UNITED STATES

REPORTS

564

OCT. TERM 2010

UNITED STATES REPORTS

VOLUME 564

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2010

JUNE 9 THROUGH SEPTEMBER 28, 2011

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

WASHINGTON : 2016

Printed on Uncoated Permanent Printing Paper

For sale by the Superintendent of Documents, U. S. Government Printing Office

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.
SONIA SOTOMAYOR, ASSOCIATE JUSTICE.
ELENA KAGAN, ASSOCIATE JUSTICE.

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

ERIC H. HOLDER, JR., ATTORNEY GENERAL.
NEAL KUMAR KATYAL, ACTING SOLICITOR GENERAL.[1]
DONALD B. VERRILLI, JR., SOLICITOR GENERAL.[2]
WILLIAM K. SUTER, CLERK.
CHRISTINE LUCHOK FALLON, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
JUDITH A. GASKELL, LIBRARIAN.[3]

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*For notes, see p. IV.

NOTES

[1] Acting Solicitor General Katyal resigned effective June 9, 2011.

[2] The Honorable Donald B. Verrilli, Jr., of New York, was nominated by President Obama on January 26, 2011, to be Solicitor General; the nomination was confirmed by the Senate on June 6, 2011; he was commissioned and took the oath of office on June 9, 2011. He was presented to the Court on June 27, 2011. See *post*, p. VII.

[3] Ms. Gaskell retired as Librarian on September 30, 2011. See *post*, p. IX.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 28, 2010, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

PRESENTATION OF THE SOLICITOR GENERAL

Supreme Court of the United States

MONDAY, JUNE 27, 2011

Present: Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, Justice Alito, Justice Sotomayor, and Justice Kagan.

The Chief Justice said:

The Court recognizes Deputy Solicitor General Katyal.

The Court at this time wishes to note for the record that Neal K. Katyal has served as the Acting Solicitor General from May 17, 2010, to June 9, 2011. The Court recognizes the considerable responsibility that was placed upon you, Mr. Katyal, to represent the government of the United States before this Court. And on behalf of the Court, I thank you for a job very well done. You have our sincere appreciation.

Deputy Solicitor General Katyal said:

Thank you, Mr. Chief Justice, and may it please the Court. I have the honor to present to the Court, the Solicitor General of the United States, the Honorable Donald B. Verrilli, Jr., of Washington, DC.

The Chief Justice said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the government of the United States before this

Court. You follow in the footsteps of other outstanding attorneys who have held your new office. Your commission will be duly recorded by the clerk.

The Solicitor General said:

Thank you, MR. CHIEF JUSTICE.

RETIREMENT OF LIBRARIAN

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 27, 2011

Present: CHIEF JUSTICE ROBERTS, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE ALITO, JUSTICE SOTOMAYOR, and JUSTICE KAGAN.

THE CHIEF JUSTICE said:

The Court also notes today that the Court's Librarian, Judith Gaskell, has announced her retirement. She will be leaving us before we reconvene in the fall. Ms. Gaskell has served as the Court's Librarian since 2003. In the earliest years, the Court did not have its own Library. Members of the Court used their own personal collections or borrowed books from the Library of Congress or other sources. Today, the Librarian manages the Court's splendid collection of more than 500,000 volumes, directs a staff of 28, and provides irreplaceable research in support of our work. The Court thanks you, Ms. Gaskell, for your dedicated service, and we wish you well in your retirement.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2010

SYKES *v.* UNITED STATES

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

No. 09–11311. Argued January 12, 2011—Decided June 9, 2011

When he pleaded guilty to being a felon in possession of a firearm, see 18 U. S. C. § 922(g)(1), petitioner Sykes had prior convictions for at least three felonies, including the state-law crime of "us[ing] a vehicle" to "knowingly or intentionally" "fle[e] from a law enforcement officer" after being ordered to stop, Ind. Code § 35–44–3–3(b)(1)(A). The Federal District Court decided that the prior convictions subjected Sykes to the 15-year mandatory minimum prison term that the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e), provides for an armed defendant who has three prior "violent felony" convictions. Rejecting Sykes' argument that his vehicle flight felony was not "violent" under ACCA, the Seventh Circuit affirmed.

Held: Felony vehicle flight, as proscribed by Indiana law, is a violent felony for purposes of ACCA. Pp. 7–16.

(a) The "categorical approach" used to determine if a particular crime is a violent felony "consider[s] whether the elements of the offense are of the type that would justify its inclusion within the residual provision [of 18 U. S. C. § 924(e)(2)(B)], without inquiring into the specific conduct of th[e] particular offender." *James* v. *United States*, 550 U. S. 192, 202 (emphasis deleted). When punishable by more than one year in prison, burglary, arson, extortion, and crimes that involve use of explosives are violent felonies. Under the residual clause in question so too is a crime that "otherwise involves conduct that presents a serious

potential risk of physical injury to another," § 924(e)(2)(B)(ii), *i. e.*, a risk "comparable to that posed by its closest analog among" the statute's enumerated offenses. *Id.*, at 203. When a perpetrator flees police in a car, his determination to elude capture makes a lack of concern for the safety of others an inherent part of the offense. Even if he drives without going full speed or the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. His indifference to these collateral consequences has violent—even lethal—potential for others. A fleeing criminal who creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. Also telling is a comparison to burglary, which is dangerous because it can end in confrontation leading to violence. In fact, the risks associated with vehicle flight may outstrip the dangers of both burglary and arson. While statistics are not dispositive, studies show that the risk of personal injuries is about 20% lower for each of those enumerated crimes than for vehicle pursuits. Thus, Indiana's prohibition on vehicle flight falls within § 924(e)(2)(B)(ii)'s residual clause because, as a categorical matter, it presents a serious potential risk of physical injury to another. Pp. 7–12.

(b) Sykes' argument—that *Begay* v. *United States*, 553 U. S. 137, and *Chambers* v. *United States*, 555 U. S. 122, require ACCA predicate crimes to be purposeful, violent, and aggressive in ways that vehicle flight is not—overreads those opinions. In general, levels of risk divide crimes that qualify as violent felonies from those that do not. *Chambers* is no exception: It explained that failure to report does not qualify because the typical offender is not "significantly more likely than others to attack, or physically to resist, an apprehender." *Id.*, at 128–129. *Begay*, which held that driving under the influence (DUI) is not an ACCA predicate and stated that it is not purposeful, violent, and aggressive, 553 U. S., at 145–148, is the Court's sole residual clause decision in which risk was not the dispositive factor. But *Begay* also gave a more specific reason for its holding: DUI "need not be purposeful or deliberate," *id.*, at 145, and is analogous to strict-liability, negligence, and recklessness crimes. *Begay*'s "purposeful, violent, and aggressive" phrase is an addition to the statutory text that has no precise link to the residual clause. Because vehicle flight is not a strict-liability, negligence, or recklessness crime and is, as a categorical matter, similar in risk to the crimes listed in § 924(e)(2)(B)(ii), it is a violent felony. Pp. 12–13.

(c) Sykes contends that the fact that Ind. Code § 35–44–3–3(b)(1)(B) criminalizes flight by an offender who "operates a vehicle in a manner that creates a substantial risk of bodily injury to another person"

indicates that Indiana did not intend for § 35–44–3–3(b)(1)(A), under which he was convicted, to encompass the particular class of vehicle flights reached by subsection (b)(1)(B). This argument is unconvincing. Indiana treats the two subsections as felonies of the same magnitude carrying similar prison terms, suggesting that subsection (b)(1)(A) is roughly equivalent to one type of subsection (b)(1)(B) violation. Pp. 13–15.

(d) Congress framed ACCA in general and qualitative, rather than encyclopedic, terms. The residual clause imposes enhanced punishment for unlawful firearm possession when the relevant prior offenses involved a potential risk of physical injury similar to that presented by several enumerated offenses. It instructs potential recidivists regarding the applicable sentencing regime if they again transgress. This intelligible principle provides guidance, allowing a person to conform his conduct to the law. While this approach may at times be more difficult for courts to implement, it is within congressional power to enact. Pp. 15–16.

598 F. 3d 334, affirmed

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, and SOTOMAYOR, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 16. SCALIA, J., filed a dissenting opinion, *post*, p. 28. KAGAN, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 36.

William E. Marsh argued the cause for petitioner. With him on the briefs was *James C. McKinley.*

Jeffrey B. Wall argued the cause for the United States. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Acting Deputy Solicitor General McLeese*, and *Richard A. Friedman.*

JUSTICE KENNEDY delivered the opinion of the Court.

It is a federal crime for a convicted felon to be in unlawful possession of a firearm. 18 U. S. C. § 922(g)(1). The ordinary maximum sentence for that crime is 10 years of imprisonment. § 924(a)(2). If, however, when the unlawful possession occurred, the felon had three previous convictions for a violent felony or serious drug offense, the punishment is increased to a minimum term of 15 years. § 924(e). The

instant case is another in a series in which the Court is called upon to interpret § 924(e) to determine if a particular previous conviction was for a "violent felony," as that term is used in the punishment enhancement statute. See *James* v. *United States*, 550 U. S. 192 (2007); *Begay* v. *United States*, 553 U. S. 137 (2008); *Chambers* v. *United States*, 555 U. S. 122 (2009).

In this case the previous conviction in question is under an Indiana statute that makes it a criminal offense whenever the driver of a vehicle knowingly or intentionally "flees from a law enforcement officer." Ind. Code § 35–44–3–3 (2004). The relevant text of the statute is set out in the discussion below. For the reasons explained, the vehicle flight that the statute proscribes is a violent felony as the federal statute uses that term.

I

Petitioner Marcus Sykes pleaded guilty to being a felon in possession of a firearm, 18 U. S. C. § 922(g)(1), in connection with an attempted robbery of two people at gunpoint. Sykes had previous convictions for at least three felonies. On two separate occasions Sykes used a firearm to commit robbery, in one case to rob a man of his $200 wristwatch and in another to rob a woman of her purse.

His third prior felony is the one of concern here. Sykes was convicted for vehicle flight, in violation of Indiana's "resisting law enforcement" law. Ind. Code § 35–44–3–3. That law provides:

> "(a) A person who knowingly or intentionally:
>
> "(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer;
>
> "(2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

"(3) flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop;

"commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).

"(b) The offense under subsection (a) is a:

"(1) Class D felony if:

"(A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or

"(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

"(2) Class C felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes serious bodily injury to another person; and

"(3) Class B felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person."

Here, as will be further explained, Sykes used a vehicle to flee after an officer ordered him to stop, which was, as the statute provides, a class D felony. The Court of Appeals of Indiana has interpreted the crime of vehicle flight to require "a knowing attempt to escape law enforcement." *Woodward* v. *State*, 770 N. E. 2d 897, 901 (2002) (internal quotation marks omitted). *Woodward* involved a driver who repeatedly flashed his bright lights and failed to obey traffic signals. *Id.*, at 898. When an officer activated his emergency equipment, the defendant became "aware . . . that [the officer] wanted him to pull his vehicle over," but instead drove for a mile without "stopping, slowing, or otherwise acknowledging" the officer because, he later testified, he "was 'trying to rationalize why [he] would be pulled over.'" *Id.*, at 898, 901.

Though the defendant later claimed that he was also seeking a "well-lighted place to stop where there would be someone who knew him," *id.*, at 901, his actions suggested otherwise. He passed two gas stations, a food outlet store, and a McDonald's before pulling over. When he got out of the car, he began to shout profanities at the pursuing officer. *Ibid.* By that time, the officer had called for backup and exited his own vehicle with his gun drawn. *Id.*, at 898. In answering the defendant's challenge to the sufficiency of the above evidence, the Indiana court held that because he knew that a police officer sought to stop him, the defendant could not "choose the location of the stop" and insist on completing the stop "on his own terms," as he had done, "without adequate justification," which he lacked. *Id.*, at 901–902.

In the instant case a report prepared for Sykes' federal sentencing describes the details of the Indiana crime. After observing Sykes driving without using needed headlights, police activated their emergency equipment for a traffic stop. Sykes did not stop. A chase ensued. Sykes wove through traffic, drove on the wrong side of the road and through yards containing bystanders, passed through a fence, and struck the rear of a house. Then he fled on foot. He was found only with the aid of a police dog.

The District Court decided that his three prior convictions, including the one for violating the prohibition on vehicle flight in subsection (b)(1)(A) of the Indiana statute just discussed, were violent felonies for purposes of § 924(e) and sentenced Sykes to 188 months of imprisonment. On appeal Sykes conceded that his two prior robbery convictions were violent felonies. He did not dispute that his vehicle flight offense was a felony, but he did argue that it was not violent. The Court of Appeals for the Seventh Circuit affirmed. 598 F. 3d 334 (2010). The court's opinion was consistent with the rulings of the Courts of Appeals in the First, Fifth, Sixth, and Tenth Circuits. *Powell* v. *United States*, 430 F. 3d 490 (CA1 2005) *(per curiam); United States* v. *Harri-*

mon, 568 F. 3d 531, 534–537 (CA5 2009); *United States* v. *LaCasse*, 567 F. 3d 763, 765–767 (CA6 2009); *United States* v. *McConnell*, 605 F. 3d 822, 827–830 (CA10 2010) (finding the flight to be a "crime of violence" under the "nearly identical" §4B1.2(a)(2) of the United States Sentencing Guidelines). It was in conflict with a ruling by the Court of Appeals for the Eleventh Circuit in *United States* v. *Harrison*, 558 F. 3d 1280, 1291–1296 (2009), and at least in tension, if not in conflict, with the reasoning of the Court of Appeals for the Eighth Circuit in *United States* v. *Tyler*, 580 F. 3d 722, 724–726 (2009), and for the Ninth Circuit in *United States* v. *Kelly*, 422 F. 3d 889, 892–897 (2005), *United States* v. *Jennings*, 515 F. 3d 980, 992–993 (2008), and *United States* v. *Peterson*, No. 07–30465, 2009 WL 3437834, *1 (Oct. 27, 2009). The writ of certiorari, 561 U. S. 1058 (2010), allows this Court to address the conflict.

