In fact, however, it still has work to do. For one thing, it clarifies when the duty to arrest is triggered: upon release from criminal custody, not before such release or after the completion of noncustodial portions of a criminal sentence (such as a term of "parole, supervised release, or probation," as the paragraph goes on to emphasize). Thus, paragraph (1) does not permit the Secretary to cut short an alien's state prison sentence in order to usher him more easily right into immigration detention—much as another provision prevents officials from actually removing an alien from the country "until the alien is released from imprisonment." 8 U. S. C. § 1231(a)(4)(A). And from the other end, as paragraph (1)'s

language makes clear, the Secretary need not wait for the sentencing court's supervision over the alien to expire.

The "when . . . released" clause also serves another purpose: exhorting the Secretary to act quickly. And this point answers respondents' second surplusage claim: that the "Transition Period Custody Rules" enacted along with § 1226(c) would have been superfluous if § 1226(c) did not call for immediate arrests, since those rules authorized delays in § 1226(c)'s implementation while the Government expanded its capacities. See *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 675 (BIA 1997). This argument again confuses what the Secretary is obligated to do with the consequences that follow if the Secretary fails (for whatever reason) to fulfill that obligation. The transition rules delayed the onset of the Secretary's obligation to begin making arrests as soon as covered aliens were released from criminal custody, and in that sense they were not superfluous.[6] This is so even though, had the transition rules not been adopted, the Secretary's failure to make an arrest immediately upon a covered alien's release would not have exempted the alien from mandatory detention under § 1226(c).

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[6] The dissent asks *why* Congress would have felt the need to provide for a delay if it thought that either way, the Secretary would get to deny a hearing to aliens arrested well after release. *Post*, at 436; see also *post*, at 439. The answer is that Congress does not draft legislation *in the expectation* that the Executive will blow through the deadlines it sets. That is why Congress specifies any deadlines for executive duties at all; and here it explains why Congress furthermore provided that the deadline it set for this particular duty (to arrest criminal aliens *upon their release*) would not take effect right away.

In fact, if the dissent's argument from the transition rules were sound—*i. e.*, if textual evidence that Congress *expects* the Executive to meet a deadline (once it officially takes effect) were proof that Congress wanted the deadline *enforced by courts*—then every case involving an express statutory deadline would be one in which Congress intended for courts to enforce the deadline. But this would include, by definition, all of the loss-of-authority cases we discussed above, see Part III–B–2, *supra*—a long line of precedent that the dissent does not question.

B

The Court of Appeals objected that the Government's reading of § 1226(c) would have the bizarre result that some aliens whom the Secretary need not arrest at all must nonetheless be detained without a hearing if they *are* arrested. 831 F. 3d, at 1201–1203. This rather complicated argument, as we understand it, proceeds as follows. Paragraph (2) requires the detention of aliens "described in paragraph (1)." While most of the aliens described there have been convicted of a criminal offense, this need not be true of aliens captured by subparagraph (D) in particular—which covers, for example, aliens who are close relatives of terrorists and those who are believed likely to commit a terrorist act. See § 1182(a)(3)(B)(i)(IX). But if, as the Government maintains, *any* alien who falls under subparagraphs (A)–(D) is thereby ineligible for release from immigration custody, then the Secretary would be forbidden to release even these aliens who were never convicted or perhaps even charged with a crime, once she arrested them. Yet she would be free not to arrest them to begin with (or so the Court of Appeals assumed), since she is obligated to arrest aliens "when . . . released," and there was no prior custody for *these* aliens to be "released" *from*. Therefore, the court concluded, the Government's position has the absurd implication that aliens who were never charged with a crime need not be arrested pending a removal determination, but if they *are* arrested, they must be detained and cannot be released on bond or parole.

We agree that it would be very strange for Congress to forbid the release of aliens who need not be arrested in the first place, but the fact is that the Government's reading (and ours) does not have that incongruous result. The real anomalies here would flow instead from the Court of Appeals' interpretation.

To begin with the latter point: Under the Court of Appeals' reading, the mandatory-detention scheme would be gentler on terrorists than it is on garden-variety offenders.

To see why, recall first that subparagraphs (A)–(C) cover aliens who are inadmissible or deportable based on the commission of certain criminal offenses, and there is no dispute that the statute authorizes their mandatory detention when they are released from criminal custody. And the crimes covered by these subparagraphs include, for example, any drug offense by an adult punishable by more than one year of imprisonment, see §§ 1182(a)(2), 1226(c)(1)(A), as well as a variety of tax offenses, see §§ 1226(c)(1)(B), 1227(a)(2)(A)(iii); *Kawashima* v. *Holder*, 565 U. S. 478 (2012). But notice that aliens who fall within subparagraph (D), by contrast, may never have been arrested on criminal charges—which according to the court below would exempt them from mandatory detention. Yet this subparagraph covers the very sort of aliens for which Congress was most likely to have wanted to require mandatory detention—including those who are representatives of a terrorist group and those whom the Government has reasonable grounds to believe are likely to engage in terrorist activities. See §§ 1182(a)(3)(B)(i)(III), (IV), 1226(c)(1)(D).[7] Thus, by the Court of Appeals' logic, Congress chose to spare terrorist aliens from the rigors of mandatory detention—a mercy withheld from almost all drug offenders and tax cheats. See Brief for National Immigrant Justice Center as *Amicus Curiae* 7–8. *That* result would be incongruous.

Along similar lines, note that one § 1226(c)(1) predicate reaches aliens who necessarily escape conviction: those "for whom immunity from criminal jurisdiction was exercised." § 1182(a)(2)(E)(ii). See § 1226(c)(1)(A). And other predicates sweep in aliens whom there is no reason to expect po-

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[7] In *Alafyouny*, 2006 WL 1581959, for example, an alien subject to mandatory detention had not been charged with any crime. Rather, in a hearing to consider his application for adjustment of status, an Immigration Judge found that the alien had engaged in terrorism-related activity identified in § 1182(a)(3)(B)(iv)(IV)(cc), which qualified him for mandatory detention under § 1226(c)(1)(D). *Id.*, at *3, *24.

lice (as opposed to immigration officials) will have reason to arrest: *e. g.*, the "spouse or child of an alien" who recently engaged in terrorist activity. § 1182(a)(3)(B)(i)(IX); see § 1226(c)(1)(D). It would be pointless for Congress to have covered such aliens in subsections (c)(1)(A)–(D) if subsection (c)'s mandates applied only to those emerging from jail.

Thus, contrary to the Court of Appeals' interpretation of the "when released" clause as limiting the class of aliens subject to mandatory detention, we read subsection (c)(1) to specify the timing of arrest ("when the alien is released") only for the vast majority of cases: those involving criminal aliens who were once in criminal custody. The paragraph simply does not speak to the timeline for arresting the few who had no stint in jail. (And why should it? Presumably they—unlike those serving time—are to be detained as they come across the Government's radar and any relevant evidentiary standards are satisfied.[8])

In short, we read the "when released" directive to apply when there is a release. In other situations, it is simply not relevant. It follows that both of subsection (c)'s mandates—for arrest and for release—apply to any alien linked with a predicate offense identified in subparagraphs (A)–(D), regardless of exactly when or even whether the alien was released from criminal custody.

C

Finally, respondents perch their reading of § 1226(c)—unsteadily, as it turns out—on the canon of constitutional avoidance. This canon provides that "[w]hen 'a serious doubt' is raised about the constitutionality of an act of Congress, ' . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question

[8] See n. 7, *supra*. Detainees who deny that they satisfy any § 1226(c) predicate may challenge their mandatory detention in a *Joseph* hearing. See *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). See also *Jennings* v. *Rodriguez*, 583 U. S. 281, 289, n. 1 (2018).

may be avoided.' " *Jennings*, 583 U. S., at 296 (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932)).

Respondents say we should be uneasy about endorsing any reading of § 1226(c) that would mandate arrest and detention years after aliens' release from criminal custody—when many aliens will have developed strong ties to the country and a good chance of being allowed to stay if given a hearing. At that point, respondents argue, mandatory detention may be insufficiently linked to public benefits like protecting others against crime and ensuring that aliens will appear at their removal proceedings. In respondents' view, detention in that scenario would raise constitutional doubts under *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), which held that detention violates due process absent "adequate procedural protections" or "special justification[s]" sufficient to outweigh one's " 'constitutionally protected interest in avoiding physical restraint,' " *id.*, at 690 (quoting *Kansas* v. *Hendricks*, 521 U. S. 346, 356 (1997)). Thus, respondents urge, we should adopt a reading of § 1226(c)—their reading—that avoids this result.

The trouble with this argument is that constitutional avoidance " 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.' " *Jennings*, 583 U. S., at 296. The canon "has no application" absent "ambiguity." *Warger* v. *Shauers*, 574 U. S. 40, 50 (2014) (internal quotation marks omitted). See also *Zadvydas*, 533 U. S., at 696 ("Despite this constitutional problem, if Congress has made its intent in the statute clear, we must give effect to that intent" (internal quotation marks omitted)). Here the text of § 1226 cuts clearly against respondents' position, see Part III, *supra*, making constitutional avoidance irrelevant.

We emphasize that respondents' arguments here have all been statutory. Even their constitutional concerns are offered as just another pillar in an argument for their preferred reading of the language of § 1226(c)—an idle pillar

here because the statute is clear. While respondents might have raised a head-on constitutional challenge to § 1226(c), they did not. Our decision today on the meaning of that statutory provision does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it.

* * *

The judgments of the Court of Appeals for the Ninth Circuit are reversed, and the cases are remanded for further proceedings.

It is so ordered.

JUSTICE KAVANAUGH, concurring.

I write separately to emphasize the narrowness of the issue before us and, in particular, to emphasize what this case is *not* about.

This case is not about whether a noncitizen may be *removed* from the United States on the basis of criminal offenses. Under longstanding federal statutes, the Executive Branch may remove noncitizens from the United States when the noncitizens have been convicted of certain crimes, even when the crimes were committed many years ago.

This case is also not about whether a noncitizen may be *detained* during removal proceedings or before removal. Congress has expressly authorized the Executive Branch to detain noncitizens during their removal proceedings and before removal. 8 U. S. C. §§ 1226(a), (c), and 1231(a).

This case is also not about *how long* a noncitizen may be detained during removal proceedings or before removal. We have addressed that question in cases such as *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), *Clark* v. *Martinez*, 543 U. S. 371 (2005), and *Jennings* v. *Rodriguez*, 583 U. S. 281 (2018).

This case is also not about whether Congress may *mandate* that the Executive Branch detain noncitizens during removal proceedings or before removal, as opposed to merely

giving the Executive Branch discretion to detain. It is undisputed that Congress may mandate that the Executive Branch detain certain noncitizens during removal proceedings or before removal. Congress has in fact mandated detention of certain noncitizens who have been in criminal custody and who, upon their release, would pose a danger to the community or risk of flight. As relevant here, Congress has mandated detention "when" such noncitizens are "released" from criminal custody. 8 U. S. C. § 1226(c)(1).

The sole question before us is narrow: whether, under § 1226, the Executive Branch's mandatory duty to detain a particular noncitizen when the noncitizen is released from criminal custody remains mandatory if the Executive Branch fails to *immediately* detain the noncitizen when the noncitizen is released from criminal custody—for example, if the Executive Branch fails to immediately detain the noncitizen because of resource constraints or because the Executive Branch cannot immediately locate and apprehend the individual in question. No constitutional issue is presented. The issue before us is entirely statutory and requires our interpretation of the strict 1996 illegal-immigration law passed by Congress and signed by President Clinton. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546.

It would be odd, in my view, if the Act (1) mandated detention of particular noncitizens because the noncitizens posed such a serious risk of danger or flight that they *must* be detained during their removal proceedings, but (2) nonetheless allowed the noncitizens to remain free during their removal proceedings if the Executive Branch failed to *immediately* detain them upon their release from criminal custody. Not surprisingly, the Act does not require such an odd result. On the contrary, the relevant text of the Act is relatively straightforward, as the Court explains. Interpreting that text, the Court correctly holds that the Executive Branch's detention of the particular noncitizens here remained manda-

tory even though the Executive Branch did not immediately detain them. I agree with the Court's careful statutory analysis, and I join the Court's opinion in full.

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

I continue to believe that no court has jurisdiction to decide questions concerning the detention of aliens before final orders of removal have been entered. See *Jennings* v. *Rodriguez*, 583 U. S. 281, 314–323 (2018) (THOMAS, J., concurring in part and concurring in judgment). By my count, Congress has erected at least three barriers to our review of the merits, and I also question whether Article III jurisdiction existed at the time of class certification. Nonetheless, because the Court has held that we have jurisdiction in cases like these, and because I largely agree with the Court's resolution of the merits, I join all but Parts II and III–B–2 of the Court's opinion.

I

Respondents consist of two classes of aliens who committed criminal offenses that require the Secretary of Homeland Security to detain them without a bond hearing under 8 U. S. C. § 1226(c), but who were not detained immediately upon release from criminal custody. Respondents argued that, by failing to immediately detain them, the Secretary lost the authority to deny them a bond hearing when they were rearrested.

The first class action was brought in the Northern District of California and has three class representatives. One of the plaintiffs, Mony Preap, received cancellation of removal and was not in immigration custody at the time of certification. The other two, Eduardo Vega Padilla and Juan Lozano Magdaleno, had received bond hearings as required by a Ninth Circuit decision, *Rodriguez* v. *Robbins*, 715 F. 3d 1127, 1138 (2013); Padilla had been released, while Magdaleno was denied release. The District Court certified a class of all

aliens in California who are or will be subjected to mandatory detention under § 1226(c) and who were not or will not have been taken into custody by the Government immediately upon their release from criminal custody for a § 1226(c)(1) offense. The court issued a preliminary injunction requiring the Government to provide all class members with bond hearings under § 1226(a).

The second class action was brought in the Western District of Washington and also has three class representatives: Bassam Yusuf Khoury and Alvin Rodriguez Moya, who had been released on bond before class certification after their *Rodriguez* hearings, and Pablo Carrera Zavala, who was released before class certification because the Department of Homeland Security determined that he had not committed a predicate § 1226(c)(1) offense. The District Court certified a class of all aliens in its judicial district who were not detained immediately upon their release from criminal custody but were subjected to mandatory detention under § 1226(c). The court entered a declaratory judgment barring the Government from subjecting class members to detention under § 1226(c) unless it took the alien into custody immediately upon release.

II

At least three statutory provisions limit judicial review here, and I am skeptical whether the District Courts had Article III jurisdiction to certify the classes.

A

First, § 1252(b)(9) bars judicial review of "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States," except for review of "a final order" or other circumstances not present here. These cases raise questions of law or fact arising from removal proceedings—"[d]etention is necessarily a part of [the] deportation procedure"

that culminates in the removal of the alien, *Carlson* v. *Landon*, 342 U. S. 524, 538 (1952)—and they do not come to us on review of final orders of removal. Thus, for the reasons I set forth in *Jennings*, *supra*, at 314–323, no court has jurisdiction over these class actions.

B

Second, § 1226(e) provides that "[n]o court may set aside any action or decision by the [Secretary] under this section regarding the detention or release of any alien or the grant, revocation, or *denial of bond* or parole." (Emphasis added.) This provision "unequivocally deprives federal courts of jurisdiction to set aside 'any action or decision' by the [Secretary]" regarding detention, discretionary or otherwise. *Demore* v. *Kim*, 538 U. S. 510, 533 (2003) (O'Connor, J., concurring in part and concurring in judgment); see *Jennings*, *supra*, at 323, n. 6. The plurality once again reads this language as permitting judicial review for challenges to the "statutory framework as a whole." *Ante*, at 401 (internal quotation marks omitted). But the text of the statute contains no such exception. Accordingly, I continue to think that no court has jurisdiction over these kinds of actions.

C

Third, § 1252(f)(1) deprives district courts of "jurisdiction or authority to enjoin or restrain the operation of [§§ 1221–1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under [§§ 1221–1232] have been initiated." The text of § 1252(f)(1) explicitly prohibits the classwide injunctive relief ordered by the Northern District of California in this instance, given that the class includes future, yet-to-be detained aliens against whom proceedings have not been initiated. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 481 (1999) (explaining that § 1252(f)(1) "prohibits federal courts from granting classwide injunctive

relief against the operation of §§1221–1231"). The District Court relied on *Rodriguez* v. *Hayes*, 591 F. 3d 1105 (CA9 2010), which held that this provision does not affect authority to enjoin alleged violations of the specified statutes because those claims do not "seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes." *Id.*, at 1120. This reasoning is circular and unpersuasive. Many claims seeking to enjoin or restrain the operation of the relevant statutes will allege that the Executive's action does not comply with the statutory grant of authority, but the text clearly bars jurisdiction to enter an injunction "[r]egardless of the nature of the action or claim." Although the plurality avoids deciding whether §1252(f)(1) prevented the District Court's injunction here, *ante*, at 402, I would hold that it did.

D

Finally, I harbor two concerns about whether the class actions were moot at the time of certification. First, as the plurality recognizes, class actions are ordinarily "moot if no named class representative with an unexpired claim remain[s] at the time of class certification." *United States* v. *Sanchez-Gomez*, 584 U. S. 381, 386 (2018); *ante*, at 403. At the time of class certification, all six of the named plaintiffs had received bond hearings or cancellation of removal. As I understand the plaintiffs' arguments, that was the full relief that they sought: "individualized bond hearings where they may attempt to prove that their release would not create a risk of flight or a danger to the public." Motion for Class Certification in *Preap* v. *Beers*, No. 4:13–cv–5754 (ND Cal.), Doc. 8, p. 8; see Complaint for Injunctive and Declaratory Relief in *Preap*, *supra*, Doc. 1, p. 3 (seeking "immediate individualized bond hearings"); First Amended Class Action Complaint in *Khoury* v. *Asher*, No. 2:13–cv–1367 (WD Wash.), Doc. 19, p. 13 (requesting relief of "individualized bond hearings to all Plaintiffs"). The plurality concludes that

some of the named plaintiffs still faced the threat of rearrest and mandatory detention at the time of class certification because the bond hearings that they received were provided as part of a preliminary injunction in a separate case that was later dissolved. But whether the plaintiffs actually faced that threat has not been addressed by the parties, and I question whether this future contingency was sufficiently imminent to support Article III jurisdiction.

If the threat of rearrest and mandatory detention was too speculative to support jurisdiction, I disagree with the plurality that our jurisdiction would be saved by our precedent on transitory claims. *Ante*, at 403–404. We have held that a court has Article III jurisdiction to certify a class action when the named plaintiffs' claims have become moot if the claim is "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 399 (1980). The "inherently transitory" exception is measured from the time that the complaint is filed to the court's ruling on the motion for class certification. See *Genesis HealthCare Corp.* v. *Symczyk*, 569 U. S. 66, 75–77 (2013). In other words, the named plaintiff's standing in a class action need not exist throughout the lifecycle of the entire lawsuit. Here, Members of the Court have recognized that aliens are held, on average, for one year, and sometimes longer. See *Jennings*, 583 U. S., at 328 (BREYER, J., dissenting) (noting that detention for aliens is "often lengthy," sometimes lasting years). I am not persuaded that the plaintiffs' claims are so "inherently transitory" as to preclude a ruling on class certification, especially since both District Courts certified the classes here within a year of the filing of the complaints. Cf. *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 47, 52 (1991) (finding jurisdiction over a class action that challenged a county's failure to provide

"prompt" probable-cause hearings within the 48-hour window for arraignments, as required by state law).

* * *

Because three statutes deprive courts of jurisdiction over respondents' claims, I would have vacated the judgments below and remanded with instructions to dismiss the cases for lack of jurisdiction. But because the Court has held otherwise and I agree with the Court's disposition of the merits, I concur in all but Parts II and III–B–2 of its opinion.

Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, dissenting.

A provision of the Immigration and Nationality Act, 8 U. S. C. § 1226(c), focuses upon potentially deportable noncitizens who have committed certain offenses or have ties to terrorism. It requires the Secretary of Homeland Security to take those aliens into custody "when . . . released" from prison and to hold them *without a bail hearing* until Government authorities decide whether to deport them. The question is whether this provision limits the class of persons in the "no-bail-hearing" category to only those aliens who were taken into custody "when . . . released" from prison, or whether it also places in that "no-bail-hearing" category those aliens who were taken into custody years or decades after their release from prison.

The critical statutory language is contained in paragraph (2) of this provision. That paragraph says (with one exception not relevant here) that "an alien described in paragraph (1)" must be held without a bail hearing. Here we must decide what these words mean. Do the words "an alien described in paragraph (1)" refer only to those aliens whom the Secretary, following paragraph (1)'s instructions, has "take[n] into custody . . . when the alien is released" from, say, state or federal prison? Or do these words refer in-

stead to *all* aliens who have *ever* committed one of the offenses listed in paragraph (1), regardless of when these aliens were "released" from prison?

For present purposes, I accept the Court's holding in *Jennings* v. *Rodriguez*, 583 U. S. 281 (2018), that paragraph (2) forbids bail hearings for aliens "described in paragraph (1)." But see *id.*, at 326–327 (BREYER, J., dissenting) (interpreting paragraph (2) as not forbidding bail hearings, as the Constitution likely requires them); *id.*, at 312 (majority opinion) (declining to reach constitutional question). Here, however, the Court goes much further. The majority concludes that paragraph (2) forbids bail hearings for aliens regardless of whether they are taken into custody "when . . . released" from prison. Under the majority's view, the statute for bids bail hearings even for aliens whom the Secretary has detained years or decades after their release from prison.

The language of the statute will not bear the broad interpretation the majority now adopts. Rather, the ordinary meaning of the statute's language, the statute's structure, and relevant canons of interpretation all argue convincingly to the contrary. I respectfully dissent.

I

A

The relevant statute, 8 U. S. C. § 1226, is entitled "Apprehension and detention of aliens." See Appendix A, *infra*. Its first subsection, subsection (a), is entitled "Arrest, detention, and release." Subsection (a) sets forth the background rule. It gives the Secretary of Homeland Security (formerly the Attorney General) the authority to "arres[t] and detai[n]" an "alien . . . pending a decision on whether the alien is to be removed from the United States." § 1226(a). See *ante*, at 397, n. 2. It adds that the Secretary "may release the alien" on "bond" or "conditional parole." § 1226(a)(2). Federal regulations provide that a person detained under this sub-

section must receive a bail hearing. 8 CFR §§ 236.1(d)(1), 1236.1(d)(1) (2018). With respect to release, however, subsection (a) adds the words "[e]xcept as provided in subsection (c)." 8 U. S. C. § 1226(a).

The subsection containing the exception to which (a) refers—namely, subsection (c)—is entitled "Detention of criminal aliens." It consists of two paragraphs.

Paragraph (1), entitled "Custody," says that the Secretary "shall take into custody any alien who" is "inadmissible" or "deportable" (by reason of having committed certain offenses or having ties to terrorism) "*when the alien is released*," presumably from local, state, or federal criminal custody. § 1226(c)(1) (emphasis added). Because the relevant offenses are listed in four subparagraphs headed by the letters "A," "B," "C," and "D," I shall refer to the relevant aliens as "ABCD" aliens. Thus, for present purposes, paragraph (1) says that the Secretary "shall take into custody any" ABCD alien "when the alien is released" from criminal custody.

Paragraph (2), entitled "Release," says that the Secretary "may release *an alien described in paragraph (1)* only if" the alien falls within a special category—not relevant here—related to witness protection. § 1226(c)(2) (emphasis added). We held last Term in *Jennings* that paragraph (2) forbids a bail hearing for "an alien described in paragraph (1)" unless the witness protection exception applies. 583 U. S., at 303–306 (majority opinion).

Here we focus on the meaning of a key phrase in paragraph (2): "an alien described in paragraph (1)." This is the phrase that identifies the aliens to whom paragraph (2) (and its "no-bail-hearing" requirement) applies. Does paragraph (1) "describ[e]" *all* ABCD aliens, even those whom the Secretary has "take[n] into custody" many years after their release from prison? Or does it "describ[e]" only those aliens whom the Secretary has "take[n] into custody . . . when the alien [was] released" from prison?

B

The issue may sound technical. But it is extremely important. That is because the Government's reading of the statute—namely, that paragraph (2) forbids bail hearings for all ABCD aliens regardless of whether they were detained "when . . . released" from criminal custody—would significantly expand the Secretary's authority to deny bail hearings. Under the Government's view, the aliens subject to detention without a bail hearing may have been released from criminal custody years earlier, and may have established families and put down roots in a community. These aliens may then be detained for months, sometimes years, without the possibility of release; they may have been convicted of only minor crimes—for example, minor drug offenses, or crimes of "moral turpitude" such as illegally downloading music or possessing stolen bus transfers; and they sometimes may be innocent spouses or children of a suspect person. Moreover, for a high percentage of them, it will turn out after months of custody that they will not be removed from the country because they are eligible by statute to receive a form of relief from removal such as cancellation of removal. These are not mere hypotheticals. See Appendix B, *infra*. Thus, in terms of potential consequences and basic American legal traditions, see *infra*, at 437–438, the question before us is not a "narrow" one, *ante*, at 421 (KAVANAUGH, J., concurring).

Why would Congress have granted the Secretary such broad authority to deny bail hearings, especially when doing so would run contrary to basic American and common-law traditions? See *Jennings*, *supra*, at 332–334 (BREYER, J., dissenting). The answer is that Congress did not do so. Ordinary tools of statutory interpretation demonstrate that the authority Congress granted to the Secretary is far more limited.

II

The statute's language, its structure, and relevant canons of interpretation make clear that the Secretary cannot hold

an alien without a bail hearing unless the alien is "take[n] into custody . . . when the alien is released" from criminal custody. § 1226(c)(1).

A

Consider the statute's language. Paragraph (1) of subsection (c) provides that the Secretary "shall take into custody" any ABCD alien—that is, any alien who is "inadmissible" or "deportable" under the subparagraphs labeled "A," "B," "C," and "D"—"when the alien is released" from, say, state or federal prison. *Ibid.* Paragraph (2), meanwhile, generally forbids a bail hearing for "an alien described in paragraph (1)." § 1226(c)(2).

The key phrase in paragraph (2) is "an alien *described* in paragraph (1)." As a matter of ordinary meaning and usage, the words "take into custody . . . when the alien is released" in paragraph (1) form part of the *description* of the "alien": An "alien described in paragraph (1)" is an ABCD alien whom the Secretary has "take[n] into custody . . . when the alien is released" from prison.

The majority emphasizes a grammatical point—namely, that ordinarily only adjectives or adjectival phrases "modify" nouns. *Ante*, at 406. But the statute does not use the word "modify." It uses the word "described." While the word "describe" will in some contexts refer only to the words that directly "modify" a noun, normally it has a broader meaning. Compare American Heritage Dictionary 490 (5th ed. 2011) (to "describe" is to "convey an idea or impression of") and Webster's Third New International Dictionary 610 (1986) (to "describe" is to "convey an image or notion of") with P. Peters, The Cambridge Guide to English Usage 355 (2004) (defining a "modifie[r]" as a word that "qualifies" a noun).

The common rules of grammar make the broad scope of the word "described" obvious. They demonstrate that a noun often is "described" by more than just the adjectives that modify it. Consider the following sentence: "The well-behaved child was taken by a generous couple to see *Hamil-*

ton." That sentence, written in the passive voice, describes the "child" not only as "well-behaved" but also as someone "taken by a generous couple to see *Hamilton.*" The description of the child would not differ were we to write the sentence in the active voice: "The generous couple took the well-behaved child to see *Hamilton.*" The action taken by the "generous couple" ("took . . . to see *Hamilton*") still "describes" the "child," even though these words do not "modify" the word "child." That is because a person who has been subjected to an action can be described by that action no less than by an adjective. See Peters, *supra*, at 386 (describing such a person as someone "affected by the action"); B. Garner, The Chicago Guide to Grammar, Usage, and Punctuation 452 (2016) (describing such a person as someone who "is acted on by or receives the action"); see also R. Huddleston & G. Pullum, The Cambridge Grammar of the English Language 1436 (2002) (noting the "large-scale overlap" between adjectives and certain verb forms).

An example illustrates how these principles apply to the statute at issue here. Imagine the following cookbook recipe. Instruction (1) says: "(1) Remove the Angus steak from the grill when the steak is cooked to 120 degrees Fahrenheit." Instruction (4) says: "(4) Let the steak described in Instruction (1) rest for ten minutes and then serve it." What would we say of a chef who grilled an Angus steak to 185 degrees Fahrenheit, served it, and then appealed to these instructions—particularly the word "described" in Instruction (4)—as a justification? That he was not a good cook? That he had an odd sense of humor? Or simply that he did not understand the instructions? The chef would have no good textual defense: The steak "described in Instruction (1)" is not just an "Angus" steak, but an "Angus" steak that must be "remove[d] . . . when the steak is cooked to 120 degrees Fahrenheit." By the same logic, the alien in paragraph (1) is "described" not only by the four clauses—A, B, C, and D—that directly modify the word "alien," but *also* by

the verb ("shall take") and that verb's modifier ("when the alien is released").

The majority argues that "the crucial point" is that the phrase "when the alien is released" plays "no role in identifying for the Secretary *which* aliens she must immediately arrest." *Ante*, at 407. That may be so. But why is that a "crucial point" in the majority's favor? After all, in the example above, the words "[r]emove . . . from the grill when the steak is cooked to 120 degrees Fahrenheit" do not tell our chef what kind of steak to cook in the first place. (The word "Angus" does that.) Even so, those words still "describe" the steak that must be served in Instruction (4). Why? Because by the time our chef gets to Instruction (4), the recipe contemplates that the action in Instruction (1) has been completed. At that point, the "steak described in Instruction (1)" is a steak that has been cooked in the manner mandated by Instruction (1).

The same is true of the two paragraphs before us. The key word "described" appears not in paragraph (1), but in paragraph (2). Paragraph (2) refers back to the entirety of paragraph (1). And because paragraph (2) is the *release* provision, it contemplates that the action mandated by paragraph (1)—namely, detention—has already occurred. Thus, the function of the phrase "an alien described in paragraph (1)" is not to describe who must be detained, but instead to describe who must be denied bail.

In short, the language demonstrates that an alien is "described in paragraph (1)"—and therefore subject to paragraph (2)'s bar on bail hearings—only if the alien is "take[n] into custody . . . when the alien is released."

B

The statute's structure and context support this reading of the phrase "an alien described in paragraph (1)."

First, "Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line." *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 300 (2017).

Congress employed that structure "to make precise cross-references" throughout the immigration code. *Ibid.* As relevant here, in a different detention provision enacted alongside the provision at issue here, Congress said that the Government "may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii)." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 303(b)(3)(B), 110 Stat. 3009–587. Yet Congress did not make such a precise cross-reference in paragraph (2): It did not refer to "an alien described in subparagraphs (A)–(D) of paragraph (1)," as it could have—and would have—done had it intended the majority's narrow interpretation. Instead, it referred to aliens "described" in *the entirety* of paragraph (1).

We usually "presume differences in language like this convey differences in meaning." *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. 79, 86 (2017). The cross-reference to all of paragraph (1) reinforces that "an alien described in paragraph (1)" is not just an ABCD alien, but an ABCD alien whom (in the words of paragraph (1)) the Secretary "take[s] into custody . . . when the alien is released" from criminal confinement.

Second, consider the structural similarity between subsections (a) and (c). See Appendix A, *infra*. The first sentence of subsection (a) sets forth a detention rule: An "alien may be arrested and detained" pending a decision on the alien's removal. 8 U. S. C. § 1226(a). And the second sentence sets forth a release rule that allows for release on bond and parole. *Ibid.* Subsection (c) has a parallel structure. The first sentence (namely, paragraph (1)) says that the Secretary must "take into custody" a subset of those aliens "when the alien is released" from criminal custody. § 1226(c)(1). And the second sentence (namely, paragraph (2)) sets forth the rule that "an alien described in paragraph (1)" generally may not be released. § 1226(c)(2).

It is obvious that the second sentence of (a) applies only to those aliens who are detained following the rule in (a)'s first sentence. Parallel structure suggests that the same is true in (c): The second sentence of (c) applies only to those detained following the rule in (c)'s first sentence. Subsection (a)'s reference to (c) strengthens this structural inference: Subsection (a) says that its release rule applies "[e]xcept as provided in subsection (c)"—that is, except as provided in the *whole* of subsection (c), not simply paragraph (2) or the few lines the majority picks from (c)'s text.

Thus, the release rule in each subsection (the second sentence) applies only if the Secretary complies with the detention rule in that subsection (the first sentence). In light of "the parallel structures of these provisions," it would "flou[t] the text" to find that an alien is subject to (c)'s release rule, which forbids release, without also finding that the alien was detained in accordance with (c)'s detention rule, which requires the alien to be detained "when . . . released." *Chan* v. *Korean Air Lines, Ltd.*, 490 U. S. 122, 132 (1989).

The majority responds that subsections (a) and (c) do not "establis[h] separate sources of arrest and release authority," and that (c) is merely "a limit" on the authority granted by (a). *Ante*, at 409. But even if (c) were treated as a "limit" on the authority granted by (a), the parallel structure of the statute would still point to the same conclusion: The Secretary must comply with the limit on detention in the first sentence of (c) in order to invoke the rule on release in the second sentence of (c).

Third, Congress' enactment of a special "transition" statute strengthens the point. When Congress enacted subsection (c), it recognized that there might be "insufficient detention space" and "personnel" to carry out subsection (c)'s requirements. IIRIRA, § 303(b)(2), 110 Stat. 3009–586. It therefore authorized the Government to delay implementa-

tion of subsection (c)—initially for one year, then for a second year. *Ibid.*

If the majority were correct that the "when . . . released" provision does not set a time limit on the Secretary's authority to deny bail hearings, then a special transition statute delaying implementation for one year would have been unnecessary. To avoid overcrowding, the Government simply could have delayed arresting aliens for 1, 2, 5, or 10 years, as the majority believes it can do, and then deny them bail hearings. What need for a 1-year transition period? The majority responds that the transition statute still served a purpose: to "dela[y] the onset of the Secretary's obligation to begin making arrests." *Ante,* at 415. But that just raises the question: Why would Congress have needed to "dela[y] the onset of the Secretary's obligation" if it thought that the Secretary could detain aliens without a bail hearing after a year-long delay? The majority offers no good answer. The transition statute therefore strongly suggests that Congress viewed the "when . . . released" provision as a constraint on the Secretary's authority to deny a bail hearing.

The transition statute also supports this conclusion in another respect: It demonstrates that Congress anticipated that subsection (c) would apply only to aliens "released" from state or federal prison. As noted, clauses A, B, C, and D in paragraph (1) cover some aliens who have never been in criminal custody. *Supra,* at 430. Even the majority acknowledges that it would be bizarre if these aliens could be detained without a bail hearing. *Ante,* at 416. The transition statute confirms as much: It indicates that "the provisions of [subsection (c)] shall apply to *individuals released* after" the transition period concludes. IIRIRA, § 303(b)(2), 110 Stat. 3009–586 (emphasis added). From this it follows that Congress saw paragraph (2) as forbidding bail hearings only for aliens who have been "released." That, however, can be true only if the "when . . . released" provision limits the class of aliens subject to paragraph (2)'s "no-bail-hearing" require-

ment. The majority's contrary reading, under which paragraph (2) applies "regardless of . . . whether the alien was released from criminal custody," *ante*, at 418, conflicts with how Congress itself described the scope of subsection (c) when it enacted the statute.

C

Even if statutory text and structure were not enough to resolve these cases, the Government's reading would fail for another reason. A well-established canon of statutory interpretation provides that, "if fairly possible," a statute must be construed "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) (using word "serious" instead of "grave"). The Government's reading of the statute, which the majority adopts, construes the statute in a way that creates serious constitutional problems. That reading would give the Secretary authority to arrest and detain aliens years after they have committed a minor crime and then hold them without a bail hearing for months or years. This possibility is not simply theoretical. See Appendix B, *infra*.

In *Jennings*, I explained why I believe the practice of indefinite detention without a bail hearing likely deprives a "person" of his or her "liberty . . . without due process of law." U. S. Const., Amdt. 5. See 583 U. S., at 330 (dissenting opinion). This practice runs counter to "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of" the Founders' "ancestors." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). It runs counter to practices well established at the time of the American Revolution. *Jennings*, *supra*, at 333–334. And it runs counter to common sense: Why would the law grant a bail hearing to

a person accused of murder but deny it to a person who many years before committed a crime perhaps no greater than possessing a stolen bus transfer? See Appendix B, *infra.*

I explained much of the constitutional problem in my dissent in *Jennings.* Rather than repeat what I wrote there, I refer the reader to that opinion. See *Jennings, supra,* at 326. I add only the obvious point that a bail hearing does not mean release on bail. It simply permits the person held to demonstrate that, if released, he will neither run away nor pose a threat. It is especially anomalous to take this opportunity away from an alien who committed a crime many years before and has since reformed, living productively in a community.

The majority's reading also creates other anomalies. As I have said, by permitting the Secretary to hold aliens without a bail hearing even if they were not detained "when . . . released," the majority's reading would allow the Secretary to hold indefinitely without bail those who have never been to prison and who received only a fine or probation as punishment. *Supra,* at 430, 436–437. See, *e. g.,* § 1226(c)(1)(A) (incorporating § 1182(a)(2), which covers controlled substance offenses for which the maximum penalty exceeds one year); Brief for Advancement Project et al. as *Amici Curiae* 19, 24, 29 (describing examples). That fact simply aggravates the constitutional problem.

III

Although the Court of Appeals correctly concluded that paragraph (2)'s prohibition on release applies only to an alien whom the Secretary "take[s] into custody . . . when the alien is released" from criminal custody, it also held that the phrase "when the alien is released" means that the Secretary must grant a bail hearing to any alien who is not " 'immediately detained' when released from criminal custody." *Preap* v. *Johnson,* 831 F. 3d 1193, 1207 (CA9 2016). I disagree with the Court of Appeals as to the meaning of the phrase "when the alien is released."

A

As an initial matter, the phrase "when the alien is released" imposes an enforceable statutory deadline. I cannot agree with JUSTICE ALITO, who writes for a plurality of the Court on this point, that our cases holding certain statutory deadlines unenforceable are applicable here. *Ante*, at 411–412. See, *e. g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U. S. 149, 152 (2003) (holding that the Government's untimeliness did not bar it from taking action beyond the statutory deadline); *United States* v. *Montalvo-Murillo*, 495 U. S. 711, 713–714 (1990) (holding that a provision requiring a detention hearing to " 'be held immediately' " did not bar detention in the event of a late hearing); *Brock* v. *Pierce County*, 476 U. S. 253, 266 (1986) (holding that the Government's failure to observe a 120-day statutory deadline did not deprive it of authority under the statute).

I disagree with the plurality on this point because our case law makes clear that a statutory deadline against the Government must be enforced at least in contexts where "other part[s]" of the relevant statutes indicate that the time limit must be enforced, *Montalvo-Murillo*, *supra*, at 717; see also *Barnhart*, *supra*, at 161, 163; *Dolan* v. *United States*, 560 U. S. 605, 613 (2010); where the statute " 'specif[ies] a consequence for noncompliance' " with the time limit, *Barnhart*, *supra*, at 159 (quoting *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 63 (1993)); or where the harms caused by the Government's delay are likely to be serious, see *Dolan*, *supra*, at 615–616; *Montalvo-Murillo*, *supra*, at 719–720.

Here, the special transition statute Congress enacted alongside subsection (c) makes clear that Congress expected that the mandate that an alien be detained "when . . . released" would be enforceable. Congress neither wished for nor expected the Secretary to detain aliens more than a year after their release from criminal custody. IIRIRA, § 303(b)(2), 110 Stat. 3009–586. Why else would Congress

have enacted a statute permitting the Government, due to "insufficient detention space and Immigration and Naturalization Service personnel," to delay implementation of the entirety of subsection (c) for one year? *Ibid.* As I have said, had Congress read the phrase "when the alien is released" as the plurality now reads it, the Government could have delayed implementation for as long as it liked without the need for any transition statute. *Supra,* at 435–436. The transition statute demonstrates that Congress viewed the phrase "when the alien is released" as imposing a deadline. Based on the transition statute, the Secretary may not delay detention under subsection (c) for longer than one year.

Moreover, the statute does " 'specify a consequence' " for the Secretary's failure to detain an alien "when the alien is released." *Barnhart*, *supra,* at 159 (quoting *James Daniel Good*, *supra,* at 63). In that case, subsection (c) will not apply, and the Secretary must fall back on subsection (a), the default detention and release provision. Critically, subsection (a) does not guarantee release. Rather, it leaves much to the Government's judgment: By regulation, aliens who are subject to subsection (a)'s default detention and release rules will simply receive a hearing at which they can attempt to demonstrate that, if released, they will not pose a risk of flight or a threat to the community. 8 CFR §§ 236.1(d)(1), 1236.1(d)(1).

Finally, I have already mentioned the many harms that could befall aliens whom the Secretary does not detain "when . . . released." They range from long periods of detention, to detention years or even decades after the alien's release from criminal custody, to the risk of splitting up families that are long established in a community. *Supra,* at 430. Thus, unlike some of our prior cases, the harm from a missed deadline hardly can be described as "insignificant." *Montalvo-Murillo*, *supra,* at 719.

The plurality objects that "Congress could not have meant for judges to 'enforce' " the mandatory detention require-

ment "in case of delay by—of all things—forbidding its execution." *Ante*, at 412–413. But treating the "when the alien is released" clause as an enforceable limit does not prohibit the Secretary from detaining the aliens that subsection (c) requires her to detain. Rather, the Secretary's failure to comply with the "when the alien is released" clause carries only one consequence: The Secretary cannot deny a bail hearing.

B

So what does the phrase "when the alien is released" mean? The word "when" can, but does not always, mean "[a]t the time that," American Heritage Dictionary, at 1971, or "just after the moment that," Webster's Third New International Dictionary, at 2602. But the word only "[s]ometimes impl[ies] suddenness." 20 Oxford English Dictionary 209 (2d ed. 1989). It often admits of at least some temporal delay. A child who is told to "mow the lawn, please, when you get home from school" likely does not have to mow the lawn the second she comes into the house. She can do a few other things first.

Mindful of "the greater immigration-related expertise of the Executive Branch" and "the serious administrative needs and concerns inherent in the necessarily extensive [Government] efforts to enforce this complex statute," I would interpret the word "when" in the same manner as we interpreted other parts of this statute in *Zadvydas* v. *Davis*, 533 U. S. 678, 700 (2001). The words "when the alien is released" require the Secretary to detain aliens under subsection (c) within a reasonable time after their release from criminal custody—presumptively no more than six months. If the Secretary does not do so, she must grant a bail hearing. This presumptive 6-month limit is consistent with how long the Government can detain certain aliens while they are awaiting removal from the country. *Id.*, at 682, 701 (interpreting a different provision, § 1231(a)(6)). To insist upon similar treatment in this context would give the Government

sufficient time to detain aliens following their release from local, state, or federal criminal custody. It would also ensure that the Government does not fall outside the 1-year maximum dictated by the transition statute. See *supra*, at 435–436, 439–440.

IV

To reiterate: The question before us is not "narrow." *Ante,* at 421 (KAVANAUGH, J., concurring). See *supra,* at 430. That is because we cannot interpret the words of this specific statute without also considering basic promises that America's legal system has long made to all persons. In deciphering the intent of the Congress that wrote this statute, we must decide—in the face of what is, at worst, linguistic ambiguity—whether Congress intended that persons who have long since paid their debt to society would be deprived of their liberty for months or years without the possibility of bail. We cannot decide that question without bearing in mind basic American legal values: the Government's duty not to deprive any "person" of "liberty" without "due process of law," U. S. Const., Amdt. 5; the Nation's original commitment to protect the "unalienable" right to "Liberty," Declaration of Independence ¶2; and, less abstractly and more directly, the longstanding right of virtually all persons to receive a bail hearing.

I would have thought that Congress meant to adhere to these values and did not intend to allow the Government to apprehend persons years after their release from prison and hold them indefinitely without a bail hearing. In my view, the Court should interpret the words of this statute to reflect Congress' likely intent, an intent that is consistent with our basic values. To speak more technically, I believe that aliens are subject to paragraph (2)'s bar on release only if they are detained "when . . . released" from criminal custody. To speak less technically, I fear that the Court's contrary interpretation will work serious harm to the principles for which American law has long stood.

For these reasons, with respect, I dissent.

APPENDIXES

A

8 U. S. C. § 1226. “Apprehension and detention of aliens

“(a) Arrest, detention, and release

“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

“(1) may continue to detain the arrested alien; and

“(2) may release the alien on—

“(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

“(B) conditional parole;

. . . . .

“(c) Detention of criminal aliens

“(1) Custody

“The Attorney General *shall take into custody* any alien who—

“(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

“(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

“(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or

“(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

“*when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

“(2) Release

"The Attorney General may release *an alien described in paragraph (1)* only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien." (Emphasis added.)

B

The following citations support the claims made *supra*, at 430, regarding the breadth of the Government's reading of the statute. I do not intend to suggest that these citations provide a complete description of the many aliens who are detained without a bail hearing under 8 U. S. C. § 1226(c). See *Jennings* v. *Rodriguez*, 583 U. S. 281, 328 (2018) (Breyer, J., dissenting) (indicating that thousands of aliens are eligible to be detained under subsection (c), that many are held for six months or longer, and that "[n]early 40% of those who have served criminal sentences receive relief from removal"); *Preap* v. *Johnson*, 831 F. 3d 1193, 1197 (CA9 2016) (noting that one respondent was detained 11 years after his release from prison); Brief for Advancement Project et al. as *Amici Curiae* 12 (presenting data from a recent lawsuit in Massachusetts indicating that more than one in five aliens detained under subsection (c) were taken into custody more than five years after their release from prison); § 1226(c)(1)(A) (referencing § 1182(a)(2), which includes aliens who have committed federal or state controlled substance offenses for which the maximum term of imprisonment exceeds one year); § 1226(c)(1)(C) (referencing § 1227(a)(2)(A)(i), which ap-

plies to aliens convicted of certain crimes "involving moral turpitude"); *Hashish* v. *Gonzales*, 442 F. 3d 572, 576 (CA7 2006) (illegally downloading music is a crime of "moral turpitude"); *Michel* v. *INS*, 206 F. 3d 253, 261 (CA2 2000) (possessing stolen bus transfers is a crime of "moral turpitude"); § 1226(c)(1)(D) (referencing § 1182(a)(3)(B), which covers the "spouse or child" of certain aliens engaged in terrorist activity); § 1229b (identifying the requirements for obtaining cancellation of removal).

AIR & LIQUID SYSTEMS CORP. ET AL. *v.* DEVRIES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DEVRIES, DECEASED, ET AL.

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

No. 17–1104. Argued October 10, 2018—Decided March 19, 2019

Petitioners produced equipment for three Navy ships. The equipment required asbestos insulation or asbestos parts to function as intended, but the manufacturers did not always incorporate the asbestos into their products. Instead, the manufacturers delivered much of the equipment to the Navy without asbestos, and the Navy later added the asbestos to the equipment. Two Navy veterans, Kenneth McAfee and John DeVries, were exposed to asbestos on the ships and developed cancer. They and their wives sued the manufacturers, alleging that the asbestos exposure caused the cancer and contending that the manufacturers were negligent in failing to warn about the dangers of asbestos in the integrated products. Raising the "bare-metal defense," the manufacturers argued that they should not be liable for harms caused by later-added third-party parts. The District Court granted summary judgment to the manufacturers, but the Third Circuit, adopting a foreseeability approach, vacated and remanded.

Held: In the maritime tort context, a product manufacturer has a duty to warn when its product requires incorporation of a part, the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and the manufacturer has no reason to believe that the product's users will realize that danger. Pp. 451–458.

(a) Tort law imposes a duty to exercise reasonable care on those whose conduct presents a risk of harm to others. That includes a duty to warn when the manufacturer "knows or has reason to know" that its product "is or is likely to be dangerous for the use for which it is supplied" and "has no reason to believe" that the product's users will realize that danger. 2 Restatement (Second) of Torts § 388. Three approaches have emerged on how to apply that "duty to warn" principle when a manufacturer's product requires later incorporation of a dangerous part in order for the integrated product to function as intended. The first—the foreseeability rule—provides that a manufacturer may be liable when it was foreseeable that its product would be used with

another product or part, even if the manufacturer's product did not require use or incorporation of that other product or part. The second—the bare-metal defense—provides that if a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product—even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses. A third approach, falling between those two, imposes on the manufacturer a duty to warn when its product requires incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses.

The third approach is most appropriate for this maritime context. The foreseeability rule would sweep too broadly, imposing a difficult and costly burden on manufacturers, while simultaneously overwarning users. The bare-metal defense ultimately goes too far in the other direction. After all, a manufacturer that supplies a product that is dangerous in and of itself and a manufacturer that supplies a product that requires incorporation of a part that the manufacturer knows or has reason to know is likely to make the integrated product dangerous for its intended uses both "kno[w] or ha[ve] reason to know" that the product "is or is likely to be dangerous for the use for which it is supplied." And in the latter case, the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger, because the product manufacturer knows the nature of the ultimate integrated product. Requiring a warning in these circumstances will not impose a significant burden on manufacturers, who already have a duty to warn of the dangers of their own products. Nor will it result in substantial uncertainty about when product manufacturers must provide warnings, because the rule requires a manufacturer to warn only when its product *requires* a part in order for the integrated product to function as intended. And this Court is unaware of any substantial overwarning problems in those jurisdictions that have adopted the approach taken here. Requiring the product manufacturer to warn when its product requires incorporation of a part that makes the integrated product dangerous for its intended uses is especially appropriate in the context of maritime law, which has always recognized a " 'special solicitude for the welfare' " of sailors. *American Export Lines, Inc.* v. *Alvez*, 446 U. S. 274, 285. Pp. 451–457.

(b) The maritime tort rule adopted here encompasses all of the following circumstances, so long as the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its in-

tended uses, and the manufacturer has no reason to believe that the product's users will realize that danger: (i) a manufacturer directs that the part be incorporated; (ii) a manufacturer itself makes the product with a part that the manufacturer knows will require replacement with a similar part; or (iii) a product would be useless without the part. P. 457.

873 F. 3d 232, affirmed.

Kavanaugh, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Gorsuch, J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined, *post*, p. 458.

Shay Dvoretzky argued the cause for petitioners. With him on the briefs were *Jeffrey R. Johnson*, *Benjamin M. Flowers*, *Christopher G. Conley*, *Brady L. Green*, *Christopher J. Keale*, *Afigo I. Okpewho-Fadahunsi*, and *John J. Hare*. *Carter G. Phillips*, *Paul J. Zidlicky*, *William R. Levi*, *Timothy E. Kapshandy*, and *Tobias S. Loss-Eaton* filed briefs for General Electric as respondent under this Court's Rule 12.6 in support of petitioners.

Thomas C. Goldstein argued the cause for respondents. On the brief were *Richard P. Myers*, *Robert E. Paul*, *Alan I. Reich*, *Denyse F. Clancy*, *Jonathan Ruckdeschel*, and *William W. C. Harty*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Jeffrey S. Bucholtz*, *Justin A. Torres*, and *Peter Tolsdorf*; for the Coalition for Litigation Justice, Inc., et al. by *Mark A. Behrens*, *Christopher E. Appel*, *Karen R. Harned*, and *Elizabeth Milito*; and for the Product Liability Advisory Council, Inc., by *James M. Beck*.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *Jeffrey R. White* and *Elise Sanguinetti*; for Multiple Veterans Organizations by *Christian Hartley*; for Port Ministries International by *Michael F. Sturley* and *Charles S. Siegel*; and for Evelyn Hutchins et al. by *Alan Kellman*, *Lisa Shirley*, and *Charles W. Branham III*.

Nevin M. Gewertz and *Richard A. Epstein, pro se*, filed a brief for Richard A. Epstein et al. as *amicus curiae*.

Justice Kavanaugh delivered the opinion of the Court.

In maritime tort cases, we act as a common-law court, subject to any controlling statutes enacted by Congress. See *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 507–508 (2008). This maritime tort case raises a question about the scope of a manufacturer's duty to warn. The manufacturers here produced equipment such as pumps, blowers, and turbines for three Navy ships. The equipment required asbestos insulation or asbestos parts in order to function as intended. When used on the ships, the equipment released asbestos fibers into the air. Two Navy veterans who were exposed to asbestos on the ships developed cancer and later died. The veterans' families sued the equipment manufacturers, claiming that the manufacturers were negligent in failing to warn of the dangers of asbestos.

The plaintiffs contend that a manufacturer has a duty to warn when the manufacturer's product requires incorporation of a part (here, asbestos) that the manufacturer knows is likely to make the integrated product dangerous for its intended uses. The manufacturers respond that they had no duty to warn because they did not themselves incorporate the asbestos into their equipment; rather, the Navy added the asbestos to the equipment after the equipment was already on board the ships.

We agree with the plaintiffs. In the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger. The District Court did not apply that test when granting summary judgment to the defendant manufacturers. Although we do not agree with all of the reasoning of the U. S. Court of Appeals for the Third Circuit, we affirm its judgment requiring the District Court

to reconsider its prior grants of summary judgment to the defendant manufacturers.

I

Kenneth McAfee served in the U. S. Navy for more than 20 years. As relevant here, McAfee worked on the U. S. S. *Wanamassa* from 1977 to 1980 and then on the U. S. S. *Commodore* from 1982 to 1986. John DeVries served in the U. S. Navy from 1957 to 1960. He worked on the U. S. S. *Turner*.

Those ships were outfitted with equipment such as pumps, blowers, and turbines. That equipment required asbestos insulation or asbestos parts in order to function as intended. When used as intended, that equipment can cause the release of asbestos fibers into the air. If inhaled or ingested, those fibers may cause various illnesses.

Five businesses—Air and Liquid Systems, CBS, Foster Wheeler, Ingersoll Rand, and General Electric—produced some of the equipment that was used on the ships. Although the equipment required asbestos insulation or asbestos parts in order to function as intended, those businesses did not always incorporate the asbestos into their products. Instead, the businesses delivered much of the equipment to the Navy without asbestos. The equipment was delivered in a condition known as "bare-metal." In those situations, the Navy later added the asbestos to the equipment.[1]

McAfee and DeVries allege that their exposure to the asbestos caused them to develop cancer. They and their wives sued the equipment manufacturers in Pennsylvania state court. (McAfee and DeVries later died during the course of the ongoing litigation.) The plaintiffs did not sue the Navy because they apparently believed the Navy was immune. See *Feres* v. *United States*, 340 U. S. 135 (1950). The plaintiffs also could not recover much from the manufacturers of

[1] Sometimes, the equipment manufacturers themselves added the asbestos to the equipment. Even in those situations, however, the Navy later replaced the asbestos parts with third-party asbestos parts.

the asbestos insulation and asbestos parts because those manufacturers had gone bankrupt. As to the manufacturers of the equipment—such as the pumps, blowers, and turbines—the plaintiffs claimed that those manufacturers negligently failed to warn them of the dangers of asbestos in the integrated products. If the manufacturers had provided warnings, the workers on the ships presumably could have worn respiratory masks and thereby avoided the danger.

Invoking federal maritime jurisdiction, the manufacturers removed the cases to federal court. The manufacturers then moved for summary judgment on the ground that manufacturers should not be liable for harms caused by later-added third-party parts. That defense is known as the "bare-metal defense."

The District Court granted the manufacturers' motions for summary judgment. The U. S. Court of Appeals for the Third Circuit vacated and remanded. *In re Asbestos Prods. Liability Litigation*, 873 F. 3d 232, 241 (2017). The Third Circuit held that "a manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials" if the manufacturer could foresee that the product would be used with the later-added asbestos-containing materials. *Id.*, at 240.

We granted certiorari to resolve a disagreement among the Courts of Appeals about the validity of the bare-metal defense under maritime law. 584 U. S. 976 (2018). Compare 873 F. 3d 232 (case below), with *Lindstrom* v. *A-C Prod. Liability Trust*, 424 F. 3d 488 (CA6 2005).

II

Article III of the Constitution grants the federal courts jurisdiction over maritime cases. Under 28 U. S. C. § 1333, the federal courts have "original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

When a federal court decides a maritime case, it acts as a federal "common law court," much as state courts do in state common-law cases. *Exxon Shipping Co.*, 554 U. S., at 507. Subject to direction from Congress, the federal courts fashion federal maritime law. See *id.*, at 508, n. 21; *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 27 (1990); *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975); *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U. S. 21, 42–44 (1934). In formulating federal maritime law, the federal courts may examine, among other sources, judicial opinions, legislation, treatises, and scholarly writings. See *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 839 (1996); *East River S. S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858, 864 (1986).

This is a maritime tort case. The plaintiffs allege that the defendant equipment manufacturers were negligent in failing to warn about the dangers of asbestos. "The general maritime law has recognized the tort of negligence for more than a century . . . ." *Norfolk Shipbuilding & Drydock Corp.* v. *Garris*, 532 U. S. 811, 820 (2001); see also *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 631–632 (1959). Maritime law has likewise recognized common-law principles of products liability for decades. See *East River S. S. Corp.*, 476 U. S., at 865.

In this negligence case, we must decide whether a manufacturer has a duty to warn when the manufacturer's product requires later incorporation of a dangerous part—here, asbestos—in order for the integrated product to function as intended.

We start with basic tort-law principles. Tort law imposes "a duty to exercise reasonable care" on those whose conduct presents a risk of harm to others. 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7, p. 77 (2005). For the manufacturer of a product, the general duty of care includes a duty to warn when the manufacturer "knows or has reason to know" that its product "is or is likely to be dangerous for the use for which it is supplied" and the

manufacturer "has no reason to believe" that the product's users will realize that danger. 2 Restatement (Second) of Torts § 388, p. 301 (1963–1964).

In tort cases, the federal and state courts have not reached consensus on how to apply that general tort-law "duty to warn" principle when the manufacturer's product requires later incorporation of a dangerous part in order for the integrated product to function as intended. Three approaches have emerged.

The first approach is the more plaintiff-friendly foreseeability rule that the Third Circuit adopted in this case: A manufacturer may be liable when it was foreseeable that the manufacturer's product would be used with another product or part, even if the manufacturer's product did not require use or incorporation of that other product or part. See, *e. g.*, 873 F. 3d, at 240; *Kochera* v. *Foster Wheeler, LLC*, 2015 WL 5584749, *4 (SD Ill., Sept. 23, 2015); *Chicano* v. *General Elec. Co.*, 2004 WL 2250990, *9 (ED Pa., Oct. 5, 2004); *McKenzie* v. *A. W. Chesterson Co.*, 277 Ore. App. 728, 749–750, 373 P. 3d 150, 162 (2016).

The second approach is the more defendant-friendly bare-metal defense that the manufacturers urge here: If a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product—even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses. See, *e. g.*, *Lindstrom*, 424 F. 3d, at 492, 495–497; *Evans* v. *CBS Corp.*, 230 F. Supp. 3d 397, 403–405 (Del. 2017); *Cabasug* v. *Crane Co.*, 989 F. Supp. 2d 1027, 1041 (Haw. 2013).

The third approach falls between those two approaches. Under the third approach, foreseeability that the product may be used with another product or part that is likely to be dangerous is not enough to trigger a duty to warn. But a manufacturer does have a duty to warn when its product

requires incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses. Under that approach, the manufacturer may be liable even when the manufacturer does not itself incorporate the required part into the product. See, *e. g.*, *Quirin* v. *Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 769–770 (ND Ill. 2014); *In re New York City Asbestos Litigation*, 27 N. Y. 3d 765, 793–794, 59 N. E. 3d 458, 474 (2016); *May* v. *Air & Liquid Systems Corp.*, 446 Md. 1, 29, 129 A. 3d 984, 1000 (2015).

We conclude that the third approach is the most appropriate for this maritime tort context.

To begin, we agree with the manufacturers that a rule of mere foreseeability would sweep too broadly. See generally 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7, Comment *j*, at 82; 2 Restatement (Second) of Torts § 395, Comment *j*, at 330. Many products can foreseeably be used in numerous ways with numerous other products and parts. Requiring a product manufacturer to imagine and warn about all of those possible uses—with massive liability looming for failure to correctly predict how its product might be used with other products or parts—would impose a difficult and costly burden on manufacturers, while simultaneously overwarning users. In light of that uncertainty and unfairness, we reject the foreseeability approach for this maritime context.

That said, we agree with the plaintiffs that the bare-metal defense ultimately goes too far in the other direction. In urging the bare-metal defense, the manufacturers contend that a business generally has "no duty" to "control the conduct of a third person as to prevent him from causing physical harm to another." *Id.*, § 315, at 122. That is true, but it is also beside the point here. After all, when a manufacturer's product is dangerous in and of itself, the manufacturer "knows or has reason to know" that the product "is or is likely to be dangerous for the use for which it is supplied."

Id., § 388, at 301. The same holds true, we conclude, when the manufacturer's product requires incorporation of a part that the manufacturer knows or has reason to know is likely to make the integrated product dangerous for its intended uses. As a matter of maritime tort law, we find no persuasive reason to distinguish those two similar situations for purposes of a manufacturer's duty to warn. See Restatement (Third) of Torts: Products Liability § 2, Comment *i*, p. 30 (1997) ("[W]arnings also may be needed to inform users and consumers of nonobvious and not generally known risks that unavoidably inhere in using or consuming the product").

Importantly, the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated product. See generally G. Calabresi, The Costs of Accidents 311–318 (1970). The product manufacturer knows the nature of the ultimate integrated product and is typically more aware of the risks associated with that integrated product. By contrast, a parts manufacturer may be aware only that its part could conceivably be used in any number of ways in any number of products. A parts manufacturer may not always be aware that its part will be used in a way that poses a risk of danger.[2]

To be sure, as the manufacturers correctly point out, issuing a warning costs time and money. But the burden usually is not significant. Manufacturers already have a duty to warn of the dangers of their own products. That duty typically imposes a light burden on manufacturers. See, *e. g.*, *Davis* v. *Wyeth Labs.*, *Inc.*, 399 F. 2d 121, 131 (CA9 1968); *Butler* v. *L. Sonneborn Sons*, *Inc.*, 296 F. 2d 623, 625–626 (CA2 1961); *Ross Labs.* v. *Thies*, 725 P. 2d 1076, 1079 (Alaska 1986); *Moran* v. *Faberge*, *Inc.*, 273 Md. 538, 543–544, 332 A. 2d 11, 15 (1975). Requiring a manufacturer to also warn when the manufacturer knows or has reason to know that a required later-added part is likely to make the inte-

[2] We do not rule out the possibility that, in certain circumstances, the parts manufacturer may also have a duty to warn.

grated product dangerous for its intended uses should not meaningfully add to that burden.

The manufacturers also contend that requiring a warning even when they have not themselves incorporated the part into the product will lead to uncertainty about when product manufacturers must provide warnings. But the manufacturers have not pointed to any substantial confusion in those jurisdictions that have adopted this approach. And the rule that we adopt here is tightly cabined. The rule does not require that manufacturers warn in cases of mere foreseeability. The rule requires that manufacturers warn only when their product *requires* a part in order for the integrated product to function as intended.

The manufacturers further assert that requiring a warning in these circumstances will lead to excessive warning of consumers. Again, however, we are not aware of substantial overwarning problems in those jurisdictions that have adopted this approach. And because the rule we adopt here applies only in certain narrow circumstances, it will not require a plethora of new warnings.

Requiring the product manufacturer to warn when its product requires incorporation of a part that makes the integrated product dangerous for its intended uses—and not just when the manufacturer itself incorporates the part into the product—is especially appropriate in the maritime context. Maritime law has always recognized a "special solicitude for the welfare" of those who undertake to "venture upon hazardous and unpredictable sea voyages." *American Export Lines, Inc.* v. *Alvez*, 446 U. S. 274, 285 (1980) (internal quotation marks omitted). The plaintiffs in this case are the families of veterans who served in the U. S. Navy. Maritime law's longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances. See *Yamaha Motor Corp., U. S. A.* v. *Calhoun*, 516 U. S. 199, 213 (1996); *Miles*, 498 U. S., at 36; *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 387 (1970).

For those reasons, we conclude as follows: In the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger. We do not purport to define the proper tort rule outside of the maritime context.

One final point for clarity: Courts have determined that this rule applies in certain related situations, including when: (i) a manufacturer directs that the part be incorporated, see, *e. g.*, *Bell* v. *Foster Wheeler Energy Corp.*, 2016 WL 5780104, *6–*7 (ED La., Oct. 4, 2016); (ii) a manufacturer itself makes the product with a part that the manufacturer knows will require replacement with a similar part, see, *e. g.*, *Chesher* v. *3M Co.*, 234 F. Supp. 3d 693, 713–714 (SC 2017); *Quirin*, 17 F. Supp. 3d, at 769–770; *May*, 446 Md., at 29, 129 A. 3d, at 1000; or (iii) a product would be useless without the part, see, *e. g.*, *In re New York City Asbestos Litigation*, 27 N. Y. 3d, at 793–794, 59 N. E. 3d, at 474. In all of those situations, courts have said that the product in effect requires the part in order for the integrated product to function as intended. We agree. The maritime tort rule we adopt today therefore encompasses those situations, so long as the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and the manufacturer has no reason to believe that the product's users will realize that danger.

* * *

In the maritime tort context, we hold that a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize

that danger. The District Court should evaluate the evidence under that rule. Although we do not agree with all of the reasoning of the Third Circuit, we affirm its judgment requiring the District Court to reconsider its prior grants of summary judgment to the defendant manufacturers.

It is so ordered.

Justice Gorsuch, with whom Justice Thomas and Justice Alito join, dissenting.

Decades ago, many of the defendants before us sold "bare metal" products to the Navy. Things like the turbines used to propel its ships. Did these manufacturers have to warn users about the dangers of asbestos that *someone else* later chose to add to or wrap around their products as insulation?

Start with a couple of things we can all agree on. First, everyone accepts that, under traditional tort principles, the manufacturers who actually supplied the later-added asbestos had to warn about its known dangers. Second, everyone agrees that the court of appeals erred when it came to analyzing the duties of the bare metal defendants. The court of appeals held that the bare metal manufacturers had a duty to warn because they could have "foreseen" the possibility that others would later use asbestos in conjunction with their products. Today, the Court rightly rejects this "foreseeability" standard, succinctly explaining that "[r]equiring a product manufacturer to imagine and warn about all of those possible uses—with massive liability looming for failure to correctly predict how its product might be used with other products or parts—would impose a difficult and costly burden on manufacturers, while simultaneously overwarning users." *Ante*, at 454.

Our disagreement arises only in what comes next. Immediately after rejecting the court of appeals' approach, the Court proceeds to devise its own way of holding the bare metal manufacturers responsible for later-added asbestos. In the Court's judgment, the bare metal defendants had a

duty to warn about the dangers of asbestos introduced by others so long as they (i) produced a product that "require[d] incorporation of" asbestos, (ii) "kn[ew] or ha[d] reason to know" that the "integrated product" would be dangerous, and (iii) had "no reason to believe" that users would realize that danger. *Ante*, at 457. The Court's new three-part standard surely represents an improvement over the court of appeals' unadorned "foreseeability" offering. But, respectfully, it seems to me to suffer from many of the same defects the Court itself has identified.

In the first place, neither of these standards enjoys meaningful roots in the common law. The common law has long taught that a manufacturer has no "duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products." *Firestone Steel Prods. Co.* v. *Barajas*, 927 S. W. 2d 608, 616 (Tex. 1996). Instead, "the manufacturer's duty is restricted to warnings based on the characteristics of *the manufacturer's own product*." *Powell* v. *Standard Brands Paint Co.*, 166 Cal. App. 3d 357, 364, 212 Cal. Rptr. 395, 398 (1985).[1] It doesn't matter, either, whether a manu-

[1] See also, *e. g.*, *Dreyer* v. *Exel Industries, S. A.*, 326 Fed. Appx. 353, 357–358 (CA6 2009); *Barnes* v. *Kerr Corp.*, 418 F. 3d 583, 590 (CA6 2005); *Reynolds* v. *Bridgestone/Firestone, Inc.*, 989 F. 2d 465, 472 (CA11 1993); *Baughman* v. *General Motors Corp.*, 780 F. 2d 1131, 1133 (CA4 1986); *In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1068 (ND Cal. 2005); *Acoba* v. *General Tire, Inc.*, 92 Haw. 1, 18, 986 P. 2d 288, 305 (1999); *Brown* v. *Drake-Willock Int'l, Ltd.*, 209 Mich. App. 136, 144–146, 530 N. W. 2d 510, 514–515 (1995); *Rastelli* v. *Goodyear Tire & Rubber Co.*, 79 N. Y. 2d 289, 297–298, 591 N. E. 2d 222, 225–226 (1992); *Walton* v. *Harnischfeger*, 796 S. W. 2d 225, 226 (Tex. App. 1990); *Toth* v. *Economy Forms Corp.*, 391 Pa. Super. 383, 388–389, 571 A. 2d 420, 423 (1990); *Mitchell* v. *Sky Climber, Inc.*, 396 Mass. 629, 631–632, 487 N. E. 2d 1374, 1376 (1986); *Johnson* v. *Jones-Blair Paint Co.*, 607 S. W. 2d 305, 306 (Tex. Civ. App. 1980); 63A Am. Jur. 2d, Products Liability § 1027, p. 247 (2010); Behrens & Horn, Liability for Asbestos-Containing Connected or Replacement Parts Made by Third-Parties: Courts Are Properly Rejecting This Form of Guilt by Association, 37 Am. J. Trial Advocacy 489, 494–497 (2014).

facturer's product happens to be (or is designed to be) "integrated" with another's. Instead, it is black-letter law that the supplier of a product generally must warn about only those risks associated with the product itself, not those associated with the "products and systems into which [it later may be] integrated." Restatement (Third) of Torts: Products Liability § 5, Comment *b*, p. 132 (1997).[2]

More than that, the traditional common law rule still makes the most sense today. The manufacturer of a product is in the best position to understand and warn users about its risks; in the language of law and economics, those who make products are generally the least-cost avoiders of their risks. By placing the duty to warn on a product's manufacturer, we force it to internalize the full cost of any injuries caused by inadequate warnings—and in that way ensure it is fully incentivized to provide adequate warnings. By contrast, we dilute the incentive of a manufacturer to warn about the dangers of its products when we require other people to share the duty to warn and its corresponding costs. See S. Shavell, Economic Analysis of Accident Law 17 (1987); G. Calabresi, The Costs of Accidents 135, and n. 1 (1970); *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 324 (1964).[3]

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[2] See, *e. g.*, *Cipollone* v. *Yale Indus. Prods., Inc.*, 202 F. 3d 376, 379 (CA1 2000); *Crossfield* v. *Quality Control Equip. Co.*, 1 F. 3d 701, 703–704 (CA8 1993); *Childress* v. *Gresen Mfg. Co.*, 888 F. 2d 45, 48–49 (CA6 1989); *Koonce* v. *Quaker Safety Prods. & Mfg. Co.*, 798 F. 2d 700, 715 (CA5 1986).