II

In determining whether an offense is a violent felony, this Court has explained,

> "we employ the categorical approach . . . . Under this approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction. That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *James*, 550 U. S., at 202 (internal quotation marks and citations omitted); see also *Taylor* v. *United States*, 495 U. S. 575, 599–602 (1990).

So while there may be little doubt that the circumstances of the flight in Sykes' own case were violent, the question is whether §35–44–3–3 of the Indiana Code, as a categorical matter, is a violent felony.

Under 18 U. S. C. § 924(e)(2)(B), an offense is deemed a violent felony if it is a crime punishable by more than one year of imprisonment that

> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Resisting law enforcement through felonious vehicle flight does not meet the requirements of clause (i), and it is not among the specific offenses named in clause (ii). Thus, it is violent under this statutory scheme only if it fits within the so-called residual provision of clause (ii). To be a violent crime, it must be an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

The question, then, is whether Indiana's prohibition on flight from an officer by driving a vehicle—the violation of Indiana law for which Sykes sustained his earlier conviction—falls within the residual clause because, as a categorical matter, it presents a serious potential risk of physical injury to another. The offenses enumerated in § 924(e)(2)(B)(ii)—burglary, extortion, arson, and crimes involving the use of explosives—provide guidance in making this determination. For instance, a crime involves the requisite risk when "the risk posed by [the crime in question] is comparable to that posed by its closest analog among the enumerated offenses." *James*, 550 U. S., at 203 (explaining that attempted burglary poses risks akin to that of completed burglary).

When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense.

Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent—even lethal—potential for others. A criminal who takes flight and creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. This similarity is a beginning point in establishing that vehicle flight presents a serious potential risk of physical injury to another.

Another consideration is a comparison to the crime of burglary. Burglary is dangerous because it can end in confrontation leading to violence. *Id.*, at 200. The same is true of vehicle flight, but to an even greater degree. The attempt to elude capture is a direct challenge to an officer's authority. It is a provocative and dangerous act that dares, and in a typical case requires, the officer to give chase. The felon's conduct gives the officer reason to believe that the defendant has something more serious than a traffic violation to hide. In Sykes' case, officers pursued a man with two prior violent felony convictions and marijuana in his possession. In other cases officers may discover more about the violent potential of the fleeing suspect by running a check on the license plate or by recognizing the fugitive as a convicted felon. See, *e. g.*, *Arizona* v. *Gant*, 556 U. S. 332, 336 (2009).

Because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves dutybound to escalate their response to ensure the felon is apprehended. *Scott* v. *Harris*, 550 U. S. 372, 385 (2007), rejected the possibility that police could eliminate the danger from a vehicle flight by giving up the chase because the perpetrator "might have been just as likely to respond by continuing to drive reck-

lessly as by slowing down and wiping his brow." And once the pursued vehicle is stopped, it is sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicle flight. It places property and persons at serious risk of injury.

Risk of violence is inherent to vehicle flight. Between the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes. It presents more certain risk as a categorical matter than burglary. It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture.

Unlike burglaries, vehicle flights from an officer by definitional necessity occur when police are present, are flights in defiance of their instructions, and are effected with a vehicle that can be used in a way to cause serious potential risk of physical injury to another. See *post,* at 19–21 (THOMAS, J., concurring in judgment); see also *post,* at 21–22 (listing Indiana cases addressing ordinary intentional vehicle flight and noting the high-risk conduct that those convictions involved).

Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony. See *Chambers,* 555 U. S., at 129 (explaining that statistical evidence sometimes "helps provide a conclusive . . . answer" concerning the risks that crimes present). As JUSTICE THOMAS explains, chase-related crashes kill more than 100 nonsuspects every year. See *post,* at 19. Injury rates are much higher. Studies show that between 18% and 41% of chases involve crashes, which always carry a risk of injury, and that between 4% and 17% of all chases end in injury. See *post,* at 20.

A 2008 International Association of Chiefs of Police (IACP) study examined 7,737 police pursuits reported by 56 agencies in 30 States during 2001–2007. C. Lum & G. Fachner, Police Pursuits in an Age of Innovation and Reform 54. Those pursuits, the study found, resulted in 313 injuries to police and bystanders, a rate of slightly over 4 injuries to these nonsuspects per 100 pursuits. *Id.*, at 57. Given that police may be least likely to pursue suspects where the dangers to bystanders are greatest—*i. e.*, when flights occur at extraordinarily high speeds—it is possible that risks associated with vehicle flight are even higher.

Those risks may outstrip the dangers of at least two offenses enumerated in 18 U. S. C. § 924(e)(2)(B)(ii). According to a study by the Department of Justice, approximately 3.7 million burglaries occurred on average each year in the United States between 2003 and 2007. Bureau of Justice Statistics, S. Catalano, Victimization During Household Burglary 1 (Sept. 2010). Those burglaries resulted in an annual average of approximately 118,000 injuries, or 3.2 injuries for every 100 burglaries. *Id.*, at 9–10. That risk level is 20% lower than that which the IACP found for vehicle pursuits.

The U. S. Fire Administration (USFA) maintains the world's largest databank on fires. It secures participation from over one-third of U. S. fire departments. It reports an estimated 38,400 arsons in 2008. Those fires resulted in an estimated 1,255 injuries, or 3.3 injuries per 100 arsons. USFA, Methodology Used in the Development of the Topical Fire Research Series, http://www.usfa.dhs.gov/downloads/pdf/tfrs/methodology.pdf (all Internet materials as visited June 3, 2011, and available in Clerk of Court's case file); USFA, Nonresidential Building Intentional Fire Trends (Dec. 2010), http://www.usfa.dhs.gov/downloads/pdf/statistics/nonres_bldg_intentional_fire_trends.pdf; USFA, Residential Building Causes, http://www.usfa.dhs.gov/downloads/xls/estimates/res_bldg_fire_cause.xlsx; USFA, Residential and

Nonresidential Fire Estimate Summaries, 2003–2008, http://www.usfa.dhs.gov/statistics/estimates/index.shtm. That risk level is about 20% lower than that reported by the IACP for vehicle flight.

III

Sykes argues that, regardless of risk level, typical vehicle flights do not involve the kinds of dangers that the Armed Career Criminal Act's (ACCA) residual clause demands. In his view this Court's decisions in *Begay* and *Chambers* require ACCA predicates to be purposeful, violent, and aggressive in ways that vehicle flight is not. Sykes, in taking this position, overreads the opinions of this Court.

ACCA limits the residual clause to crimes "typically committed by those whom one normally labels 'armed career criminals,'" that is, crimes that "show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U. S., at 146. In general, levels of risk divide crimes that qualify from those that do not. See, *e. g.*, *James*, 550 U. S. 192 (finding attempted burglary risky enough to qualify). *Chambers* is no exception. 555 U. S., at 128–129 (explaining that failure to report does not qualify because the typical offender is not "significantly more likely than others to attack, or physically to resist, an apprehender").

The sole decision of this Court concerning the reach of ACCA's residual clause in which risk was not the dispositive factor is *Begay*, which held that driving under the influence (DUI) is not an ACCA predicate. There, the Court stated that DUI is not purposeful, violent, and aggressive. 553 U. S., at 145–148. But the Court also gave a more specific reason for its holding. "[T]he conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate," *id.*, at 145 (analogizing DUI to strict-liability, negligence, and recklessness crimes). By contrast, the Indiana statute at issue here has a stringent *mens rea* requirement. Violators must act "knowingly or

intentionally." Ind. Code § 35–44–3–3(a); see *Woodward*, 770 N. E. 2d, at 901 (construing the statute to require "a knowing attempt to escape law enforcement" (internal quotation marks omitted)).

The phrase "purposeful, violent, and aggressive" has no precise textual link to the residual clause, which requires that an ACCA predicate "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). The *Begay* phrase is an addition to the statutory text. In many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same. As between the two inquiries, risk levels provide a categorical and manageable standard that suffices to resolve the case before us.

Begay involved a crime akin to strict-liability, negligence, and recklessness crimes; and the purposeful, violent, and aggressive formulation was used in that case to explain the result. The felony at issue here is not a strict-liability, negligence, or recklessness crime and because it is, for the reasons stated and as a categorical matter, similar in risk to the listed crimes, it is a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii).

IV

Sykes finds it significant that his flight conviction was not under the Indiana provision that criminalizes flight in which the offender "operates a vehicle in a manner that creates a substantial risk of bodily injury to another person." Ind. Code § 35–44–3–3(b)(1)(B). In structuring its laws in this way, Sykes contends, Indiana confirmed that it did not intend subsection (b)(1)(A)'s general prohibition on vehicle flight to encompass the particular class of vehicle flights that subsection (b)(1)(B) reaches.

Sykes' argument is unconvincing. Indiana treats violations of subsections (b)(1)(A) and (b)(1)(B) as crimes of the same magnitude. They are both class D felonies, and both carry terms of between six months and three years, Ind. Code § 35–50–2–7(a). The distinction between the provisions is their relationship to subsection (a), which prohibits, among other acts, much conduct in which a person "(1) forcibly resists, obstructs, or interferes with a law enforcement officer . . . ; (2) forcibly resists, obstructs, or interferes with the authorized service or execution of . . . process . . . ; or (3) flees from a law enforcement officer." § 35–44–3–3(a). Subsection (b)(1)(A) only involves the conduct barred by subsection (a)(3)—flight—which, it states, is a felony whenever committed with a vehicle. Under subsection (b)(1)(B), by contrast, any of the offenses in subsection (a) is a felony if the offender commits it while using a vehicle to create a substantial risk of bodily injury to another. Taken together, the statutory incentives always favor prosecuting vehicle flights under subsection (b)(1)(A) rather than subsection (b)(1)(B). They reflect a judgment that some offenses in subsection (a) can be committed without a vehicle or without creating substantial risks. They reflect the further judgment that this is not so for vehicle flights.

Serious and substantial risks are an inherent part of vehicle flight. Under subsection (b)(1)(A), they need not be proved separately to secure a conviction equal in magnitude to those available for other forms of resisting law enforcement with a vehicle that involve similar risks.

In other words, the "similarity in punishment for these related, overlapping offenses suggests that [subsection (b)(1)(A)] is the rough equivalent of one type of [subsection (b)(1)(B)] violation." *Post*, at 25 (THOMAS, J., concurring in judgment); see also *ibid.*, n. 2. By adding subsection (b)(1)(A) in 1998, the Indiana Legislature determined that subsection (b)(1)(A) by itself sufficed as a basis for the punishments available under subsection (b)(1)(B). *Post*, at 25–

26; see also *ibid.*, n. 2 (identifying reckless endangerment statutes with similar structures); cf. *post*, at 27 (explaining that because in most cases Indiana does not "specify what additional punishment is warranted when [a] crime kills or injures," its provisions creating higher penalties for vehicle flights that do so reflect a judgment that these flights are "inherently risky").

The Government would go further and deem it irrelevant under the residual clause whether a crime is a lesser included offense even in cases where that offense carries a less severe penalty than the offense that includes it. As the above discussion indicates, however, the case at hand does not present the occasion to decide that question.

V

Congress chose to frame ACCA in general and qualitative, rather than encyclopedic, terms. It could have defined violent felonies by compiling a list of specific covered offenses. Under the principle that all are deemed to know the law, every armed felon would then be assumed to know which of his prior felonies could serve to increase his sentence. Given that ACCA "requires judges to make sometimes difficult evaluations of the risks posed by different offenses," this approach could simplify adjudications for judges in some cases. *James*, 550 U. S., at 210, n. 6.

Congress instead stated a normative principle. The residual clause imposes enhanced punishment for unlawful possession of the firearm when the relevant prior offenses involved a potential risk of physical injury similar to that presented by burglary, extortion, arson, and crimes involving use of explosives. The provision instructs potential recidivists regarding the applicable sentencing regime if they again transgress. It states an intelligible principle and provides guidance that allows a person to "conform his or her conduct to the law." *Chicago* v. *Morales*, 527 U. S. 41, 58 (1999) (plurality opinion). Although this approach may at times be more

difficult for courts to implement, it is within congressional power to enact. See *James*, *supra*, at 210, n. 6 (giving examples of federal laws similar to ACCA's residual clause); see also 18 U. S. C. § 1031(b)(2) ("conscious or reckless risk of serious personal injury"); § 2118(e)(3) ("risk of death, significant physical pain . . . "); § 2246(4) ("substantial risk of death, unconsciousness, extreme physical pain . . . "); § 2258B(b)(2)(B) (2006 ed., Supp. III) ("substantial risk of causing physical injury"); § 3286(b) (2006 ed.) ("forseeable risk of . . . death or serious bodily injury to another person" (footnote omitted)); § 4243(d) ("substantial risk of bodily injury to another person"); §§ 4246(a), (d), (d)(2), (e), (e)(1), (e)(2), (f), (g) (same); § 4247(c)(4)(C) (same).