[3] See also Restatement (Third) of Torts: Products Liability § 5, Comment *a*, p. 131 (1997) ("If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground" that others "utiliz[e] the component in a manner that renders the integrated product defective"); *Edwards* v. *Honeywell, Inc.*, 50 F. 3d 484, 490 (CA7 1995) (placing liability on a defendant who is not "in the best position to prevent a particular class of accidents" may "dilute the incentives of other potential defendants" who should be the first "line of defense"); *National Union Fire Ins. Co. of Pittsburgh* v. *Riggs Nat. Bank of Washington, D. C.*, 5 F. 3d 554, 557 (CADC 1993) (Silberman, J., concurring) ("Placing liability with the least-cost avoider increases the incentive for that party to adopt pre-

The traditional common law rule better accords, too, with consumer expectations. A home chef who buys a butcher's knife may expect to read warnings about the dangers of knives but not about the dangers of undercooked meat. Likewise, a purchaser of gasoline may expect to see warnings at the pump about its flammability but not about the dangers of recklessly driving a car. As the Court today recognizes, encouraging manufacturers to offer warnings about other people's products risks long, duplicative, fine print, and conflicting warnings that will leave consumers less sure about which to take seriously and more likely to disregard them all. In the words of the California Supreme Court, consumer welfare is not well "served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell." *O'Neil* v. *Crane Co.*, 53 Cal. 4th 335, 343, 266 P. 3d 987, 991 (2012); see also *Cotton* v. *Buckeye Gas Prods. Co.*, 840 F. 2d 935, 938 (CADC 1988) ("The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print").

The traditional tort rule bears yet another virtue: It is simple to apply. The traditional rule affords manufacturers fair notice of their legal duties, lets injured consumers know whom to sue, and ensures courts will treat like cases alike. By contrast, when liability depends on the application of opaque or multifactor standards like the one proposed below or the one announced today, "equality of treatment" becomes harder to ensure across cases; "predictability is destroyed" for innovators, investors, and consumers alike; and "judicial courage is impaired" as the ability (and temptation) to fit the law to the case, rather than the case to the law, grows. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989).

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ventive measures" that will "have the greatest marginal effect on preventing the loss").

Just consider some of the uncertainties each part of the Court's new three-part test is sure to invite:

(i) When does a customer's side-by-side use of two products qualify as "incorporation" of the products? Does hanging asbestos on the outside of a boiler count, or must asbestos be placed inside a product? And when is incorporation of a dangerous third-party product "required" as opposed to just optimal or preferred? What if a potential substitute existed, but it was less effective or more costly (surely alternatives to asbestos insulation have existed for a long time)? And what if the third-party product becomes less advantageous over time due to advancing technology (as asbestos did)? When does the defendant's duty to warn end?

(ii) What will qualify as an "integrated product"? In the past, we've suggested that a "product" is whatever assemblage of parts is "placed in the stream of commerce by the manufacturer," and we've stressed the importance of maintaining the "distinction between the components added to a product by a manufacturer before the product's sale . . . and those items added" later by someone else. *Saratoga Fishing Co.* v. *J. M. Martinac & Co.*, 520 U. S. 875, 883–884 (1997). The Court's new standard blurs that distinction, but it is unclear how far it goes. The Court suggests a turbine and separately installed insulation may now qualify as a single "integrated product." But what about other parts connected to the turbine? Does even the propeller qualify as part of the final "integrated product" too, so that its manufacturer also bears a duty to warn about the dangers of asbestos hung around the turbine? For that matter, why isn't the entire ship an "integrated product," with a corresponding duty for all the manufacturers who contributed parts to warn about the dangers of all the other parts? And when exactly is a manufacturer supposed to "know or have reason to know" that

some supplement to its product has now made a resulting "integrated product" dangerous? How much cost and effort must manufacturers expend to discover and understand the risks associated with third-party products others may be "incorporating" with their products? (iii) If a defendant reasonably expects that the manufacturer of a third-party product will comply with its own duty to warn, is that sufficient "reason to believe" that users will "realize" the danger to absolve the defendant of responsibility? Or does a defendant have to assume that the third-party manufacturer will behave negligently in rendering its own warnings? Or that users won't bother to read the warnings others offer? And what if the defendants here understood that the Navy itself would warn sailors about the need for proper handling of asbestos—did they still have to provide their own warnings?[4]

Headscratchers like these are sure to enrich lawyers and entertain law students, but they also promise to leave everyone else wondering about their legal duties, rights, and liabilities.

Nor is this kind of uncertainty costless. Consider what might follow if the Court's standard were widely adopted in tort law. Would a company that sells smartphone cases have to warn about the risk of exposure to cell phone radiation? Would a car maker have to warn about the risks of improperly stored antifreeze? Would a manufacturer of flashlights have to warn about the risks associated with leaking batteries? Would a seller of hot dog buns have to warn about the health risks of consuming processed meat? Just the threat of litigation and liability would force many manufacturers of safe products to spend time and money educat-

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[4] See App. 40 (affidavit of retired Rear Admiral Roger B. Horne stating that "the Navy chose to control and make personnel aware of the hazards of asbestos exposures through . . . military specifications and personnel training").

ing themselves and writing warnings about the dangers of other people's more dangerous products. All this would, as well, threaten to leave consumers worse off. After all, when we effectively require manufacturers of safe products to subsidize those who make more dangerous items, we promise to raise the price and restrict the output of socially productive products. Tort law is supposed to be about aligning liability with responsibility, not mandating a social insurance policy in which everyone must pay for everyone else's mistakes.

Finally and relatedly, the Court's new standard implicates the same sort of fair notice problem that the court of appeals' standard did. Decades ago, the bare metal defendants produced their lawful products and provided all the warnings the law required. Now, they are at risk of being held responsible retrospectively for failing to warn about other people's products. It is a duty they could not have anticipated then and one they cannot discharge now. They can only pay. Of course, that may be the point. In deviating from the traditional common law rule, the Court may be motivated by the unfortunate facts of this particular case, where the sailors' widows appear to have a limited prospect of recovery from the companies that supplied the asbestos (they've gone bankrupt) and from the Navy that allegedly directed the use of asbestos (it's likely immune under our precedents). *Ante*, at 450–451. The bare metal defendants may be among the only solvent potential defendants left. But how were they supposed to anticipate many decades ago the novel duty to warn placed on them today? People should be able to find the law in the books; they should not find the law coming upon them out of nowhere.

Still, there's a silver lining here. In announcing its new standard, the Court expressly states that it does "not purport to define the proper tort rule outside of the maritime context." *Ante*, at 457. Indeed, the Court acknowledges that it has created its new standard in part because of the "solicitude for sailors" that is a unique feature of our mari-

time jurisdiction. *Ante*, at 456. All of this means, of course, that nothing in today's opinion compels courts operating outside the maritime context to apply the test announced today. In other tort cases, courts remain free to use the more sensible and historically proven common law rule. And given that, "unlike state courts, we have little . . . experience in the development of new common-law rules of tort," *Saratoga*, 520 U. S., at 886 (Scalia, J., dissenting), that is a liberty they may be wise to exercise.[5]

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[5] As the Court notes, some of the defendants sold the Navy products that were not "bare metal" but contained asbestos at the time of sale. *Ante*, at 450, n. 1. We can all agree that those defendants had a duty to warn users about the known dangers of asbestos. And there's a colorable argument that their responsibility didn't end when the Navy, as part of routine upkeep, swapped out the original asbestos parts for replacements supplied by others. Under traditional tort principles, the seller of a defective, "unreasonably dangerous" product may be liable to an injured user if the product "is expected to and does reach the user . . . without substantial change in the condition in which it is sold." 2 Restatement (Second) of Torts § 402A(1)(b), pp. 347–348 (1963–1964). And replacing wornout parts every now and then with equivalently dangerous third-party parts may not qualify as a "substantial change" if the replacement part does "no more than perpetuate" problems latent in the original. *Sage* v. *Fairchild-Swearingen Corp.*, 70 N. Y. 2d 579, 584–587, 517 N. E. 2d 1304, 1306–1308 (1987); see, *e. g.*, *Whelan* v. *Armstrong Int'l Inc.*, 455 N. J. Super. 569, 597–598, 190 A. 3d 1090, 1106–1107 (App. Div. 2018). Of course, the defendants' original failure to warn might not be the legal cause of any harm if the use of the replacement part was unforeseeable, or if an intervening action severed the connection between the original sale and the injurious use. For example, if the replacement part itself posed the danger—or if, by the time the original part wore out, safer alternatives had become available. The Court's new standard, however, does not address these defendants separately, but focuses on the bare metal defendants.

Syllabus

OBDUSKEY *v.* McCARTHY & HOLTHUS LLP

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

No. 17–1307. Argued January 7, 2019—Decided March 20, 2019

Law firm McCarthy & Holthus LLP was hired to carry out a nonjudicial foreclosure on a Colorado home owned by petitioner Dennis Obduskey. McCarthy sent Obduskey correspondence related to the foreclosure. Obduskey responded with a letter invoking a federal Fair Debt Collection Practices Act (FDCPA or Act) provision, 15 U. S. C. § 1692g(b), which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. Instead, McCarthy initiated a nonjudicial foreclosure action. Obduskey sued, alleging that McCarthy failed to comply with the FDCPA's verification procedure. The District Court dismissed on the ground that McCarthy was not a "debt collector" within the meaning of the FDCPA, and the Tenth Circuit affirmed.

Held: A business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of § 1692f(6). Pp. 473–481.

(a) The FDCPA regulates " 'debt collector[s].' " § 1692a(6). Relevant here, the definition of debt collector has two parts. The Act first sets out the primary definition of the term "debt collector": A " 'debt collector,' " it says, is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." *Ibid.* The Act then sets forth the limited-purpose definition, which states that "[f]or the purpose of section 1692f(6) . . . [the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." It is undisputed that McCarthy is, by virtue of its role enforcing security interests, at least subject to the specific prohibitions contained in § 1692f(6). But only if McCarthy falls within the primary definition's scope do the Act's other provisions, including those at issue here, apply. Pp. 473–474.

(b) Three considerations lead to the conclusion that McCarthy is not subject to the Act's main coverage. *First*, and most decisive, is the text of the Act itself. The limited-purpose definition says that "*[f]or the purpose of section 1692f(6)*" a debt collector "*also* includes" a business, like McCarthy, "the principal purpose of which is the enforcement of security interests." § 1692a(6) (emphasis added). This phrase, particu-

larly the word "also," strongly suggests that security-interest enforcers do not fall within the scope of the primary definition. If they did, the limited-purpose definition would be superfluous. By contrast, under a reading that gives effect to every word of the limited-purpose definition, the FDCPA's debt-collector-related prohibitions (with the exception of § 1692f(6)) do not apply to those who, like McCarthy, are engaged in no more than security-interest enforcement. *Second*, Congress may well have chosen to treat security-interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes. *Third*, this Court's reading is supported by legislative history, which suggests that the Act's present language was the product of a compromise between competing versions of the bill, one which would have totally excluded security-interest enforcement from the Act, and another which would have treated it like ordinary debt collection. Pp. 474–477.

(c) Obduskey's counterarguments are unconvincing. *First*, he suggests that the limited-purpose definition is not superfluous because it was meant to cover "repo men"—a category of security-interest enforcers who he says would not otherwise fall within the primary definition of "debt collector." The limited-purpose definition, however, speaks broadly of "the enforcement of security interests," § 1692a(6), not "the enforcement of security interests *in personal property*." *Second*, Obduskey claims that the Act's venue provision, § 1692i(a), which covers legal actions brought by "debt collectors" to enforce interests in real property, only makes sense if those who enforce security interests in real property are debt collectors subject to all prohibitions and requirements that come with that designation. The venue provision, however, does nothing to alter the definition of a debt collector. *Third*, Obduskey argues that McCarthy engaged in *more* than security-interest enforcement by sending notices that any ordinary homeowner would understand as an attempt to collect a debt. Here, however, the notices sent by McCarthy were antecedent steps required under state law to enforce a security interest, and the Act's (partial) exclusion of "the enforcement of security interests" must also exclude the legal means required to do so. *Finally*, Obduskey fears that this Court's decision will permit creditors and their agents to engage in a host of abusive practices forbidden by the Act. But the Court must enforce the statute that Congress enacted, and Congress is free to expand the FDCPA's reach if it wishes. Pp. 477–481.

879 F. 3d 1216, affirmed.

Breyer, J., delivered the opinion for a unanimous Court. Sotomayor, J., filed a concurring opinion, *post*, p. 481.

Daniel L. Geyser argued the cause and filed briefs for petitioner.

Kannon K. Shanmugam argued the cause for respondent. With him on the brief were *Masha G. Hansford*, *Joel S. Johnson*, *Thomas J. Holthus*, *Matthew E. Podmenik*, and *Holly R. Shilliday*.

Jonathan C. Bond argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Deputy Solicitor General Wall*, *Steven Y. Bressler*, and *Nandan M. Joshi*.*

Justice Breyer delivered the opinion of the Court.

The Fair Debt Collection Practices Act regulates " 'debt collector[s].' " 15 U. S. C. § 1692a(6); see 91 Stat. 874, 15 U. S. C. § 1692 *et seq.* A " 'debt collector,' " the Act says, is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." § 1692a(6). This definition, however, goes on to say that "[f]or the purpose of section 1692f(6)" (a separate provision of the Act), "[the] term [debt collector] also includes any per-

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*Briefs of *amici curiae* urging reversal were filed for Members of Congress by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Ashwin P. Phatak*; for NAACP Legal Defense & Educational Fund, Inc., by *Sherrilyn A. Ifill*, *Janai S. Nelson*, and *Samuel Spital*; and for the National Consumer Law Center by *Stuart Rossman*.

Briefs of *amici curiae* urging affirmance were filed for Colorado Mortgage Lenders Association by *Deanne R. Stodden* and *Elizabeth S. Marcus*; for the Commercial Law League of America by *Stephen W. Sather*; for Legal League 100 by *Michelle G. Gilbert*; for the Michigan Creditors Bar Association by *Kathleen H. Klaus* and *Jesse L. Roth*; for Mortgage Bankers Association et al. by *Andrew J. Pincus*, *Archis A. Parasharami*, *Daniel E. Jones*, *Matthew A. Waring*, *Thomas Pinder*, *Daryl Joseffer*, and *Kevin Carroll*; for National Creditors Bar Association by *Tomio B. Narita* and *Jeffrey A. Topor*; for United Trustees Association et al. by *Dean T. Kirby, Jr.*, *Martin T. McGuinn*, and *Michael R. Pfeifer*; and for USFN–America's Mortgage Banking Attorneys by *Richard P. Haber*, *Christopher J. Picard*, and *Robert J. Wichowski*.

son . . . in any business the principal purpose of which is the enforcement of security interests." *Ibid.*

The question before us concerns this last sentence. Does it mean that one principally involved in "the enforcement of security interests" is *not* a debt collector (except "[f]or the purpose of section 1692f(6)")? If so, numerous other provisions of the Act do not apply. Or does it simply reinforce the fact that those principally involved in the enforcement of security interests are subject to § 1692f(6) in addition to the Act's other provisions?

In our view, the last sentence does (with its § 1692f(6) exception) place those whose "principal purpose . . . is the enforcement of security interests" outside the scope of the primary "debt collector" definition, § 1692a(6), where the business is engaged in no more than the kind of security-interest enforcement at issue here—nonjudicial foreclosure proceedings.

I

A

When a person buys a home, he or she usually borrows money from a lending institution, such as a bank. The resulting debt is backed up by a "mortgage"—a security interest in the property designed to protect the creditor's investment. Restatement (Third) of Property: Mortgages § 1.1 (1996) (Restatement). (In some States, this security interest is known as a "deed of trust," though for present purposes the difference is immaterial. See generally *ibid.*) The loan likely requires the homeowner to make monthly payments. And if the homeowner defaults, the mortgage entitles the creditor to pursue foreclosure, which is "the process in which property securing a mortgage is sold to pay off the loan balance due." 2 B. Dunaway, Law of Distressed Real Estate § 15:1 (2018) (Dunaway).

Every State provides some form of *judicial* foreclosure: a legal action initiated by a creditor in which a court super-

vises sale of the property and distribution of the proceeds. *Id.*, § 16:1. These procedures offer various protections for homeowners, such as the right to notice and to protest the amount a creditor says is owed. *Id.*, §§ 16:17, 16:20; Restatement § 8.2. And in the event that the foreclosure sale does not yield the full amount due, a creditor pursuing a judicial foreclosure may sometimes obtain a deficiency judgment, that is, a judgment against the homeowner for the unpaid balance of a debt. J. Rao, T. Twomey, G. Walsh, & O. Williamson, National Consumer Law Center (NCLC), Foreclosures and Mortgage Servicing §§ 12.3.1–2 (5th ed. 2014).

About half the States also provide for what is known as *nonjudicial* foreclosure, where notice to the parties and sale of the property occur outside court supervision. 2 Dunaway § 17:1. Under Colorado's form of nonjudicial foreclosure, at issue here, a creditor (or more likely its agent) must first mail the homeowner certain preliminary information, including the telephone number for the Colorado foreclosure hotline. Colo. Rev. Stat. § 38–38–102.5(2) (2018). Thirty days later, the creditor may file a "notice of election and demand" with a state official called a "public trustee." § 38–38–101. The public trustee records this notice and mails a copy, alongside other materials, to the homeowner. §§ 38–38–102, 38–38–103. These materials give the homeowner information about the balance of the loan, the homeowner's right to cure the default, and the time and place of the foreclosure sale. §§ 38–38–101(4), 38–38–103. Assuming the debtor does not cure the default or declare bankruptcy, the creditor may then seek an order from a state court authorizing the sale. Colo. Rule Civ. Proc. 120 (2018); see Colo. Rev. Stat. § 38–38–105. (Given this measure of court involvement, Colorado's "nonjudicial" foreclosure process is something of a hybrid, though no party claims these features transform Colorado's nonjudicial scheme into a judicial one.) In court, the homeowner may contest the creditor's right to sell the property, and a hearing will be held to determine whether the sale should go forward. Colo. Rules Civ. Proc. 120(c), (d).

If the court gives its approval, the public trustee may then sell the property at a public auction, though a homeowner may avoid a sale altogether by curing the default up until noon on the day before. Colo. Rev. Stat. §§ 38–38–110, 38–38–104(VI)(b). If the sale goes forward and the house sells for more than the amount owed, any profits go first to lienholders and then to the homeowner. § 38–38–111. If the house sells for less than what is owed, the creditor cannot hold the homeowner liable for the balance due unless it files a separate action in court and obtains a deficiency judgment. See § 38–38–106(6); *Bank of America* v. *Kosovich*, 878 P. 2d 65, 66 (Colo. App. 1994). Other States likewise prevent creditors from obtaining deficiency judgments in nonjudicial foreclosure proceedings. Restatement § 8.2. And in some States, pursuing nonjudicial foreclosure bars or curtails a creditor's ability to obtain a deficiency judgment altogether. Rao, NCLC, Foreclosures and Mortgage Servicing § 12.3.2.

B

In 2007, petitioner Dennis Obduskey bought a home in Colorado with a $329,940 loan secured by the property. About two years later, Obduskey defaulted.

In 2014, Wells Fargo Bank, N. A., hired a law firm, McCarthy & Holthus LLP, the respondent here, to act as its agent in carrying out a nonjudicial foreclosure. According to the complaint, McCarthy first mailed Obduskey a letter that said it had been "instructed to commence foreclosure" against the property, disclosed the amount outstanding on the loan, and identified the creditor, Wells Fargo. App. 37–38; see *id.*, at 23. The letter purported to provide notice "[p]ursuant to, and in compliance with," both the Fair Debt Collection Practices Act (FDCPA or Act) and Colorado law. *Id.*, at 37. (The parties seem not to dispute that this and other correspondence from McCarthy was required under state law. Because that is a question of Colorado law not briefed by the parties before us nor passed on by the courts below, we proceed along

the same assumption.) Obduskey responded with a letter invoking § 1692g(b) of the FDCPA, which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor.

Yet, Obduskey alleges, McCarthy neither ceased collecting on the debt nor provided verification. App. 22–23. Instead, the firm initiated a nonjudicial foreclosure action by filing a notice of election and demand with the county public trustee. *Ibid.*; see *id.*, at 39–41. The notice stated the amount due and advised that the public trustee would "sell [the] property for the purpose of paying the indebtedness." *Id.*, at 40.

Obduskey then filed a lawsuit in federal court alleging that the firm had violated the FDCPA by, among other things, failing to comply with the verification procedure. *Id.*, at 29. The District Court dismissed the suit on the ground that the law firm was not a "debt collector" within the meaning of the Act, so the relevant Act requirements did not apply. *Obduskey* v. *Wells Fargo*, 2016 WL 4091174, *3 (D Colo., July 19, 2016).

On appeal, the Court of Appeals for the Tenth Circuit affirmed the dismissal, concluding that the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under" the Act. *Obduskey* v. *Wells Fargo*, 879 F. 3d 1216, 1223 (2018).

Obduskey then petitioned for certiorari. In light of different views among the Circuits about application of the FDCPA to nonjudicial foreclosure proceedings, we granted the petition. Compare *ibid.* and *Vien-Phuong Thi Ho* v. *ReconTrust Co., NA*, 858 F. 3d 568, 573 (CA9 2016) (holding that an entity whose only role is the enforcement of security interests is not a debt collector under the Act), with *Kaymark* v. *Bank of America, N. A.*, 783 F. 3d 168, 179 (CA3 2015) (holding that such an entity is a debt collector for the purpose of all the Act's requirements), *Glazer* v. *Chase Home*

Finance LLC, 704 F. 3d 453, 461 (CA6 2013) (same), and *Wilson* v. *Draper & Goldberg, P. L. L. C.*, 443 F. 3d 373, 376 (CA4 2006) (same).

II

A

The FDCPA's definitional section, 15 U. S. C. § 1692a, defines a "debt" as

> "*any obligation* or alleged obligation of a consumer *to pay money* arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." § 1692a(5) (emphasis added).

The Act then sets out the definition of the term "debt collector." § 1692a(6). The first sentence of the relevant paragraph, which we shall call the primary definition, says that the term "debt collector"

> "means any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Ibid.*

The third sentence, however, provides what we shall call the limited-purpose definition:

> "For the purpose of section 1692f(6) [the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." *Ibid.*

The subsection to which the limited-purpose definition refers, § 1692f(6), prohibits a "debt collector" from

> "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

"(A) there is no present right to possession of the property . . . ;

"(B) there is no present intention to take possession of the property; or

"(C) the property is exempt by law from such dispossession or disablement."

The rest of the Act imposes myriad other requirements on debt collectors. For example, debt collectors may not use or threaten violence, or make repetitive annoying phone calls. § 1692d. Nor can debt collectors make false, deceptive, or misleading representations in connection with a debt, like misstating a debt's "character, amount, or legal status." § 1692e. And, as we have mentioned, if a consumer disputes the amount of a debt, a debt collector must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. § 1692g(b).

No one here disputes that McCarthy is, by virtue of its role enforcing security interests, at least subject to the specific prohibitions contained in § 1692f(6). The question is whether *other* provisions of the Act apply. And they do if, but only if, McCarthy falls within the scope of the Act's primary definition of "debt collector."

B

Three considerations lead us to conclude that McCarthy is not subject to the main coverage of the Act.

First, and most decisive, is the text of the Act itself. As a preliminary matter, we concede that if the FDCPA contained *only* the primary definition, a business engaged in nonjudicial foreclosure proceedings would qualify as a debt collector for all purposes. We have explained that a home loan is an obligation to pay money, and the purpose of a mortgage is to secure that obligation. See *supra*, at 469. Foreclosure, in turn, is "the process in which property securing a mortgage is sold to pay off the loan balance due." 2 Dunaway § 15:1. In other words, foreclosure is a means of collect-

ing a debt. And a business pursuing nonjudicial foreclosures would, under the capacious language of the Act's primary definition, be one that "regularly collects or attempts to collect, directly or indirectly, debts." § 1692a(6).

It is true that, as McCarthy points out, nonjudicial foreclosure does not seek "a payment of money *from the debtor*" but rather from sale of the property itself. Brief for Respondent 17 (emphasis added). But nothing in the primary definition requires that payment on a debt come "from a debtor." The statute speaks simply of the "collection of any debts . . . owed or due." § 1692a(6). Moreover, the provision sweeps in both "direc[t]" and "indirec[t]" debt collection. *Ibid.* So, even if nonjudicial foreclosure were not a *direct* attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing a security interest, it would be an *indirect* attempt to collect a debt.

The Act does not, however, contain only the primary definition. And the limited-purpose definition poses a serious, indeed an insurmountable, obstacle to subjecting McCarthy to the main coverage of the Act. It says that "*[f]or the purpose of section 1692f(6)*" a debt collector "*also* includes" a business, like McCarthy, "the principal purpose of which is the enforcement of security interests." § 1692a(6) (emphasis added). This phrase, particularly the word "also," strongly suggests that one who does no more than enforce security interests does *not* fall within the scope of the general definition. Otherwise why add this sentence at all?

It is logically, but not practically, possible that Congress simply wanted to emphasize that the definition of "debt collector" includes those engaged in the enforcement of security interests. But why then would Congress have used the word "also"? And if security-interest enforcers are covered by the primary definition, why would Congress have needed to say anything special about § 1692f(6)? After all, § 1692f(6), just like all the provisions applicable to debt collectors, would have already applied to those who enforce se-

curity interests. The reference to § 1692f(6) would on this view be superfluous, and we "generally presum[e] that statutes do not contain surplusage." *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 299, n. 1 (2006). By contrast, giving effect to every word of the limited-purpose definition narrows the primary definition, so that the debt-collector-related prohibitions of the FDCPA (with the exception of § 1692f(6)) do *not* apply to those who, like McCarthy, are engaged in no more than security-interest enforcement.

Second, we think Congress may well have chosen to treat security-interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes. As Colorado's law makes clear, *supra*, at 470–471, state nonjudicial foreclosure laws provide various protections designed to prevent sharp collection practices and to protect homeowners, see 2 Dunaway § 17:1. And some features of these laws are in tension with aspects of the Act. For example, the FDCPA broadly limits debt collectors from communicating with third parties "in connection with the collection of any debt." § 1692c(b). If this rule were applied to nonjudicial foreclosure proceedings, then advertising a foreclosure sale—an essential element of such schemes—might run afoul of the FDCPA. Given that a core purpose of publicizing a sale is to attract bidders, ensure that the sale price is fair, and thereby protect the borrower from further liability, the result would hardly benefit debtors. See 2 Dunaway § 17:4. To be sure, it may be possible to resolve these conflicts without great harm to either the Act or state foreclosure schemes. See *Heintz* v. *Jenkins*, 514 U. S. 291, 296–297 (1995) (observing that the FDCPA's protections may contain certain "implici[t] exception[s]"). But it is also possible, in light of the language it employed, that Congress wanted to avoid the risk of such conflicts altogether.

Third, for those of us who use legislative history to help interpret statutes, the history of the FDCPA supports our reading. When drafting the bill, Congress considered a version that would have subjected security-interest enforcers to the full coverage of the Act. That version defined a debt collector as "any person who engages in any business the principal purpose of which is the collection of any debt *or enforcement of security interests.*" S. 918, 95th Cong., 1st Sess., § 803(f) (1977) (emphasis added). A different version of the bill, however, would have totally excluded from the Act's coverage "any person who enforces or attempts to enforce a security interest in real or personal property." S. 1130, 95th Cong., 1st Sess., § 802(8)(E) (1977). Given these conflicting proposals, the Act's present language has all the earmarks of a compromise: The prohibitions contained in § 1692f(6) will cover security-interest enforcers, while the other "debt collector" provisions of the Act will not.

These considerations convince us that, but for § 1692f(6), those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the Act.

III

Obduskey makes several arguments to the contrary. But, on balance, we do not find them determinative.

First, Obduskey acknowledges that unless the limited-purpose definition is superfluous, it must make some kind of security-interest enforcer a "debt collector" who would not otherwise fall within the primary definition. Reply Brief 11–13. But, according to Obduskey, "repo men"—those who seize automobiles and other personal property in response to nonpayment—fit the bill. See Black's Law Dictionary 1493 (10th ed. 2014) (explaining that "repo" is short for "repossession," which means "retaking property; esp., a seller's retaking of goods sold on credit when the buyer has failed to pay for them"). This is so, he says, because repossession often

entails only "limited communication" with the debtor, as when the repo man sneaks up and "tows a car in the middle of the night." Brief for Petitioner 25–26, and n. 13. And because, according to Obduskey, the language of § 1692f(6), which forbids "[t]aking or threatening to take any nonjudicial action to effect *dispossession or disablement* of property," applies more naturally to the seizure of personal property than to nonjudicial foreclosure. (Emphasis added.)

But we do not see why that is so. The limited-purpose provision speaks broadly of "the enforcement of security interests," § 1692a(6), not "the enforcement of security interests *in personal property*"; if Congress meant to cover only the repo man, it could have said so. Moreover, Obduskey's theory fails to save the limited-purpose definition from superfluity. As we have just discussed, *supra*, at 474–475, if the Act contained only the primary definition, enforcement of a security interest would at least be an indirect collection of a debt. The same may well be true of repo activity, a form of security-interest enforcement, as the point of repossessing property that secures a debt is to collect some or all of the value of the defaulted debt. And while Obduskey argues that the language of § 1692f(6) fits more comfortably with repossession of personal property than nonjudicial foreclosure, we think it at least plausible that "threatening" to foreclose on a consumer's home without having legal entitlement to do so is the kind of "nonjudicial action" without "present right to possession" prohibited by that section. § 1692f(6)(A). (We need not, however, here decide precisely what conduct runs afoul of § 1692f(6).)

We are also unmoved by Obduskey's argument that repossession would not fall under the primary definition because it generally involves only limited communication with the debtor. For one thing, while some of the FDCPA's substantive protections apply where there has been a "communicat[ion]" with a consumer, see, *e. g.*, § 1692c, the primary definition of debt collector turns on the "collection of . . . debts,"

without express reference to communication, § 1692a(6). For another, while Obduskey imagines a silent repo man striking in the dead of night, state law often requires communication with a debtor during the repossession process, such as notifying a consumer of a sale. C. Carter, J. Sheldon, J. Van Alst, T. Twomey, & J. Battle, NCLC, Repossessions § 10.4 (9th ed. 2017).

Second, Obduskey points to the Act's venue provision, 15 U. S. C. § 1692i(a), which states that "[a]ny *debt collector* who brings any legal action on a debt against any consumer shall . . . in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district" where the "property is located." (Emphasis added.) This provision, he says, makes clear that a person who *judicially* enforces a real-property-related security interest is a debt collector; hence, a person who *nonjudicially* enforces such an interest must also be a debt collector. Indeed, he adds, this subsection "only makes sense" if those who enforce security interests in real property are debt collectors subject to all prohibitions and requirements that come with that designation. Brief for Petitioner 21.

This argument, however, makes too much of too little. To begin with, the venue section has no direct application in this case, for here we consider *nonjudicial* foreclosure. And whether those who judicially enforce mortgages fall within the scope of the primary definition is a question we can leave for another day. See 879 F. 3d, at 1221–1222 (noting that the availability of a deficiency judgment is a potentially relevant distinction between judicial and nonjudicial foreclosures).

More to the point, the venue provision does nothing to alter the definition of a debt collector. Rather, it applies whenever a "debt collector" brings a "legal action . . . to enforce an interest in real property." § 1692i(a)(1). In other words, the provision anticipates that a debt collector can bring a judicial action respecting real property, but it

nowhere says that an entity is a debt collector *because* it brings such an action. Obduskey suggests that under our interpretation this provision will capture a null set. We think not. A business that qualifies as a debt collector based on *other* activities (say, because it "regularly collects or attempts to collect" unsecured credit card debts, § 1692a(6)) would have to comply with the venue provision if it also filed "an action to enforce an interest in real property," § 1692i(a)(1). Here, however, the only basis alleged for concluding that McCarthy is a debt collector under the Act is its role in nonjudicial foreclosure proceedings.

Third, Obduskey argues that even if "simply enforcing a security interest" falls outside the primary definition, McCarthy engaged in *more* than security-interest enforcement by sending notices that any ordinary homeowner would understand as an attempt to collect a debt backed up by the threat of foreclosure. Brief for Petitioner 15–16; see Reply Brief 13. We do not doubt the gravity of a letter informing a homeowner that she may lose her home unless she pays her outstanding debts. But here we assume that the notices sent by McCarthy were antecedent steps required under state law to enforce a security interest. See *supra*, at 471–472. Indeed, every nonjudicial foreclosure scheme of which we are aware involves notices to the homeowner. See 2 Dunaway § 17:4 (describing state procedures concerning notice of sale). And because he who wills the ends must will the necessary means, we think the Act's (partial) exclusion of "the enforcement of security interests" must also exclude the legal means required to do so. This is not to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not grant an actor blanket immunity from the Act. But given that we here confront only steps required by state law, we need not consider what *other* conduct (related to, but not required for, enforcement of a security interest) might transform a

security-interest enforcer into a debt collector subject to the main coverage of the Act.

Finally, Obduskey fears that our decision will open a loophole, permitting creditors and their agents to engage in a host of abusive practices forbidden by the Act. States, however, can and do guard against such practices, for example, by requiring notices, review by state officials such as the public trustee, and limited court supervision. See *supra*, at 470–471, 476. Congress may think these state protections adequate, or it may choose to expand the reach of the FDCPA. Regardless, for the reasons we have given, we believe that the statute exempts entities engaged in no more than the "enforcement of security interests" from the lion's share of its prohibitions. And we must enforce the statute that Congress enacted.

For these reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE SOTOMAYOR, concurring.

I join the Court's opinion, which makes a coherent whole of a thorny section of statutory text. I write separately to make two observations: First, this is a close case, and today's opinion does not prevent Congress from clarifying this statute if we have gotten it wrong. Second, as the Court makes clear, "enforcing a security interest does not grant an actor blanket immunity from the" mandates of the Fair Debt Collection Practices Act (FDCPA), 15 U. S. C. § 1692 *et seq. Ante*, at 480.

This case turns on two sentences that, put together, read in relevant part:

> "[1] The term 'debt collector' means any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts . . . . [2] For the purpose of section 1692f(6) of this title, such term also

> includes any person . . . in any business the principal purpose of which is the enforcement of security interests." § 1692a(6).

As the Court recognizes, if the first sentence were the only text before us, nonjudicial foreclosure plainly would qualify as debt collection—after all, foreclosure itself "is a means of collecting a debt," *ante*, at 474–475, whether "directly or indirectly," § 1692a(6). That may be because a house can be sold—thus satisfying the debt with the proceeds—but it may also be because the initiation of a foreclosure itself sends a clear message: "[P]ay up or lose your house." Brief for Petitioner 17; see *Alaska Trustee, LLC* v. *Ambridge*, 372 P. 3d 207, 217–218 (Alaska 2016); *Glazer* v. *Chase Home Finance LLC*, 704 F. 3d 453, 461 (CA6 2013).

The problem for Obduskey's reading, as the Court explains, is the second sentence, which then becomes superfluous if all security-interest enforcement is already covered by sentence one. See *ante*, at 475–476. To be clear, there is a reasonable argument that the second sentence covers security-interest enforcers who are not already covered by the first sentence: Under this argument, those additional security-interest enforcers are "people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts," *Piper* v. *Portnoff Law Assoc., Ltd.*, 396 F. 3d 227, 236 (CA3 2005); see also *Alaska Trustee*, 372 P. 3d, at 219–220; *Glazer*, 704 F. 3d, at 463–464, such as "the repo man [who] sneaks up and 'tows a car in the middle of the night,'" *ante*, at 478. But, as the Court explains, that reading does not resolve the surplusage problem, because even such repossession agencies engage in a means of collecting debts "indirectly"—which means that they are similarly situated to entities pursuing nonjudicial foreclosures after all. See *ante*, at 477–479.

All the same, this is too close a case for me to feel certain that Congress recognized that this complex statute would be

interpreted the way that the Court does today. While States do regulate nonjudicial foreclosures, see *ante*, at 476, the extent and method of those protections can vary widely, and the FDCPA was enacted not only "to eliminate abusive debt collection practices" but also "to promote consistent State action to protect consumers against debt collection abuses," § 1692(e); see also § 1692n (pre-empting inconsistent state laws while exempting state consumer protections that are "greater than the protection provided by [the FDCPA]"). Today's opinion leaves Congress free to make clear that the FDCPA fully encompasses entities pursuing nonjudicial foreclosures and regulates security-interest enforcers like repossession agencies in only the more limited way addressed in § 1692f(6). That too would be consistent with the FDCPA's broad, consumer-protective purposes. See § 1692(e).

Separately, I note that the Court's opinion recognizes that the question before us involves "no more than the kind of security-interest enforcement at issue here," *ante*, at 469, which means an entity that takes "only steps required by state law," *ante*, at 480. The Court rightly notes, therefore, that nothing in today's opinion is "to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not grant an actor blanket immunity from the Act." *Ibid.* Indeed, in addition to the unnecessary and abusive practices that the Court notes, I would see as a different case one in which the defendant went around frightening homeowners with the threat of foreclosure without showing any meaningful intention of ever actually following through. There would be a question, in such a case, whether such an entity was in fact a "business the principal purpose of which is the enforcement of security interests," see § 1692a(6), or whether it was simply using that label as a stalking horse for something else.

Because the Court rightly cabins its holding to the kinds of good-faith actions presented here and because we are bound to apply Congress' statutes as best we can understand them, I concur in the Court's opinion.

FRANK ET AL. *v.* GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

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

No. 17–961. Argued October 31, 2018—Decided March 20, 2019

Three named plaintiffs (including Paloma Gaos) brought class action claims against Google for alleged violations of the Stored Communications Act, 18 U. S. C. § 2701 *et seq.* Over the course of litigation below, Google moved to dismiss for lack of standing three times. As relevant here, when the District Court held that Gaos had standing to assert an SCA claim, the District Court rested its conclusion on *Edwards* v. *First American Corp.*, 610 F. 3d 514—a Ninth Circuit decision reasoning that an Article III injury exists whenever a statute gives an individual a statutory cause of action and the plaintiff claims that the defendant violated the statute. *Gaos* v. *Google*, 2012 WL 1094646, *3. After a second amended complaint was filed, Google again moved to dismiss, challenging standing and noting that this Court had agreed to review the decision in *Edwards* on which the District Court previously relied. This Court eventually dismissed *Edwards* as improvidently granted, 567 U. S. 756 (*per curiam*), and Google then withdrew its argument that the plaintiffs lacked standing to assert SCA claims. On the merits, the parties ultimately negotiated a settlement agreement that would require Google to include certain disclosures on some of its webpages and would distribute more than $5 million to *cy pres* recipients, more than $2 million to class counsel, and no money to absent class members. The District Court granted preliminary certification of the class and preliminary approval of the settlement. Five class members, including petitioners Theodore Frank and Melissa Holyoak, objected to the settlement on several grounds. After a hearing, the District Court granted final approval of the settlement, and Frank and Holyoak appealed. While the appeal was pending in the Ninth Circuit, but prior to decision by that court, this Court issued *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, in which the Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*, at 341. *Spokeo* rejected the premise, relied on in *Edwards*, that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 578 U. S., at 341. A divided panel of the Ninth Circuit affirmed the settlement, without addressing *Spokeo*. *In*

re Google Referrer Header Privacy Litigation, 869 F. 3d 737. This Court granted certiorari to review whether *cy pres* settlements satisfy the requirement that class settlements be "fair, reasonable, and adequate." Fed. Rule Civ. Proc. 23(e)(2). The Solicitor General filed a brief as *amicus curiae* urging the Court to vacate and remand the case for the lower courts to address whether any named plaintiff in the class action actually had standing in the District Court. After oral argument, the Court ordered supplemental briefing on the standing question.

Held: Because there remain substantial questions about whether any of the named plaintiffs has standing to sue in light of the Court's decision in *Spokeo*, the judgment of the Ninth Circuit is vacated, and the case remanded. The Court has an obligation to ensure that litigants have standing under Article III. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 340. That obligation extends to court approval of proposed class action settlements. In a class action, the "claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. Rule Civ. Proc. 23(e). A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing. *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20. Here, no court in this case has analyzed whether any named plaintiff has alleged SCA violations in the operative complaint that are sufficiently concrete and particularized to support standing. The supplemental briefs filed after oral argument raise a wide variety of legal and factual issues not addressed in the merits briefing before the Court or at oral argument. This is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7. Resolution of the standing question should first take place in the District Court or the Ninth Circuit.

869 F. 3d 737, vacated and remanded.

Theodore H. Frank, *pro se*, argued the cause for petitioners. With him on the briefs were *Melissa Holyoak*, *pro se*, and *Anna St. John*.

Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Charles W. Scarborough*, and *Katherine Twomey Allen*.

Andrew J. Pincus argued the cause for respondent Google LLC. On the brief were *Donald M. Falk*, *Edward D. John-*

son, *Brian D. Netter*, and *Daniel E. Jones*. *Jeffrey A. Lamken* argued the cause for respondent Gaos et al. With him on the briefs were *Michael G. Pattillo, Jr.*, *James A. Barta*, *William J. Cooper*, *Kassra P. Nassiri*, and *Michael Aschenbrener*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Mark Brnovich*, Attorney General of Arizona, and *Oramel H. Skinner*, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Jahna Lindemuth* of Alaska, *Leslie Rutledge* of Arkansas, *Cynthia Coffman* of Colorado, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Adam Paul Laxalt* of Nevada, *Wayne Stenehjem* of North Dakota, *Mike Hunter* of Oklahoma, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Ken Paxton* of Texas, and *Peter K. Michael* of Wyoming; for the Cato Institute et al. by *Ilya Shapiro* and *Jeremy L. Kidd*; for the Center for Constitutional Jurisprudence et al. by *John C. Eastman* and *Anthony T. Caso*; for the Center for Individual Rights by *Michael E. Rosman*; for the Electronic Privacy Information Center by *Marc Rotenberg* and *Alan Butler*; for Lawyers for Civil Justice by *Alex Dahl*, *Mary Massaron*, and *Josephine DeLorenzo*; for the Manhattan Institute for Policy Research by *C. Thomas Ludden*; and for the New Jersey Civil Justice Institute by *Joseph Edward Feibelman.*

Briefs of *amici curiae* urging affirmance were filed for the State of Oregon et al. by *Ellen F. Rosenblum*, Attorney General of Oregon, *Benjamin Gutman*, Solicitor General, *Carson Whitehead*, Assistant Attorney General, and *Henry Kantor*, and by the Attorneys General for their respective States as follows: *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Russell A. Suzuki* of Hawaii, *Lisa Madigan* of Illinois, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Barbara D. Underwood* of New York, *Joshua H. Stein* of North Carolina, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for the American Association for Justice by *Jeffrey R. White* and *Elise Sanguinetti*; for the Center for Democracy and Technology et al. by *Leslie M. Spencer*, *Lisa A. Hayes*, *Sophia Cope*, and *Sally Greenberg*; for the Center for Workplace Compliance by *Rae T. Vann* and *John R. Annand*; for the Civil Justice Research Initiative by *Gerson H. Smoger*, *Erwin Chemerinsky,* and *Anne Bloom*; for the Computer & Communications Industry Association et al. by *David H. Kramer* and *Brian M. Willen*; for the New York Bar Foundation et al. by *Christopher M. Mason*, *Sarah Erickson André*, *Daniel Deane*, and *Seth A. Horvath*; for

PER CURIAM.

Three named plaintiffs brought class action claims against Google for alleged violations of the Stored Communications Act. The parties negotiated a settlement agreement that would require Google to include certain disclosures on some of its webpages and would distribute more than $5 million to *cy pres* recipients, more than $2 million to class counsel, and no money to absent class members. We granted certiorari to review whether such *cy pres* settlements satisfy the requirement that class settlements be "fair, reasonable, and adequate." Fed. Rule Civ. Proc. 23(e)(2). Because there remain substantial questions about whether any of the named plaintiffs has standing to sue in light of our decision in *Spokeo, Inc.* v. *Robins*, 578 U. S. 330 (2016), we vacate the judgment of the Ninth Circuit and remand for further proceedings.

Google operates an Internet search engine. The search engine allows users to search for a word or phrase by typing a query into the Google website. Google returns a list of webpages that are relevant to the indicated term or phrase. The complaints alleged that when an Internet user conducted a Google search and clicked on a hyperlink to open one of the webpages listed on the search results page, Google transmitted information including the terms of the search to the server that hosted the selected webpage. This so-called referrer header told the server that the user arrived at

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Public Citizen, Inc., et al. by *Allison M. Zieve*, *Scott L. Nelson*, and *Adina H. Rosenbaum*; and for William B. Rubenstein by *Mr. Rubenstein*, *pro se.*

Briefs of *amici curiae* were filed for the American Bar Association by *Hilarie Bass*, *Rex S. Heinke*, and *Jessica Weisel*; for the Chamber of Commerce of the United States of America by *Ashley C. Parrish* and *Justin A. Torres*; for Law Professors by *Lori B. Andrews*; for Legal Aid Organizations by *Wilber H. Boies* and *M. Miller Baker*; for the National Consumer Law Center et al. by *Stuart Rossman* and *Michael Landis*; for Spectrum Settlement Recovery, LLC, by *Howard L. Yellen*, *Hugh C. D. Alexander*, *Eric L. Lewis*, and *James P. Davenport*; for Roy A. Katriel by *Mr. Katriel*, *pro se*; and for David Lowrey et al. by *Antigone G. Peyton*.

the webpage by searching for particular terms on Google's website.

Paloma Gaos challenged Google's use of referrer headers. She filed a complaint in Federal District Court on behalf of herself and a putative class of people who conducted a Google search and clicked on any of the resulting links within a certain time period. Gaos alleged that Google's transmission of users' search terms in referrer headers violated the Stored Communications Act, 18 U. S. C. § 2701 *et seq.* The SCA prohibits "a person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." § 2702(a)(1). The Act also creates a private right of action that entitles any "person aggrieved by any violation" to "recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." § 2707(a). Gaos also asserted several state law claims.

Google moved to dismiss for lack of standing three times. Its first attempt was successful. The District Court reasoned that although "a plaintiff may establish standing through allegations of violation of a statutory right," Gaos had "failed to plead facts sufficient to support a claim for violation of her statutory rights." *Gaos* v. *Google*, *Inc.*, 2011 WL 7295480, *3 (ND Cal., Apr. 7, 2011). In particular, the court faulted Gaos for failing to plead "that she clicked on a link from the Google search page." *Ibid.*

After Gaos filed an amended complaint, Google again moved to dismiss. That second attempt was partially successful. The District Court dismissed Gaos' state law claims, but denied the motion as to her SCA claims. The court reasoned that because the SCA created a right to be free from the unlawful disclosure of certain communications, and because Gaos alleged a violation of the SCA that was specific to her (*i. e.*, based on a search she conducted), Gaos alleged a concrete and particularized injury. *Gaos* v. *Google*

Inc., 2012 WL 1094646, *4 (ND Cal., Mar. 29, 2012). The court rested that conclusion on *Edwards* v. *First American Corp.*, 610 F. 3d 514 (2010)—a Ninth Circuit decision reasoning that an Article III injury exists whenever a statute gives an individual a statutory cause of action and the plaintiff claims that the defendant violated the statute. 2012 WL 1094646, *3.

After the District Court ruled on Google's second motion to dismiss, we granted certiorari in *Edwards* to address whether an alleged statutory violation alone can support standing. *First American Financial Corp.* v. *Edwards*, 564 U. S. 1018 (2011). In the meantime, Gaos and an additional named plaintiff filed a second amended complaint against Google. Google once again moved to dismiss. Google argued that the named plaintiffs did not have standing to bring their SCA claims because they had failed to allege facts establishing a cognizable injury. Google recognized that the District Court had previously relied on *Edwards* to find standing based on the alleged violation of a statutory right. But because this Court had agreed to review *Edwards*, Google explained that it would continue to challenge the District Court's conclusion. We eventually dismissed *Edwards* as improvidently granted, 567 U. S. 756 (2012) (*per curiam*), and Google then withdrew its argument that Gaos lacked standing for the SCA claims.

Gaos' putative class action was consolidated with a similar complaint, and the parties negotiated a classwide settlement. The terms of their agreement required Google to include certain disclosures about referrer headers on three of its webpages. Google could, however, continue its practice of transmitting users' search terms in referrer headers. Google also agreed to pay $8.5 million. None of those funds would be distributed to absent class members. Instead, most of the money would be distributed to six *cy pres* recipients. In the class action context, *cy pres* refers to the practice of distributing settlement funds not amenable to individid-

ual claims or meaningful pro rata distribution to nonprofit organizations whose work is determined to indirectly benefit class members. Black's Law Dictionary 470 (10th ed. 2014). In this case, the *cy pres* recipients were selected by class counsel and Google to "promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." App. to Pet. for Cert. 84. The rest of the funds would be used for administrative costs and fees, given to the named plaintiffs in the form of incentive payments, and awarded to class counsel as attorney's fees.

The District Court granted preliminary certification of the class and preliminary approval of the settlement. Five class members, including petitioners Theodore Frank and Melissa Holyoak, objected to the settlement on several grounds. They complained that settlements providing only *cy pres* relief do not comply with the requirements of Rule 23(e), that *cy pres* relief was not justified in this case, and that conflicts of interest infected the selection of the *cy pres* recipients. After a hearing, the District Court granted final approval of the settlement.

Frank and Holyoak appealed. After briefing before the Ninth Circuit was complete, but prior to decision by that court, we issued our opinion in *Spokeo, Inc.* v. *Robins*, 578 U. S. 330 (2016). In *Spokeo*, we held that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*, at 341. We rejected the premise, relied on in the decision then under review and in *Edwards*, that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 578 U. S., at 341; see also *id.*, at 336–337. Google notified the Ninth Circuit of our opinion.

A divided panel of the Ninth Circuit affirmed, without addressing *Spokeo*. *In re Google Referrer Header Privacy Litigation*, 869 F. 3d 737 (2017). We granted certiorari, 584

U. S. 958 (2018), to decide whether a class action settlement that provides a *cy pres* award but no direct relief to class members satisfies the requirement that a settlement binding class members be "fair, reasonable, and adequate." Fed. Rule Civ. Proc. 23(e)(2).

In briefing on the merits before this Court, the Solicitor General filed a brief as *amicus curiae* supporting neither party. He urged us to vacate and remand the case for the lower courts to address standing. The Government argued that there is a substantial open question about whether any named plaintiff in the class action actually had standing in the District Court. Because Google withdrew its standing challenge after we dismissed *Edwards* as improvidently granted, neither the District Court nor the Ninth Circuit ever opined on whether any named plaintiff sufficiently alleged standing in the operative complaint.

"We have an obligation to assure ourselves of litigants' standing under Article III." *DaimlerChrysler Corp.* v. *Cuno,* 547 U. S. 332, 340 (2006) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 180 (2000); internal quotation marks omitted). That obligation extends to court approval of proposed class action settlements. In ordinary non-class litigation, parties are free to settle their disputes on their own terms, and plaintiffs may voluntarily dismiss their claims without a court order. Fed. Rule Civ. Proc. 41(a)(1)(A). By contrast, in a class action, the "claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. Rule Civ. Proc. 23(e). A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing. *Simon* v. *Eastern Ky. Welfare Rights Organization,* 426 U. S. 26, 40, n. 20 (1976).

When the District Court ruled on Google's second motion to dismiss, it relied on *Edwards* to hold that Gaos had standing to assert a claim under the SCA. Our decision in *Spokeo* abrogated the ruling in *Edwards* that the violation of a statutory right automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue to vindicate that right. 578 U. S., at 341; see *Edwards*, 610 F. 3d, at 517–518. Since that time, no court in this case has analyzed whether any named plaintiff has alleged SCA violations that are sufficiently concrete and particularized to support standing. After oral argument, we ordered supplemental briefing from the parties and Solicitor General to address that question.

After reviewing the supplemental briefs, we conclude that the case should be remanded for the courts below to address the plaintiffs' standing in light of *Spokeo*. The supplemental briefs filed in response to our order raise a wide variety of legal and factual issues not addressed in the merits briefing before us or at oral argument. We "are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). Resolution of the standing question should take place in the District Court or the Ninth Circuit in the first instance. We therefore vacate and remand for further proceedings. Nothing in our opinion should be interpreted as expressing a view on any particular resolution of the standing question.

* * *

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

It is so ordered.

JUSTICE THOMAS, dissenting.

Respectfully, I would reach the merits and reverse. As I have previously explained, a plaintiff seeking to vindicate a

private right need only allege an invasion of that right to establish standing. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 348 (2016) (concurring opinion). Here, the plaintiffs alleged violations of the Stored Communications Act, which creates a private right: It prohibits certain electronic service providers from "knowingly divulg[ing] . . . the contents of a communication" sent by a " 'user,' " "subscriber," or "customer" of the service, except as provided in the Act. 18 U. S. C. §§ 2510(13), 2702(a)(1)–(2), (b); see § 2707(a) (providing a cause of action to persons aggrieved by violations of the Act). They also asserted violations of private rights under state law. By alleging the violation of "private dut[ies] owed personally" to them " 'as individuals,' " *Spokeo, supra*, at 349, 344 (opinion of THOMAS, J.), the plaintiffs established standing. Whether their allegations state a plausible claim for relief under the Act or state law is a separate question on which I express no opinion.

As to the class-certification and class-settlement orders, I would reverse. The named plaintiffs here sought to simultaneously certify and settle a class action under Federal Rules of Civil Procedure 23(b)(3) and (e). Yet the settlement agreement provided members of the class no damages and no other form of meaningful relief.* Most of the settlement fund was devoted to *cy pres* payments to nonprofit organizations that are not parties to the litigation; the rest, to plaintiffs' lawyers, administrative costs, and incentive payments for the named plaintiffs. *Ante*, at 490–491. The District Court and the Court of Appeals approved this arrangement on the view that the *cy pres* payments provided an "indirect" benefit to the class. *In re Google Referrer Header Privacy*

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*The settlement required that Google make additional disclosures on its website for the benefit of "future users." App. to Pet. for Cert. 50. But no party argues that these disclosures were valuable enough on their own to independently support the settlement.

Litigation, 87 F. Supp. 3d 1122, 1128–1129, 1137 (ND Cal. 2015); *In re Google Referrer Header Privacy Litigation*, 869 F. 3d 737, 741 (CA9 2017).

Whatever role *cy pres* may permissibly play in disposing of unclaimed or undistributable class funds, see *Klier* v. *Elf Atochem North Am., Inc.*, 658 F. 3d 468, 474–476 (CA5 2011); *id.*, at 480–482 (Jones, C. J., concurring), *cy pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees). And the settlement agreement here provided no other form of meaningful relief to the class. This *cy pres*-only arrangement failed several requirements of Rule 23. First, the fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented. Fed. Rules Civ. Proc. 23(a)(4), (g)(4); see *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 619–620 (1997) (settlement terms can inform adequacy of representation). Second, the lack of any benefit for the class rendered the settlement unfair and unreasonable under Rule 23(e)(2). Further, I question whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy" when it serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief. Fed. Rule Civ. Proc. 23(b)(3); see Rule 23(b)(3)(A) (courts must consider "the class members' interests in individually controlling the prosecution . . . of separate actions").

In short, because the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, I would hold that the class action should not have been certified, and the settlement should not have been approved.

REPORTER'S NOTE

Orders commencing with February 19, 2019, begin with page 1140. The preceding orders in 586 U. S., from October 1, 2018, through February 15, 2019, were reported in Part 1, at 801–1140. 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.

prison refused to give Ray a copy of its own practices and procedures (which would have made that distinction clear). So there is no reason Ray should have known, prior to January 23, that his imam would be granted less access than the Christian chaplain to the execution chamber.

This Court is ordinarily reluctant to interfere with the substantial discretion Courts of Appeals have to issue stays when needed. See, *e. g.*, *Dugger* v. *Johnson*, 485 U. S. 945, 947 (1988) (O'Connor, J., joined by Rehnquist, C. J., dissenting). Here, Ray has put forward a powerful claim that his religious rights will be violated at the moment the State puts him to death. The Eleventh Circuit wanted to hear that claim in full. Instead, this Court short-circuits that ordinary process—and itself rejects the claim with little briefing and no argument—just so the State can meet its preferred execution date. I respectfully dissent.

Certiorari Denied

No. 18–7796 (18A813). Ray *v.* Alabama. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied.

February 15, 2019

Certiorari Granted

No. 18–966. Department of Commerce et al. *v.* New York et al. C. A. 2d Cir. Certiorari before judgment granted. Case will be set for argument in the second week of the April argument session.

February 19, 2019

Dismissal Under Rule 46

No. 18–626. Glen St. Andrew Living Community, LLC, et al. *v.* Wetzel. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 901 F. 3d 856.

Certiorari Granted—Reversed and Remanded. (See *Moore* v. *Texas*, 586 U. S. 133 (2019) (*per curiam*).)

Certiorari Dismissed

No. 18–7073. Luh *v.* Fulton State Hospital et al. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pau-*

peris denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) (*per curiam*).

No. 18–7090. Morales *v.* Florida. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Justice Kagan took no part in the consideration or decision of this motion and this petition.

No. 18–7501. GwanJun Kim *v.* Grand Valley State University et al. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) (*per curiam*).

Miscellaneous Orders

No. 17A612. Schneider *v.* Bank of America, N. A., et al. Application for injunctive relief, addressed to Justice Ginsburg and referred to the Court, denied.

No. 18A554. Harihar *v.* U. S. Bank N. A. et al. C. A. 1st Cir. Application for stay, addressed to The Chief Justice and referred to the Court, denied.

No. 18A692. Golz *v.* Carson, Secretary of Housing and Urban Development. D. C. Colo. Application for stay, addressed to The Chief Justice and referred to the Court, denied.

No. D–3014. In re Disbarment of Wertkin. Disbarment entered. [For earlier order herein, see 584 U. S. 912.]

No. D–3028. In re Disbarment of Sacks. Disbarment entered. [For earlier order herein, see 584 U. S. 929.]

No. D–3029. In re Disbarment of Speights. Disbarment entered. [For earlier order herein, see 586 U. S. 961.]

No. D–3031. In re disbarment of Roberts. Disbarment entered. [For earlier order herein, see 586 U. S. 961.]

No. D–3032. In re Disbarment of Powell. Disbarment entered. [For earlier order herein, see 586 U. S. 962.]

No. D–3033. In re Disbarment of Casale. Disbarment entered. [For earlier order herein, see 586 U. S. 962.]

No. D–3034. In re Disbarment of Jonas. Disbarment entered. [For earlier order herein, see 586 U. S. 962.]

No. D–3037. In re Disbarment of Cooper. Disbarment entered. [For earlier order herein, see 586 U. S. 962.]

No. D–3038. In re Disbarment of Hicks. Disbarment entered. [For earlier order herein, see 586 U. S. 962.]

No. D–3039. In re Disbarment of Marcin. Disbarment entered. [For earlier order herein, see 586 U. S. 963.]

No. D–3040. In re Disbarment of Mandelbaum. Disbarment entered. [For earlier order herein, see 586 U. S. 963.]

No. 18M91. Romain *v.* O'Connor et al. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 18M92. Smith *v.* United States;
No. 18M95. Morales *v.* United States;
No. 18M96. Golden *v.* Pfister, Warden;
No. 18M97. Matthews *v.* Jones, Secretary, Florida Department of Corrections;
No. 18M99. Wong *v.* Lubetkin, Chapter 7 Trustee, et al.; and
No. 18M102. Thompson *v.* Uehara. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M94. In re Hudnall. Motion for leave to proceed as a veteran granted.

No. 18M98. A. R. *v.* Florida Department of Children and Families et al. Motion for leave to file petition for writ of certiorari under seal granted.

No. 18M100. RPX Corp. *v.* Applications in Internet Time, LLC; and

No. 18M101. Rodriguez *v.* New Jersey. Motions for leave to file petitions for writs of certiorari with supplemental appendixes under seal granted.

No. 17–1594. Return Mail, Inc. *v.* United States Postal Service et al. C. A. Fed. Cir. [Certiorari granted, 586 U. S. 959.] Motion of Electronic Frontier Foundation for leave to file brief as *amicus curiae* granted.

No. 17–9107. Grigsby *v.* United States. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 803] denied.

No. 18–281. Virginia House of Delegates et al. *v.* Bethune-Hill et al. D. C. E. D. Va. [Probable jurisdiction postponed, 586 U. S. 996.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted in part, and the time is divided as follows: 25 minutes for appellants, 10 minutes for the Solicitor General as *amicus curiae*, 10 minutes for appellee Virginia State Board of Elections et al., and 15 minutes for appellee Golden Bethune-Hill et al.

No. 18–431. United States *v.* Davis et al. C. A. 5th Cir. [Certiorari granted, 586 U. S. 1063.] Motion of petitioner to dispense with printing joint appendix granted.

No. 18–948. In re Grand Jury Subpoena. Motion of Reporters Committee for Freedom of the Press to intervene denied. Motion of respondent for leave to file redacted copies of the application for stay, response, and reply granted.

No. 18–6823. Williams *v.* County of Los Angeles, California, et al. C. A. 9th Cir.;
No. 18–6857. Munt *v.* Schnell, Commissioner, Minnesota Department of Corrections, et al. C. A. 8th Cir.;
No. 18–6907. Kulick *v.* Leisure Village Assn., Inc. C. A. 9th Cir.;
No. 18–7013. In re Zimmermann; and
No. 18–7241. Kerrigan *v.* QBE Insurance Corp. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 12, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–7247. In re Bolze;
No. 18–7392. In re Rudnick;
No. 18–7461. In re Lee;
No. 18–7507. In re Carter; and
No. 18–7528. In re Doyle. Petitions for writs of habeas corpus denied.

No. 18–7260. In re Daniels. Petition for writ of habeas corpus denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 18–7526. In re Heffernan. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 18–768. In re Kellogg et al.; and
No. 18–6962. In re Kostich. Petitions for writs of mandamus denied.

No. 18–7001. In re Kennedy; and
No. 18–7205. In re Armstrong. Motions of petitioners for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus dismissed. See this Court's Rule 39.8.

No. 18–7255. In re Barnes. Petition for writ of mandamus and/or prohibition denied.

No. 18–7207. In re Johnston. Petition for writ of prohibition denied.

Certiorari Granted

No. 18–260. County of Maui, Hawaii *v.* Hawaii Wildlife Fund et al. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 886 F. 3d 737.

Certiorari Denied

No. 17–1386. Wilson *v.* Bridges, Individually and as the Surviving Spouse of Bridges, Deceased, et al. C. A. 10th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 636.

No. 18–99. Barnes *v.* Gerhart et al. C. A. 5th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 316.

No. 18–265. Patterson *v.* Clarke, Director, Virginia Department of Corrections. Sup. Ct. Va. Certiorari denied.

No. 18–295. Alimanestianu et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 888 F. 3d 1374.

No. 18–306. Larrabee *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 78 M. J. 107.

No. 18–377. Montanans for Community Development *v.* Mangan et al. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 280.

No. 18–392. Richardson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 822.

No. 18–410. Yates *v.* United States; and
No. 18–6336. Walker *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 167 A. 3d 1191.

No. 18–423. Barrella *v.* Village of Freeport, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 714 Fed. Appx. 78.

No. 18–444. Montana *v.* Tipton. Sup. Ct. Mont. Certiorari denied. Reported below: 392 Mont. 59, 421 P. 3d 780.

No. 18–546. Frosh, Attorney General of Maryland, et al. *v.* Association for Accessible Medicines. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 3d 664.

No. 18–560. Peaje Investments LLC *v.* Financial Oversight and Management Board for Puerto Rico et al. C. A. 1st Cir. Certiorari denied. Reported below: 899 F. 3d 1.

No. 18–580. Nu Image, Inc. *v.* International Alliance of Theatrical Stage Employees et al. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 3d 636.

No. 18–597. Lee *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 726 Fed. Appx. 589.

No. 18–622. Whole Woman's Health et al. *v.* Texas Catholic Conference of Bishops et al. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 3d 362.

No. 18–652. El Omari *v.* Ras Al Khaimah Free Trade Zone Authority et al. C. A. 2d Cir. Certiorari denied. Reported below: 735 Fed. Appx. 30.

No. 18–669. Gates *v.* Reed et al. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 3d 874.

No. 18–681. Nwoke *v.* Consulate of Nigeria. C. A. 7th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 478.

No. 18–686. King et al. *v.* Caliber Home Loans, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 47.

No. 18–687. Frett *v.* Territory of the Virgin Islands. Sup. Ct. V. I. Certiorari denied. Reported below: 66 V. I. 399.

No. 18–691. Snelling *v.* Segbers et al. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 548 S. W. 3d 372.

No. 18–692. Mylan Pharmaceuticals Inc. et al. *v.* UCB, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 890 F. 3d 1313.

No. 18–695. Chung et al. *v.* Silva, as Personal Representative of the Estate of Haleck, et al. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 883.

No. 18–697. Carruthers *v.* Mays, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 3d 273.

No. 18–700. Saunders-Gomez *v.* Rutledge Maintenance Corp. Sup. Ct. Del. Certiorari denied. Reported below: 189 A. 3d 1288.

No. 18–701. Tanksley *v.* Daniels et al. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 3d 165.

No. 18–703. University of Southern California et al. *v.* Munro et al. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 3d 1088.

No. 18–705. Griffen, Judge, Sixth Judicial Circuit, Pulaski County, Arkansas *v.* Kemp, Chief Justice, Arkansas Supreme Court, et al. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 3d 900.

No. 18–707. Becton *v.* Social Security Administration et al. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 180.

No. 18–712. Artrip *v.* Ball Corp. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 735 Fed. Appx. 708.

No. 18–713. Wright *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 892 F. 3d 963.

No. 18–718. Young *v.* Overly et al. C. A. 6th Cir. Certiorari denied.

No. 18–720. Duhe et al. *v.* City of Little Rock, Arkansas, et al. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 3d 858.

No. 18–721. Bloom *v.* Aftermath Public Adjusters, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 3d 516.

No. 18–723. Rodriguez *v.* Bank of America, N. A. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 246 So. 3d 541.

No. 18–724. City of Sandpoint, Idaho, et al. *v.* Maddox, on Behalf of Minor Children D. M. et al., et al. C. A. 9th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 609.

No. 18–727. Manley *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 18–731. Vega Duron, a Minor, et al. *v.* Johnson et al. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 3d 644.

No. 18–732. Coulter *v.* Tatananni et al. C. A. 3d Cir. Certiorari denied. Reported below: 737 Fed. Appx. 613.

No. 18–734. Szmania *v.* E-Loan, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 647.

No. 18–736. Lawson et ux. *v.* Bell Sports USA. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–741. Odermatt *v.* Way et al. C. A. 2d Cir. Certiorari denied. Reported below: 694 Fed. Appx. 842.

No. 18–743. White Oak Realty, LLC, et al. *v.* Army Corps of Engineers et al. C. A. 5th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 294.

No. 18–744. Unger *v.* Bergh, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 55.

No. 18–748. Wilson *v.* Office of the Commissioner of the Revenue of Stafford County et al. Sup. Ct. Va. Certiorari denied.

No. 18–749. Crossett *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–751. Metropolitan Interpreters & Translators Inc. *v.* Bates et al. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 268.

No. 18–752. Taupier *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 330 Conn. 149, 193 A. 3d 1.

No. 18–753. Couturier *v.* Presiding Judge, Superior Court of California, Los Angeles County, et al. C. A. 9th Cir. Certiorari denied.

No. 18–754. Ramirez *v.* Walmart. Sup. Ct. N. D. Certiorari denied. Reported below: 2018 ND 179, 915 N. W. 2d 674.

No. 18–757. Chuang *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–758. Ivy et al. *v.* Moran. C. A. 6th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 820.

No. 18–765. Brady *v.* New York et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 158 App. Div. 3d 457, 67 N. Y. S. 3d 837.

No. 18–767. Ancient Coin Collectors Guild *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 899 F. 3d 295.

No. 18–769. Minnesota Living Assistance, Inc., dba Baywood Home Care *v.* Peterson et al. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 548.

No. 18–770. Webtrends, Inc. *v.* Iancu, Director, Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 725 Fed. Appx. 1010.

No. 18–771. Vaigasi *v.* Solow Management Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 750 Fed. Appx. 37.

No. 18–775. Chien *v.* LeClairRyan et al. C. A. 4th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 63.

No. 18–777. Bueno-Muela *v.* Whitaker, Acting Attorney General (Reported below: 893 F. 3d 1073); and Lemus Martinez *v.* Whitaker, Acting Attorney General (893 F. 3d 1067). C. A. 8th Cir. Certiorari denied.

No. 18–778. St. Louis Heart Center, Inc. *v.* Nomax, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 500.

No. 18–780. Kerr *v.* Marshall University Board of Governors et al. C. A. 4th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 827.

No. 18–787. Rhoe *v.* Montgomery County Office of Child Support Enforcement. Ct. Sp. App. Md. Certiorari denied. Reported below: 237 Md. App. 756 and 758.

No. 18–789. Hylton *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 300.

No. 18–791. Moesch *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–794. Shea *v.* Winnebago County Sheriff's Office et al. C. A. 7th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 541.

No. 18–795. Bush *v.* Department of Agriculture, Risk Management Agency, et al. C. A. 8th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 607.

No. 18–796. Alexander *v.* Trump, President of the United States, et al. C. A. 5th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 201.

No. 18–797. Burmaster *v.* Herman et al. C. A. 7th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 790.

No. 18–799. Davis *v.* Bhatt. Ct. App. Ga. Certiorari denied.