VI

Felony vehicle flight is a violent felony for purposes of ACCA. The judgment of the Court of Appeals is

Affirmed.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Indiana crime of intentional vehicular flight, Ind. Code § 35–44–3–3(b)(1)(A) (2004), is a "violent felony" under the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e)(2)(B)(ii). The majority also correctly refuses to apply the "purposeful, violent, and aggressive" test created in *Begay* v. *United States*, 553 U. S. 137, 145 (2008). However, the majority errs by implying that the "purposeful, violent, and aggressive" test may still apply to offenses "akin to strict-liability, negligence, and recklessness crimes." *Ante*, at 13.

The error in imposing that test, which does not appear in ACCA, is well catalogued. See, *e. g.*, *Begay*, 553 U. S., at 150–152 (SCALIA, J., concurring in judgment); *id.*, at 158–159 (ALITO, J., dissenting); *ante*, at 13 (finding "no precise textual link" in the statute). I agree with JUSTICES SCALIA and

KAGAN that the majority's partial retreat from *Begay* only further muddies ACCA's residual clause. *Post,* at 28 (SCALIA, J., dissenting); *post,* at 36–37, n. 1 (KAGAN, J., dissenting).

The only question here is whether, in the ordinary case, using a vehicle to knowingly flee from the police after being ordered to stop "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). I believe that it does. Therefore I concur in the judgment.

I

Under Indiana law, intentional vehicular flight is a felony. Any person who "knowingly or intentionally . . . flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop" commits a misdemeanor. Ind. Code § 35–44–3–3(a)(3). If the person "uses a vehicle" to flee, however, the offense is elevated to a class D felony. § 3(b)(1)(A). That felony, the parties agree, qualifies as a "violent felony" under ACCA if it is "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii).

As explained below, Indiana's crime of intentional vehicular flight "involves conduct that presents a serious potential risk of physical injury to another." *Ibid.* The elements of § 3(b)(1)(A), compared to those of the enumerated ACCA offense of burglary, suggest that an ordinary violation of § 3(b)(1)(A) is far riskier than an ordinary burglary. Statistics, common experience, and Indiana cases support this conclusion.

A

The specific crimes Congress listed as "violent felon[ies]" in ACCA—arson, extortion, burglary, and use of explosives—provide a "baseline against which to measure the degree of risk" that a nonenumerated offense must present in

order to qualify as a violent felony. *James* v. *United States*, 550 U. S. 192, 208 (2007); see also *ante*, at 8. Burglary, for instance, sets a low baseline level for risk. Its elements are "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor* v. *United States*, 495 U. S. 575, 599 (1990). As this Court has recognized, the risk of burglary is in "the possibility that an innocent person might appear while the crime is in progress" and the danger inherent in such a "face-to-face confrontation." *James*, 550 U. S., at 203. The chance of an interruption or confrontation in an ordinary burglary is, of course, quite small; burglars generally plan and commit their crimes with an eye toward avoiding detection. Nevertheless, that small chance sufficed for Congress to list burglary as a "violent felony," and for this Court to hold that attempted burglary also qualifies. See *id.*, at 195.

Compared to burglary, the elements of intentional vehicular flight describe conduct that ordinarily poses greater potential risk. Although interruption and confrontation are quite rare for burglary, *every* §3(a)(3) flight is committed in the presence of a police officer. *Every* §3(a)(3) flight also involves a perpetrator acting in knowing defiance of an officer's direct order to stop, "which is a clear challenge to the officer's authority and typically initiates pursuit." *United States* v. *Harrimon*, 568 F. 3d 531, 535 (CA5 2009); see also *United States* v. *Spells*, 537 F. 3d 743, 752 (CA7 2008) ("Taking flight calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit"). Finally, in *every* §3(b)(1)(A) flight, the perpetrator is armed with what can be a deadly weapon: a vehicle. See, *e. g.*, *Scott* v. *Harris*, 550 U. S. 372, 383 (2007) (noting that "the threat posed by the flight on foot of an unarmed suspect" was not "even remotely comparable to the extreme danger to human life" posed by that vehicular chase); *United States* v. *Kendrick*, 423 F. 3d 803, 809 (CA8 2005) ("[T]he

dangerous circumstances surrounding a person's attempt to flee from law enforcement are compounded by the person's operation of a motor vehicle"); *United States* v. *Aceves-Rosales*, 832 F. 2d 1155, 1157 (CA9 1987) *(per curiam)* ("It is indisputable that an automobile . . . can be used as a deadly weapon").

In sum, every violation of §3(b)(1)(A) involves a defiant suspect with a dangerous weapon committing a felony in front of a police officer. Based on its elements, the potential risk of intentional vehicular flight resembles "armed burglary in the presence of a security guard" more than simple burglary. Section 3(b)(1)(A) outlaws conduct with much more risk—a far greater likelihood of confrontation with police and a greater chance of violence in that confrontation—than burglary. It follows that the "the conduct encompassed by the elements of the offense, in the ordinary case," poses a greater risk of harm than the enumerated offense of burglary. *James*, *supra*, at 208.

B

Common experience and statistical evidence confirm the "potential risk" of intentional vehicular flight. Cf. *Chambers* v. *United States*, 555 U. S. 122, 129 (2009) (statistical evidence, though not always necessary, "strongly supports the intuitive belief that failure to report does not involve a serious potential risk of physical injury"). Data from the National Highway Traffic Safety Administration show that approximately 100 police officers, pedestrians, and occupants of other cars are killed each year in chase-related crashes. National Center for Statistics & Analysis, Fatalities in Motor Vehicle Traffic Crashes Involving Police in Pursuit 37–56 (2010) (reporting 1,269 such deaths between 2000 and 2009).

The number injured must be much higher. Many thousands of police chases occur every year. In California and Pennsylvania, which collect statewide pursuit data, police were involved in a combined total of more than 8,700 chases

in 2007 alone. See Pennsylvania State Police Bureau of Research & Development, Police Pursuits 2007 Annual Report; Report to the Legislature, Senate Bill 719, California Police Pursuits (Mar. 2008); see also Schultz, Hudak, & Alpert, Emergency Driving and Pursuits, FBI Law Enforcement Bulletin, Apr. 2009, pp. 1, 4 (surveying more than 2,100 police officers and finding an average of just over one pursuit per officer each year). And up to 41% of all chases involve a crash, which always carries some risk of injury. Wells & Falcone, Research on Police Pursuits: Advantages of Multiple Data Collection Strategies, 20 Policing: Int'l J. Police Strategies & Management 729, 740 (1997) (citing nine studies, each showing a crash rate between 18% and 41%). Indeed, studies show that 4% to 17% of all chases actually cause injury. *Ibid.;* see also C. Lum & G. Fachner, Police Pursuits in an Age of Innovation and Reform 57 (2008) (finding that 23.5% of flights involve a crash, and 9% of flights cause injury).

An International Association of Chiefs of Police study of 7,737 pursuits across 30 States found 900 injuries, of which 313 were to police or bystanders. *Ibid.* As the majority observes, that injury rate is just over four injuries per 100 chases, *excluding* injuries to the perpetrator. *Ante*, at 11. By comparison, the injury rate for burglary and arson is around three injuries per 100 crimes, or less. *Ibid.;* see also *Harrimon*, *supra*, at 537 (citing similar arson statistics, showing between one and three injuries per 100 fires, apparently including injuries to perpetrators). Statistics support what logic suggests: The ordinary case of intentional vehicular flight is risky, indeed, more so than some offenses listed in ACCA.

These statistical risks of intentional flight merely reinforce common sense and real world experience. See, *e. g.*, Carroll & Woomer, Family Killed in Visalia Crash After Man Flees From Sheriff's Deputy, Visalia Times-Delta, Apr. 2–3,

2011, p. 1A; Broward & Butler, Fleeing Car Hits Another; 5 People Injured, Florida Times-Union, Mar. 15, 2011, p. C2; Klopott, Crash During Police Chase Kills Father of Four, Washington Examiner, Nov. 22, 2010, p. 4; Fenton, Woman Killed During Pursuit Identified, Baltimore Sun, July 27, 2010, p. 4A (reporting that a woman was killed when a fleeing suspect crashed into her car); Rein & Hohmann, Crashes, Injuries Left in Wake of Pr. George's-Baltimore Chase, Washington Post, Nov. 22, 2009, p. C3 (noting injuries to two police officers and an innocent motorist).

Also well known are the lawsuits that result from these chases. See, *e. g.*, Bowes, Claim Settled in Death of Officer, Richmond Times-Dispatch, Mar. 28, 2007, p. B1 ($2.35 million settlement for the family of an off-duty police officer killed in a head-on collision with a police car chasing a suspect); Cuculiansky, Stop-Stick Death Suit Settled, Daytona Beach News-Journal, Aug. 4, 2010, p. 1C ($100,000 settlement for the family of a man killed by a fleeing vehicle); Ostendorff, Woman Sues City Police, Asheville Citizen-Times, June 17, 2010, p. A1 (woman sued police after they fired 10 shots into the fleeing car she was riding in, wounding her); Gates, $375,000 Awarded in Crash Lawsuit, Jackson, Miss., Clarion-Ledger, May 9, 2010, p. 1B (noting four police-chase lawsuits won against the city in a single year and describing an opinion awarding $375,000 to an injured third party); Pallasch, $17.5 Million Awarded to Motorist Disabled in Police Chase, Chicago Sun Times, Mar. 23, 2005, p. 18. In the real world, everyone—police, citizens, and suspects who elect to flee—knows that vehicular flight is dangerous.

C

Convictions under § 3(b)(1)(A) further support this conclusion. See, *e. g.*, *Mason* v. *State*, 944 N. E. 2d 68, 69–70 (Ind. App. 2011) (defendant suddenly drove his car toward police officers, who then fired at him; he crashed into other cars

and was Tasered); *Jones* v. *State*, 938 N. E. 2d 1248, 1253 (Ind. App. 2010) (defendant accelerated and crashed into a police car); *Haney* v. *State*, 2010 WL 305813, *1 (Ind. App., Jan. 27, 2010) (defendant, who had been speeding, drove into a yard, between two houses, and then into a field where he crashed into a tree); *Hape* v. *State*, 903 N. E. 2d 977, 984, 985, n. 4, 994 (Ind. App. 2009) (defendant fled for 40 minutes, at times in excess of 100 mph and into oncoming traffic; police fired at his truck at least 20 times; he was captured only after driving into a flooded area); *Smith* v. *State*, 2009 WL 1766526, *1 (Ind. App., June 23, 2009) (defendant led police on a stop-and-go chase for five minutes, which included traveling at 30 mph through a stop sign and crowded parking lot; he ultimately had to be chemical sprayed); *Butler* v. *State*, 2009 WL 2706123, *1 (Ind. App., Aug. 28, 2009) (defendant led a chase at speeds up to 80 mph, swerved into the path of an oncoming vehicle, and eventually jumped from the car while it was still moving); *Amore* v. *State*, 2008 WL 1032611, *1 (Ind. App., Apr. 11, 2008) (defendant led police on a 15-mile chase at speeds up to 125 mph, ending in a crash); *Johnson* v. *State*, 2008 WL 131195, *1 (Ind. App., Jan. 14, 2008) (defendant led a chase at 65–70 mph at 1 a.m. with no tail lights, crashed his car, and caused a police car to crash); *Tinder* v. *State*, 2008 WL 540772, *1, *3 (Ind. App., Feb. 29, 2008) (rev'g on other grounds) (defendant led a 12:30 a.m. chase, which ended when he ran off the road, crashed through a corn silo, and hit a fence). Although these cases are only a limited collection, their facts illustrate that convictions under §3(b)(1)(A) often involve highly dangerous conduct.

II

Sykes argues that intentional vehicular flight is not a violent felony for two main reasons. First, he asserts that it is possible to violate Indiana's intentional vehicular flight statute without doing anything dangerous. Second, he urges

that the existence of Ind. Code §35–44–3–3(b)(1)(B), which includes "substantial risk" as an additional element, indicates that §3(b)(1)(A) is nonrisky. Neither argument is persuasive.

A

Sykes observes that it would violate the statute to flee at low speed, obeying traffic signs and stopping after only a short distance. See *Woodward* v. *State*, 770 N. E. 2d 897, 900–901 (Ind. App. 2002); *post*, at 38 (KAGAN, J., dissenting). Such a flight, he urges, would not present "a serious potential risk of physical injury to another," so a conviction under the statute cannot categorically be a violent felony.

The fact that Sykes can imagine a nonrisky way to violate §3(b)(1)(A) does not disprove that intentional vehicular flight is dangerous "in the ordinary case." See *James*, 550 U. S., at 208. It is also possible to imagine committing burglary—an enumerated offense—under circumstances that pose virtually no risk of physical injury. See *id.*, at 207 (hypothesizing a "break-in of an unoccupied structure located far off the beaten path and away from any potential intervenors").

Nor has Sykes established that the nonrisky scenario he imagines is the ordinary violation of §3(b)(1)(A). Sykes offers nothing more than two Indiana cases that, in his view, are instances of nonrisky vehicular flight. See *Swain* v. *State*, 2010 WL 623720 (Ind. App., Feb. 23, 2010); *Woodward*, *supra*, at 898. Yet not even those cases obviously involve nonrisky conduct. In *Swain*, the defendant was a getaway driver who picked up her boyfriend's accomplice as he ran on foot from two police officers. 2010 WL 623720, *1, *3. As the officers approached the car and shouted to stop, she yelled, "'Hurry up. Come on. They're coming,'" and drove off as the runner jumped in. *Id.*, at *1. She stopped 10 to 15 seconds later, when police vehicles converging on the scene took up pursuit. *Ibid.* In *Woodward*, the defendant

ignored a police siren for approximately a mile, passed several good places to pull over, and drove all the way home, but traveled at the speed limit of 45 mph and obeyed traffic laws. 770 N. E. 2d, at 898. Eventually the defendant got out of his car and shouted profanities at the officer, who drew his pistol. *Id.*, at 898, 901; see also *id.*, at 901, 902 (observing that the defendant had refused to stop "except on his own terms" and noting "the dangers that could await a police officer stopping where the citizen selects"). These two cases fall well short of showing that intentional flight in Indiana is ordinarily nonrisky.[1] See also *post*, at 41 (KAGAN, J., dissenting) (noting that the "intuition that dangerous flights outstrip mere failures to stop . . . seems consistent with common sense and experience").

B

Sykes also notes that a different subparagraph, § 3(b)(1)(B), covers intentional flight committed while "operat[ing] a vehicle in a manner that creates a substantial risk of bodily injury to another person," whereas § 3(b)(1)(A) has no such element. From this, Sykes infers that § 3(b)(1)(A) necessarily concerns only flight that does not present a serious potential risk. The argument is that, even though the elements of § 3(b)(1)(A) describe conduct that ordinarily will satisfy the requisite level of risk, the presence of § 3(b)(1)(B) casts § 3(b)(1)(A) in a less dangerous light. *Post*, at 43–44 (KAGAN, J., dissenting). But the fact that § 3(b)(1)(B) includes "substantial risk of bodily injury" as an element does not restrict § 3(b)(1)(A) to nonrisky conduct.

First, apart from the existence of § 3(b)(1)(B), the absence of risk as an element of § 3(b)(1)(A) does not mean that the

[1] Sykes certainly cannot use his own flight as an example. His § 3(b)(1)(A) conviction was based on fleeing from police in a damaged car at night without headlights, driving on the wrong side of the road, weaving through traffic, barreling through two yards and among bystanders, destroying a fence, and crashing into a house. *Ante*, at 6; 2 App. 11 (Sealed).

offense is not a violent felony. ACCA does not require that a violent felony expressly include a risk of injury as an element of the offense. Enumerated violent felonies like arson and burglary have no such element.

Second, § 3(b)(1)(B) is not a risky, aggravated version of § 3(b)(1)(A). Both are class D felonies, and at the time of Sykes' conviction, there was no statutory difference in punishment between them. Even now, the offenses remain of a single class, meriting similar punishments.

The similarity in punishment for these related, overlapping offenses suggests that § 3(b)(1)(A) is the rough equivalent of one type of § 3(b)(1)(B) violation. Section 3(b)(1)(B) enhances punishments for three separate types of intentional misdemeanors: obstructing an officer, § 3(a)(1); interfering with service of process, § 3(a)(2); and fleeing from a police officer, § 3(a)(3). Under § 3(b)(1)(B), committing any of those offenses while also drawing a deadly weapon, inflicting injury, or "operat[ing] a vehicle in a manner that creates a substantial risk of bodily injury to another person" has long been a class D felony.

In 1998, the Indiana Legislature added § 3(b)(1)(A) to provide that *any* use of a vehicle to flee from an officer under § 3(a)(3) is *always* a class D felony. Section 3(b)(1)(A) is, in effect, a shortcut to the same punishment for one particular violation of § 3(b)(1)(B).[2] It is still the case that under

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[2] Indiana law at the time of Sykes' conviction presented two related provisions, within a single statute, carrying the same punishment. One was a broad provision that had risk as an element, and the other was a narrower provision that did not. While JUSTICE KAGAN would infer that the offense lacking risk as an element was likely not ordinarily risky, *post*, at 41–43, I think it makes more sense to infer the opposite.

Consider reckless endangerment statutes. In Hawaii, for instance, it is "reckless endangering in the second degree" either to "recklessly plac[e] another person in danger of death or serious bodily injury," Haw. Rev. Stat. § 707–714(1)(a) (2009 Cum. Supp.), *or* to "[i]ntentionally discharg[e] a firearm in a populated area," § 707–714(1)(b). I would infer that discharg-

§3(b)(1)(B), using a vehicle to obstruct an officer or interfere with service of process is a class D felony only if the vehicle is "operate[d] . . . in a manner that creates a substantial risk of bodily injury to another person." But using a vehicle to intentionally flee is always a class D felony, without any need to prove risk. §3(b)(1)(A).

This rough equivalence between §3(b)(1)(A) and §3(b)(1)(B) is borne out in Indiana case law. The conduct underlying the Indiana cases discussed above, see *supra*, at 21–22, demonstrates that despite §3(b)(1)(B), convictions under §3(b)(1)(A) include risky flights.

Third, the remainder of Indiana's resisting law enforcement statute confirms that its other provisions do not reserve §3(b)(1)(A) for nonrisky conduct. An intentional vehicular flight becomes a class C felony if the vehicle is operated "in a manner that causes serious bodily injury." Ind. Code §35–44–3–3(b)(2). The same act becomes a class

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ing the firearm is deemed dangerous enough *per se* that the statute does not require the State to prove danger in any given case. Other States have similar statutes. See, *e. g.*, Del. Code Ann., Tit. 11, §§603(a)(1), (2) (2007); Wyo. Stat. Ann. §§6–2–504(a), (b) (1977–2009); Me. Rev. Stat. Ann., Tit. 17–A, §§301(1)(B)(1), (2) (Supp. 2010).

Similarly here, I infer that §3(b)(1)(A)'s upgrade of intentional flight to a class D felony based on the use of a vehicle alone indicates that the offense *inherently* qualifies as, or approximates, "operat[ing] a vehicle in a manner that creates a substantial risk of bodily injury to another person" under §3(b)(1)(B).

JUSTICE KAGAN argues that if my reading were correct, the Indiana Legislature would have removed the reference to vehicular flight from §3(b)(1)(B) when it added §3(b)(1)(A). *Post*, at 47. There are at least two problems with this reasoning. First, even though §3(b)(1)(A) may be redundant with §3(b)(1)(B) as to the vehicular flight offenses in subsection (a)(3), the reference to "operat[ing] a vehicle" in §3(b)(1)(B) is still independently useful for the offenses in subsections (a)(1) and (2). Thus, it is hardly strange for the legislature to have left the reference to "operat[ing] a vehicle" in §3(b)(1)(B). Second, although JUSTICE KAGAN can envision a more perfectly drafted statute, we do not require perfection in statutory drafting. See, *e. g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 236 (2011). I think it clear enough what the statute means.

B felony if someone is killed. § 35–44–3–3(b)(3).[3] JUSTICE KAGAN asserts that each of these "separate, escalating crimes" captures an increasing degree of risk and necessarily means that § 3(b)(1)(A), the offense *simpliciter*, is less risky than it otherwise seems. *Post*, at 42.

The flaw in this reasoning is that §§ 3(b)(2) and (3) enhance punishment based solely on the *results* of the flight, not the degree of risk it posed. Neither provision requires any action by a suspect beyond that which satisfies the elements of § 3(b)(1)(A).[4] Rather, each provision addresses what happens when the risk inherent in a violation of § 3(b)(1)(A) is actualized and someone is hurt or killed. The risk of physical injury inherent in intentional vehicular flight *simpliciter* was apparently clear enough to spur the Indiana Legislature to specify greater penalties for the inevitable occasions when physical injury actually occurs. By comparison, for obviously nonrisky felonies like insurance fraud or misappropriation of escrow funds, legislatures do not specify what additional punishment is warranted when the crime kills or injures bystanders or police. See, *e. g.*, Ind. Code § 35–43–5–7.2; § 35–43–9–7. In sum, §§ 3(b)(2) and (3) do not demonstrate that § 3(b)(1)(A) is less risky than it otherwise seems, but instead support the idea that it is inherently risky.

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Looking to the elements, statistics, common experience, and cases, I conclude that in the ordinary case, Indiana's crime of intentional vehicular flight, § 3(b)(1)(A), "involves conduct that presents a serious potential risk of physical in-

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[3] Indiana recently added that if a police officer dies, it becomes a class A felony. 2010 Ind. Acts p. 1197.

[4] For that matter, each provision also could be satisfied by a flight that did not satisfy § 3(b)(1)(B), which casts further doubt on JUSTICE KAGAN's vision of the statutory scheme as a unified structure of neatly progressing offenses with corresponding risk levels and punishments. See *post*, at 41–42.

jury to another." 18 U. S. C. § 924(e)(2)(B)(ii). The crime is therefore a violent felony under ACCA.

JUSTICE SCALIA, dissenting.

As the Court's opinion acknowledges, this case is "another in a series," *ante*, at 4. More specifically, it is an attempt to clarify, for the fourth time since 2007, what distinguishes "violent felonies" under the residual clause of the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e)(2)(B)(ii), from other crimes. See *James* v. *United States*, 550 U. S. 192 (2007); *Begay* v. *United States*, 553 U. S. 137 (2008); *Chambers* v. *United States*, 555 U. S. 122 (2009). We try to include an ACCA residual-clause case in about every second or third volume of the United States Reports.

As was perhaps predictable, instead of producing a clarification of the Delphic residual clause, today's opinion produces a fourth ad hoc judgment that will sow further confusion. Insanity, it has been said, is doing the same thing over and over again, but expecting different results. Four times is enough. We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness. See *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983).

I

ACCA defines "violent felony," in relevant part, as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii). Many years of prison hinge on whether a crime falls within this definition. A felon convicted of possessing a firearm who has three prior violent-felony convictions faces a 15-year mandatory minimum sentence and the possibility of life imprisonment. See § 924(e)(1); see *United States* v. *Harrison*, 558 F. 3d 1280, 1282, n. 1 (CA11 2009). Without those prior convictions, he

would face a much lesser sentence, which could not possibly exceed 10 years. See § 924(a)(2).

Vehicular flight is a violent felony only if it falls within ACCA's residual clause; that is, if it "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). Today's opinion says, or initially seems to say, that an offense qualifies as a violent felony if its elements, in the typical case, create a degree of risk "'comparable to that posed by its closest analog among the enumerated offenses.'" *Ante*, at 8. That is a quotation from the Court's opinion in the first of our residual-clause trilogy, *James*, 550 U. S., at 203. I did not join that opinion because I thought it should suffice if the elements created a degree of risk comparable to the least risky of the enumerated offenses, whether or not it was the closest analog. See *id.*, at 230 (SCALIA, J., dissenting). The problem with applying the *James* standard to the present case is that the elements of vehicular flight under Indiana law are not analogous to *any* of the four enumerated offenses. See Ind. Code § 35–44–3–3 (2004). Nor is it apparent which of the enumerated offenses most closely resembles, for example, statutory rape, see *United States* v. *Daye*, 571 F. 3d 225, 228–236 (CA2 2009); possession of a sawed-off shotgun, see *United States* v. *Upton*, 512 F. 3d 394, 403–405 (CA7 2008); or a failure to report to prison, see *Chambers*, *supra*. I predicted this inadequacy of the "closest analog" test in my *James* dissent. See 550 U. S., at 215.

But as it turns out, the Court's inability to identify an analog makes no difference to the outcome of the present case. For today's opinion introduces the *James* standard with the words "[f]or instance," *ante*, at 8. It is (according to the Court) merely *one example* of how the enumerated crimes (burglary, arson, extortion, and crimes using explosives) "provide guidance." *Ibid.* And the opinion then proceeds to obtain guidance from the risky-as-the-least-risky test that I suggested (but the Court rejected) in *James*—finding ve-

hicular flight at least as risky as both arson and burglary. See *ante*, at 6–9.

But what about the test that determined the outcome in our second case in this "series"—the "purposeful, violent, and aggressive" test of *Begay?* Fear not. That incompatible variation has been neither overlooked nor renounced in today's tutti-frutti opinion. "In many cases," we are told, it "will be redundant with the inquiry into risk." *Ante*, at 13. That seems to be the case here—though why, and when it will *not* be the case, are not entirely clear. The Court's accusation that Sykes "overreads the opinions of this Court," *ante*, at 12, apparently applies to his interpretation of *Begay*'s "purposeful, violent, and aggressive" test, which the Court now suggests applies only "to strict-liability, negligence, and recklessness crimes," *ante*, at 13. But that makes no sense. If the test excluded only those unintentional crimes, it would be recast as the "purposeful" test, since the last two adjectives ("violent, and aggressive") would do no work. For that reason, perhaps, all 11 Circuits that have addressed *Begay* "overrea[d]" it just as Sykes does*—and as does the Government, see Brief for United States 8.