No. 18–804. Dry, as Administrator ad Litem for the Estate of Dry *v.* Steele et al. Ct. App. Tenn. Certiorari denied.

No. 18–806. Hohman et al. *v.* United States et al. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 3d 776.

No. 18–808. Webster *v.* Shanahan, Acting Secretary of Defense. C. A. 4th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 214.

No. 18–818. Thompson *v.* Rovella, Chief of Police, City of Hartford, Connecticut, et al. C. A. 2d Cir. Certiorari denied. Reported below: 734 Fed. Appx. 787.

No. 18–820. Weinacker *v.* National Loan Acquisitions Co. C. A. 11th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 390.

No. 18–823. ZUP, LLC *v.* Nash Manufacturing, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 896 F. 3d 1365.

No. 18–825. Shumpert, Individually and as Administrator of the Estate of Shumpert, et al. *v.* City of Tupelo, Mississippi, et al. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 3d 310.

No. 18–826. Shelton *v.* Patterson. Commw. Ct. Pa. Certiorari denied. Reported below: 175 A. 3d 442.

No. 18–828. Ghiringhelli et al. *v.* Assurance Group, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 970.

No. 18–833. Stokes *v.* Commission for Lawyer Discipline. C. A. 5th Cir. Certiorari denied.

No. 18–839. Colon *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 160120, 117 N. E. 3d 278.

No. 18–841. Hoffman *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 248 So. 3d 1107.

No. 18–846. Anderton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 3d 278.

No. 18–850. Altstatt *v.* Fruendt, Executive Director, Oklahoma Department of Rehabilitation Services, et al. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 3d 1167.

No. 18–851. Marshall *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 139.

No. 18–856. Antonin *v.* Baltimore Police Department. Ct. Sp. App. Md. Certiorari denied. Reported below: 237 Md. App. 348, 185 A. 3d 811.

No. 18–857. Boyd *v.* Mississippi Department of Public Safety et al. C. A. 5th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 444.

No. 18–858. McCullars *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 3d 255.

No. 18–860. Parrish *v.* Board of Professional Responsibility. Sup. Ct. Tenn. Certiorari denied. Reported below: 556 S. W. 3d 153.

No. 18–861. WesternGeco LLC *v.* ION Geophysical Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 889 F. 3d 1308.

No. 18–863. Edmond *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 899 F. 3d 446.

No. 18–864. Tatum et ux. *v.* Dallas Morning News, Inc., et al. Sup. Ct. Tex. Certiorari denied. Reported below: 554 S. W. 3d 614.

No. 18–872. Dolacinski et al. *v.* Bank of America. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 252 So. 3d 1188.

No. 18–874. Houston Auto M. Imports Greenway, Ltd., dba Mercedes-Benz of Houston Greenway *v.* Zastrow et al. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 496.

No. 18–878. Stevens et al. *v.* CoreLogic, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 3d 666.

No. 18–884. Jeffrey *v.* West Virginia. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–888. Bent *v.* Strange et al. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 357.

No. 18–902. Poupart *v.* Hooper, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 53.

No. 18–903. Perry et al. *v.* Coles County, Illinois. C. A. 7th Cir. Certiorari denied. Reported below: 906 F. 3d 583.

No. 18–931. Hesse *v.* Howell. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 18–6009. Myrthil *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 480.

No. 18–6011. Hamidullin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 3d 62.

No. 18–6061. Ortiz-Martinez *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–6096. Jackson *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–6147. Nettles *v.* Horton, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–6157. Sealed Appellee *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 3d 707.

No. 18–6185. Beckman *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 230 So. 3d 77.

No. 18–6187. Martinez-Lopez *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 326.

No. 18–6212. Burgess *v.* English, Warden. C. A. 11th Cir. Certiorari denied.

No. 18–6258. Lazar *v.* Capozza, Superintendent, State Correctional Institution at Fayette, et al. C. A. 3d Cir. Certiorari denied. Reported below: 731 Fed. Appx. 119.

No. 18–6269. Lloyd *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 570.

No. 18–6273. Davis *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 728 Fed. Appx. 165.

No. 18–6292. Robinson *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 18–6374. Welsh *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 3d 530.

No. 18–6385. Beeman *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 3d 1215.

No. 18–6409. Morrow *v.* Ford, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 3d 1138.

No. 18–6563. Gonzalez-Negron *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 892 F. 3d 485.

No. 18–6588. Warren *v.* Thomas, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 3d 609.

No. 18–6608. O'Neil *v.* Warden, Federal Correctional Complex Coleman. C. A. 11th Cir. Certiorari denied.

No. 18–6679. Graham *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 152413, 109 N. E. 3d 281.

No. 18–6716. Walker, aka Richmond *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 18–6741. Mamou *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 820.

No. 18–6766. Gulbrandson *v.* Ryan, Director, Arizona Department of Corrections. C. A. 9th Cir. Certiorari denied.

No. 18–6773. Knox *v.* Plowden. C. A. 4th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 263.

No. 18–6776. Owen *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 247 So. 3d 394.

No. 18–6779. Heffington *v.* Puleo et al. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 572.

No. 18–6794. Bradshaw *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 457.

No. 18–6796. Muckle *v.* Wells Fargo Bank et al. C. A. 1st Cir. Certiorari denied.

No. 18–6799. Nash *v.* Wachovia Bank et al. C. A. 9th Cir. Certiorari denied.

No. 18–6802. Kitlas *v.* Haws, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 158.

No. 18–6803. McNeil *v.* Grim et al. C. A. 3d Cir. Certiorari denied. Reported below: 736 Fed. Appx. 33.

No. 18–6805. Rodriguez *v.* Paramo, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–6815. Ibenyenwa *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–6835. Sanchez *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, et al. C. A. 5th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 172.

No. 18–6836. Rivas *v.* Spearman, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 163.

No. 18–6837. Swinton *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–6840. Rosky *v.* Baker, Warden, et al. Ct. App. Nev. Certiorari denied. Reported below: 134 Nev. 1004.

No. 18–6849. James *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied.

No. 18–6850. Esparza *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–6866. Sperber *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 177 A. 3d 212.

No. 18–6876. Joshlin *v.* Neven, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 477.

No. 18–6877. Shere *v.* Florida. Sup. Ct. Fla. Certiorari denied.

No. 18–6878. Daley *v.* Maryland et al. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 172.

No. 18–6881. Alston *v.* Mississippi Department of Employment Security. Ct. App. Miss. Certiorari denied. Reported below: 247 So. 3d 303.

No. 18–6883. Caterbone *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–6884. Tryon *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 2018 OK CR 20, 423 P. 3d 617.

No. 18–6885. Marquez *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–6886. Johnson *v.* Berryhill, Acting Commissioner of Social Security. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 107.

No. 18–6887. Wilson *v.* Berryhill, Acting Commissioner of Social Security. C. A. 7th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 286.

No. 18–6888. Clay *v.* Papik. C. A. 9th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 709.

No. 18–6899. Uranga *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 3d 282.

No. 18–6902. Mansfield *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 248 So. 3d 59.

No. 18–6903. McLaurin *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 160 App. Div. 3d 1438, 76 N. Y. S. 3d 691.

No. 18–6909. Lucero *v.* Holland, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 3d 979.

No. 18–6921. Stevenson *v.* Richman, Judge, Superior Court of California, Los Angeles County, et al. C. A. 9th Cir. Certiorari denied.

No. 18–6925. Tarver *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 249 So. 3d 641.

No. 18–6928. Johnson *v.* Wylie et al. C. A. 3d Cir. Certiorari denied. Reported below: 733 Fed. Appx. 31.

No. 18–6929. Johnson *v.* Queen Elizabeth. C. A. 3d Cir. Certiorari denied. Reported below: 733 Fed. Appx. 28.

No. 18–6930. Johnson *v.* Rothschild. C. A. 3d Cir. Certiorari denied. Reported below: 731 Fed. Appx. 87.

No. 18–6931. Johnson *v.* Rothschild. C. A. 3d Cir. Certiorari denied. Reported below: 741 Fed. Appx. 52.

No. 18–6932. Johnson *v.* German Aerospace Center. C. A. 3d Cir. Certiorari denied. Reported below: 739 Fed. Appx. 182.

No. 18–6933. Johnson *v.* Office of Children, Youth and Families. C. A. 3d Cir. Certiorari denied. Reported below: 740 Fed. Appx. 17.

No. 18–6938. Phillips *v.* Washburn, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–6940. Andrews *v.* Montgomery, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 697.

No. 18–6942. Zapata *v.* PECO Energy Co. C. A. 3d Cir. Certiorari denied. Reported below: 712 Fed. Appx. 216.

No. 18–6944. Vizcaino-Ramos *v.* Lindamood, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–6946. Trevino *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–6947. Gillard *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 171121–U.

No. 18–6950. McBride *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 18–6953. Jaime Jimenez *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–6954. Wells *v.* California. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 18–6956. Walton *v.* Florida et al. Sup. Ct. Fla. Certiorari denied. Reported below: 246 So. 3d 246.

No. 18–6957. Sultaana *v.* Harris, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–6958. Velayo *v.* Talamayan et al. C. A. 10th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 614.

No. 18–6959. Kingham *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–6960. Mack *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–6965. Lei Yin *v.* Biogen, Inc., fka Biogen-IDEC. C. A. 1st Cir. Certiorari denied.

No. 18–6966. Wagoner *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 18–6968. Quinones Leyva *v.* United States District Court for the District of South Carolina. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 139.

No. 18–6975. Van Nortrick *v.* Louisiana. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 51,604 (La. App. 2 Cir. 1/10/18), 244 So. 3d 810.

No. 18–6976. Ewalan *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 3 Wash. App. 2d 1041.

No. 18–6977. Mitchell *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 18–6978. Mascarena *v.* Montana. Sup. Ct. Mont. Certiorari denied. Reported below: 392 Mont. 553, 416 P. 3d 180.

No. 18–6987. Sanders *v.* Kelley, Director, Arkansas Department of Correction, et al. C. A. 8th Cir. Certiorari denied.

No. 18–6988. Sanders *v.* Uribe, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 527.

No. 18–6991. Rambo *v.* Kansas. C. A. 10th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 246.

No. 18–6997. T. H. -H. *v.* Allegheny County Office of Children, Youth and Families, et al. Sup. Ct. Pa. Certiorari denied. Reported below: 648 Pa. 236, 192 A. 3d 1080.

No. 18–6998. Cleveland *v.* South Carolina. Ct. App. S. C. Certiorari denied.

No. 18–6999. McQueen *v.* Fisher. C. A. 6th Cir. Certiorari denied.

No. 18–7003. Ramirez *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 18–7006. Reid *v.* Warden et al. C. A. 11th Cir. Certiorari denied.

No. 18–7008. White *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–7011. Myzer *v.* Bush et al. C. A. 10th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 644.

No. 18–7014. Collins *v.* Epstein et al. C. A. 3d Cir. Certiorari denied. Reported below: 734 Fed. Appx. 145.

No. 18–7015. West *v.* Spencer, Secretary of the Navy. C. A. 9th Cir. Certiorari denied.

No. 18–7016. Washington *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7017. Black *v.* Lindsay. Ct. App. D. C. Certiorari denied. Reported below: 189 A. 3d 712.

No. 18–7018. Santos LaGaite *v.* Foley et al. C. A. 5th Cir. Certiorari denied.

No. 18–7019. Jones *v.* Byrne, Warden. Ct. App. Nev. Certiorari denied. Reported below: 134 Nev. 965.

No. 18–7024. Villafana *v.* Clarke, Director, Virginia Department of Corrections. Sup. Ct. Va. Certiorari denied.

No. 18–7025. Burt *v.* California. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 18–7027. Kuri *v.* Addictive Behavioral Change Health Group et al. Ct. App. Kan. Certiorari denied. Reported below: 55 Kan. App. 2d xiii, 408 P. 3d 1003.

No. 18–7030. S. R. *v.* West Virginia Department of Health and Human Resources et al. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–7031. Lewis *v.* Quiros et al. C. A. 2d Cir. Certiorari denied.

No. 18–7034. Sadik *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 181 A. 3d 1255.

No. 18–7040. Perry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 337.

No. 18–7041. Donaldson *v.* Michigan Department of Health and Human Services et al. Ct. App. Mich. Certiorari denied.

No. 18–7042. Warterfield *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7043. Tuton *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 893 F. 3d 562.

No. 18–7045. Gilkers *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 3d 336.

No. 18–7046. Castillo *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 742 Fed. Appx. 610.

No. 18–7047. Casanova *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–7049. Munt *v.* Larson et al. C. A. 8th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 108.

No. 18–7051. Taylor *v.* CVS Caremark Corp. C. A. 4th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 704.

No. 18–7052. Wilkerson *v.* Woods. Ct. Sp. App. Md. Certiorari denied.

No. 18–7053. Varner *v.* Christiansen, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7054. White *v.* Matthews et al. Sup. Ct. Mich. Certiorari denied. Reported below: 503 Mich. 863, 917 N. W. 2d 59.

No. 18–7055. White *v.* Southeast Michigan Surgical Hospital et al. Sup. Ct. Mich. Certiorari denied. Reported below: 503 Mich. 862, 917 N. W. 2d 67.

No. 18–7056. Johnson *v.* California. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 18–7057. Royston *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7058. Joaquin Ramirez *v.* City of New York, New York, et al. C. A. 2d Cir. Certiorari denied.

No. 18–7059. Rosky *v.* Byrne, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 18–7062. Clements *v.* Florida Department of Corrections et al. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 255 So. 3d 818.

No. 18–7064. Mackenzie *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–7068. Figueroa *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7069. Ludovici *v.* Marsh, Superintendent, State Correctional Institution at Benner Township, et al. C. A. 3d Cir. Certiorari denied.

No. 18–7070. Jackson *v.* GMAC Mortgage Corp. C. A. 11th Cir. Certiorari denied.

No. 18–7071. Brewer *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 509.

No. 18–7075. Martinez *v.* Texas. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 18–7080. Danmola *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 514.

No. 18–7081. Williams *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7082. Rosas Cuellar *v.* United States (Reported below: 738 Fed. Appx. 320); and Larios-Villatoro *v.* United States (741 Fed. Appx. 269). C. A. 5th Cir. Certiorari denied.

No. 18–7083. Walter-Eze, aka Okam *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 3d 891.

No. 18–7084. Young *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 331.

No. 18–7085. McGhee *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–7087. Lopez *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 614.

No. 18–7088. Mora *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 271.

No. 18–7089. Milliner *v.* Litteral, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7092. Cain *v.* Atelier Esthetique Institute of Esthetics, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 733 Fed. Appx. 8.

No. 18–7093. Clark *v.* Allen & Overy, LLP. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 159 App. Div. 3d 478, 73 N. Y. S. 3d 144.

No. 18–7095. Robinson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 277.

No. 18–7100. Simmons *v.* Capra, Superintendent, Sing Sing Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 18–7101. Ghobrial *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 5th 250, 420 P. 3d 179.

No. 18–7102. Huling *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 702.

No. 18–7103. Garcia-Montejo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 94.

No. 18–7104. Irizarry-Rosario *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 903 F. 3d 151.

No. 18–7106. Plascencia-Orozco *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7107. Odums *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 175.

No. 18–7109. Miller *v.* Ohio. Ct. App. Ohio, 7th App. Dist., Mahoning County. Certiorari denied. Reported below: 2018-Ohio-3430, 118 N. E. 3d 1094.

No. 18–7111. Guerra *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7114. Williams *v.* California. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 18–7116. Jones *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 3d 1325.

No. 18–7117. Mayberry *v.* Dittman, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 904 F. 3d 525.

No. 18–7119. Grigsby *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied.

No. 18–7120. Zuniga Hernandez *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7121. Higgs, aka Beachum *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–7122. Gola *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 602.

No. 18–7124. Hernandez *v.* Texas. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 18–7125. Abul Hosn *v.* Department of State et al. C. A. 6th Cir. Certiorari denied.

No. 18–7126. Abdullah *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 905 F. 3d 739.

No. 18–7127. French *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 836.

No. 18–7128. Bebo *v.* Medeiros, Superintendent, Massachusetts Correctional Institution at Norfolk. C. A. 1st Cir. Certiorari denied. Reported below: 906 F. 3d 129.

No. 18–7129. Christian *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 165.

No. 18–7131. Lott *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7133. Burks *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 191.

No. 18–7134. Lowe *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 552 S. W. 3d 842.

No. 18–7141. Rey Gonzalez *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 224.

No. 18–7142. Talley *v.* Pride Mobility Products Corp. et al. Ct. App. N. C. Certiorari denied. Reported below: 259 N. C. App. 734, 816 S. E. 2d 533.

No. 18–7143. Eidson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 725 Fed. Appx. 453.

No. 18–7145. Sadowski *v.* Grounds, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 311.

No. 18–7147. Smith *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 943.

No. 18–7150. Hostetler *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 18–7153. J. E., aka J. E. C. *v.* Oregon Department of Human Services. Ct. App. Ore. Certiorari denied. Reported below: 285 Ore. App. 652, 402 P. 3d 783.

No. 18–7154. Visconti *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 543.

No. 18–7158. Knox *v.* Clarke, Director, Virginia Department of Corrections. Sup. Ct. Va. Certiorari denied.

No. 18–7161. Martin *v.* Whitaker, Acting Attorney General. C. A. 3d Cir. Certiorari denied. Reported below: 729 Fed. Appx. 210.

No. 18–7162. Jama *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 3d 295.

No. 18–7163. Mayfield et al. *v.* Harvey County Sheriff's Department et al. C. A. 10th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 685.

No. 18–7167. Kirsh *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2017–0231 (La. App. 1 Cir. 11/1/17), 234 So. 3d 941.

No. 18–7169. Wright *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 3d 868.

No. 18–7176. Garcia-Ortiz *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 904 F. 3d 102.

No. 18–7177. Gonzales *v.* Santoro, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 468.

No. 18–7178. Tran *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7180. Urquia-Melendez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 280.

No. 18–7181. White *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 255.

No. 18–7183. Martin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 446.

No. 18–7184. Chambers, aka Sealed Defendant *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 751 Fed. Appx. 44.

No. 18–7185. Diaz-Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 830.

No. 18–7186. Weidner *v.* Taylor, Superintendent, Eastern Oregon Correctional Institution. C. A. 9th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 782.

No. 18–7189. Manlove *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 630.

No. 18–7191. Pendergraft et al. *v.* Network of Neighbors, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 517.

No. 18–7192. Phillips *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 891.

No. 18–7193. Collins *v.* Berryhill, Acting Commissioner of Social Security. C. A. 7th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 21.

No. 18–7194. Colbert *v.* California. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 18–7195. Gomez *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 150605, 105 N. E. 3d 901.

No. 18–7196. McElroy *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 612.

No. 18–7197. Lewis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 247.

No. 18–7198. Cruz *v.* Hallenbeck, Superintendent, Hale Creek Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 18–7199. Fauntleroy *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 18–7200. Riley *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 730 Fed. Appx. 175.

No. 18–7206. Kegler *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 572.

No. 18–7209. Oberacker *v.* Noble, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7210. Prailow *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 237 Md. App. 757.

No. 18–7212. Dailey *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7214. McLaughlin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 270.

No. 18–7215. Uces *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 115.

No. 18–7216. Duhamel *v.* Miller, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7222. Jiau *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 18–7227. Jones *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 771.

No. 18–7228. Brown *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 959.

No. 18–7229. Blackman *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 3d 772.

No. 18–7230. Ashley *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–7231. Avery *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 482.

No. 18–7236. Stoutamire *v.* La Rose, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7238. Edwards *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 526.

No. 18–7239. Cannon *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 18–7240. King *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 323.

No. 18–7243. Rojas-Cisneros *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7245. Rodriguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 638.

No. 18–7249. Doe *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 987 F. 3d 1216.

No. 18–7251. Jordan *v.* Equal Employment Opportunity Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 742 Fed. Appx. 514.

No. 18–7253. Forte *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 207.

No. 18–7254. Thomas *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 750 Fed. Appx. 120.

No. 18–7256. De Castro *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 905 F. 3d 676.

No. 18–7263. Patmon *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 902.

No. 18–7267. Greene *v.* Semple, Commissioner, Connecticut Department of Correction. Sup. Ct. Conn. Certiorari denied. Reported below: 330 Conn. 1, 190 A. 3d 851.

No. 18–7268. Berry *v.* McGinley, Superintendent, State Correctional Institution at Coal Township, et al. C. A. 3d Cir. Certiorari denied.

No. 18–7269. Allison *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7270. Bryant *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 143578–U.

No. 18–7272. Pablo Arreola *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 723 Fed. Appx. 48.

No. 18–7274. Spears, aka Aziz *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7275. Powers *v.* Block et al. C. A. 7th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 480.

No. 18–7278. Williams *v.* California. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied.

No. 18–7282. Bradley *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 3d 779.

No. 18–7284. Barlow *v.* Garman, Superintendent, State Correctional Institution at Rockview, et al. C. A. 3d Cir. Certiorari denied.

No. 18–7287. LaPrade *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 733 Fed. Appx. 592.

No. 18–7289. Bommerito *v.* Diaz, Acting Secretary, California Department of Corrections and Rehabilitation, et al. C. A. 9th Cir. Certiorari denied.

No. 18–7292. Whitley *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7293. Walker *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 286 So. 3d 18.

No. 18–7294. Antonio Zambrano *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 775.

No. 18–7296. Cisneros *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 730 Fed. Appx. 555.

No. 18–7297. Howard *v.* California. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 18–7300. Millis *v.* Kallis, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7303. Rivera *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 3d 896.

No. 18–7304. Rodriguez-Mantos *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 591.

No. 18–7305. Hilts *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 757 Fed. Appx. 56.

No. 18–7306. Steele *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7307. Rayo-Espinoza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 295.

No. 18–7308. Rodriguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 638.

No. 18–7309. Balfour *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7310. Thomas *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 18–7313. Templeton *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 685.

No. 18–7317. Davis *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 728 Fed. Appx. 125.

No. 18–7320. Ford *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 725 Fed. Appx. 785.

No. 18–7323. Willis *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7325. Zinkand *v.* Hernandez, Superintendent, Avery-Mitchell Correctional Institution, et al. C. A. 4th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 128.

No. 18–7327. Johnson *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–7329. Selfa *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 856.

No. 18–7330. Garrett *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 3d 811.

No. 18–7333. Moffett *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7340. Dillon *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 310.

No. 18–7341. Burton *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 361.

No. 18–7344. Dickinson *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 18–7345. Gonzalez *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7348. Garcia *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 868.

No. 18–7350. Flores-Botello *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 674 Fed. Appx. 409.

No. 18–7351. Geddes *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7352. Ellis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 598.

No. 18–7355. Haynes *v.* Oregon Board of Parole and Post-Prison Supervision et al. C. A. 9th Cir. Certiorari denied.

No. 18–7356. Gossett *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 337.

No. 18–7357. Ford *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7360. Mathis *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7361. Gibbons *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7365. DeVore *v.* Kelly, Superintendent, Oregon State Penitentiary. Sup. Ct. Ore. Certiorari denied.

No. 18–7367. Huggans *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7371. Johnson *v.* California. Ct. App. Cal., 1st App. Dist., Div. 2. Certiorari denied.

No. 18–7372. Cuevas *v.* Kelly, Superintendent, Oregon State Prison. C. A. 9th Cir. Certiorari denied.

No. 18–7374. Mejia *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 3d 307.

No. 18–7375. Nicolaison *v.* County of Hennepin, Minnesota. C. A. 8th Cir. Certiorari denied.

No. 18–7377. Harris *v.* Easterling, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7387. Lenihan *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7388. Romo *v.* Ormond, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7390. Stancik *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7391. Romero *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 906 F. 3d 196.

No. 18–7393. Roman *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 304.

No. 18–7400. Sleugh *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 3d 1007.

No. 18–7417. Robinson *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 152703–U.

No. 18–7418. Seals *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 231.

No. 18–7419. Becerra *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 213.

No. 18–7420. Alires *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 510.

No. 18–7424. Vail *v.* Louisiana. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 2017–354 (La. App. 3 Cir. 12/28/17), 236 So. 3d 644.

No. 18–7434. Graham *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7463. Koyle *v.* Sand Canyon Corp. et al. C. A. 10th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 549.

No. 18–7466. Bennett *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–7467. LaPointe *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2018 IL App (2d) 160903, 127 N. E. 3d 131.

No. 18–7469. Valenzuela Arzate *v.* Robertson, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7484. Naphaeng *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 906 F. 3d 173.

No. 18–7496. Allan *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 329 Conn. 815, 190 A. 3d 874.

No. 18–7506. Turner *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 3d 1084.

No. 18–7512. Jackson *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 150487, 105 N. E. 3d 996.

No. 18–7515. Newton *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 2018 IL 122958, 120 N. E. 3d 948.

No. 18–7518. Holt *v.* Terris, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7555. Gray *v.* Dorethy, Warden. C. A. 7th Cir. Certiorari denied.

No. 17–1542. McKee *v.* Cosby. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 3d 54.

Justice Thomas, concurring.

In December 2014, petitioner Kathrine McKee publicly accused actor and comedian Bill Cosby of forcibly raping her some 40 years earlier. McKee contends that Cosby's attorney responded on his behalf by writing and leaking a defamatory letter. According to McKee, the letter deliberately distorts her personal background to "damage her reputation for truthfulness and honesty, and further to embarrass, harass, humiliate, intimidate, and shame" her. App. to Pet. for Cert. 93a. She alleges that excerpts of the letter were disseminated via the Internet and published by news outlets around the world.

McKee filed suit in federal court for defamation under state law, but her case was dismissed. Applying *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and its progeny, the Court of Appeals concluded that, by disclosing her accusation to a reporter, McKee had " 'thrust' herself to the 'forefront' " of the public controversy over "sexual assault allegations implicating Cosby" and was therefore a "limited purpose public figure." 874 F. 3d 54, 61–62 (CA1 2017) (citing *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 345 (1974)). Under this Court's First Amendment precedents, public figures are barred from recovering damages for defamation unless they can show that the statement at issue was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, *supra,* at 280. Like many plaintiffs subject to this "al-

most impossible" standard, McKee was unable to make that showing. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 771 (1985) (White, J., concurring in judgment).

McKee asks us to review her classification as a limited-purpose public figure. I agree with the Court's decision not to take up that factbound question. I write to explain why, in an appropriate case, we should reconsider the precedents that require courts to ask it in the first place.

New York Times and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own " 'federal rule[s]' " by balancing the "competing values at stake in defamation suits." *Gertz*, *supra*, at 334, 348 (quoting *New York Times*, *supra*, at 279).

We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, we should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.

I

From the founding of the Nation until 1964, the law of defamation was "almost exclusively the business of state courts and legislatures." *Gertz*, *supra*, at 369–370 (White, J., dissenting). But beginning with *New York Times*, the Court "federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States." *Gertz*, *supra*, at 370. These decisions made little effort to ground their holdings in the original meaning of the Constitution.

A

New York Times involved a full-page advertisement soliciting support for the civil-rights movement and the legal defense of Dr. Martin Luther King, Jr. 376 U. S., at 256–257. The advertisement asserted that the movement was facing an " 'unprecedented wave of terror by those who would deny and negate' " the protections of the Constitution. *Id.*, at 256. As an example, the advertisement claimed that " 'truckloads of police' " in Montgomery, Alabama, " 'armed with shotguns and tear-gas,' " had surrounded

a college campus following a student demonstration. *Id.*, at 257. It further claimed that " '[w]hen the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.' " *Ibid.* The advertisement also stated that " 'the Southern violators' " had " 'answered Dr. King's peaceful protests with intimidation and violence,' " " 'bombed his home almost killing his wife and child,' " " 'assaulted his person,' " " 'arrested him seven times,' " and " 'charged him with "perjury." ' " *Id.*, at 257–258.

The Times made no independent effort to confirm the truth of these claims, and they contained numerous inaccuracies. *Id.*, at 261.[1] The Times eventually retracted the advertisement. *Ibid.*

L. B. Sullivan served as Montgomery's commissioner of public affairs when the advertisement was published. *Id.*, at 256. Although none of the "Southern violators" was identified in the advertisement, Sullivan filed a libel suit alleging that the statements implicating Montgomery police officers were made " 'of and concerning' " him because his responsibilities included supervising the police department. *Id.*, at 256, 262. A jury awarded Sullivan $500,000, and the Supreme Court of Alabama affirmed. *Id.*, at 256.

This Court reversed. *Id.*, at 264. It held that the evidence in the record was "incapable of supporting the jury's finding" that the false statements were made about Sullivan, who was not mentioned "by name or official position" in the advertisement. *Id.*, at 288. The advertisement was an "impersonal attack on governmental operations" and could not by "legal alchemy" be transformed into "a libel of an official responsible for those operations." *Id.*, at 292. This holding was sufficient to resolve the case.

But the Court also addressed "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.*, at 256. The Court took it upon itself "to define the proper accommodation between" two

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[1] For example, the police did not "at any time" surround the campus when deployed near it; the dining hall "was not padlocked on any occasion"; the student protesters had not "refus[ed] to register" but rather "boycott[ed] classes on a single day"; "Dr. King had not been arrested seven times, but only four"; and the police "were not only not implicated in the bombings, but had made every effort to apprehend those who were." *New York Times*, 376 U. S., at 259.

competing interests—"the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz*, *supra*, at 325 (majority opinion). It consulted a variety of materials to assist it in its analysis: "general proposition[s]" about the value of free speech and the inevitability of false statements, *New York Times*, 376 U. S., at 269–272, and n. 13; judicial decisions involving criminal contempt and official immunity, *id.*, at 272–273, 282–283; public responses to the Sedition Act of 1798, *id.*, at 273–277; comparisons of civil libel damages to criminal fines, *id.*, at 277–278; policy arguments against "self-censorship," *id.*, at 278–279; the "consensus of scholarly opinion," *id.*, at 280, n. 20; and state defamation laws, *id.*, at 280–282. These materials led the Court to promulgate a "federal rule" that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. Although the Court held that its newly minted actual-malice rule was "required by the First and Fourteenth Amendments," *id.*, at 283, it made no attempt to base that rule on the original understanding of those provisions.

B

New York Times was "the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander." *Dun & Bradstreet*, 472 U. S., at 766 (White, J., concurring in judgment). The Court promptly expanded the actual-malice rule to all defamed " 'public figures,' " *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 134 (1967), which it defined to include private persons who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," *Gertz*, 418 U. S., at 345. The Court also extended the actual-malice rule to criminal libel prosecutions, *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), and even restricted the situations in which private figures could recover for defamation against media defendants, *Gertz*, *supra*, at 347, 349; *Philadelphia Newspapers*, *Inc.* v. *Hepps*, 475 U. S. 767 (1986).

None of these decisions made a sustained effort to ground their holdings in the Constitution's original meaning. As the Court itself acknowledged, "the rule enunciated in the *New York Times* case" is "largely a judge-made rule of law," the "content" of which

is "given meaning through the evolutionary process of common-law adjudication." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501–502 (1984). Only Justice White grappled with the historical record, and he concluded that "there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves." *Gertz*, *supra*, at 370 (dissenting opinion).

II

The constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.

A

The common law of libel at the time the First and Fourteenth Amendments were ratified did not require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages. Typically, a defamed individual needed only to prove "a false written publication that subjected him to hatred, contempt, or ridicule." *Dun & Bradstreet*, *supra*, at 765 (White, J., concurring in judgment); see 4 W. Blackstone, Commentaries *150 (Blackstone); H. Folkard, Starkie on Slander and Libel *156 (4th Eng. ed., H. Wood ed. 1877) (Starkie). Malice was presumed in the absence of an applicable privilege, right, or duty. *Id.*, at *293–*294. General injury to reputation was also presumed, special damages could be recovered, and punitive damages were available if actual malice was established. *Dun & Bradstreet*, *supra*, at 765 (White, J., concurring in judgment); see Starkie *151, *322–*323; M. Newell, Defamation, Libel and Slander 842–843 (1890) (Newell). Truth was a defense to a civil libel claim. See Starkie *170, *528–*530; 4 Blackstone *150–*151. But where the publication was false, even if the defendant could show that no reputational injury occurred, the prevailing rule was that at least nominal damages were to be awarded. *Dun & Bradstreet*, *supra*, at 765 (White, J., concurring in judgment) (citing Restatement of Torts § 569, Comment *b*, p. 166 (1938)); see Starkie *492; Newell 839.

Libel was also a "common-law crime, and thus criminal in the colonies." *Beauharnais* v. *Illinois*, 343 U. S. 250, 254 (1952);

see 4 Blackstone *150–*153. The same principles generally applied, except that truth traditionally was not a defense to libel prosecutions—the crime was intended to punish provocations to a breach of the peace, not the falsity of the statement. See *id.*, at *150–*151; Starkie *712–*713. Laws authorizing the criminal prosecution of libel were both widespread and well established at the time of the founding. See *Roth* v. *United States*, 354 U. S. 476, 482, and n. 11 (1957); Newell 28–29 (describing colonial statutes dating back to 1645 and 1701). And they remained so when the Fourteenth Amendment was adopted, although many States by then allowed truth or good motives to serve as a defense to a libel prosecution. *Beauharnais*, *supra*, at 254–255, and n. 4.

Far from increasing a public figure's burden in a defamation action, the common law deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary libels. See 3 Blackstone *124 ("Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man"); 4 *id.*, at *150 (defining libels as "malicious defamations of any person, *and especially a magistrate*, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule" (emphasis added)). Libel of a public official was deemed an offense " 'most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties.' " Newell 533 (quoting *Commonwealth* v. *Clap*, 4 Mass. 163, 169–170 (1808)); accord, *White* v. *Nicholls*, 3 How. 266, 290 (1845).[2]

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[2] In England, "[w]ords spoken in derogation of a peer, a judge, or other great officer of the realm" were called *scandalum magnatum* and were "held to be still *more* heinous"; such words could support a claim that "would not be actionable in the case of a common person." 3 Blackstone *123 (emphasis added); Starkie *142–*143. This action, recognized by English statutes dating back to 1275, had fallen into disuse by the 19th century and was not employed in the United States. See *id.*, at *142, n. 1 ("In this country, no distinction as to persons is recognized, and in practice, a person holding a high office is regarded as a target at whom any person may let fly his poisonous words"). Nevertheless, the action of *scandalum magnatum* confirms that the law of defamation historically did not impose a heightened burden on public figures as plaintiffs.

The common law did afford defendants a privilege to comment on public questions and matters of public interest. Starkie *237–*238. This privilege extended to the "public conduct of a public man," which was a "matter of public interest" that could "be discussed with the fullest freedom" and "made the subject of hostile criticism." *Id.*, at *242. Under this privilege, "criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual." *Ibid.* And the privilege extended to the man's character "'so far as it may respect his fitness and qualifications for the office,'" which was in the interest of the people to know. *White*, *supra*, at 290 (quoting *Clap*, *supra*, at 169).

But the purposes underlying this privilege also defined its limits. Thus, the privilege applied only when the facts stated were true. Starkie *238, n. 4; *White*, *supra*, at 290. And the privilege did not afford the publisher an opportunity to defame the officer's private character. Starkie *238; see *id.*, at *242 ("The question for the jury is, whether the writer has transgressed the bounds within which comments upon the character of a public man ought to be confined . . . "); *ibid.* (distinguishing between criticism of public conduct and the "imputation of motives by which that conduct may be supposed to be actuated"). "One may in good faith publish the truth concerning a public officer, but if he states that which is false and aspersive, he is liable therefor however good his motives may be; and the same is true whether the party defamed be an officer or a candidate for an office, elective or appointive." Newell 533 (footnote omitted).