The only case that is not brought forward in today's opinion to represent yet another test is the third and most recent in the trilogy, *Chambers*, 555 U. S. 122—which applied both the risky-as-the-least-risky test and the "purposeful, violent, and aggressive" test to reach the conclusion that failure to

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*See *United States* v. *Holloway*, 630 F. 3d 252, 260 (CA1 2011); *United States* v. *Brown*, 629 F. 3d 290, 295–296 (CA2 2011) *(per curiam); United States* v. *Lee*, 612 F. 3d 170, 196 (CA3 2010); *United States* v. *Jenkins*, 631 F. 3d 680, 683 (CA4 2011); *United States* v. *Harrimon*, 568 F. 3d 531, 534 (CA5 2009); *United States* v. *Young*, 580 F. 3d 373, 377 (CA6 2009); *United States* v. *Sonnenberg*, 628 F. 3d 361, 364 (CA7 2010); *United States* v. *Boyce*, 633 F. 3d 708, 711 (CA8 2011); *United States* v. *Terrell*, 593 F. 3d 1084, 1089–1091 (CA9 2010); *United States* v. *Ford*, 613 F. 3d 1263, 1272–1273 (CA10 2010); *United States* v. *Harrison*, 558 F. 3d 1280, 1295–1296 (CA11 2009).

report for periodic incarceration was not a crime of violence under ACCA. But today's opinion does cite *Chambers* for another point: Whereas *James* rejected the risky-as-the-least-risky approach because, among other reasons, no "hard statistics" on riskiness "have been called to our attention," 550 U. S., at 210; and whereas *Begay* made no mention of statistics; *Chambers* explained (as today's opinion points out) that "statistical evidence sometimes 'helps provide a conclusive . . . answer' concerning the risks that crimes present," *ante*, at 10 (quoting *Chambers*, *supra*, at 129). Today's opinion then outdoes *Chambers* in the volume of statistics that it spews forth—statistics compiled by the International Association of Chiefs of Police concerning injuries attributable to police pursuits, *ante*, at 11; statistics from the Department of Justice concerning injuries attributable to burglaries, *ibid.;* statistics from the U. S. Fire Administration concerning injuries attributable to fires, *ibid.;* and (by reference to JUSTICE THOMAS's concurrence) statistics from the National Center for Statistics & Analysis, the Pennsylvania State Police Bureau of Research, the FBI Law Enforcement Bulletin and several articles published elsewhere concerning injuries attributable to police pursuits, *ante*, at 10 (citing *ante*, at 19–20 (THOMAS, J., concurring in judgment)).

Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery. See Fed. Rules Crim. Proc. 16(a)(1)(F), (G); Fed. Rules Evid. 702–703, 705. An adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies' findings on faith, without examining their methodology at all. The Court does not examine, for example, whether the police-pursuit data on which it relies is a representative sample of all vehicular flights. The data may be skewed toward the rare and riskier forms

of flight. See *post*, at 40, n. 4 (KAGAN, J., dissenting). We also have no way of knowing how many injuries reported in that data would have occurred even absent pursuit, by a driver who was driving recklessly even before the police gave chase. Similar questions undermine confidence in the burglary and arson data the Court cites. For example, the Court relies on a U. S. Fire Administration dataset to conclude that 3.3 injuries occur per 100 arsons. See *ante*, at 11. But a 2001 report from the same U. S. Fire Administration suggests that roughly one injury occurs per 100 arsons. See Arson in the United States, Vol. 1 Topical Fire Research Series, No. 8, pp. 1–2 (rev. Dec. 2001), online at http://www.usfa.dhs.gov/downloads/pdf/tfrs/v1i8-508.pdf (as visited May 27, 2011, and available in Clerk of Court's case file). The Court does not reveal why it chose one dataset over another. In sum, our statistical analysis in ACCA cases is untested judicial factfinding masquerading as statutory interpretation. Most of the statistics on which the Court relies today come from Government-funded studies, and did not make an appearance in this litigation until the Government's merits brief to this Court. See Brief for Petitioner 17; see also *Chambers*, *supra*, at 128–129 (demonstrating that the same was true in that case).

But the more fundamental problem with the Court's use of statistics is that, far from eliminating the vagueness of the residual clause, it increases the vagueness. Vagueness, of course, must be measured *ex ante—before* the Court gives definitive meaning to a statutory provision, not *after*. Nothing is vague once the Court decrees precisely what it means. And is it seriously to be expected that the average citizen would be familiar with the sundry statistical studies showing (if they are to be believed) that this-or-that crime is more likely to lead to physical injury than what sundry statistical studies (if they are to be believed) show to be the case for burglary, arson, extortion, or use of explosives? To ask the

question is to answer it. A few words, then, about unconstitutional vagueness.

II

When I dissented from the Court's judgment in *James*, I said that the residual clause's "shoddy draftsmanship" put courts to a difficult choice:

> "They can (1) apply the ACCA enhancement to virtually all predicate offenses, . . . ; (2) apply it case by case in its pristine abstraction, finding it applicable whenever the particular sentencing judge (or the particular reviewing panel) believes there is a 'serious potential risk of physical injury to another' (whatever that means); (3) try to figure out a coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion to a smaller subset of crimes; or (4) recognize the statute for the drafting failure it is and hold it void for vagueness . . . ." 550 U. S., at 229–230.

My dissent "tried to implement," *id.*, at 230, the third option; and the Court, I believed, had chosen the second. "Today's opinion," I wrote, "permits an unintelligible criminal statute to survive uncorrected, unguided, and unexplained." *Id.*, at 230–231.

My assessment has not been changed by the Court's later decisions in the ACCA "series." Today's opinion, which adds to the "closest analog" test *(James)* the "purposeful, violent, and aggressive" test *(Begay)*, and even the risky-as-the-least-risky test that I had proposed as the exclusive criterion, has not made the statute's application clear and predictable. And all of them together—or even the risky-as-the-least-risky test alone, I am now convinced—never will. The residual-clause series will be endless, and we will be doing ad hoc application of ACCA to the vast variety of state criminal offenses until the cows come home.

That does not violate the Constitution. What does violate the Constitution is approving the enforcement of a sentencing statute that does not "give a person of ordinary intelligence fair notice" of its reach, *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979) (internal quotation marks omitted), and that permits, indeed invites, arbitrary enforcement, see *Kolender*, 461 U. S., at 357. The Court's ever-evolving interpretation of the residual clause will keep defendants and judges guessing for years to come. The reality is that the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" does not clearly define the crimes that will subject defendants to the greatly increased ACCA penalties. It is not the job of this Court to impose a clarity which the text itself does not honestly contain. And even if that were our job, the further reality is that we have by now demonstrated our inability to accomplish the task.

We have, I recognize, upheld hopelessly vague criminal statutes in the past—indeed, in the recent past. See, *e. g.*, *Skilling* v. *United States*, 561 U. S. 358 (2010). That is regrettable, see *id.*, at 415 (SCALIA, J., concurring in part and concurring in judgment). What sets ACCA apart from those statutes—and what confirms its incurable vagueness—is our repeated inability to craft a principled test out of the statutory text. We have demonstrated by our opinions that the clause is too vague to yield "an intelligible principle," *ante*, at 15, each attempt to ignore that reality producing a new regime that is less predictable and more arbitrary than the last. ACCA's residual clause fails to speak with the clarity that criminal proscriptions require. See *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89–90 (1921).

The Court believes that the residual clause cannot be unconstitutionally vague because other criminal prohibitions also refer to the degree of risk posed by a defendant's conduct. See *ante*, at 15–16. Even apart from the fact that our

opinions dealing with those statutes have not displayed the confusion evident in our four ACCA efforts, this is not the first time I have found the comparison unpersuasive:

> "None of the provisions the Court cites . . . is similar in the crucial relevant respect: None prefaces its judicially-to-be-determined requirement of risk of physical injury with the word 'otherwise,' preceded by four confusing examples that have little in common with respect to the supposedly defining characteristic. The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *James*, *supra*, at 230, n. 7.

Of course even if the cited statutes were comparable, repetition of constitutional error does not produce constitutional truth.

* * *

We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt. I do not think it would be a radical step—indeed, I think it would be highly responsible—to limit ACCA to the named violent crimes. Congress can quickly add what it wishes. Because the majority prefers to let vagueness reign, I respectfully dissent.

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, dissenting.

Vehicular flight comes in different varieties, and so too the statutes that criminalize the conduct. A person may attempt to outrun police officers by driving recklessly and at high speed, in disregard of traffic laws and with disdain for others' safety. Or a person may fail to heed an officer's command to pull over, but otherwise drive in a lawful manner, perhaps just trying to find a better place to stop. In Indiana, as in most States, both of these individuals are lawbreakers. But in Indiana, again as in most States, the law takes account of the differences between them, by distinguishing simple from aggravated forms of vehicular flight. Unlike the Court, I would attend to these distinctions when deciding which of Indiana's several vehicular flight crimes count as "violent felon[ies]" under the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e)(2)(B). Because petitioner Marcus Sykes was convicted only of simple vehicular flight, and not of any flight offense involving aggressive or dangerous activity, I would find that he did not commit a "violent felony" under ACCA.

I

As the Court relates, we must decide whether the crime of which Sykes was convicted falls within ACCA's "residual clause." See *ante*, at 8. To do so, the crime must "presen[t] a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii), and involve conduct that is "purposeful, violent, and aggressive," *Begay* v. *United States*, 553 U. S. 137, 145 (2008).[1] Because we use the "categorical approach," we

[1] I understand the majority to retain the "purposeful, violent, and aggressive" test, but to conclude that it is "redundant" in this case. See *ante*, at 13. Like JUSTICE SCALIA, see *ante*, at 30 (dissenting opinion), I find this conclusion puzzling. I do not think the majority could mean to limit the test to "strict-liability, negligence, and recklessness crimes." *Ante*, at 13 (majority opinion). As JUSTICE SCALIA notes, see *ante*, at 30,

do not concern ourselves with Sykes's own conduct. See *Taylor* v. *United States*, 495 U. S. 575, 602 (1990). Nor do we proceed by exploring whether some platonic form of an offense—here, some abstract notion of vehicular flight—satisfies ACCA's residual clause. We instead focus on the elements of the actual state statute at issue. Cf. *Chambers* v. *United States*, 555 U. S. 122, 126–127 (2009) (breaking down an Illinois statute into discrete offenses to decide whether the crime of conviction fit within the residual clause); *James* v. *United States*, 550 U. S. 192, 202 (2007) (examining how Florida's law defined attempted burglary to determine if the residual clause included that offense). More particularly, we ask whether "the conduct encompassed by the elements" of that statute, "in the ordinary case" (not in every conceivable case), involves the requisite danger and violence. *Id.*, at 208. By making this inquiry, we attempt to determine whether the crime involved is "characteristic of the armed career criminal"—or otherwise said, whether the prohibited conduct is of a kind that "makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Begay*, 553 U. S., at 145 (internal quotation marks omitted).

Under this approach, some vehicular flight offenses should count as violent felonies under ACCA. Consider, for example, a statute that makes it a crime to "willfully flee from a law enforcement officer by driving at high speed or otherwise demonstrating reckless disregard for the safety of oth-

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that would be to eliminate the test's focus on "violence" and "aggression." And it would collide with *Chambers* v. *United States*, 555 U. S. 122 (2009)—a decision the majority cites approvingly, see *ante*, at 10—which applied the test to an intentional crime. See 555 U. S., at 128 (opinion of the Court), 130 (Appendix A to opinion of the Court) (holding that "knowin[g] fail[ure] to report to a penal institution" does not involve "purposeful, violent, and aggressive conduct" (internal quotation marks omitted)). So I assume this test will make a resurgence—that it will be declared non-redundant—the next time the Court considers a crime, whether intentional or not, that involves risk of injury but not aggression or violence.

ers." Such a statute, by its terms, encompasses conduct that ordinarily "presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). And the covered conduct qualifies as "purposeful, violent, and aggressive." *Id.*, at 145. When a motorist responds to an officer's signal to stop by increasing his speed or taking reckless evasive action, he turns his car into a weapon and provokes confrontation. In so doing, he engages in behavior "roughly similar, in kind as well as in degree of risk posed," to that involved in ACCA's enumerated offenses—the sort of conduct, in other words, "typically committed by . . . 'armed career criminals.'" *Id.*, at 143, 146. Like the majority, see *ante*, at 11–12, I therefore would classify crimes of this type—call them aggravated vehicular flight offenses—as violent felonies under ACCA.

But a vehicular flight offense need not target aggressive and dangerous behavior. Imagine the converse of the statute described above—a statute making it a crime to "willfully flee from a law enforcement officer *without* driving at high speed or otherwise demonstrating reckless disregard for the safety of others." That hypothetical statute addresses only simple vehicular flight: mere disregard of a police officer's directive to stop, devoid of additional conduct creating risk to others. This behavior—often called "failure to stop"—is illegal in most States (under a wide variety of statutory provisions). In Indiana, for example, a driver who "know[s] that a police officer wishes to effectuate a traffic stop" may commit a felony if he attempts to "choose the location of the stop," rather than pulling over immediately; it makes no difference that the driver "did not speed or disobey any . . . traffic laws." *Woodward* v. *State*, 770 N. E. 2d 897, 902 (Ind. App. 2002).[2] But a mere failure to stop does not

[2] The majority attempts to show that *Woodward* involved conduct more risky and violent than a simple failure to stop. See *ante*, at 5–6; see also *ante*, at 23–24 (THOMAS, J., concurring in judgment). But the facts of that case, like the facts of this one, are irrelevant. Under ACCA, all that mat-

usually "presen[t] a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii), any more than normal driving does. Nor is this conduct "violent . . . and aggressive." *Begay*, 553 U. S., at 145; see Brief for United States 43 (characterizing as "nonviolent" a flight from police that complies with "all traffic laws"). True, the offender is ignoring a command he should obey. But nothing in his behavior is affirmatively belligerent: It does not "show an increased likelihood that [he] is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U. S., at 146.[3] And so, under our precedents, a statute criminalizing *only* simple vehicular flight would not fall within ACCA's residual clause. I do not understand the majority to disagree.

The Indiana provision under which Sykes was convicted straddles the two hypothetical statutes I have just described. That provision, subsection (b)(1)(A), states that a person commits a felony if he "flees from a law enforcement officer" while "us[ing] a vehicle." Ind. Code §§ 35–44–3–3(a)(3), (b)(1)(A) (2009). As the Indiana courts have recognized, the subsection thus criminalizes mere failure to stop, which should not count as a violent felony under ACCA. See *Woodward*, 770 N. E. 2d 897; *supra*, at 38, and n. 2. But the provision *also* includes more violent forms of vehicular flight: It covers a person who speeds or drives recklessly, who leads

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ters is the elements of the offense, and the Indiana Court of Appeals held in *Woodward* that a person who "merely fail[s] to stop" for police, and does nothing more, commits a felony under state law. 770 N. E. 2d, at 900–902.

[3] Indeed, a driver may refrain from pulling over immediately out of concern for his own safety. He may worry, for example, that road conditions make it hazardous to stop. Or a driver may fear that the person initiating the stop is a criminal rather than a police officer. See, *e. g.*, Brennan, Rapist To Spend Life in Prison, Tampa Tribune, Feb. 18, 2011, Metro section, p. 3 ("[A man] impersonating a police officer . . . used the ruse to pull over a woman . . . and then kidnap and rape her"); DeKunder, Watch for "Fake" Police, Local Authorities Warn, Northeast Herald, Jan. 14, 2010, pp. 12, 13 (noting several similar incidents).

the police on a "Hollywood-style car chase," *Scott* v. *Harris*, 550 U. S. 372, 380 (2007), and who endangers police officers, other drivers, and pedestrians. And so the "conduct encompassed by the elements" of this subsection, *James*, 550 U. S., at 208, runs the gamut—from simple to aggravated vehicular flight, from the least violent to the most violent form of the activity. Accord, *ante*, at 24 (THOMAS, J., concurring in judgment) (stating that subsection (b)(1)(A) is "not restrict[ed] . . . to nonrisky conduct"). The question presented is whether such a facially broad provision meets the requirements of ACCA's residual clause.

If subsection (b)(1)(A) were the whole of Indiana's law on vehicular flight, the majority would have a reasonable argument that the provision does so. As noted, a statute fits within the residual clause if it covers conduct that *in the ordinary case*—not in every conceivable case—poses serious risk of physical injury and is purposeful, violent, and aggressive. See *James*, 550 U. S., at 208; *Begay*, 553 U. S., at 145. We therefore must decide what the ordinary case of vehicular flight actually is. Is it the person trying to escape from police by speeding or driving recklessly, in a way that endangers others? Or is it instead the person driving normally who, for whatever reason, fails to respond immediately to a police officer's signal? The Government has not presented any empirical evidence addressing this question, and such evidence may not in fact exist.[4] See Wells & Falcone, Re-

[4] The Government offers anecdotal examples and statistical surveys of vehicular flights, see Brief for United States 13–15, 17–22, but none helps to answer whether the "ordinary" case of vehicular flight is aggravated or simple. Cf. *ante*, at 31–33 (SCALIA, J., dissenting). The anecdotes and all but one of the surveys demonstrate only that some vehicular flights result in serious injury, a proposition no one does or could dispute. The single statistical study cited by the Government that posits an injury rate for vehicular flight concludes that about 4% of 7,737 reported police pursuits harmed police or bystanders. But that study may well involve only aggravated flights. See C. Lum & G. Fachner, Police Pursuits in an Age of Innovation and Reform 55 (2008) (noting that the study relies on voluntary

search on Police Pursuits: Advantages of Multiple Data Collection Strategies, 20 Policing Int'l J. Police Strategies & Management 729 (1997) ("Collecting valid and reliable data on policing activities is a perennial problem . . . . This is particularly true when studying . . . vehicle pursuits"); cf. *Begay*, 553 U. S., at 154 (SCALIA, J., concurring in judgment) ("Needless to say, we do not have these relevant statistics"). But the majority's intuition that dangerous flights outstrip mere failures to stop—that the aggravated form of the activity is also the ordinary form—seems consistent with common sense and experience. So that judgment, even though unsupported by data, would likely be sufficient to justify the Court's conclusion were subsection (b)(1)(A) the only relevant provision.

But subsection (b)(1)(A) does not stand alone, and the context of the provision casts a different light on it. Like a great many States (45 by my count), Indiana divides the world of vehicular flight into discrete categories, corresponding to the seriousness of the criminal behavior. At the time of Sykes's conviction, Indiana had four degrees of vehicular flight, only the first of which—subsection (b)(1)(A)—covered mere failure to stop.[5] See Ind. Code §35–44–3–3. Indiana classified as a felon any person who:

- "flees from a law enforcement officer" while "us[ing] a vehicle," §3(b)(1)(A);
- "flees from a law enforcement officer" while "operat[ing] a vehicle in a manner that *creates a substantial risk of bodily injury* to another person," §3(b)(1)(B);[6]

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and non-systematic reporting and that participating police departments might not have reported "informal" incidents). And even assuming the study is comprehensive, it is entirely consistent with the possibility that the "ordinary case"—*i. e.*, the most common form—of vehicular flight is mere failure to stop, which produces a much lower rate of injury.

[5] After Sykes's conviction, Indiana added yet a fifth degree. See 2010 Ind. Acts p. 1197. The four degrees described above remain unchanged.

[6] This provision also bars a range of other conduct. See n. 9, *infra*.

- "flees from a law enforcement officer" while "operat[ing] a vehicle in a manner that *causes serious bodily injury* to another person," §3(b)(2); or
- "flees from a law enforcement officer" while "operat[ing] a vehicle in a manner that *causes the death* of another person," §3(b)(3) (all emphasis added).

Vehicular flight in Indiana is therefore not a single offense, but instead a series of separate, escalating crimes. Each category captures conduct more dangerous than the one before it, as shown by the language italicized above.[7] And at the very beginning of this series is subsection (b)(1)(A), the offense of which Sykes was convicted.

That placement alters the nature of the analysis. We have previously examined the way statutory provisions relate to each other to determine whether a particular provision counts as a violent felony under ACCA. In *Chambers*, 555 U. S., at 126–127, we considered an Illinois statute prohibiting within a single section several different kinds of behavior, including escape from a penal institution and failure to report to a penal institution. The courts below had treated the statute as defining a single crime of felonious escape and held that crime to qualify as a violent felony under ACCA. See *id.*, at 125; *United States* v. *Chambers*, 473 F. 3d 724, 725–726 (CA7 2007). We disagreed, stating

[7] JUSTICE THOMAS attempts to bisect this series by stating that the two most serious degrees of aggravated vehicular flight "enhance punishment based solely on the *results* of the flight, not the degree of risk it posed." *Ante*, at 27. But conduct that leads to serious injury or death is ordinarily more risky, viewed *ex ante*, than conduct that does not produce these results. And in any event, the fundamental point here is that the Indiana statute grades vehicular flight according to the seriousness of the behavior—ranging from flight that need not pose any risk of harm, through flight posing a substantial risk of harm, to flight involving a *certainty* of harm. Subsections (b)(2) and (b)(3) thus underscore that Indiana has divided the world of vehicular flight into discrete, ascending crimes, rather than treating all vehicular flight as of a piece.

that failure to report was a distinct offense, which did not meet ACCA's requirements. That was so, we stated, because "[t]he behavior that likely underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Chambers*, 555 U. S., at 127. In addition, we noted, the statute "list[ed] escape and failure to report separately (in its title and its body)." *Ibid.* We thus considered the failure-to-report clause in its statutory context—as one part of a legislature's delineation of related criminal offenses—to determine whether the behavior it encompassed ordinarily poses a serious risk of injury.

That same focus on statutory structure resolves this case, because it reveals subsection (b)(1)(A) to aim at a single form—the least serious form—of vehicular flight. Remember: Indiana has made a purposeful choice to divide the full spectrum of vehicular flight into different degrees, based on the danger associated with a driver's conduct. Once again, starting with the most serious conduct: flight resulting in death; flight resulting in physical injury; flight creating a substantial risk of physical injury; flight. That last category—flight—almost screams to have the word "mere" placed before it. Under the Indiana statute, flight—the conduct prohibited by subsection (b)(1)(A)—is what is left over when no aggravating factor causing substantial risk or harm exists. Put on blinders, and the subsection is naturally understood to address all flight, up to and including the most dangerous kinds. But take off those blinders—view the statute as a whole—and the subsection is instead seen to target failures to stop.

In this vein, the distinction between subsections (b)(1)(A) and (b)(1)(B) is especially telling. As noted, subsection (b)(1)(B) prohibits vehicular flight that "creates a substantial risk of bodily injury to another person." That language almost precisely tracks the phrasing of ACCA's residual clause, which refers to conduct that "presents a serious

potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii). This correspondence indicates that the conduct criminalized under subsection (b)(1)(B) qualifies as a violent felony under ACCA. But subsection (b)(1)(A) lacks the very feature that makes subsection (b)(1)(B) and ACCA such a perfect match: It does not require any behavior that poses serious risk to others. This difference in statutory elements indicates that subsection (b)(1)(B)—but *not* subsection (b)(1)(A)—is directed toward the conduct described in ACCA's residual clause. To count *both* as ACCA offenses is to pay insufficient heed to the way the Indiana Legislature drafted its statute—as a series of escalating offenses, ranging from the simple to the most aggravated.[8]

II

The Court does not deny that a State's decision to divide a generic form of conduct (like vehicular flight) into separate, escalating crimes may make a difference under ACCA; rather, the Court declines to address that question. See *ante*, at 15. The Court rejects the structural argument here for one, and only one, reason. Indiana, the majority says, "treats violations of subsections (b)(1)(A) and (b)(1)(B) as crimes of the same magnitude": They are both class D felonies carrying the same punishment.[9] *Ante*, at 14. See also

[8] None of this is to deny that prosecutors may sometimes charge violent and dangerous offenders under subsection (b)(1)(A). A prosecutor may elect to use a lower grade of vehicular flight when he could use a higher one, either as a matter of discretion or because the defendant entered into a plea bargain. This case provides one example, see *ante*, at 16 (majority opinion), and JUSTICE THOMAS offers several others, see *ante*, at 21–22. But as everyone agrees, what matters in determining whether an offense qualifies under ACCA's residual clause is the "ordinary case" of conviction. And in the absence of reliable empirical evidence, the structure of the Indiana statute provides the best way to discern the ordinary case under each subsection.

[9] The Government spurns the structural argument on a different ground, contending that subsection (b)(1)(A) is not a lesser included offense of subsection (b)(1)(B). The Court wisely does not accept this claim. Both sub-

ante, at 25–26 (THOMAS, J., concurring in judgment). But the Court is wrong to think that fact dispositive.

In general, "similar punishment does not necessarily imply similar risk" (or similar violence). *James*, 550 U. S., at 217 (SCALIA, J., dissenting). Because this is so, the Court has never suggested that all state offenses falling within a single felony class and subject to the same penalties must receive the same treatment under ACCA. To the contrary, we have always focused on the "conduct encompassed by the elements of the offense," *id.*, at 208 (majority opinion)—an inquiry that does not mention the offense's sentencing consequences. And that is for good reason. It would be quite remarkable if either all or none of Indiana's (or any State's) class D felonies satisfied the requirements of the residual clause. In Indiana, other such felonies, subject to "the same magnitude" of punishment, *ante*, at 14, include election fraud, computer tampering, and "cemetery mischief." See Ind. Code § 3–14–2–1 *et seq.* (2009); § 35–43–1–4; § 35–43–1–2.1. I presume the

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sections (b)(1)(A) and (b)(1)(B) involve the use of a vehicle to flee, with subsection (b)(1)(B) additionally requiring that this use "creat[e] a substantial risk of bodily injury." So a fleeing driver who violates subsection (b)(1)(B) necessarily runs afoul of subsection (b)(1)(A) as well. The Government contends, in response, that a person can violate subsection (b)(1)(B) and *not* (b)(1)(A) by engaging in conduct *other than* vehicular flight. See Brief for United States 48–49, n. 11. That is because subsection (b)(1)(B) additionally prohibits "obstruct[ing]" or "resist[ing]" a police officer by a variety of means, including through use of a vehicle. But Indiana law makes clear that subsection (b)(1)(A) still counts as a lesser included offense of subsection (b)(1)(B) in any prosecution involving vehicular flight. See *Wright* v. *State*, 658 N. E. 2d 563, 566–567 (Ind. 1995) (holding a crime to be a lesser included offense if its elements are "factually" subsumed within another offense). And even if that were not the case, it should make no difference. The meaningful question for purposes of ACCA is whether subsection (b)(1)(B)'s prohibition of aggravated vehicular flight indicates that subsection (b)(1)(A) targets simple vehicular flight. That a person can violate subsection (b)(1)(B) by means independent of *any* vehicular flight has no bearing on that question.