B

These common-law protections for the "core private righ[t]" of a person's "'uninterrupted enjoyment of . . . his reputation'" formed the backdrop against which the First and Fourteenth Amendments were ratified. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 567 (2007) (quoting 1 Blackstone *129). Before our decision in *New York Times*, we consistently recognized that the First Amendment did not displace the common law of libel. As Justice Story explained:

> "The liberty of speech, or of the press, has nothing to do with this subject. They are not endangered by the punishment of libellous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defama-

tion." *Dexter* v. *Spear*, 7 F. Cas. 624 (No. 3,867) (CC RI 1825).

The Court consistently listed libel among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); see, *e. g.*, *Beauharnais*, *supra*, at 254–256, and nn. 4–5, 266 (libelous utterances are "not . . . within the area of constitutionally protected speech"); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 715 (1931) ("[T]he common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions").

New York Times marked a fundamental change in the relationship between the First Amendment and state libel law. Although the Court did not repudiate its earlier statements that libel is constitutionally unprotected, it nevertheless was unable to "accept the generality of this historic view." *Gertz*, 418 U. S., at 386 (White, J., dissenting). The Court instead observed that it had never upheld the use of libel law "to impose sanctions upon expression critical of the official conduct of public officials." *New York Times*, 376 U. S., at 268. In the Court's view, it was "writing upon a clean slate," *id.*, at 299 (Goldberg, J., concurring in result), and thus free to work a "substantial abridgement" of the common law of libel based on its balancing of competing interests, *Gertz*, *supra*, at 343 (majority opinion).

C

There are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." See *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147, 160 (1939) (applying these protections against the States through the Fourteenth Amendment).[3] Justice White's dissenting opinion in *Gertz*

[3] By its terms, the First Amendment addresses only "law[s]" "ma[d]e" by "Congress." For present purposes, I set aside the question whether the speech and press rights incorporated against the States restrict common-law rights of action that are not codified by state legislatures.

provides a helpful starting point in interpreting these terms. Justice White had joined the majority opinion in *New York Times*. But after canvassing historical practice under similar state constitutions, treatises, scholarly commentary, the ratification debates, and our precedent, he concluded that "[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers." *Gertz*, 418 U. S., at 381; see *id.*, at 380–388. Justice White later expressed "doubts about the soundness of the Court's approach" in *New York Times* "and about some of the assumptions underlying it." *Dun & Bradstreet*, 472 U. S., at 767 (concluding that the Court "struck an improvident balance in the *New York Times* case").

Historical practice further suggests that protections for free speech and a free press—whether embodied in state constitutions, the First Amendment, or the Fourteenth Amendment—did not abrogate the common law of libel. See generally Chase, Criticism of Public Officers and Candidates for Office, 23 Am. L. Rev. 346 (1889) (surveying American defamation decisions). Public officers and public figures continued to be able to bring civil libel suits for unprivileged statements without showing proof of actual malice as a condition for liability. See, *e. g.*, *Root* v. *King*, 7 Cow. 613, 628 (N. Y. 1827) (lieutenant governor); *White*, 3 How., at 291 (customs collector); *Hamilton* v. *Eno*, 81 N. Y. 116, 126 (1880) (assistant health inspector) (citing *Lewis* v. *Few*, 5 Johns. 1 (N. Y. 1809) (Governor)); *Royce* v. *Maloney*, 58 Vt. 437, 447–448, 5 A. 395, 400 (1886) (chief judge and chancellor); *Wheaton* v. *Beecher*, 66 Mich. 307, 309–310, 33 N. W. 503, 505–506 (1887) (candidate for city comptroller); *Prosser* v. *Callis*, 117 Ind. 105, 108–109, 19 N. E. 735, 737 (1889) (county auditor). The States continued to criminalize libel, including of public figures. *E. g.*, *People* v. *Croswell*, 3 Johns. Cas. 337, 377–378, 393–394 (N. Y. 1804) (opinion of Kent, J.), and *id.*, at 403–404, 410 (opinion of Lewis, J.) (President Jefferson); *Clap*, 4 Mass., at 169–170 (auctioneer); see also *Commonwealth* v. *Blanding*, 20 Mass. 304, 311–314 (1825) (elaborating on legal standard); *Beauharnais*, 343 U. S., at 254–255 (noting that many States in the first decades after the founding began to allow truth or good motives to serve as a defense, but "nowhere was there any suggestion that the crime of libel be abolished"). As of 1952, "every American jurisdiction . . . punish[ed] libels directed

at individuals." *Id.*, at 255, and n. 5. And "Congresses, during the period while [the Fourteenth] Amendment was being considered or was but freshly adopted, approved Constitutions of 'Reconstructed' States that expressly mentioned state libel laws, and also approved similar Constitutions for States erected out of the federal domain." *Id.*, at 293–294, and nn. 7–8 (Jackson, J., dissenting). Criticism of the public actions of public figures remained privileged, allowing latitude for public discourse and disagreement on matters of public concern.

As against this body of historical evidence, *New York Times* pointed only to opposition surrounding the Sedition Act of 1798, which prohibited "any false, scandalous and malicious writing" against "the government of the United States, or either house of the Congress . . . , or the President." § 2, 1 Stat. 596; see *New York Times*, 376 U. S., at 273–277. Most prominently, the opinion discusses a report written by James Madison in support of the Virginia Resolutions of 1798, which protested the Act. *Id.*, at 274–275. The opinion highlights Madison's view that the press in every State had " 'exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law.' " *Id.*, at 275 (quoting 4 Debates on the Constitution 570 (J. Elliot ed. 1876) (Elliot's Debates)). It also emphasizes Madison's point that " '[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' " 376 U. S., at 271 (quoting 4 Elliot's Debates 571). After discussing other opposition to the Act, the Court concluded that "the attack upon its validity has carried the day in the court of history." 376 U. S., at 276; see *id.*, at 273–277.

The Court gleaned from this evidence a "broad consensus" that the First Amendment protects "criticism of government and public officials." *Id.*, at 276. And the Court further inferred that because the Act allowed truth to be offered as a defense and applied to defamatory statements, a libel law prohibiting only false defamation could still fail First Amendment scrutiny. *Id.*, at 273–274. But constitutional opposition to the Sedition Act—a federal law directly criminalizing criticism of the Government—does not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures. Madison did not contend that the Constitution abrogated the common law applica-

ble to these private actions. Instead, he seemed to contemplate that "those who administer [the Federal Government]" retain "a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties." 4 Elliot's Debates 573. Moreover, a central assumption of Madison's view was the historical absence of a national common law "pervading and operating through" each Colony "as one society." *Id.*, at 561. Yet the Court elevated just such a rule to constitutional status in *New York Times*.

It is certainly true that defamation law did not remain static after the founding. For example, many States acted "by judicial decision, statute or constitution" during the early 19th century to allow truth or good motives to serve as a defense to a libel prosecution. *Beauharnais*, *supra*, at 254–255, and n. 4. Eventually, changing views led to the "virtual disappearance" of criminal libel prosecutions involving individuals. *Garrison*, 379 U. S., at 69. But these changes appear to have reflected changing policy judgments, not a sense that existing law violated the original meaning of the First or Fourteenth Amendment.

In short, there appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original understanding of the First or Fourteenth Amendment.

III

Like Justice White, I assume that *New York Times* and our other constitutional decisions displacing state defamation law have been popular in some circles, "but this is not the road to salvation for a court of law." *Gertz*, 418 U. S., at 370 (dissenting opinion). We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.

No. 18–404. Colorado Independent *v.* District Court for the 18th Judicial District of Colorado et al. Sup. Ct. Colo. Motion of respondent Sir Mario Owens for leave to proceed *in forma pauperis* granted. Motion of respondent District Court of Colorado for leave to file supplemental appendix under seal granted. Certiorari denied. Reported below: 420 P. 3d 257.

No. 18–406. Schock *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 891 F. 3d 334.

Statement of Justice Sotomayor respecting the denial of certiorari.

Petitioner Aaron Schock, a former Congressman from Illinois, asks us to decide whether he may immediately appeal, as a collateral order, the denial of his motion to dismiss part of a criminal indictment against him for running afoul of the Constitution's Rulemaking Clause. See Art. I, § 5. He argues that certain charges against him would require the District Court for the Central District of Illinois to interpret internal rules adopted by the House of Representatives to govern its own Members, and thus would violate separation-of-powers doctrine. The Court of Appeals for the Seventh Circuit held that denials of such Rulemaking Clause challenges are not collateral orders subject to immediate appeal, 891 F. 3d 334 (2018), in disagreement with at least one other Court of Appeals, see *United States* v. *Rostenkowski*, 59 F. 3d 1291, 1297 (CADC 1995). Although this question does not arise frequently—presumably because criminal charges against Members of Congress are rare—the sensitive separation-of-powers questions that such prosecutions raise ought to be handled uniformly.

It is not clear, however, that this case cleanly presents the question whether such orders are, as a general matter, immediately appealable. The District Court here denied the motion to dismiss on Rulemaking Clause grounds only provisionally, stating that it would revisit the matter "if at any time it becomes apparent that the prosecution will rely upon evidence that requires the interpretation of House Rules." 2017 WL 4780614, *7, and n. 6 (CD Ill., Oct. 23, 2017). Indeed, the District Court dismissed the only count of the indictment that did, in its view, necessarily turn on an interpretation of the House Rules. *Id.*, at *8–*11. As a result, the District Court's order may have been insufficiently "conclusive" to support collateral-order appellate jurisdiction, whether or not such jurisdiction would otherwise have been proper. See *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42 (1995). The Court of Appeals did not address that alternative ground for affirmance, the presence of which might complicate our review.

I therefore concur in the Court's decision to deny certiorari. I do so on the understanding, however, that Schock remains free to

reassert his Rulemaking Clause challenge in the District Court should subsequent developments warrant.*

No. 18–446. City of Taunton, Massachusetts *v.* Environmental Protection Agency. C. A. 1st Cir. Motion of City of Dover, New Hampshire, for leave to file brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 895 F. 3d 120.

No. 18–462. Gunderson et vir *v.* Indiana et al. Sup. Ct. Ind. Motions of Minnesota Association of Realtors and Cato Institute et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 90 N. E. 3d 1171.

No. 18–548. Adorers of the Blood of Christ, United States Province, et al. *v.* Federal Energy Regulatory Commission et al. C. A. 3d Cir. Motion of The Rutherford Institute for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 897 F. 3d 187.

No. 18–717. PMCM TV, LLC *v.* Federal Communications Commission et al. C. A. D. C. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. The Chief Justice and Justice Kavanaugh took no part in the consideration or decision of this motion and this petition. Reported below: 731 Fed. Appx. 1.

No. 18–747. Ritter *v.* Brady, Chapter 7 Trustee. C. A. 9th Cir. Motions of the Honorable Eugene Wedoff et al. and Professor Margaret Howard for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 730 Fed. Appx. 529.

No. 18–6901. Hall *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 246 So. 3d 210.

Justice Sotomayor, dissenting.

I dissent for the reasons set out in *Reynolds* v. *Florida*, 586 U. S. 1004, 1011 (2018) (Sotomayor, J., dissenting from denial of certiorari).

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*In its briefing to the Court of Appeals, the Government argued that the House regulations were, in fact, " 'necessary' " and "important" to prove other charges still pending. Brief for Appellee in No. 17–3277 (CA7), p. 55. Those representations may be pertinent to the District Court's further consideration of Schock's arguments.

No. 18–6982. Walden *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition.

No. 18–6990. Sturdza *v.* United Arab Emirates. C. A. D. C. Cir. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

No. 18–7002. Diaz *v.* Washington Metropolitan Area Transit Authority. C. A. D. C. Cir. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 726 Fed. Appx. 1.

No. 18–7086. Hernandez *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 743 Fed. Appx. 156.

No. 18–7112. Hill *v.* Associates for Renewal in Education, Inc. C. A. D. C. Cir. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 897 F. 3d 232.

No. 18–7132. Bright *v.* United States. C. A. 6th Cir. Certiorari denied.

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States*, 586 U. S. 953 (2018) (Sotomayor, J., dissenting from denial of certiorari).

No. 18–7148. Ray *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 899 F. 3d 852.

No. 18–7264. Miller *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 891 F. 3d 1220.

No. 18–7266. Brown *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 731 Fed. Appx. 827.

No. 18–7286. MASTERS *v.* KENTUCKY. Ct. App. Ky. Motion of Student Press Law Center et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 551 S. W. 3d 458.

No. 18–7346. FORD, AKA GREEN, AKA WRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 18–7421. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States*, 586 U. S. 953 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

No. 18–7432. BARBER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 731 Fed. Appx. 5.

Rehearing Denied

No. 16–8635. DEAN *v.* UNITED STATES, 581 U. S. 983;
No. 17–1641. THOMAS ET VIR *v.* WILLIAMS, 586 U. S. 1050;
No. 17–7345. GREEN *v.* MCGILL-JOHNSTON ET AL., 583 U. S. 1185;
No. 17–8355. ISMAY *v.* UNITED STATES, 584 U. S. 985;
No. 17–8719. DE VERA *v.* UNITED AIRLINES, INC., 586 U. S. 996;
No. 17–8845. EASON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 586 U. S. 834;
No. 17–8959. GIBSON *v.* UNITED STATES, 585 U. S. 1009;
No. 17–9085. WESTINE *v.* UNITED STATES, 586 U. S. 841;
No. 17–9118. WILLIAMS *v.* CALIFORNIA, 586 U. S. 843;
No. 17–9138. HILL *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 586 U. S. 844;
No. 17–9319. GIVENS *v.* ALLEN, WARDEN, 586 U. S. 854;
No. 17–9383. MITCHELL *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 586 U. S. 857;

No. 18–331. Pabon Ortega *v.* Llompart Zeno et al., 586 U. S. 1069;
No. 18–393. Moody *v.* National Football League, 586 U. S. 1036;
No. 18–399. Fink *v.* Kirchner et al., 586 U. S. 1036;
No. 18–413. Bosch *v.* Arizona Department of Revenue, 586 U. S. 1022;
No. 18–538. Nora *v.* Wisconsin Office of Lawyer Regulation, 586 U. S. 1037;
No. 18–541. Deol *v.* Depreta et al., 586 U. S. 1037;
No. 18–569. Shao *v.* Tsan-Kuen Wang, 586 U. S. 1073;
No. 18–577. Netzer *v.* Shell Oil Co. et al., 586 U. S. 1073;
No. 18–5200. Kruskal *v.* Meltzer et al., 586 U. S. 888;
No. 18–5425. Joaquin Ramirez *v.* Aponte et al., 586 U. S. 922;
No. 18–5537. Opengeym *v.* Heartland Employment Services, LLC, 586 U. S. 999;
No. 18–5584. Thompson *v.* Copeland et al., 586 U. S. 947;
No. 18–5591. Mason *v.* Polster, Judge, United States District Court for the Northern District of Ohio, et al., 586 U. S. 947;
No. 18–5621. Torkornoo *v.* Helwig et al., 586 U. S. 1038;
No. 18–5628. Tacquard *v.* Arizona, 586 U. S. 948;
No. 18–5718. Campbell *v.* Virginia, 586 U. S. 970;
No. 18–5722. Lugo *v.* California, 586 U. S. 970;
No. 18–5742. Roberts *v.* Florida, 586 U. S. 971;
No. 18–5765. Russell *v.* Redstone Federal Credit Union et al.; and Russell *v.* Ingegneri et al., 586 U. S. 989.
No. 18–5888. Morrison *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 1000;
No. 18–5931. Laschkewitsch *v.* Legal & General America, Inc., dba Banner Life Insurance Co., 586 U. S. 1001;
No. 18–6020. Rodgers *v.* Miller, Warden, 586 U. S. 951;
No. 18–6055. Triplett *v.* Vannoy, Warden, 586 U. S. 1024;
No. 18–6093. Tate *v.* Maryland, 586 U. S. 991;
No. 18–6106. Miller *v.* Kashani et al., 586 U. S. 1039;
No. 18–6134. Peters *v.* Baldwin et al., 586 U. S. 1039;
No. 18–6164. Laschkewitsch *v.* ReliaStar Life Insurance Co., 586 U. S. 1040;

No. 18–6168. Soon Young Kim *v.* California, 586 U. S. 1040;

No. 18–6228. Laschkewitsch *v.* American National Life Insurance Co., 586 U. S. 1041;

No. 18–6288. Cooley *v.* Director, Office of Workers' Compensation Programs, Department of Labor, et al., 586 U. S. 1053;

No. 18–6386. Adkins *v.* Whole Foods Market Group, Inc., 586 U. S. 1053;

No. 18–6486. In re Hernandez, 586 U. S. 1020;

No. 18–6526. In re Yonamine, 586 U. S. 1067;

No. 18–6630. In re Gullett, 586 U. S. 1050;

No. 18–6652. Lowe *v.* Roy, Commissioner, Minnesota Department of Corrections, 586 U. S. 1088; and

No. 18–6743. Kulick *v.* Leisure Village Assn., Inc., 586 U. S. 1128. Petitions for rehearing denied.

No. 18–5538. Gieswein *v.* United States, 586 U. S. 911. Petition for rehearing denied. Justice Kagan and Justice Gorsuch took no part in the consideration or decision of this petition.

No. 18–6003. Kavandi *v.* Time Warner Cable, Inc., et al., 586 U. S. 1017. Petition for rehearing denied. The Chief Justice took no part in the consideration or decision of this petition.

February 21, 2019

Miscellaneous Order

No. 18–966. Department of Commerce et al. *v.* New York et al. C. A. 2d Cir. [Certiorari granted, 586 U. S. 1140.] Petitioners' brief on the merits, and any *amicus curiae* briefs in support of petitioners or in support of neither party, are to be filed on or before Wednesday, March 6, 2019. Respondents' briefs on the merits, and any *amicus curiae* briefs in support of respondents, are to be filed on or before Monday, April 1, 2019. Reply brief on the merits is to be filed in accordance with this Court's Rule 25.3.

February 25, 2019

Certiorari Granted—Vacated and Remanded. (See also *Yovino* v. *Rizo*, 586 U. S. 181 (2019) (*per curiam*).)

No. 17–5018. Klikno *v.* United States. C. A. 7th Cir.;

No. 17–8740. Van Sach *v.* United States. C. A. 7th Cir.;

No. 17–9399. SHIELDS *v.* UNITED STATES. C. A. 7th Cir. Reported below: 885 F. 3d 1020;

No. 18–6177. LIPSCOMB *v.* UNITED STATES. C. A. 7th Cir. Reported below: 721 Fed. Appx. 518; and

No. 18–6369. BROWNING *v.* UNITED STATES. C. A. 7th Cir. Reported below: 723 Fed. Appx. 343. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Stokeling* v. *United States*, 586 U. S. 73 (2019).

No. 17–8401. FRANKLIN *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on July 6, 2018.

No. 18–5213. BAKER *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Washington* v. *Commissioner of Social Security*, 906 F. 3d 1353 (CA11 2018). Reported below: 729 Fed. Appx. 870.

Certiorari Dismissed

No. 18–7608. WHITNEY *v.* CHANCELLOR. Sup. Ct. Ark. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 2018 Ark. 259.

Miscellaneous Orders

No. 18M103. HOM *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 18M104. GRIGSBY *v.* BALTAZAR, WARDEN. Motion for leave to proceed as a veteran denied. JUSTICE GORSUCH took no part in the consideration or decision of this motion.

No. 17–1606. SMITH *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. [Certiorari granted, 586 U. S. 985.] Motion for divided argument filed by the Solicitor General granted, and the time is divided as follows: 15 minutes for peti-

tioner, 15 minutes for the Solicitor General, and 30 minutes for Court-appointed *amicus curiae* in support of the judgment below.

No. 18–315. Cochise Consultancy, Inc., et al. *v.* United States ex rel. Hunt. C. A. 11th Cir. [Certiorari granted, 586 U. S. 1018.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–7681. In re Aguinaga. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 18–328. Rotkiske *v.* Klemm et al. C. A. 3d Cir. Certiorari granted. Reported below: 890 F. 3d 422.

Certiorari Denied

No. 17–5239. Razz *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 950.

No. 17–5543. Davis *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–5745. Phelps *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–5772. Conde *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 686 Fed. Appx. 755.

No. 17–6026. Williams *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 895.

No. 17–6054. Everette *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 760.

No. 17–6140. Jones *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–6276. Middleton *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–6357. Reeves *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–6374. Rivera *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–6540. Shotwell *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 989.

No. 17–6664. Mays *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–6829. Hardy *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–6887. Wright *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 868.

No. 17–6991. Baxter *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 572.

No. 17–7140. Pace *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 577.

No. 17–7391. Repress *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 826.

No. 17–7563. Cottman *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7716. Garcia *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7747. Beverly *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7762. Jackson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 911.

No. 17–7952. Wright *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8272. Bannister *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8289. Wright *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8431. Casamayor *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 890.

No. 17–8544. Robinett *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 3d 689.

No. 17–8663. Hall *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 3d 800.

No. 17–8676. King *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 913.

No. 17–8678. Jackson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 954.

No. 17–8745. Williams *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 712 Fed. Appx. 50.

No. 17–8766. DeShazior *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 882 F. 3d 1352.

No. 17–8860. Davis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 948.

No. 17–8951. Lewis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 619.

No. 17–9097. Lewis *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–9128. Joyner *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 882 F. 3d 1369.

No. 17–9151. Godbee *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 588.

No. 17–9353. Walker *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 968.

No. 17–9378. Diemer *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 654.

No. 17–9589. Harris *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 919.

No. 18–192. J. B. R. *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–323. Evans, Individually and as Wife and Next of Kin of Evans, Deceased *v.* United States et al. C. A. 6th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 554.

No. 18–340. In-N-Out Burger, Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 3d 707.

No. 18–566. Menendez *v.* Garber. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 3d 839.

No. 18–578. Pender et al. *v.* Bank of America Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 359.

No. 18–642. Zukerman *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 3d 423.

No. 18–651. Montgomery *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 381.

No. 18–674. Murphy *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 3d 578.

No. 18–680. Huss, Warden *v.* Robinson. C. A. 6th Cir. Certiorari denied. Reported below: 901 F. 3d 710.

No. 18–742. Washington *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied.

No. 18–773. Sullivan *v.* City of Frederick, Maryland, et al. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 198.

No. 18–779. Power Integrations Inc. *v.* Fairchild Semiconductor International, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 904 F. 3d 965.

No. 18–783. Barone *v.* Wells Fargo Bank, N. A. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 244 So. 3d 277.

No. 18–784. Bugg *v.* Honey et al. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 542 S. W. 3d 367.

No. 18–785. Alston *v.* Administrative Office of the Courts, Delaware Judiciary, et al. Sup. Ct. Del. Certiorari denied. Reported below: 181 A. 3d 614.

No. 18–786. Blair *v.* McClinton et al. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 18–792. Satterlee *v.* Miller-Degase, Assessor of Douglas County, Missouri, et al. Ct. App. Mo., Southern Dist. Certiorari denied.

No. 18–800. Shao *v.* McManis Faulkner, LLP. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 18–802. DeHoog et al. *v.* Anheuser-Busch InBev SA/NV et al. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 3d 758.

No. 18–812. Teamsters Local 210 Affiliated Health and Insurance Fund *v.* Silverman, as Trustee of the Union Mutual Medical Fund, et al. C. A. 2d Cir. Certiorari denied. Reported below: 725 Fed. Appx. 79.

No. 18–816. Davis *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–822. Cohen *v.* Grievance Administrator, Attorney Grievance Commission of Michigan. Sup. Ct. Mich. Certiorari denied. Reported below: 503 Mich. 875, 917 N. W. 2d 666.

No. 18–829. Davis *v.* Anderson, Judge, United States Court of Appeals for the Seventh Circuit, et al. C. A. 7th Cir. Certiorari denied.

No. 18–836. Miranda Luna *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 252 So. 3d 1196.

No. 18–844. Chavez-Juarez *v.* Barr, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 509.

No. 18–849. HTC Corp. *v.* 3G Licensing, S. A., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 889 F. 3d 1349.

No. 18–871. Jarmuth *v.* International Club Homeowners Assn., Inc. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 155.

No. 18–875. Hill et al. *v.* PBL Multi-Strategy Fund, L. P. C. A. 5th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 192.

No. 18–892. Kirsch *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 903 F. 3d 213.

No. 18–904. King Law Group, PLLC, et al. *v.* M2 Technology, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 588.

No. 18–914. Bove *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 3d 606.

No. 18–919. Davies *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 746 Fed. Appx. 86.

No. 18–924. Bullock *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 258 N. C. App. 72, 811 S. E. 2d 713.

No. 18–945. TLSL, Inc. *v.* Snead, as Administrator ad Litem of the Estate of Estrada, et al. Sup. Ct. Ala. Certiorari denied. Reported below: 288 So. 3d 418.

No. 18–960. Nationwide Biweekly Administration, Inc. *v.* BMO Harris Bank, N. A. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 564.

No. 18–961. Swartz *v.* United States Patent and Trademark Office et al. C. A. Fed. Cir. Certiorari denied. Reported below: 743 Fed. Appx. 426.

No. 18–991. Huebner *v.* Midland Credit Management et al. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 3d 42.

No. 18–993. Young Adult Institute, Inc., dba YAI National Institute for People with Disabilities, et al. *v.* Levy et al. C. A. 2d Cir. Certiorari denied. Reported below: 744 Fed. Appx. 12.

No. 18–1002. Davis et al. *v.* Valsamis, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 688.

No. 18–5092. Anderson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 833.

No. 18–5232. Pettis *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 888 F. 3d 962.

No. 18–5288. Serrano *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 659.

No. 18–5384. Rivera-Ruperto *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 846 F. 3d 417 and 852 F. 3d 1.

No. 18–5612. Smith *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–5838. Swopes *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 3d 668.

No. 18–5940. Perez *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 885 F. 3d 984.

No. 18–6025. Borrero *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 990.

No. 18–6092. Ables *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 394.

No. 18–6257. McCranie *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 889 F. 3d 677.

No. 18–6410. McKinzy *v.* Gaston (McKinzy). Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 555 S. W. 3d 479.

No. 18–6411. Reed *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 5th 989, 416 P. 3d 68.

No. 18–6715. Edstrom *v.* Minnesota. Sup. Ct. Minn. Certiorari denied. Reported below: 916 N. W. 2d 512.

No. 18–6727. Stojetz *v.* Shoop, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 3d 175.

No. 18–6752. McGuire *v.* Ohio. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2018-Ohio-1390.

No. 18–6772. Grant *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 18–6781. Farr *v.* Commissioner of Internal Revenue. C. A. 10th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 969.

No. 18–6813. Ghosh *v.* City of Berkeley, California. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 18–6818. Rangel *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 5th 442, 420 P. 3d 902.

No. 18–7026. Coats *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 257.

No. 18–7099. Ratushny *v.* Kauffman, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied. Reported below: 739 Fed. Appx. 104.

No. 18–7118. Lynch *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 254 So. 3d 312.

No. 18–7136. Hanna *v.* LeBlanc, Secretary, Louisiana Department of Public Safety and Corrections, et al. C. A. 5th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 265.

No. 18–7137. Madrigal *v.* Ohio. Ct. App. Ohio, 6th App. Dist., Lucas County. Certiorari denied.

No. 18–7146. Sage *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 1 Wash. App. 2d 685, 407 P. 3d 359.

No. 18–7149. Danielak *v.* Brewer, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 339.

No. 18–7151. Mulhern *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 179 A. 3d 576.

No. 18–7155. Provencio *v.* Lizarraga, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7157. Mayfield *v.* Martin, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 722.

No. 18–7159. Lamar *v.* O'Dell, Colorado Parole Board Member. C. A. 10th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 714.

No. 18–7160. Aranoff *v.* Aranoff. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 3d 1052, 113 N. E. 3d 463.

No. 18–7164. Knuth *v.* Arp, Judge, District Court for the First Judicial District of Colorado, et al. Ct. App. Colo. Certiorari denied.

No. 18–7165. Jones *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–7168. Williams *v.* Soto, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7170. Yancey *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 286 So. 3d 34.

No. 18–7171. Young *v.* Voong et al. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 509.

No. 18–7172. Keen *v.* Washington. Ct. App. Wash. Certiorari denied.

No. 18–7173. Lofgren *v.* Hardin. Ct. App. Wash. Certiorari denied. Reported below: 3 Wash. App. 2d 1024.

No. 18–7174. Everson *v.* New York (two judgments). App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 158 App. Div. 3d 1119, 70 N. Y. S. 3d 301 (first judgment); 158 App. Div. 3d 1123, 67 N. Y. S. 3d 877 (second judgment).

No. 18–7175. Lipsey *v.* Court of Appeal of California, Second Appellate District. C. A. 9th Cir. Certiorari denied.

No. 18–7179. Taylor *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 300 Neb. 629, 915 N. W. 2d 568.

No. 18–7182. Gates *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7202. Rios Soto *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 18–7234. Edwards et al. *v.* Gene Salter Properties et al. C. A. 8th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 357.

No. 18–7237. Saunders *v.* Berryhill, Acting Commissioner of Social Security. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 733.

No. 18–7244. Licea Morales *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 713.

No. 18–7250. Jones *v.* Samson Resources Corp. et al. C. A. 3d Cir. Certiorari denied. Reported below: 734 Fed. Appx. 177.

No. 18–7276. Francisco Vega et al. *v.* Kapusta, Interim Secretary, Florida Department of Children and Families. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 253 So. 3d 1072.

No. 18–7298. Moore *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 18–7311. Wilkins, aka Brown *v.* Gonzalez et al. C. A. 9th Cir. Certiorari denied.

No. 18–7337. Martin *v.* Terry, Acting Warden. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–7354. Johnson *v.* Bradley, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7368. Howard *v.* McCready et al. C. A. 4th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 219.

No. 18–7385. Cheng Le *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 3d 104.

No. 18–7394. Brown *v.* Tanner, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–7395. Wilfred H. *v.* West Virginia. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–7397. Breeden *v.* Kelley, Director, Arkansas Department of Correction. Sup. Ct. Ark. Certiorari denied. Reported below: 2018 Ark. 299, 557 S. W. 3d 264.

No. 18–7404. Laake *v.* Turning Stone Resort Casino. C. A. 2d Cir. Certiorari denied. Reported below: 740 Fed. Appx. 744.

No. 18–7410. Kott *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–7412. Kennedy *v.* Louisiana Department of Public Safety and Corrections. Sup. Ct. La. Certiorari denied. Reported below: 2018–1489 (La. 12/17/18), 258 So. 3d 596.

No. 18–7427. Daud *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 608.

No. 18–7430. Farah *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 608.

No. 18–7436. Aase *v.* Schnell, Commissioner, Minnesota Department of Corrections. C. A. 8th Cir. Certiorari denied.

No. 18–7440. Whitman *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 3d 1240.

No. 18–7443. Thornton *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 991.

No. 18–7445. George *v.* Kent, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–7447. Lemon *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 444.

No. 18–7452. Garcia-Carillo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 767.

No. 18–7454. St. Vallier *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 750 Fed. Appx. 135.

No. 18–7456. Sebert *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 639.

No. 18–7462. Johnson *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7468. Jones *v.* Palmer, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 127.

No. 18–7473. Albright *v.* Kansas. Sup. Ct. Kan. Certiorari denied.

No. 18–7498. Hall *v.* Terris, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7522. Kennedy *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 649.

No. 18–7523. James *v.* Krueger, Warden. C. A. 8th Cir. Certiorari denied.

No. 18–7537. Saldierna *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 371 N. C. 407, 817 S. E. 2d 174.

No. 18–7550. Reyes-Ruiz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 496.

No. 18–7556. Horton *v.* Ducart, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7562. Isaiah *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 18–7565. Fuller *v.* Eppinger, Warden. Sup. Ct. Ohio. Certiorari denied. Reported below: 153 Ohio St. 3d 269, 2018-Ohio-2629, 104 N. E. 3d 762.

No. 18–7578. Howard *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7579. Price *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 906 F. 3d 685.

No. 18–7585. Gay *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 886.

No. 18–7587. Hudson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7588. Odom *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 317.

No. 18–7593. Sanchez *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7598. Morris *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 221.

No. 18–7600. Holt *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 820.

No. 18–7602. Demerson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 228.

No. 18–7605. Diaz *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7607. White *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 18–7609. Alston *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 899 F. 3d 135.

No. 18–7615. Bacon *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 900 F. 3d 1234.

No. 18–7619. Morris *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 607.

No. 18–7623. Goolsby *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7638. Williams *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 736 Fed. Appx. 267.

No. 18–7644. Benitez *v.* Key, Superintendent, Airway Heights Corrections Center. C. A. 9th Cir. Certiorari denied.

No. 18–7654. Fausnaught *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 18–7662. Lewis *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 296.

No. 18–7664. Greer *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7666. De Jesus Vasquez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 800.

No. 18–7667. Taylor *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–7713. Grimsley *v.* McGinley, Superintendent, State Correctional Institution at Coal Township, et al. C. A. 3d Cir. Certiorari denied.

No. 17–6271. James *v.* United States. C. A. 11th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 17–6577. Orr *v.* United States. C. A. 4th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 685 Fed. Appx. 263.

No. 17–8739. Dorvilus *v.* United States. C. A. 11th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 17–9469. Angel Garcia *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Kagan took no part in the con-

sideration or decision of this petition. Reported below: 877 F. 3d 944.

No. 18–551. Philip Morris USA Inc. *v.* Jordan. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 243 So. 3d 929.

No. 18–552. Philip Morris USA Inc. *v.* Brown, as Personal Representative of the Estate of Brown. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 243 So. 3d 521.

No. 18–621. R. J. Reynolds Tobacco Co. et al. *v.* Pardue, as Personal Representative of the Estate of Faricy. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 247 So. 3d 415.

No. 18–649. R. J. Reynolds Tobacco Co. et al. *v.* Searcy, as Personal Representative of the Estate of LaSard. C. A. 11th Cir. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 902 F. 3d 1342.

No. 18–653. Philip Morris USA Inc. *v.* McKeever, as Personal Representative of the Estate of McKeever. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 207 So. 3d 907.

No. 18–654. Philip Morris USA Inc. et al. *v.* Boatright et ux. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 217 So. 3d 166.

No. 18–798. Blauch *v.* Colorado. Dist. Ct. Colo., Adams County. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 18–897. R. J. Reynolds Tobacco Co. *v.* Nally, as Personal Representative of the Estate of Nally, Deceased. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 253 So. 3d 576.

No. 18–898. R. J. Reynolds Tobacco Co. *v.* Johnston, Personal Representative of Johnston. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 253 So. 3d 576.

No. 18–900. Zodhiates *v.* United States. C. A. 2d Cir. Motion of Foundation for Moral Law for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 901 F. 3d 137.

No. 18–7448. Foxx *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 253.

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States,* 586 U. S. 953 (2018) (Sotomayor, J., dissenting from denial of certiorari).

No. 18–7453. Sterling *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 848.

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States,* 586 U. S. 953 (2018) (Sotomayor, J., dissenting from denial of certiorari).