Court does not also intend to treat these offenses as violent felonies under ACCA.

Moreover, Indiana sentencing law has always enabled judges to take account of the difference between subsections (b)(1)(A) and (b)(1)(B) in imposing punishment. As the majority notes, *ante*, at 14, Indiana provides for a range of prison terms for class D felonies, stretching from six months to three years. And in deciding what term to impose (or whether to suspend the term), courts may consider an array of aggravating factors—including whether the crime "threatened serious harm to persons," § 35–38–1–7.1(b)(1). Convictions under subsections (b)(1)(A) and (b)(1)(B) therefore may produce widely varying sentences, as judges respond to the different forms of vehicular flight targeted by the offenses.

The Court argues, in support of its position, that the "similarity in punishment" reveals that the conduct falling within subsection (b)(1)(A) is "rough[ly] equivalent," in terms of risk, to the conduct falling within subsection (b)(1)(B). *Ante*, at 14 (internal quotation marks omitted); see also *ante*, at 25–26 (THOMAS, J., concurring in judgment). More specifically, the Court claims that the Indiana Legislature added subsection (b)(1)(A) to the statute in 1998 because it determined that vehicular flight is *per se* risky—and that all such flight therefore deserves the same punishment as is meted out to the various non-flight conduct that subsection (b)(1)(B) prohibits upon a showing of risk. See *ante*, at 14; see also n. 9, *supra*. But that argument disregards the legislature's decision to criminalize vehicular flight in *both* provisions—that is, to retain subsection (b)(1)(B)'s prohibition on *risky* vehicular flight alongside subsection (b)(1)(A)'s ban on simple flight. In effect, the Court reads subsection (b)(1)(A) as including all vehicular flight and subsection (b)(1)(B) as including only the other (non-flight) things it mentions—even though subsection (b)(1)(B) specifically bars "flee[ing] from a law enforcement officer . . . in a manner that creates a substantial risk of bodily injury."

Perhaps the Court assumes that the Indiana Legislature, in enacting subsection (b)(1)(A), simply forgot to remove the reference to vehicular flight in subsection (b)(1)(B). Cf. *ante*, at 25 (THOMAS, J., concurring in judgment) (acknowledging superfluity). But if so, the legislature forgot four more times to correct its error, as it serially amended and reamended its vehicular flight statute over the last 13 years.[10] And more fundamentally, a better explanation than legislative mistake is available for Indiana's decision to enact subsection (b)(1)(A) while keeping subsection (b)(1)(B)'s ban on risky vehicular flight. Prior to 1998, Indiana, unlike most other States in the nation, cf. *infra*, at 48, did not criminalize simple vehicular flight (*i. e.*, failure to stop) *at all*. See 1998 Ind. Acts pp. 677–678. So Indiana's decision to create that offense in subsection (b)(1)(A)—and to distinguish it from the more aggravated forms of vehicular flight already penalized under subsections (b)(1)(B), (b)(2), and (b)(3)—brought the State's vehicular flight statute into conformity with the prevailing approach used nationwide. Especially given that backdrop, I would not impute shoddy draftsmanship to the Indiana Legislature. I would heed what that body said, rather than assume (just because it made both offenses class D felonies) that it must have meant something different. And what the legislature said is that vehicular flight comes in different forms—one posing substantial risk of injury (subsection (b)(1)(B)) and one not (subsection (b)(1)(A)).

The best that can be said for the Court's approach is that it is very narrow—indeed, that it decides almost no case other than this one. As noted above, see *supra*, at 44, the Court reserves the question whether a vehicular flight provision like subsection (b)(1)(A) is a crime of violence under ACCA "where that offense carries a less severe penalty than

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[10] See 2011 Ind. Acts pp. 91–92; 2010 Ind. Acts pp. 1196–1197, 1186–1187; 2006 Ind. Acts p. 2470. Notably, one of these amendments revised subsection (b)(1)(B) itself. See *ibid.*

[a greater] offense that includes it," *ante*, at 15. But as fate would have it, that reservation describes the great majority of vehicular flight statutes across the country. Indiana is idiosyncratic in this respect; other States not only separately prohibit, but also differently punish, simple and aggravated vehicular flight.[11] Or perhaps I should say Indiana *was* idiosyncratic. That is because in 2006, a few years after Sykes's conviction, Indiana amended its vehicular flight statute to set different penalties for violations of subsections (b)(1)(A) and (b)(1)(B). A person who violates subsection (b)(1)(B) today faces a mandatory 30-day sentence that cannot be suspended; that sentence rises to six months or one year for repeat offenders. See Ind. Code § 35–44–3–3(d). By contrast, a person who violates subsection (b)(1)(A), even more than once, is not subject to any mandatory jail time. See § 35–44–3–3(d). So by its own terms, the Court's opinion—our fourth applying ACCA's residual clause in as many years—applies only to a single State's vehicular flight statute as it existed from 1998 to 2006. Cf. *ante*, at 33 (SCALIA, J., dissenting) ("[W]e will be doing ad hoc application of ACCA . . . until the cows come home").

* * *

The Indiana statute before us creates a series of escalating offenses dividing the universe of vehicular flight into discrete categories. One of those categories, subsection (b)(1)(B), requires proof that the defendant operated "a vehicle in a manner that creates a substantial risk of bodily injury." That phrase tracks the language that ACCA's residual clause uses to define a crime of violence. Other provisions in the Indiana statute demand even more—actual injury or death. In

[11] See, *e. g.*, Fla. Stat. § 316.1935 (2010); Mich. Comp. Laws Ann. § 257.602a (West 2010); Minn. Stat. § 609.487 (2010); N. J. Stat. Ann. § 2C:29–2 (West Supp. 2011); S. C. Code Ann. § 56–5–750 (2006); Tenn. Code Ann. § 39–16–603 (Supp. 2011); Tex. Penal Code Ann. § 38.04 (West 2011); Utah Code Ann. § 76–8–305.5 (Lexis 2008).

stark contrast, subsection (b)(1)(A), the least severe of the State's vehicular flight offenses and the one of which Sykes was convicted, lacks any element relating to threat of physical injury. In deciding this case, I would respect that statutory difference. And because I would take the Indiana Legislature at its word, I respectfully dissent.

Syllabus

TALK AMERICA, INC. *v.* MICHIGAN BELL TELEPHONE CO., DBA AT&T MICHIGAN

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

No. 10–313. Argued March 30, 2011—Decided June 9, 2011*

The Telecommunications Act of 1996 requires incumbent local exchange carriers (LECs)—*i. e.*, providers of local telephone service—to share their physical networks with competitive LECs at cost-based rates in two ways relevant here. First, 47 U. S. C. § 251(c)(3) requires an incumbent LEC to lease "on an unbundled basis"—*i. e.*, a la carte—network elements specified by the Federal Communications Commission (FCC) to allow a competitor to create its own network without having to build every element from scratch. In identifying those elements, the FCC must consider whether access is "necessary" and whether failing to provide it would "impair" the competitor's provision of service. § 251(d)(2). Second, § 251(c)(2) mandates that incumbent LECs "provide . . . interconnection" between their networks and competitive LECs' to ensure that a competitor's customers can call the incumbent's customers, and vice versa. The interconnection duty is independent of the unbundling rules and not subject to impairment analysis.

In 2003, the FCC issued its *Triennial Review Order* deciding, contrary to previous orders, that § 251(c)(3) did not require an incumbent LEC to provide a competitive LEC with cost-based unbundled access to existing "entrance facilities"—*i. e.*, transmission facilities (typically wires or cables) that connect the two LECs' networks—because such facilities are not network elements at all. The FCC noted, however, that entrance facilities are used for both interconnection and backhauling, and it emphasized that its order did not alter incumbent LECs' § 251(c)(2) obligation to provide for interconnection. Thus, the practical effect of the order was only that incumbent LECs were not obligated to unbundle entrance facilities for backhauling purposes.

In 2005, following D. C. Circuit review, the FCC issued its *Triennial Review Remand Order*. The FCC retreated from the view that entrance facilities are not network elements, but adhered to its previous position that cost-based unbundled access to such facilities need not be

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*Together with No. 10–329, *Isiogu et al.* v. *Michigan Bell Telephone Co., dba AT&T Michigan*, also on certiorari to the same court.

provided under § 251(c)(3). Treating entrance facilities as network elements, the FCC concluded that competitive LECs are not impaired without access to such facilities. The FCC again emphasized that competitive LECs' § 251(c)(2) right to obtain interconnection had not been altered.

In the *Remand Order*'s wake, respondent AT&T notified competitive LECs that it would no longer provide entrance facilities at cost-based rates for either backhauling or interconnection, but would instead charge higher rates. Competitive LECs complained to the Michigan Public Service Commission that AT&T was unlawfully abrogating their § 251(c)(2) right to cost-based interconnection. The Michigan Public Service Commission agreed and ordered AT&T to continue providing entrance facilities for interconnection at cost-based rates. AT&T challenged the ruling. Relying on the *Remand Order*, the Federal District Court ruled in AT&T's favor. The Sixth Circuit affirmed, declining to defer to the FCC's argument that the order did not change incumbent LECs' interconnection obligations, including the obligation to lease entrance facilities for interconnection.

Held: The FCC has advanced a reasonable interpretation of its regulations—*i. e.*, that to satisfy its duty under § 251(c)(2), an incumbent LEC must make its existing entrance facilities available to competitors at cost-based rates if the facilities are to be used for interconnection—and this Court defers to the FCC's views. Pp. 57–67.

(a) No statute or regulation squarely addresses the question. Pp. 57–59.

(b) Absent an unambiguous statute or regulation, the Court turns to the FCC's interpretation of its regulations in its *amicus* brief. See, *e. g.*, *Chase Bank USA, N. A.* v. *McCoy*, 562 U. S. 195, 207. The FCC proffers a three-step argument why its regulations require AT&T to provide access at cost-based rates to existing entrance facilities for interconnection purposes. Pp. 59–61.

(1) Interpreting 47 CFR § 51.321(a), the FCC first contends that an incumbent LEC must lease "technically feasible" facilities for interconnection. Pp. 59–60.

(2) The FCC contends, second, that existing entrance facilities are part of an incumbent LEC's network, 47 CFR § 51.319(e), and therefore are among the facilities that an incumbent LEC must lease for interconnection, if technically feasible. Pp. 60–61.

(3) Third, says the FCC, it is technically feasible to provide access to the particular entrance facilities at issue in these cases—a point AT&T does not dispute. P. 61.

Syllabus

(c) Contrary to AT&T's arguments, the FCC's interpretation is not "'"plainly erroneous or inconsistent with the regulation[s]."'" *Auer* v. *Robbins*, 519 U. S. 452, 461. First, it is perfectly sensible to read the FCC's regulations to include entrance facilities as part of incumbent LECs' networks. Second, the FCC's views do not conflict with 47 CFR § 51.5's definition of interconnection as "the linking of two networks for the mutual exchange of traffic[, but not] the transport and termination of traffic." Pp. 61–63.

(d) Nor is there any other "reason to suspect that the [FCC's] interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, *supra*, at 462. AT&T incorrectly suggests that the FCC is attempting to require under § 251(c)(2) what courts have prevented it from requiring under § 251(c)(3) and what the FCC itself said was *not* required in the *Remand Order*. Pp. 63–67.

597 F. 3d 370, reversed.

THOMAS, J., delivered the opinion of the Court, in which all other Members joined, except KAGAN, J., who took no part in the consideration or decision of the cases. SCALIA, J., filed a concurring opinion, *post*, p. 67.

John J. Bursch, Solicitor General of Michigan, argued the cause for petitioners in both cases. With him on the briefs in No. 10–329 were *Bill Schuette*, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, *Steven D. Hughey*, and *Anne M. Uitvlugt*, Assistant Attorney General. On the briefs in No. 10–313 was *Susan C. Gentz*.

Eric D. Miller argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Acting Solicitor General Katyal*, *Deputy Solicitor General Stewart*, *Austin C. Schlick*, *Richard K. Welch*, and *Maureen K. Flood*.