No. 18–7495. Boyd *v.* Quintana, Warden. C. A. 6th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 18–7614. Jacoby *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 750 Fed. Appx. 689.

No. 18–7656. Garcia *v.* United States. C. A. 11th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–8786. Deveaux *v.* Caldwell, Warden, 586 U. S. 832;
No. 17–8963. Herbert *v.* CVS Pharmacy et al., 586 U. S. 837;

No. 17–9058. Carter *v.* Berryhill, Acting Commissioner of Social Security, 586 U. S. 840;

No. 17–9108. Hurd *v.* Lizarraga, Warden, 586 U. S. 842;

No. 17–9144. Honish *v.* United States, 586 U. S. 844;

No. 17–9322. Haffer *v.* New Hampshire, 586 U. S. 854;

No. 17–9563. Ingram *v.* Diaz, Acting Secretary, California Department of Corrections and Rehabilitation, 586 U. S. 867;

No. 18–223. In re Dawson, 586 U. S. 1034;

No. 18–375. Alexander *v.* Bayview Loan Servicing, LLC, 586 U. S. 1070;

No. 18–458. Pellegrini *v.* Fresno County, California, et al., 586 U. S. 1070;

No. 18–598. Chien *v.* Clark et al., 586 U. S. 1074;

No. 18–683. Stark *v.* United States, 586 U. S. 1076;

No. 18–5128. In re Fairchild-Littlefield, 586 U. S. 811;

No. 18–5886. Mitchell *v.* Taylor et al., 586 U. S. 990;

No. 18–6160. Carmody *v.* Board of Trustees of the University of Illinois et al., 586 U. S. 1079;

No. 18–6230. Shoate *v.* Lewis, Warden, 586 U. S. 1052;

No. 18–6294. Walcott *v.* Terrebonne Parish Jail Medical Department et al., 586 U. S. 1080;

No. 18–6298. Fratta *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 1080;

No. 18–6326. Coxe *v.* White, Superintendent, Washington State Corrections Center, 586 U. S. 1053;

No. 18–6354. Jossie *v.* CVS Pharmacy, 586 U. S. 1081;

No. 18–6383. Kulick *v.* Rein, 586 U. S. 1081;

No. 18–6507. Brown *v.* Del Norte County, California, et al., 586 U. S. 1084;

No. 18–6647. Sharma *v.* United States, 586 U. S. 1088; and

No. 18–6654. In re DeBolt, 586 U. S. 1034. Petitions for rehearing denied.

February 26, 2019

Dismissal Under Rule 46

No. 18–995. Crunch San Diego, LLC *v.* Marks. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 904 F. 3d 1041.

FEBRUARY 28, 2019

Certiorari Denied

No. 18–8070 (18A845). COBLE *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.

MARCH 4, 2019

Certiorari Granted—Vacated and Remanded

No. 17–9044. FABIAN-BALTAZAR *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Garza* v. *Idaho*, 586 U. S. 232 (2019). Reported below: 707 Fed. Appx. 477.

Certiorari Dismissed

No. 18–7225. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS, INC. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) (*per curiam*).

No. 18–7544. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 6. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 18–7545. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 6. 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–3030. IN RE DISBARMENT OF REINER. Disbarment entered. [For earlier order herein, see 586 U. S. 961.]

No. 18M105. CALDWELL *v.* ROBERTS, WARDEN;

No. 18M107. Cox et al. *v.* United States et al.;
No. 18M108. Dyson *v.* Brennan, Postmaster General;
No. 18M109. Katz *v.* National Board of Medical Examiners et al.;
No. 18M110. Jennifer A. *v.* Gregory M. et al.; and
No. 18M111. Lebron *v.* United States. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M106. Shampine *v.* Lee et al. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 17–1705. PDR Network, LLC, et al. *v.* Carlton & Harris Chiropractic, Inc. C. A. 4th Cir. [Certiorari granted, 586 U. S. 996.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–7856. In re Alexander; and
No. 18–7890. In re Joaquin Ramirez. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 18–801. Iancu, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office *v.* NantKwest, Inc. C. A. Fed. Cir. Certiorari granted. Reported below: 898 F. 3d 1177.

Certiorari Denied

No. 18–384. Papierfabrik August Koehler SE *v.* United States et al. C. A. Fed. Cir. Certiorari denied. Reported below: 710 Fed. Appx. 889.

No. 18–450. Utah Republican Party *v.* Cox, Lieutenant Governor of Utah, et al. C. A. 10th Cir. Certiorari denied. Reported below: 892 F. 3d 1066.

No. 18–534. Well Luck Co., Inc. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 887 F. 3d 1106.

No. 18–555. Marquette County Road Commission *v.* Environmental Protection Agency et al. C. A. 6th Cir. Certiorari denied. Reported below: 726 Fed. Appx. 461.

No. 18–648. Searcey et al. *v.* Dean et al. C. A. 8th Cir. Certiorari denied. Reported below: 893 F. 3d 504.

No. 18–746. County of Los Angeles, California, et al. *v.* Mendez et al. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 3d 1067.

No. 18–815. T. B., by and Through His Parents, T. B. et ux. *v.* Prince George's County Board of Education et al. C. A. 4th Cir. Certiorari denied. Reported below: 897 F. 3d 566.

No. 18–819. Vasconcellos *v.* Hamlin. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2018 IL App (2d) 160715–U.

No. 18–840. Banks *v.* Gore et al. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 766.

No. 18–862. Daugherty et al. *v.* Sheer et al. C. A. D. C. Cir. Certiorari denied. Reported below: 891 F. 3d 386.

No. 18–883. Ledesma-Conchas *v.* Barr, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 744.

No. 18–885. Kennedy et al. *v.* Schneider Electric, fka Square D Co. C. A. 7th Cir. Certiorari denied. Reported below: 893 F. 3d 414.

No. 18–920. Veltre *v.* Fifth Third Bank. C. A. 3d Cir. Certiorari denied. Reported below: 732 Fed. Appx. 171.

No. 18–927. Mekowulu *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–967. Micheo-Acevedo *v.* Stericycle of Puerto Rico, Inc. C. A. 1st Cir. Certiorari denied. Reported below: 897 F. 3d 360.

No. 18–977. Anderson *v.* Walrath, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 294.

No. 18–1005. Zell *v.* Klingelhafer et al. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 641.

No. 18–1009. United States ex rel. Cody *v.* ManTech International Corp. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 166.

No. 18–1011. Rodriguez Lopez *v.* ReadyOne Industries, Inc. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 551 S. W. 3d 305.

No. 18–1018. Bennett et al. *v.* Jefferson County, Alabama. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 3d 1240.

No. 18–1021. Hawkins *v.* Inch, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 18–6207. Paiz Guevara *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 3d 593.

No. 18–6306. Hebert *v.* Rogers, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 3d 213.

No. 18–6482. Anchundia-Espinoza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 3d 629.

No. 18–6569. Murray *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–6780. Farr *v.* Davis et al. C. A. 10th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 961.

No. 18–6807. Slusser *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 3d 437.

No. 18–6845. Mitchell *v.* Mahally, Superintendent, State Correctional Institution at Dallas, et al. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 3d 156.

No. 18–6869. McNeill *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 371 N. C. 198, 813 S. E. 2d 797.

No. 18–6916. Powell *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 5th 921, 422 P. 3d 973.

No. 18–7190. Wicks *v.* Radnothy et al. Sup. Ct. Fla. Certiorari denied.

No. 18–7211. Monte *v.* Kessling et al. C. A. 3d Cir. Certiorari denied. Reported below: 745 Fed. Appx. 471.

No. 18–7213. Dixit *v.* Brasher, Judge, Superior Court of Georgia, Atlanta Judicial Circuit. Ct. App. Ga. Certiorari denied.

No. 18–7218. Berhe *v.* Oleseha. Ct. App. D. C. Certiorari denied.

No. 18–7220. Farooqi *v.* California. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 18–7221. Gilbert *v.* Washington Department of Corrections et al. C. A. 9th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 673.

No. 18–7223. Hall *v.* Paramo, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 519.

No. 18–7295. Barnes *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 254 So. 3d 397.

No. 18–7316. Howell *v.* NuCar Connection, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 784.

No. 18–7319. Greene *v.* Alabama Department of Revenue et al. C. A. 11th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 929.

No. 18–7339. Reyes *v.* Duggan et al. C. A. D. C. Cir. Certiorari denied. Reported below: 723 Fed. Appx. 3.

No. 18–7347. Freer *v.* Berryhill, Acting Commissioner of Social Security, et al. C. A. 2d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 41.

No. 18–7362. Daniels *v.* Florida. C. A. 11th Cir. Certiorari denied.

No. 18–7402. Shapiro *v.* United States. C. A. Fed. Cir. Certiorari denied.

No. 18–7405. Beason *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 102 N. E. 3d 346.

No. 18–7415. Scott *v.* California. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 18–7479. Haycraft *v.* Indiana. Ct. App. Ind. Certiorari denied.

No. 18–7505. Pina *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 413.

No. 18–7511. Ortiz-Fagot *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 18–7541. Rangel *v.* Tippecanoe County, Indiana, et al. C. A. 7th Cir. Certiorari denied.

No. 18–7557. Hyppolite *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 329.

No. 18–7560. Freeman *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 333.

No. 18–7561. Guzman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 240.

No. 18–7563. Foster *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7566. Goris, aka Goriz, aka Abreu *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 709 Fed. Appx. 107.

No. 18–7567. Collins *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 18–7611. Everett *v.* Delaware. Sup. Ct. Del. Certiorari denied. Reported below: 186 A. 3d 1224.

No. 18–7612. Bowens *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 3d 347.

No. 18–7621. Burns *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 243.

No. 18–7627. Houpe *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 276.

No. 18–7632. Grant *v.* Kelly, Director, Arkansas Department of Correction. Sup. Ct. Ark. Certiorari denied. Reported below: 2018 Ark. 204, 548 S. W. 3d 814.

No. 18–7642. Lassend *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 898 F. 3d 115.

No. 18–7645. Sanchez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 440.

No. 18–7646. Sawyer *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 3d 121.

No. 18–7649. Bazar *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 454.

No. 18–7660. Harris *v.* Deal, Warden. C. A. 11th Cir. Certiorari denied.

No. 18–7663. Ford *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 888 F. 3d 922.

No. 18–7668. Paladin *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 18–7669. Moreno-Alvarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 255.

No. 18–7675. Hayes *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 18–7678. Hernandez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 124.

No. 18–7679. Curry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 784.

No. 18–7682. Demers *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 740 Fed. Appx. 750.

No. 18–7692. Horn *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 262.

No. 18–7699. Ruiz-Ruiz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 253.

No. 18–7700. Ray *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 452.

No. 18–7707. Anguiano *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 699.

No. 18–7711. Fitzgerald *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 351.

No. 18–7712. Mims *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7715. Flores *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 505.

No. 18–7716. Ingram *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 982.

No. 18–7717. Ferguson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 314.

No. 18–7737. Simmons *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 18–7740. Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7742. Serna *v.* County of Hennepin, Minnesota. C. A. 8th Cir. Certiorari denied.

No. 18–7745. Evans *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 329 Conn. 770, 189 A. 3d 1184.

No. 18–7750. Morrobel *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 867.

No. 18–7759. Buckner *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 905.

No. 18–7766. Reeder *v.* Reynolds, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 81.

No. 18–7773. Espinoza-Mendoza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 263.

No. 18–7794. Krott *v.* May, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 649.

No. 18–364. Morris County Board of Chosen Freeholders et al. *v.* Freedom From Religion Foundation et al.; and
No. 18–365. Presbyterian Church in Morristown et al. *v.* Freedom From Religion Foundation et al. Sup. Ct. N. J. Certiorari denied. Reported below: 232 N. J. 543, 181 A. 3d 992.

Statement of Justice Kavanaugh, with whom Justice Alito and Justice Gorsuch join, respecting the denial of certiorari.

Morris County, New Jersey, distributes historic preservation funds to help preserve local buildings such as libraries, schoolhouses, performing arts centers, and museums. As part of that program, Morris County also distributes funds to help preserve

religious buildings such as synagogues, temples, churches, and mosques. But it turns out that New Jersey law, as recently interpreted by the New Jersey Supreme Court, prohibits Morris County from awarding grants to preserve religious buildings.

The petitioners here argue that the State's exclusion of religious buildings—because they are religious—from Morris County's historic preservation program constitutes unconstitutional discrimination against religion in violation of the First and Fourteenth Amendments to the United States Constitution. The New Jersey Supreme Court concluded that the State's discrimination did not violate the First and Fourteenth Amendments.

In my view, the decision of the New Jersey Supreme Court is in serious tension with this Court's religious equality precedents.

As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Free Exercise Clause and the Equal Protection Clause. In the words of Justice Brennan, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (opinion concurring in judgment). Under the Constitution, the government may not discriminate against religion generally or against particular religious denominations. See *Larson* v. *Valente*, 456 U. S. 228, 244 (1982).

The principle of religious equality eloquently articulated by Justice Brennan in *McDaniel* is now firmly rooted in this Court's jurisprudence. As Justice Kennedy later wrote for the Court, a law may not discriminate against "some or all religious beliefs," and "a law targeting religious beliefs as such is never permissible." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532, 533 (1993). Put another way, the government may not "impose special disabilities on the basis of . . . religious status." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877 (1990).

We have applied that bedrock principle of religious equality in numerous cases. See, *e. g., Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449 (2017); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

For example, in *McDaniel*, a Tennessee statute disqualified ministers from serving as delegates to Tennessee's constitutional convention. The Court ruled the statute unconstitutional, explaining that the Constitution does not allow the government to discriminate against religious persons by prohibiting their service in a public office. See *id.*, at 629.

In *Good News*, a school district in New York allowed residents to use the local public high school for social, civic, and recreational events. But the school district prohibited a religious organization from using the school, simply because the organization was religious. This Court held that the school district's exclusion of the religious organization was unconstitutional discrimination against religion. See 533 U. S., at 109.

That same principle of religious equality applies to governmental benefits or grants programs in which religious organizations or people seek benefits or grants on the same terms as secular organizations or people—at least, our precedents say, so long as the government does not fund the training of clergy, for example. See *Trinity Lutheran*, 582 U. S., at 464–465; *Locke* v. *Davey*, 540 U. S. 712, 721, 725 (2004).

In *Trinity Lutheran*, Missouri barred a religious school from obtaining a state funding grant for the school's playground. By contrast, Missouri allowed secular private schools to obtain state funding grants for their schools' playgrounds. This Court held that Missouri's law was unconstitutional. The Court stated that the Constitution "protects religious observers against unequal treatment." 582 U. S., at 458 (alterations omitted). In the Court's description, Missouri's law reflected an unconstitutional policy of "No churches need apply." *Id.*, at 465. The Court minced no words: Discriminating against religious schools because the schools are religious "is odious to our Constitution." *Id.*, at 467.

In this case, New Jersey's "No religious organizations need apply" for historic preservation grants appears similar to, for example, Missouri's "No religious schools need apply" for school playground grants and New York's "No religious clubs need apply" for use of school facilities and Tennessee's "No ministers need apply" for state office.

To be clear, this is not a case like *Lee* v. *Weisman*, 505 U. S. 577 (1992); *Marsh* v. *Chambers*, 463 U. S. 783 (1983); or *County of Allegheny* v. *American Civil Liberties Union, Greater Pitts-*

burgh Chapter, 492 U. S. 573 (1989), where the government itself is engaging in religious speech, such as a government-sponsored prayer or a government-sponsored religious display. Nor is this a case like *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014), or *Smith*, 494 U. S. 872, where a religious group or person is asking for an accommodation or exemption from a generally applicable law. Under the Court's precedents, both of those categories of cases can pose difficult questions. This kind of case, by contrast, should not be as difficult: Barring religious organizations because they are religious from a general historic preservation grants program is pure discrimination against religion.

* * *

At some point, this Court will need to decide whether governments that distribute historic preservation funds may deny funds to religious organizations simply because the organizations are religious. But at this point and in this case, it is appropriate to deny certiorari, for two main reasons. First, the factual details of the Morris County program are not entirely clear. In particular, it is not evident precisely what kinds of buildings can be funded under the Morris County program. That factual uncertainty about the scope of the program could hamper our analysis of petitioners' religious discrimination claim. Second, this Court decided *Trinity Lutheran* only recently, and there is not yet a robust post-*Trinity Lutheran* body of case law in the lower courts on the question whether governments may exclude religious organizations from general historic preservation grants programs.

For those reasons, denial of certiorari is appropriate. As always, a denial of certiorari does not imply agreement or disagreement with the decision of the relevant federal court of appeals or state supreme court. In my view, prohibiting historic preservation grants to religious organizations simply because the organizations are religious would raise serious questions under this Court's precedents and the Constitution's fundamental guarantee of equality.

No. 18–684. Stevens-Rucker, Administrator of the Estate of White, Deceased *v.* Frenz et al. C. A. 6th Cir. Motion of The Rutherford Institute for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 739 Fed. Appx. 834.

No. 18–704. Abbott et al. *v.* Pastides et al. C. A. 4th Cir. Motions of First Amendment Clinics at Duke Law et al. and American Civil Liberties Union of South Carolina et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 900 F. 3d 160.

No. 18–7538. Russo *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 3d 880.

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States*, 586 U. S. 953 (2018) (Sotomayor, J., dissenting from denial of certiorari).

No. 18–7616. Tovar Pupo *v.* United States. C. A. D. C. Cir. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 715 Fed. Appx. 11.

No. 18–7674. Gorbey *v.* McCall, Warden. C. A. 4th Cir. Certiorari denied. The Chief Justice and Justice Kagan took no part in the consideration or decision of this petition. Reported below: 722 Fed. Appx. 327.

Rehearing Denied

No. 17–8059. Beavers, aka Stokes, aka West *v.* United States, 586 U. S. 827;

No. 17–8685. Bell *v.* Inova Health Care, dba Inova Fairfax Hospital (two judgments), 585 U. S. 1022;

No. 18–5057. Bagby *v.* Hyatte, Warden, 586 U. S. 880;

No. 18–5120. Nelson *v.* Berryhill, Acting Commissioner of Social Security, 586 U. S. 883;

No. 18–5355. Sanders *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 896;

No. 18–5896. Baker *v.* United States, 586 U. S. 929;

No. 18–5989. Bilbo *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 1001;

No. 18–6038. Villavicencio *v.* Jones, Secretary, Florida Department of Corrections, 586 U. S. 1023;

No. 18–6239. Reilly *v.* Herrera et al., 586 U. S. 1079;

No. 18–6365. Bartlett *v.* Michigan et al., 586 U. S. 1081;

No. 18–6509. Tedesco *v.* Monroe County, Pennsylvania, et al., 586 U. S. 1084;

No. 18–6517. Brown *v.* Elite Modeling Agency, 586 U. S. 1085;

No. 18–6575. Stokes *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 1086;

No. 18–6661. Samuel *v.* United States, 586 U. S. 1088;

No. 18–6676. Wilmore *v.* United States, 586 U. S. 1088;

No. 18–6841. Stewart *v.* North Carolina, 586 U. S. 1093; and

No. 18–6941. Chapman *v.* Lampert, Director, Wyoming Department of Corrections, et al., 586 U. S. 1120. Petitions for rehearing denied.

No. 18–5578. Akel *v.* United States, 586 U. S. 911. Petition for rehearing denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 18–5704. Austin *v.* District Attorney of Philadelphia County, Pennsylvania, et al., 586 U. S. 938. Petition for rehearing denied. Justice Alito took no part in the consideration or decision of this petition.

No. 18–6291. Cook *v.* Jones, Secretary, Florida Department of Corrections, et al., 586 U. S. 1024. Motion for leave to file petition for rehearing denied.

No. 18–6376. Albra *v.* Board of Trustees of Miami Dade College et al., 586 U. S. 1109. Petition for rehearing denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

March 5, 2019

Dismissal Under Rule 46

No. 18–788. R. J. Reynolds Tobacco Co. *v.* Odom, as Personal Representative of the Estate of Thurston. Sup. Ct. Fla. Certiorari dismissed under this Court's Rule 46.1. Reported below: 254 So. 3d 268.

MARCH 15, 2019

Miscellaneous Orders

No. 18–422. RUCHO ET AL. *v.* COMMON CAUSE ET AL. D. C. M. D. N. C. [Probable jurisdiction postponed, 586 U. S. 1062.] Joint motion of appellees for enlargement of time for oral argument and for divided argument granted in part, and the time is divided as follows: 35 minutes for appellants, 20 minutes for appellee Common Cause et al., and 15 minutes for appellee League of Women Voters of North Carolina et al.

No. 18–966. DEPARTMENT OF COMMERCE ET AL. *v.* NEW YORK ET AL. C. A. 2d Cir. [Certiorari granted, 586 U. S. 1140.] The parties are directed to brief and argue the following additional question: "Whether the Secretary of Commerce's decision to add a citizenship question to the Decennial Census violated the Enumeration Clause of the U. S. Constitution, Art. I, § 2, cl. 3." Respondents are allowed an additional 2,000 words in aggregate to address this question in their briefs on the merits. Petitioners are allowed an additional 1,000 words to address this question in their reply brief on the merits.

MARCH 18, 2019

Certiorari Granted—Vacated and Remanded

No. 18–6612. PINKNEY *v.* UNITED STATES. C. A. 7th 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 *Stokeling* v. *United States*, 586 U. S. 73 (2019). Reported below: 734 Fed. Appx. 986.

Certiorari Dismissed

No. 18–7697. YATES *v.* IOWA. Dist. Ct. North Lee County, Iowa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 18–7705. YATES *v.* IOWA. Ct. App. Iowa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 924 N. W. 2d 532.

Miscellaneous Orders

No. 18M112. Alfetlawi *v.* Klee, Warden;

No. 18M115. Webb-El *v.* Hurwitz, Director, Federal Bureau of Prisons, et al.; and

No. 18M116. Price *v.* Vannoy, Warden. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M113. In re Twelve Grand Jury Subpoenas; and

No. 18M114. Runnels *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. Motions for leave to file petitions for writs of certiorari under seal with redacted copies for the public record granted.

No. 18–349. Patterson *v.* Walgreen Co. C. A. 11th Cir.; and

No. 18–817. Hikma Pharmaceuticals USA Inc. et al. *v.* Vanda Pharmaceuticals Inc. C. A. Fed. Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 18–6321. Nguyen *v.* Nielsen, Secretary of Homeland Security. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1034] denied.

No. 18–6907. Kulick *v.* Leisure Village Assn., Inc. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1143] denied.

No. 18–7369. Ghosh *v.* City of Berkeley, California, et al. Ct. App. Cal., 1st App. Dist.; and

No. 18–7695. Williams *v.* Wilkie, Secretary of Veterans Affairs. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 8, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–1064. In re Williams;

No. 18–7063. In re Dread;

No. 18–8080. In re Johnson;

No. 18–8098. In re Hanson; and

No. 18–8110. In re Anderson. Petitions for writs of habeas corpus denied.

No. 18–8006. In re Evans. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 18–7754. In re Cabello; and

No. 18–7949. In re Watson. Petitions for writs of mandamus denied.

No. 18–7777. In re Brice. 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. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 18–6927. In re Urbina. Petition for writ of prohibition denied.

Certiorari Granted

No. 18–217. Mathena, Warden *v.* Malvo. C. A. 4th Cir. Certiorari granted. Reported below: 893 F. 3d 265.

No. 17–834. Kansas *v.* Garcia (Reported below: 306 Kan. 1113, 401 P. 3d 588); Kansas *v.* Morales (306 Kan. 1100, 401 P. 3d 155); and Kansas *v.* Ochoa-Lara (306 Kan. 1107, 401 P. 3d 159). Sup. Ct. Kan. Certiorari granted limited to Question 1 presented by the petition and the following question: "Whether the Immigration Reform and Control Act impliedly pre-empts Kansas' prosecution of respondents."

No. 18–5924. Ramos *v.* Louisiana. Ct. App. La., 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 2016–1199 (La. App. 4 Cir. 11/2/17), 231 So. 3d 44.

No. 18–6135. Kahler *v.* Kansas. Sup. Ct. Kan. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 307 Kan. 374, 410 P. 3d 105.

Certiorari Denied

No. 18–234. Chaidez Campos *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 3d 724.

No. 18–292. Lewis *v.* English, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 749.

No. 18–442. Benton *v.* United States;
No. 18–601. Tate *v.* United States; and
No. 18–606. Kesari *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 3d 697.

No. 18–461. Hinojosa et al. *v.* Horn et al. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 3d 305.

No. 18–472. Behr Dayton Thermal Products LLC et al. *v.* Martin et al. C. A. 6th Cir. Certiorari denied. Reported below: 896 F. 3d 405.

No. 18–499. Griffioen et al. *v.* Cedar Rapids and Iowa City Railways Co. et al. Sup. Ct. Iowa. Certiorari denied. Reported below: 914 N. W. 2d 273.

No. 18–503. N. E. L. et al. *v.* Douglas County, Colorado, et al. (Reported below: 740 Fed. Appx. 920), certiorari denied; and N. E. L. et al. *v.* Gildner et al., certiorari before judgment denied. C. A. 10th Cir.

No. 18–530. Congregation Jeshuat Israel *v.* Congregation Shearith Israel. C. A. 1st Cir. Certiorari denied. Reported below: 866 F. 3d 53.

No. 18–539. Hawes *v.* Reilly. Sup. Ct. R. I. Certiorari denied. Reported below: 184 A. 3d 661.

No. 18–576. Wright *v.* Watson et al. C. A. 11th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 981.

No. 18–596. Neba *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 3d 260.

No. 18–617. Spirit Airlines, Inc. *v.* Maizes et al. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 3d 1230.

No. 18–656. Hall, Director, Kentucky Department of Corrections, Division of Probation and Parole *v.* Ayers. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 3d 829.

No. 18–689. Moya et al. *v.* Garcia, Sheriff, Santa Fe County, New Mexico, et al. C. A. 10th Cir. Certiorari denied. Reported below: 895 F. 3d 1229.

No. 18–699. Brookdale Senior Living Communities, Inc., et al. *v.* United States ex rel. Prather. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 3d 822.

No. 18–716. Petroleo Brasileiro S. A. *v.* EIG Energy Fund XIV, L. P., et al. C. A. D. C. Cir. Certiorari denied. Reported below: 894 F. 3d 339.

No. 18–760. Saunders *v.* Ivey, Sheriff, Brevard County, Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 559.

No. 18–763. Fattah *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 3d 112.

No. 18–805. Strohmeyer *v.* Surface Transportation Board et al. C. A. 3d Cir. Certiorari denied.

No. 18–834. Sheikh et al. *v.* San Joaquin General Hospital. C. A. 9th Cir. Certiorari denied.

No. 18–835. Lozano *v.* Superior Court of Massachusetts, Suffolk County, et al. C. A. 1st Cir. Certiorari denied.

No. 18–845. Seidel *v.* Century Surety Co. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 3d 328.

No. 18–848. Bisbee *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 18–859. Peel *v.* H. E. Butt Grocery Co. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 18–865. Vella *v.* Barr, Attorney General. C. A. 3d Cir. Certiorari denied. Reported below: 742 Fed. Appx. 623.

No. 18–867. Jackson et al. *v.* Jackson. C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 905.

No. 18–869. Lecuona *v.* Lecuona. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 18–870. Ibragimov *v.* Wisconsin. Ct. App. Wis. Certiorari denied.

No. 18–876. Almond et al. *v.* Singing River Health System et al. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 846.

No. 18–880. SureShot Golf Ventures, Inc. *v.* Topgolf International, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 235.

No. 18–886. Jones *v.* Hawaii Residency Programs, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 423.

No. 18–887. California Trucking Assn. *v.* Su. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 3d 953.

No. 18–889. Smith et al. *v.* Weber. Sup. Ct. Ill. Certiorari denied.

No. 18–890. D'Addario et al. *v.* D'Addario. C. A. 2d Cir. Certiorari denied. Reported below: 901 F. 3d 80.

No. 18–901. Simmons *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 18–905. Mastrogiovanni Schorsch & Mersky, P. C., et al. *v.* Mandel. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 955.

No. 18–906. Kinney *v.* Cantil-Sakauye et al. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 562.

No. 18–907. Kinney *v.* Three Arch Bay Community Services District et al. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 553.

No. 18–908. Kinney *v.* Rothschild et al. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 555.

No. 18–909. Davis *v.* Fiat Chrysler Automobiles U. S., LLC. C. A. 6th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 309.

No. 18–912. AmeriCare MedServices, Inc. *v.* City of Anaheim, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 473.

No. 18–915. Christian *v.* Payne et al. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 504.

No. 18–917. Bent *v.* Talkin, Marshal, Supreme Court of the United States, et al. C. A. D. C. Cir. Certiorari denied.

No. 18–922. Fisch *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 537 S. W. 3d 207.

No. 18–925. A–1 Premium Acceptance, Inc. *v.* Hunter. Sup. Ct. Mo. Certiorari denied. Reported below: 557 S. W. 3d 923.

No. 18–934. Prosterman et al. *v.* American Airlines Inc. et al. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 458.

No. 18–939. Ortega-Morales *v.* Barr, Attorney General. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 839.

No. 18–947. Barth *v.* Township of Bernards, New Jersey, et al. C. A. 3d Cir. Certiorari denied.

No. 18–950. Freeman *v.* American K–9 Detection Services, LLC, et al. Sup. Ct. Tex. Certiorari denied. Reported below: 556 S. W. 3d 246.

No. 18–951. T&T Rock Distribution, LLC *v.* Velasco. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 18–955. Fernandez *v.* School Board of Miami-Dade County, Florida. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 3d 1324.

No. 18–985. BMP Family L. P. et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 764.

No. 18–986. Huckaby et al. *v.* Halley, as Next Friend of J. H., a Minor Child. C. A. 10th Cir. Certiorari denied. Reported below: 902 F. 3d 1136.

No. 18–988. RPD Holdings, L. L. C. *v.* Tech Pharmacy Services, dba Advanced Pharmacy Services. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 3d 845.

No. 18–994. Williams *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–997. Williams et al. *v.* National Gallery, London, et al. C. A. 2d Cir. Certiorari denied. Reported below: 749 Fed. Appx. 13.

No. 18–1001. Sibley *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 18–1003. Slone et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 3d 1083.

No. 18–1016. Beam *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–1029. Ghosh *v.* Dish Network L. L. C. C. A. 10th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 589.

No. 18–1075. RPX Corp. *v.* Applications in Internet Time, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 897 F. 3d 1336.

No. 18–5773. Delancy *v.* Pastrana, Warden. C. A. 11th Cir. Certiorari denied.

No. 18–5781. Dusenbery *v.* Holt, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 102.

No. 18–5969. Fuentes-Canales *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 3d 468.

No. 18–6237. Smith *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 730 Fed. Appx. 710.

No. 18–6265. Silva *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 889 F. 3d 704.

No. 18–6310. Lawson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 663.

No. 18–6319. Reid *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 3d 256.

No. 18–6377. Woodside *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 3d 894.

No. 18–6481. Fontanez *v.* Coakley, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 150.

No. 18–6533. Lewallyn *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 471.

No. 18–6550. Thomas *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 3d 561.

No. 18–6667. Elbeblawy *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 3d 925.

No. 18–6671. Malone *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 3d 310.

No. 18–6771. Gardner *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 311.

No. 18–6904. Roberson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 87.

No. 18–6913. Sowell *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 18–6914. Rojas *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 777.

No. 18–6979. Jackson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 152.

No. 18–6989. Smith *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 827.

No. 18–7000. Bueno Jimenez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 933.

No. 18–7022. Zater *v.* Atkinson, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 178.

No. 18–7224. Acuna Valenzuela *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 245 Ariz. 197, 426 P. 3d 1176.

No. 18–7242. Sanders *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 245 Ariz. 113, 425 P. 3d 1056.

No. 18–7246. Sims *v.* King et al. C. A. 8th Cir. Certiorari denied.

No. 18–7248. Anthony *v.* Boyd, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 903.

No. 18–7252. Wiese *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 3d 720.

No. 18–7257. Diakite *v.* Asuncion, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7258. Thomason *v.* Jackson et al. Sup. Ct. Ala. Certiorari denied.

No. 18–7259. Allen *v.* Smith, Superintendent, State Correctional Institution at Houtzdale. Sup. Ct. Pa. Certiorari denied.

No. 18–7261. Cumbee *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 726 Fed. Appx. 238.

No. 18–7265. Armstrong *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–7271. Johnson *v.* McDowell, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 588.

No. 18–7273. Blake *v.* Fish et al. C. A. 4th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 206.

No. 18–7279. Thomas *v.* District Attorney of Lancaster County, Pennsylvania. C. A. 3d Cir. Certiorari denied.

No. 18–7280. Wappler *v.* Ivey et al. C. A. 11th Cir. Certiorari denied.

No. 18–7281. Workman *v.* Vandermosten et al. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 379.

No. 18–7283. Bartlett *v.* Kalamazoo County Community Mental Health Board et al. C. A. 6th Cir. Certiorari denied.

No. 18–7285. Burch *v.* Atlanta City Court et al. C. A. 11th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 914.

No. 18–7288. Harrison *v.* California. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 18–7290. Ajvazi *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7291. Thompson *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7299. Parker *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7301. J. C. *v.* Texas Department of Family and Protective Services. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 18–7302. Bartlett *v.* Gorsalitz et al. C. A. 6th Cir. Certiorari denied.

No. 18–7312. Tran *v.* Kansas. Ct. App. Kan. Certiorari denied. Reported below: 54 Kan. App. 2d xxx, 399 P. 3d 290.

No. 18–7314. Thomas *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 252 So. 3d 164.

No. 18–7315. Armistead *v.* Bowen et al. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 69.

No. 18–7318. Gomez *v.* California. Ct. App. Cal., 1st App. Dist., Div. 4. Certiorari denied.

No. 18–7321. Young *v.* Chapdelaine, Warden; Young *v.* Chapdelaine, Warden; and Young *v.* Chapdelaine, Warden, et al. C. A. 2d Cir. Certiorari denied.

No. 18–7322. Yerton *v.* Bryant, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 902.

No. 18–7324. Gil *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 239 So. 3d 69.

No. 18–7328. Sheely et ux. *v.* Bank of America, N. A., et al. C. A. 11th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 603.

No. 18–7332. Dellinger *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–7334. Perez *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2018 IL App (3d) 160114–U.

No. 18–7335. McKay *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 127.

No. 18–7336. Hill *v.* Michigan. C. A. 6th Cir. Certiorari denied.

No. 18–7338. Jones *v.* Office of Administrative Hearings et al. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 692.

No. 18–7342. Gross *v.* Dannatt. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 18–7343. Israel, on Behalf of Minor Children A. I. et al. *v.* City of North Miami, Florida, et al. C. A. 11th Cir. Certiorari denied.

No. 18–7349. Hicks *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 18–7353. Jackson *v.* Ohio. Ct. App. Ohio, 11th App. Dist., Trumbull County. Certiorari denied. Reported below: 2018-Ohio-2146.

No. 18–7357. Frazier *v.* Crump et al. C. A. 6th Cir. Certiorari denied.

No. 18–7359. Greenwood *v.* Tennessee Board of Parole. Ct. App. Tenn. Certiorari denied. Reported below: 547 S. W. 3d 207.

No. 18–7363. Krohe *v.* Steinhardt. C. A. 9th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 452.

No. 18–7364. Chambers *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7366. Gray *v.* Sorrels et al. C. A. 10th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 563.

No. 18–7370. Gipson *v.* Tampkins, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7373. Patton *v.* Texas. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 18–7380. Glover *v.* Wisconsin. Ct. App. Wis. Certiorari denied.

No. 18–7381. Hernandez *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 18–7382. Herbin *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 18–7383. Feldman *v.* Adoption Star Agency et al. C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 915.

No. 18–7384. Deuschel *v.* USC Faculty Dental Practice et al. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 18–7386. Armando, aka Sarres Mendoza *v.* Whitfield et al. C. A. 5th Cir. Certiorari denied.

No. 18–7389. Smith *v.* Jackson, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7396. Fishback *v.* Parris, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7398. Kruskal *v.* Sprunt. Ct. App. N. M. Certiorari denied.

No. 18–7399. Carter *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 185 A. 3d 1129.

No. 18–7401. Shapiro *v.* United States (two judgments). C. A. 7th Cir. Certiorari denied.

No. 18–7403. Blackwell *v.* Dooley et al. C. A. 8th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 424.

No. 18–7406. Boatman *v.* Diaz, Acting Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 18–7407. Blankumsee *v.* Circuit Court of Maryland, Washington County, et al. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 844.

No. 18–7409. Leonard *v.* Florida et al. C. A. 11th Cir. Certiorari denied.

No. 18–7411. Jacob *v.* Cotton, Chairperson, Nebraska Board of Parole, et al. C. A. 8th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 509.

No. 18–7413. Smith *v.* Corcoran et al. C. A. 9th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 656.

No. 18–7416. Solis *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 886.

No. 18–7422. Williams *v.* Vannoy, Warden. Sup. Ct. La. Certiorari denied. Reported below: 2018–1540 (La. 10/15/18), 253 So. 3d 1295.

No. 18–7423. Washington *v.* Boughton, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 884 F. 3d 692.

No. 18–7425. Cooper *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2015 IL App (1st) 130884–U.

No. 18–7428. Jones *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 256 So. 3d 801.

No. 18–7429. Lopez *v.* Montgomery, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 211.

No. 18–7433. Ardaneh *v.* Massachusetts et al. C. A. 1st Cir. Certiorari denied.

No. 18–7435. Biggins *v.* Danberg et al. C. A. 3d Cir. Certiorari denied.

No. 18–7437. Animashaun *v.* Schmidt et al. C. A. 2d Cir. Certiorari denied.

No. 18–7438. Villa *v.* Kowalski. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 18–7442. Underwood *v.* Carpenter, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 894 F. 3d 1154.

No. 18–7446. Hopkins *v.* Warden, Ventress Correctional Facility. C. A. 11th Cir. Certiorari denied.

No. 18–7450. Miller *v.* Texas et al. C. A. 5th Cir. Certiorari denied.

No. 18–7457. Case *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 5th 1, 418 P. 3d 360.

No. 18–7458. Taylor *v.* Miller et al. C. A. 8th Cir. Certiorari denied. Reported below: 730 Fed. Appx. 392.

No. 18–7459. Greene *v.* Huffman et al. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 119.

No. 18–7460. Horvatt *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–7464. Gary *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 241 So. 3d 100.

No. 18–7465. Boykin *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 151347–U.

No. 18–7480. Wiley *v.* Cartledge, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 319.

No. 18–7483. Frank *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 237 So. 3d 985.

No. 18–7492. Ferebee *v.* Clarke, Director, Virginia Department of Corrections. Sup. Ct. Va. Certiorari denied.

No. 18–7508. Brooks *v.* Pinnacle Financial Corp. et al. C. A. 9th Cir. Certiorari denied.

No. 18–7517. Johnson *v.* McDermott, Warden. C. A. 7th Cir. Certiorari denied.

No. 18–7519. Duncan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 33.

No. 18–7521. King *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–7525. Harris *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 3d 1120.

No. 18–7535. Chalfant *v.* Berryhill, Acting Commissioner of Social Security. C. A. 3d Cir. Certiorari denied. Reported below: 737 Fed. Appx. 625.

No. 18–7558. Hawkins *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 246 So. 3d 354.

No. 18–7559. Daley *v.* Berryhill, Acting Commissioner of Social Security. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 963.

No. 18–7570. Hardeman *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7577. Castro *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 371.

No. 18–7586. Frey *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 878.

No. 18–7592. Hubbard *v.* Brown et al. C. A. 9th Cir. Certiorari denied.

No. 18–7601. Chhim *v.* Golden Nuggett Lake Charles, L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 730 Fed. Appx. 255.

No. 18–7606. Davis *v.* Florence et al. C. A. 2d Cir. Certiorari denied.

No. 18–7617. Hinton *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–7626. Haynes *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 150590–U.

No. 18–7628. Bevan *v.* Florida. Sup. Ct. Fla. Certiorari denied.

No. 18–7634. Fox *v.* Turner, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7635. Hall *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 266 So. 3d 759.

No. 18–7672. Moody *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 238 Md. App. 733.

No. 18–7684. Brown *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 18–7689. James *v.* Kapusta, Interim Secretary, Florida Department of Children and Families. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 260 So. 3d 241.

No. 18–7698. Ingram *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 798.

No. 18–7702. Reese *v.* Zatecky, Superintendent, Pendleton Correctional Facility. C. A. 7th Cir. Certiorari denied.

No. 18–7706. Ali *v.* Interactive Brokers LLC. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 450.

No. 18–7714. Grandison *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 234 Md. App. 564, 174 A. 3d 388.

No. 18–7720. Webber *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 511.

No. 18–7722. Escobedo-Coronado *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 36.

No. 18–7723. Dempsey *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7726. Williams *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 3d 323.

No. 18–7727. Hatt *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 585.

No. 18–7734. Cannon *v.* Iowa District Court, Des Moines County. Sup. Ct. Iowa. Certiorari denied.

No. 18–7735. Davis *v.* Andrews, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 782.

No. 18–7736. Davis *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 153 App. Div. 3d 1673, 60 N. Y. S. 3d 907.

No. 18–7738. Farrish *v.* Navy Federal Credit Union. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 189.

No. 18–7741. Sills *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7746. Davis *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 909 F. 3d 9.

No. 18–7748. Freeman *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7751. Bolton *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7755. Garcia *v.* Wilkie, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 908 F. 3d 728.

No. 18–7758. Cummins *v.* Lollar. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 18–7760. Gish *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7762. Fauconier *v.* Clarke, Director, Virginia Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 174.

No. 18–7763. Adams *v.* Department of Defense. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 200.

No. 18–7764. French *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 141815, 72 N. E. 3d 1214.

No. 18–7765. Massey *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 3d 248.

No. 18–7768. Strauss *v.* Kentucky Board of Medical Licensure. Sup. Ct. Ky. Certiorari denied. Reported below: 558 S. W. 3d 443.

No. 18–7776. Olvera-Cruz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 16.

No. 18–7778. Zemlyansky *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 908 F. 3d 1.

No. 18–7779. Kirkland *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 3d 1049.

No. 18–7781. Lopez *v.* Noble, Warden. Sup. Ct. Ohio. Certiorari denied. Reported below: 154 Ohio St. 3d 192, 2018-Ohio-4061, 112 N. E. 3d 905.

No. 18–7783. Cannady *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7784. David *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7788. Robinson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 861.

No. 18–7790. Simpson *v.* Cooper, Judge, Court of Common Pleas, Hamilton County, Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 154 Ohio St. 3d 320, 2018-Ohio-4068, 114 N. E. 3d 172.

No. 18–7792. Donato *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 18–7795. Lanieux *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 2018–1410 (La. 11/5/18), 255 So. 3d 1038.

No. 18–7799. Cutulle *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7800. Antonio Aguilar *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 522.

No. 18–7801. Tannehill *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7802. Hopson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 153.

No. 18–7804. Watson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7812. Wilcox *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–7814. Brown *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7817. Ceballos *v.* California. Ct. App. Cal., 1st App. Dist., Div. 2. Certiorari denied.

No. 18–7818. Castaneda *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 906 F. 3d 691.

No. 18–7821. Mixon *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 18–7823. Norwood *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 387.

No. 18–7824. Killingbeck *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 18–7830. Johnson *v.* Kansas. Ct. App. Kan. Certiorari denied. Reported below: 54 Kan. App. 2d xxiii, 404 P. 3d 362.

No. 18–7836. Moore *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7838. Moore *v.* United States (two judgments). C. A. 9th Cir. Certiorari denied.

No. 18–7839. Byers *v.* White, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 254.

No. 18–7841. Adetiloye *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7842. Burton *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7843. Gibson *v.* Boe, Superintendent, Clallam Bay Corrections Center. C. A. 9th Cir. Certiorari denied.

No. 18–7844. Hartley *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 112.

No. 18–7846. Hough *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7848. Fisher *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 108.

No. 18–7849. Pacheco Estudillo *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7858. Majid *v.* Noble, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 735.

No. 18–7859. Monsegue *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–7861. Graves *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 3d 137.

No. 18–7862. Beatty *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 166.

No. 18–7863. Burris *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 183.

No. 18–7871. Vennings *v.* Berryhill, Acting Commissioner of Social Security. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 419.

No. 18–7874. Booze *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 18–7878. Cannon *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 785.

No. 18–7880. Clarke *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 972.

No. 18–7882. Gates *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 649.

No. 18–7883. Carter *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7884. Villalva-Patricio *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 289.

No. 18–7886. Ocean *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 904 F. 3d 25.

No. 18–7898. Reid El Bey *v.* North Carolina et al. Gen. Ct. Justice, Super. Ct. Div., Wilson County, N. C. Certiorari denied.

No. 18–7900. Blanco-Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 339.

No. 18–7903. Arrington *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 18–7905. Hall *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 218.

No. 18–7910. Fuentes *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 3d 322.

No. 18–7911. Kun *v.* State Bar of California. Sup. Ct. Cal. Certiorari denied.

No. 18–7913. Thomas *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 750 Fed. Appx. 129.

No. 18–7914. Tharps *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 141.

No. 18–7915. Warner *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 288.

No. 18–7916. Wren *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 18–7918. Hernandez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 433.

No. 18–7920. Habeck *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 953.

No. 18–7921. Looman *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7922. LaFleur *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 983.

No. 18–7927. Anderson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 507.

No. 18–7930. Button *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 936.

No. 18–7947. Garden *v.* Massachusetts. App. Ct. Mass. Certiorari denied. Reported below: 93 Mass App. 1108, 103 N. E. 3d 1237.

No. 18–7954. Blanton *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 328.

No. 18–7960. Marshall *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 157.

No. 18–7968. Ragland *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 371 N. C. 572, 818 S. E. 2d 638.

No. 18–7969. Smith *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 18–7983. Laurson *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 18–7993. Bedford *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 3d 422.

No. 18–8033. Montalvo Borgos *v.* Medeiros, Superintendent, Massachusetts Correctional Institution at Norfolk. C. A. 1st Cir. Certiorari denied.

No. 18–8100. Franklin *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 18–285. Missouri *v.* Douglass et al. Sup. Ct. Mo. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 544 S. W. 3d 182.

No. 18–420. United States *v.* Wheeler. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 886 F. 3d 415.

No. 18–451. Aloha Bed & Breakfast *v.* Cervelli et al. Int. Ct. App. Haw. Motions of Foundation for Moral Law and Ethics & Religious Liberty Commission of the Southern Baptist Convention for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 142 Haw. 177, 415 P. 3d 919.

No. 18–545. First Advantage Background Services Corp. *v.* Superior Court of California, San Mateo County, et al. Ct. App. Cal., 1st App. Dist., Div. 4. Motion of Washington Legal Foundation et al. for leave to file brief as *amici curiae* granted. Certiorari denied.

No. 18–661. Zank *v.* Lopez Moreno. C. A. 6th Cir. Motion of Reunite International Child Abduction Centre for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 895 F. 3d 917.

No. 18–910. City of San Diego, California *v.* Public Employment Relations Board. Sup. Ct. Cal. Motion of Pacific Legal Foundation for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 5 Cal. 5th 898, 422 P. 3d 552.

No. 18–6819. Tharpe *v.* Ford, Warden. C. A. 11th Cir. Certiorari denied.

Statement of Justice Sotomayor respecting the denial of certiorari.

Petitioner Keith Tharpe is a Georgia inmate on death row. For years, Tharpe, who is black, has asked state and federal courts

to consider his claim that a white member of the jury that sentenced him to death was biased against him because of his race. Tharpe has presented a signed affidavit from the juror in question, who stated, among other things, that " 'there are two types of black people: 1. Black folks and 2. Niggers,' " and that Tharpe, " 'who wasn't in the "good" black folks category in [his] book, should get the electric chair for what he did.' " *Tharpe* v. *Sellers*, 583 U. S. 33, 34 (2018) (*per curiam*). Nevertheless, Tharpe has never received a hearing on the merits of his racial-bias claim.

The petition that the Court denies today does not turn on the merits of that claim, and I concur in the denial of Tharpe's petition. I write because I am profoundly troubled by the underlying facts of this case.

I

More than seven years after he was sentenced to death, Tharpe's attorneys uncovered evidence that a white member of his jury, Barney Gattie, harbored racist views at the time of the trial. In a sworn statement, Gattie made "repugnant comments . . . rife with racial slurs . . . and even an explicit statement that [his] decision to sentence Tharpe to death was[,] at leas[t] in part, based on race." *Tharpe* v. *Warden*, 898 F. 3d 1342, 1348 (CA11 2018) (Wilson, J., concurring). Tharpe sought postconviction relief in state court, arguing that racial bias tainted the jury's deliberations in his case.

To this day, Tharpe's racial-bias claim has never been adjudicated on its merits. The Georgia state court and the Federal District Court denied Tharpe's requests for postconviction relief on procedural grounds. Tharpe moved to reopen the federal proceedings in light of " 'extraordinary circumstances,' " *Gonzalez* v. *Crosby*, 545 U. S. 524, 536 (2005), but the District Court denied that motion. Tharpe requested a certificate of appealability (COA) from the United States Court of Appeals for the Eleventh Circuit, but the court denied his request after concluding that he had not made an adequate showing that Gattie's racial bias affected the jury's verdict. *Tharpe*, 583 U. S., at 34. This Court disagreed, explaining that Tharpe had "present[ed] a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict." *Id.*, at 34–35. We remanded for further consideration.

On remand, the Court of Appeals again denied Tharpe's request for a COA. It held that the District Court did not arguably

abuse its discretion in denying Tharpe's motion to reopen because two different threshold obstacles barred Tharpe's claim. First, the court held that Tharpe's juror-bias claim could not go forward because the claim relied on a later decided case, *Pena-Rodriguez* v. *Colorado*, 580 U. S. 206 (2017), which the court concluded does not apply retroactively. 898 F. 3d, at 1345–1346. Second, the court decided that Tharpe had not established cause for his procedural default in state court—*i. e.*, he had not given a sufficient justification for failing to raise the juror-bias claim in a motion for a new trial or in his direct appeal. Specifically, the court rejected as unsubstantiated Tharpe's allegation that counsel's ineffectiveness was to blame for his not having raised the racial-bias claim sooner. *Id.*, at 1347. Tharpe seeks this Court's review.

II

Tharpe's petition for a writ of certiorari asks us to decide only whether the Court of Appeals' procedural rulings were correct, not whether his juror-bias claim has merit. Tharpe "faces a high bar in showing that jurists of reason could disagree whether the District Court abused its discretion in denying his motion" to reopen. *Tharpe*, 583 U. S., at 35. And for Tharpe's claim to proceed, he must overcome both of the Court of Appeals' independent reasons for denying him a COA. In other words, even setting aside whether *Pena-Rodriguez* is retroactive, he would have to establish that he arguably showed sufficient cause to excuse his procedural default.

I see little likelihood that we would reverse the Court of Appeals' factbound conclusion that Tharpe did not make that showing. Before this Court, Tharpe argues that he could not have raised his racial-bias claim in a motion for new trial or on direct appeal because he did not know—indeed, could not have known—of the predicate facts of the claim at that time. Pet. for Cert. 35. If preserved, that argument would have force. But Tharpe did not make this argument before the District Court until a footnote in his reply brief in the Federal Rule of Civil Procedure 60(b)(6) proceedings, see Reply to Brief in Opposition 12–13 (listing the reply brief as the earliest point at which this argument was made), and the District Court did not address it, see App. D to Pet. for Cert. Given this preservation issue and the deference due to the District Court, the Court of Appeals reasonably focused on the ineffective-assistance argument that Tharpe did pre-

viously present to the District Court in deciding that Tharpe had not made the requisite showing of cause. See 898 F. 3d, at 1347.

I therefore concur in the Court's decision to deny Tharpe's petition for certiorari. As this may be the end of the road for Tharpe's juror-bias claim, however, we should not look away from the magnitude of the potential injustice that procedural barriers are shielding from judicial review.

Tharpe has uncovered truly striking evidence of juror bias. Gattie, the juror at issue, signed an affidavit reflecting his "view that 'there are two types of black people: 1. Black folks and 2. Niggers'; that Tharpe, 'who wasn't in the "good" black folks category in [his] book, should get the electric chair for what he did'; that '[s]ome of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't [his] reason'; and that, '[a]fter studying the Bible, [he] ha[d] wondered if black people even have souls.'" *Tharpe*, 583 U. S., at 34 (quoting App. B to Pet. for Cert. 15–16).

These racist sentiments, expressed by a juror entrusted with a vote over Tharpe's fate, suggest an appalling risk that racial bias swayed Tharpe's sentencing. The danger of race determining any criminal punishment is intolerable and endangers public confidence in the law. See *Buck* v. *Davis*, 580 U. S. 100, 124 (2017). That risk is especially grave here, where it may have yielded a punishment that is unique in its "complete finality." *Turner* v. *Murray*, 476 U. S. 28, 35 (1986). When Tharpe went on trial for his crimes, the Constitution promised him the "fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey* v. *Kemp*, 481 U. S. 279, 310 (1987) (quoting *Strauder* v. *West Virginia*, 100 U. S. 303, 309 (1880)). There is strong evidence that this promise went unfulfilled.

It may be tempting to dismiss Tharpe's case as an outlier, but racial bias is "a familiar and recurring evil." *Pena-Rodriguez*, 580 U. S., at 224. That evil often presents itself far more subtly than it has here. Yet Gattie's sentiments—and the fact that they went unexposed for so long, evading review on the merits—amount to an arresting demonstration that racism can and does seep into the jury system. The work of "purg[ing] racial prejudice from the administration of justice," *id.*, at 221, is far from done.

No. 18–7408. Leonard *v.* George Washington University Hospital et al. C. A. D. C. Cir. Certiorari denied. Justice

Kavanaugh took no part in the consideration or decision of this petition.

No. 18–7441. Wheeler *v.* United States. C. A. 6th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 18–7687. Lee *v.* Muniz, Warden. C. A. 9th Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition.

No. 18–7769. Hill *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition.

No. 18–7840. Telfair *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–5617. Moreland *v.* Lynchburg Department of Social Services, 583 U. S. 935;

No. 17–8213. Brewer *v.* United States, 584 U. S. 955;

No. 17–8593. Brooks *v.* Raemisch, Executive Director, Colorado Department of Corrections, et al., 585 U. S. 1021;

No. 17–8818. Baker *v.* United States, 584 U. S. 1019;

No. 17–8962. De Min Gu *v.* Federal Bureau of Investigation et al., 586 U. S. 837;

No. 17–9392. Grant *v.* White et al., 586 U. S. 857;

No. 17–9477. Grant *v.* Alperovich et al., 586 U. S. 862;

No. 18–497. Coulter *v.* Bissoon, Judge, United States District Court for the Western District of Pennsylvania, et al., 586 U. S. 1037;

No. 18–586. Koch *v.* Estrella et al., 586 U. S. 1074;

No. 18–611. Tatar *v.* United States, 586 U. S. 1074;

No. 18–659. Masomi *v.* Madadi, 586 U. S. 1127;

No. 18–702. Yadav et ux. *v.* New Jersey Department of Environmental Protection, 586 U. S. 1076;

No. 18–6245. Kirkland *v.* Progressive Insurance Co. et al., 586 U. S. 1079;

No. 18–6272. Steshenko *v.* McKay et al., 586 U. S. 1080;

No. 18–6388. Blackmon *v.* Eaton Corp., 586 U. S. 1081;

No. 18–6688. Leonard *v.* Florida, 586 U. S. 1118; and

No. 18–7065. Lobo *v.* United States, 586 U. S. 1121. Petitions for rehearing denied.

No. 17–8011. Blount *v.* United States, 584 U. S. 941. Petition for rehearing denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

No. 18–5428. Barraquias *v.* Wilkie, Secretary of Veterans Affairs, 586 U. S. 911. Petition for rehearing denied. Justice Kagan took no part in the consideration or decision of this petition.

March 25, 2019

Certiorari Dismissed

No. 18–7709. Laschkewitsch, as Administrator for the Estate of Laschkewitsch *v.* Lincoln Life & Annuity Distributors, Inc., dba Lincoln Financial Group. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 729 Fed. Appx. 261.

Miscellaneous Orders

No. 18A738. Dressler *v.* Circuit Court of Wisconsin, Racine County. Application for stay, addressed to The Chief Justice and referred to the Court, denied.

No. 18M117. Reed *v.* Florissant County, Missouri, et al.;
No. 18M118. Lockhart *v.* Georgia; and
No. 18M119. Wang *v.* California. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M120. Bueno-Sierra *v.* United States. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. Justice Kagan took no part in the consideration or decision of this motion.

No. 18–7499. Bida *v.* Johnson. C. A. 3d Cir.;
No. 18–7542. Harnden *v.* St. Clair County, Michigan, et al. C. A. 6th Cir.; and
No. 18–7584. Marberry *v.* State Bar of California. Sup. Ct. Cal. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 15, 2019, within which to pay the docketing fees required by Rule 38(a)

and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8246. In re Jackson. Petition for writ of habeas corpus denied.

No. 18–8243. In re Leffebre. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 18–973. In re Chatfield et al.;
No. 18–8015. In re Agbonifo; and
No. 18–8099. In re Bryant. Petitions for writs of mandamus denied.

Certiorari Denied

No. 17–1351. Greer *v.* Green Tree Servicing LLC et al. C. A. 9th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 371.

No. 18–225. Zappos.com, Inc. *v.* Stevens et al. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 3d 1020.

No. 18–498. Maricopa County, Arizona *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 3d 648.

No. 18–533. Travis *v.* Exel, Inc., dba DHL Supply Chain (USA), et al. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 3d 1326.

No. 18–640. Acklin *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 266 So. 3d 89.

No. 18–657. Grimsrud *v.* Department of Transportation. C. A. Fed. Cir. Certiorari denied. Reported below: 718 Fed. Appx. 987.

No. 18–728. Rentmeester *v.* Nike, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 3d 1111.

No. 18–729. Maxwell & Morgan, P. C., et al. *v.* McNair. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 3d 680.

No. 18–774. Anderson News, L. L. C., et al. *v.* American Media, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 899 F. 3d 87.

No. 18–831. Presley et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 895 F. 3d 1284.

No. 18–930. Brandon *v.* Brandon. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 18–933. Patel *v.* Patel et al. C. A. 4th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 52.

No. 18–943. Fairfield County, Ohio, et al. *v.* Morgan et al. C. A. 6th Cir. Certiorari denied. Reported below: 903 F. 3d 553.

No. 18–946. Arroyo *v.* Torres-Sanchez et al. C. A. 1st Cir. Certiorari denied.

No. 18–958. Mitrano *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 518.

No. 18–971. Hobson *v.* Mattis, Former Secretary of Defense. C. A. 6th Cir. Certiorari denied.

No. 18–980. Torkornoo *v.* Maryland et al. C. A. 4th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 123.

No. 18–998. Waite, as Personal Representative of the Estate of Waite *v.* Union Carbide Corp. et al. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 3d 1307.

No. 18–1006. Adams *v.* Texas. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 18–1007. Abulkhair *v.* Google LLC et al. C. A. 3d Cir. Certiorari denied. Reported below: 738 Fed. Appx. 754.

No. 18–1025. Leon *v.* New York City Department of Education et al. C. A. 2d Cir. Certiorari denied. Reported below: 740 Fed. Appx. 759.

No. 18–1047. Wade *v.* Florida Department of Juvenile Justice. C. A. 11th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 894.

No. 18–1082. Guzall *v.* City of Romulus, Michigan, et al. C. A. 6th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 574.

No. 18–1090. Beckman *v.* Match.com, LLC. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 142.

No. 18–1119. Richman Group of Florida, Inc. *v.* Pinellas County, Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 253 So. 3d 662.

No. 18–6413. Jackson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 975.

No. 18–6706. Davis *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 3d 733.

No. 18–6728. Quintana *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 18–6789. McLean *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 3d 1308.

No. 18–6822. Brown *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 741.

No. 18–6834. Johnson *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 375.

No. 18–7098. Scott *v.* Tellez, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7113. Hylor *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 3d 1219.

No. 18–7140. Hull *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 313.

No. 18–7152. Bonet *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 988.

No. 18–7376. Peters *v.* Berryhill, Acting Commissioner of Social Security. C. A. 7th Cir. Certiorari denied.

No. 18–7455. Israel Sanchez *v.* California. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 18–7472. Yoder *v.* Good Will Steam Fire Engine Company No. 1 et al. C. A. 3d Cir. Certiorari denied. Reported below: 740 Fed. Appx. 27.

No. 18–7474. Gonzalez *v.* Ferguson, Superintendent, State Correctional Institution at Graterford, et al. C. A. 3d Cir. Certiorari denied. Reported below: 655 Fed. Appx. 96.

No. 18–7475. Aldona B. *v.* Nicholas S. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–7476. Zirus *v.* Keller et al. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 44.

No. 18–7477. Williams *v.* Minor, Warden. C. A. 8th Cir. Certiorari denied.

No. 18–7478. Blair *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–7481. Workman *v.* Perry et al. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 365.

No. 18–7487. Hokenstrom *v.* New Hampshire Department of Corrections et al. C. A. 1st Cir. Certiorari denied.

No. 18–7491. Crow *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7493. Jackson *v.* Equifax Workforce Solutions, dba Labor Ready Southwest, et al. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 116.

No. 18–7494. Bozell *v.* Skipper, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7497. Wellborn *v.* Jackson, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7502. Payne *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2018 IL App (3d) 160105, 116 N. E. 3d 965.

No. 18–7503. Ambrose *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 254 So. 3d 77.

No. 18–7504. Hamilton *v.* Allbaugh, Director, Oklahoma Department of Corrections. C. A. 10th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 525.

No. 18–7509. Mixon *v.* Nevada et al. C. A. 9th Cir. Certiorari denied.

No. 18–7510. Perez *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied.

No. 18–7513. Cobas *v.* Lindsey, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7514. Palmer *v.* Kaiser Foundation Hospitals Technology Risk Office. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 590.

No. 18–7516. Mora *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 5th 442, 420 P. 3d 902.

No. 18–7520. Lee *v.* Pirko et al. C. A. 9th Cir. Certiorari denied.

No. 18–7524. Harrison et al. *v.* Huggins et al. Sup. Ct. Ill. Certiorari denied.

No. 18–7529. Dennison *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 18–7531. Galbraith *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 391.

No. 18–7532. Green *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 256 So. 3d 872.

No. 18–7533. Canada *v.* Miles, Warden. C. A. 8th Cir. Certiorari denied.

No. 18–7534. Hudson *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143125–U.

No. 18–7539. Rossi *v.* The Crown. C. A. D. C. Cir. Certiorari denied.

No. 18–7547. Mulder *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 134 Nev. 986, 422 P. 3d 1231.

No. 18–7551. Gomez *v.* Berghuis, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7552. Hayes *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 18–7553. Hopkins *v.* Dooley, Warden, et al. C. A. 8th Cir. Certiorari denied.

No. 18–7554. Ferm *v.* Office of the Attorney General of Nevada. Ct. App. Nev. Certiorari denied. Reported below: 134 Nev. 936.

No. 18–7564. Howard *v.* Jones, Secretary, Florida Department of Corrections. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 250 So. 3d 618.

No. 18–7571. Cervantes Valencia *v.* Davey, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7574. Haines-Marchel *v.* Washington State Liquor and Cannabis Board. Ct. App. Wash. Certiorari denied. Reported below: 1 Wash. App. 2d 712, 406 P. 3d 1199.

No. 18–7580. Neal *v.* Wayne County Treasurer. Ct. App. Mich. Certiorari denied.

No. 18–7582. Canete *v.* Keeton, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7589. Judy *v.* Williams et al. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 357.

No. 18–7661. Jones *v.* Inch, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 3d 1339.

No. 18–7728. Haynesworth *v.* South Carolina Department of Mental Health et al. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 122.

No. 18–7732. Curry *v.* Supreme Court of the United States et al. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 210.

No. 18–7756. Chambers *v.* Sarcone. C. A. 8th Cir. Certiorari denied.

No. 18–7770. Bradley *v.* Georgia. Sup. Ct. Ga. Certiorari denied.

No. 18–7780. Lemoine *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–7787. Golder *v.* Chapdelaine, Warden, et al. C. A. 2d Cir. Certiorari denied.

No. 18–7805. Bohannan *v.* Griffin. C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 283.

No. 18–7808. Wilson *v.* LeGrand, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 566.

No. 18–7829. Mark *v.* Rabeau. C. A. 9th Cir. Certiorari denied.

No. 18–7847. Howlett *v.* Richardson, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 461.

No. 18–7869. Deorio *v.* Flournoy, Warden. C. A. 11th Cir. Certiorari denied.

No. 18–7875. Cannon *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 721 Fed. Appx. 227.

No. 18–7876. Callahan *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7877. Decker *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7881. Ellison *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 207.

No. 18–7887. Roberts *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 429.

No. 18–7895. Anderson *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–7896. Montanez-Quinones *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 911 F. 3d 59.

No. 18–7904. Alcequiecz *v.* Ryan, Warden. C. A. 1st Cir. Certiorari denied.

No. 18–7923. Jones *v.* LeBlanc, Secretary, Louisiana Department of Public Safety and Corrections, et al. C. A. 5th Cir. Certiorari denied.

No. 18–7928. Carrasco *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7931. Henley *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7938. Quintana-Torres *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 734.

No. 18–7941. Little *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 87.

No. 18–7943. Watson *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–7946. Hawkins *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 18–7948. Carapia Hernandez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 28.

No. 18–7950. Walker *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7951. McClure *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 155.

No. 18–7952. Partman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 197.

No. 18–7958. Lohmeier *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 18–7964. Santos *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 18–7965. Stewart *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 3d 664.

No. 18–7966. Smith *v.* Terris, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7971. Chivoski *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 299.

No. 18–7973. Villa *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 586.

No. 18–7974. Cruz-Rivera, aka Llorens *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 904 F. 3d 63.

No. 18–7975. Wolf *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–7977. Mowery *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 863.

No. 18–7978. Amerson *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–7979. Watkins *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–7981. Murillo, aka Santos Murillo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 378.

No. 18–7984. Ervin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 268.

No. 18–7986. Chacon *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 3d 1322.

No. 18–7989. Guerrero *v.* English, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 207.

No. 18–7994. King *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 56.

No. 18–7995. Martin *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 873.

No. 18–7997. Allen *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 859.

No. 18–8010. Barrie *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 158.

No. 18–8011. Kerr *v.* Barr, Attorney General. C. A. 8th Cir. Certiorari denied.

No. 18–8012. Blackburn *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–8019. Austin *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–8025. St. Hubert *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 3d 335.

No. 18–8026. Ramirez *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–8028. Reel *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–8031. Bolden *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 168 A. 3d 294.

No. 18–8034. Brewer *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 18–8036. Boyle *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 18–8038. Burke *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 441.

No. 18–8040. Bannister *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–8041. Johnson *v.* United States. Ct. App. D. C. Certiorari denied.

No. 18–8042. Blaylock *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–8043. Alanis *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–8044. Brooks *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 756 Fed. Appx. 52.

No. 18–8047. Pope *v.* Franke. C. A. 9th Cir. Certiorari denied.

No. 18–8048. Owens *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 415.

No. 18–8049. Montero *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 892.

No. 18–8051. Valencia Torres *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 493.

No. 18–8053. Allen *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 340.

No. 18–8054. Young *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 381.

No. 18–8056. Glick *v.* Premo, Superintendent, Oregon State Penitentiary. C. A. 9th Cir. Certiorari denied.

No. 18–8058. Elias Sanchez *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 334.

No. 18–8059. Simmons *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 879.

No. 18–8065. Maxwell *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 255.

No. 18–8066. Magana *v.* Credio et al. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 390.

No. 18–8067. Lew *v.* California. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 18–8068. Hill *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–8075. Oriakhi *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 386.

No. 18–8079. Bentley *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 957.

No. 18–8083. Magnificent-El, aka Phillips *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 726.

No. 18–8091. Williams *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 167.

No. 18–8094. Gros *v.* Kent, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–8096. Hall *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 223.

No. 18–8101. Foltz *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 237.

No. 18–8104. Frazier *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–8106. Crump *v.* Delaware. Sup. Ct. Del. Certiorari denied. Reported below: 194 A. 3d 16.

No. 18–8111. Black *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–8112. Brown *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–8113. Arnaud *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–8114. Boyd *v.* Driver et al. C. A. 5th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 367.

No. 18–8115. Barrios *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 18–8116. Michel *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 257 So. 3d 3.

No. 18–8130. Segoviano-Briseno *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 399.

No. 18–8254. Phillips *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 18–948. In re Grand Jury Subpoena. C. A. D. C. Cir. Motion of respondent for leave to file a supplemental brief under seal granted. Motion of petitioner for leave to file a supplemental reply brief under seal with redacted copies for the public record granted in part; the supplemental reply brief will be filed under seal. Certiorari denied. Reported below: 749 Fed. Appx. 1.

No. 18–990. Raghavendra *v.* Booth et al. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–7818. In re West, 583 U. S. 1178;
No. 17–9227. Geray *v.* Muniz, Warden, 586 U. S. 849;

No. 18–6051. Bender *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 991;

No. 18–6218. Linden *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 1052;

No. 18–6478. In re Gaitor, 586 U. S. 1067;

No. 18–6540. Rayan *v.* Georgia, 586 U. S. 1085;

No. 18–6607. Peters *v.* Baldwin, 586 U. S. 1087;

No. 18–6710. Tyler *v.* Main Industries, Inc., et al., 586 U. S. 1119;

No. 18–6740. Lasher *v.* Bureau of Professional and Occupational Affairs, Pennsylvania State Board of Pharmacy, 586 U. S. 1128;

No. 18–6945. Washington *v.* Frauenheim, Warden, 586 U. S. 1129;

No. 18–6996. Curshen *v.* United States, 586 U. S. 1120;

No. 18–7027. Kuri *v.* Addictive Behavioral Change Health Group et al., 586 U. S. 1159; and

No. 18–7066. Jones *v.* United States, 586 U. S. 1121. Petitions for rehearing denied.

No. 91–8199. Deal *v.* United States, 508 U. S. 129. Motion for leave to file petition for rehearing denied. The Chief Justice took no part in the consideration or decision of this motion.

No. 18–6717. Lei Yin *v.* Thermo Fisher Scientific, 586 U. S. 1109. Petition for rehearing denied. The Chief Justice took no part in the consideration or decision of this petition.