Scott H. Angstreich argued the cause for respondent in both cases. With him on the brief were *Brendan J. Crimmins*, *Scott K. Attaway*, *Gary L. Phillips*, *Christopher M. Heimann*, *John T. Lenahan*, *Mark R. Ortlieb*, and *Cynthia F. Malone*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the California Public Utilities Commission by *Frank R. Lindh*, *Helen M. Mickiewicz*, and *Laura E. Gasser;* for COMPTEL by *Mary C. Albert;* and

JUSTICE THOMAS delivered the opinion of the Court.

In these cases, we consider whether an incumbent provider of local telephone service must make certain transmission facilities available to competitors at cost-based rates. The Federal Communications Commission (FCC or Commission) as *amicus curiae*[1] contends that its regulations require the incumbent provider to do so if the facilities are to be used for interconnection: to link the incumbent provider's telephone network with the competitor's network for the mutual exchange of traffic. We defer to the Commission's views and reverse the judgment below.

I

The Telecommunications Act of 1996 (1996 Act), 110 Stat. 56, imposed a number of duties on incumbent providers of local telephone service in order to facilitate market entry by competitors. *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 371 (1999). The incumbent local exchange carriers (LECs) owned the local exchange networks: the physical equipment necessary to receive, properly route, and deliver phone calls among customers. *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 490 (2002). Before the 1996 Act, a new, competitive LEC could not compete with an incumbent

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for Sprint Nextel Corp. by *Kannon K. Shanmugam* and *George W. Hicks, Jr.*

Briefs of *amici curiae* urging affirmance in both cases were filed for Administrative Law Professors by *C. Frederick Beckner III;* for CenturyLink, Inc., et al. by *John M. Devaney, Robert B. McKenna,* and *John E. Benedict;* for United States Telecom Association et al. by *Megan L. Brown, Bennett L. Ross,* and *Jonathan B. Banks;* and for Verizon by *Heather M. Zachary* and *Michael E. Glover.*

[1] The Solicitor General, joined by counsel for the FCC, represents that the *amicus* brief for the United States filed in this Court reflects the Commission's considered interpretation of its own rules and orders. Brief for United States 31. We thus refer to the Government's arguments in these cases as those of the agency. See, *e. g., Chase Bank USA, N. A.* v. *McCoy,* 562 U. S. 195, 203 (2011).

carrier without basically replicating the incumbent's entire existing network. *Ibid.*

The 1996 Act addressed that barrier to market entry by requiring incumbent LECs to share their networks with competitive LECs in several ways, two of which are relevant here. First, 47 U. S. C. § 251(c)(3) requires incumbent LECs to lease "on an unbundled basis"—*i. e.*, a la carte—network elements specified by the Commission. This makes it easier for a competitor to create its own network without having to build every element from scratch. In identifying which network elements must be available for unbundled lease under § 251(c)(3), the Commission is required to consider whether access is "necessary" and whether failing to provide access would "impair" a competitor's provision of service. § 251(d)(2). Second, § 251(c)(2) mandates that incumbent LECs "provide . . . interconnection" between their networks and competitive LECs' facilities. This ensures that customers on a competitor's network can call customers on the incumbent's network, and vice versa. The interconnection duty is independent of the unbundling rules and not subject to impairment analysis. It is undisputed that both unbundled network elements and interconnection must be provided at cost-based rates. See § 252(d)(1); Brief for Petitioner in No. 10–313, p. 28; Brief for Petitioners in No. 10–329, p. 7; Brief for Respondent 4.

These cases concern incumbent LECs' obligation to share existing "entrance facilities" with competitive LECs. Entrance facilities are the transmission facilities (typically wires or cables) that connect competitive LECs' networks with incumbent LECs' networks. The FCC recently adopted a regulation specifying that entrance facilities are not among the network elements that § 251(c)(3) requires incumbents to lease to competitors on an unbundled basis at cost-based rates. See 47 CFR § 51.319(e)(2)(i) (2005). The Commission noted, however, that it "d[id] not alter the right of competitive LECs to obtain interconnection facilities pur-

suant to section 251(c)(2)." *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533, 2611, ¶ 140 (2005) *(Triennial Review Remand Order)*.

The specific issue here is whether respondent, Michigan Bell Telephone Company, d/b/a AT&T Michigan (AT&T), must lease existing entrance facilities to competitive LECs at cost-based rates. The FCC interprets its regulations to require AT&T to do so for the purpose of interconnection. We begin by reviewing the Commission's recent actions regarding entrance facilities and then explain the particular dispute that is before us today.

A

In 2003, the FCC decided, contrary to its previous orders, that incumbent LECs were not obligated to provide cost-based unbundled access to entrance facilities under § 251(c)(3). *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, 17202–17205, ¶¶ 365–367 (2003) *(Triennial Review Order)*. Explaining that its previous approach had been "misguided" and "overly broad," *id.*, ¶¶ 366, 365, the Commission concluded that entrance facilities were not subject to the unbundling requirement because they are not network elements at all. See *id.*, ¶ 366 (entrance facilities "exist *outside* the incumbent LEC's local network"). The Commission therefore did not conduct an impairment analysis.

The FCC emphasized, however, the limits of this ruling. Entrance facilities are used for two purposes: interconnection and backhauling.[2] It expressly "d[id] not alter" an in-

[2] Although the parties and their *amici* disagree over the precise definition of backhauling, they all appear to agree that backhauling is important to competitive LECs and occurs when a competitive LEC uses an entrance facility to transport traffic from a leased portion of an incumbent network to the competitor's own facilities. Backhauling does not involve the exchange of traffic between incumbent and competitive networks. See, *e. g.*, Brief for Petitioners in No. 10–329, p. 25; Brief for United States Telecom Association et al. as *Amici Curiae* 32. It thus differs from interconnec-

cumbent LEC's obligation under § 251(c)(2) to provide "facilities in order to 'interconnect with the incumbent LEC's network.' " *Id.*, ¶ 366 (brackets omitted). Thus, although the Commission specified that § 251(c)(3) did not require any unbundled leasing of entrance facilities, it determined in practical effect only that "incumbent LECs [were not obligated] to unbundle [entrance facilities] for the purpose of backhauling traffic." *Id.*, ¶ 365.

On direct review, the D. C. Circuit questioned the Commission's determination that entrance facilities are not network elements under § 251(c)(3), but found the agency rulemaking record insufficient and remanded to the Commission for further consideration. See *United States Telecom Assn.* v. *FCC*, 359 F. 3d 554, 586, cert. denied, 543 U. S. 925 (2004). The court noted that if entrance facilities were in fact " 'network elements,' " then "an analysis of impairment would presumably follow." 359 F. 3d, at 586.

In 2005, the Commission responded. See *Triennial Review Remand Order* ¶¶ 136–141. The Commission retreated from its view that entrance facilities are not network elements but adhered to its previous position that cost-based unbundled access to them need not be provided under § 251(c)(3). *Id.*, ¶¶ 137–138. Treating entrance facilities as network elements, the Commission concluded that competitive LECs are not impaired without access to them. *Ibid.* The Commission again emphasized that it "d[id] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." *Id.*, ¶ 140.

B

In the wake of the *Triennial Review Remand Order*, AT&T notified competitive LECs that it would no longer provide entrance facilities at cost-based rates for either backhauling or interconnection, but would instead charge higher

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tion—"the linking of two networks for the mutual exchange of traffic." 47 CFR § 51.5 (2010).

rates. Competitive LECs complained to the Michigan Public Service Commission (PSC) that AT&T was unlawfully abrogating their right to cost-based interconnection under § 251(c)(2). The Michigan PSC agreed with the competitive LECs and ordered AT&T to continue providing entrance facilities for interconnection at cost-based rates.

AT&T challenged the Michigan PSC's ruling in the District Court, which, relying on the *Triennial Review Remand Order*, ruled in AT&T's favor. The Michigan PSC and several competitive LECs, including petitioner Talk America, Inc., appealed.

The Court of Appeals for the Sixth Circuit affirmed over a dissent. *Michigan Bell Telephone Co.* v. *Covad Communications Co.*, 597 F. 3d 370 (2010). At the court's invitation, the FCC filed a brief as *amicus curiae*, arguing that the *Triennial Review Remand Order* did not change incumbent LECs' interconnection obligations, including the obligation to lease entrance facilities for interconnection. The Sixth Circuit declined to defer to the FCC's views, 597 F. 3d, at 375, n. 6, and also expressly disagreed with the Seventh and Eighth Circuits, *id.*, at 384–386 (discussing *Illinois Bell Tel. Co.* v. *Box*, 526 F. 3d 1069 (2008), and *Southwestern Bell Tel., L. P.* v. *Missouri Pub. Serv. Comm'n*, 530 F. 3d 676 (2008)).[3]

We granted certiorari, 562 U. S. 1104 (2010), and now reverse.

II

Petitioners contend that AT&T must lease its existing entrance facilities for interconnection at cost-based rates. We agree.

A

No statute or regulation squarely addresses whether an incumbent LEC must provide access to entrance facilities at cost-based rates as part of its interconnection duty

[3] The Ninth Circuit has since joined the Seventh and Eighth Circuits. *Pacific Bell Tel. Co.* v. *California Pub. Util. Comm'n*, 621 F. 3d 836 (2010).

under § 251(c)(2). According to the statute, each incumbent LEC has:

> "The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
>
> "(A) for the transmission and routing of telephone exchange service and exchange access;
>
> "(B) at any technically feasible point within the carrier's network;
>
> "(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> "(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title."

Nothing in that language expressly addresses entrance facilities. Nor does any regulation do so. See Brief for United States as *Amicus Curiae* 22, n. 6.

AT&T contends that the statute makes clear that an incumbent LEC need not provide access to *any* facilities—much less entrance facilities—to provide interconnection. The company points out that § 251(c)(2) does not mention incumbent LECs' facilities, but rather mandates only that incumbent LECs provide interconnection "for the facilities and equipment of any [competing] carrier." In contrast, AT&T notes, § 251(c)(3) requires that incumbent LECs provide unbundled "access to [their] network elements."

We do not find the statute so clear. Although § 251(c)(2) does not expressly require that incumbent LECs lease facilities to provide interconnection, it also does not expressly excuse them from doing so. The statute says nothing about what an incumbent LEC must do to "provide . . . interconnection." § 251(c)(2). "[T]he facilities and equipment of

any [competing] carrier" identifies the equipment that an incumbent LEC must allow to interconnect, but it does not specify what the incumbent LEC must do to make the interconnection possible. *Ibid.*

B

In the absence of any unambiguous statute or regulation, we turn to the FCC's interpretation of its regulations in its *amicus* brief. See, *e. g.*, *Chase Bank USA, N. A.* v. *McCoy*, 562 U. S. 195, 207 (2011). As we reaffirmed earlier this Term, we defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is "'plainly erroneous or inconsistent with the regulation[s]'" or there is any other "'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Id.*, at 208, 209 (quoting *Auer* v. *Robbins*, 519 U. S. 452, 461, 462 (1997)).

The Commission contends that its regulations require AT&T to provide access at cost-based rates to its existing entrance facilities for the purpose of interconnection. The Commission's interpretation proceeds in three steps. First, an incumbent LEC must lease "technically feasible" facilities for interconnection. Second, entrance facilities are among the facilities that an incumbent must make available for interconnection, if technically feasible. Third, it is technically feasible to provide access to the particular entrance facilities at issue in these cases.

1

The Commission first contends that an incumbent LEC must lease, at cost-based rates, any requested facilities for obtaining interconnection with the incumbent LEC's network, unless it is technically infeasible to do so. Section 251(c)(2) mandates that an incumbent LEC provide interconnection, at cost-based rates, "at any technically feasible point within the carrier's network." The FCC has long construed § 251(c)(2) to require incumbent LECs to provide, at cost-

based rates, "any technically feasible method of obtaining interconnection . . . at a particular point." 47 CFR § 51.321(a) (2010).

The requirement in § 51.321(a) to provide a "method of obtaining interconnection," the Commission argues, encompasses a duty to lease an existing facility to a competing LEC. When the Commission originally promulgated § 51.321(a), it explained that incumbent LECs would be required to "adapt their facilities to interconnection" and to "accept the novel use of, and modification to, [their] network facilities." *In re Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15605, ¶ 202 (1996) *(Local Competition Order)*. Since then, as AT&T and its *amici* concede, incumbent LECs have commonly leased certain facilities at cost-based prices to accommodate interconnection. See Brief for Respondent 28–29; Brief for United States Telecom Association et al. as *Amici Curiae* 33–35.

As additional support for its assertion that incumbent LECs are obligated to lease facilities, the FCC highlights the examples in § 51.321(b) of "[t]echnically feasible methods of obtaining interconnection," which include "[m]eet point interconnection arrangements." In a meet-point arrangement, an incumbent LEC "accommodat[es]" interconnection by building a transmission facility from its network to a designated point, where it connects with the competitor's corresponding transmission facility. *Local Competition Order* ¶ 553. Compared to that requirement, the Commission argues, the obligation to lease existing facilities for interconnection is quite modest.

2

Next, the Commission contends that existing entrance facilities are among the facilities that an incumbent LEC must lease for interconnection. According to the FCC, the *Triennial Review Remand Order* adopted a regulatory definition that reestablished that entrance facilities are part of

an incumbent LEC's network. See ¶ 137; see also 47 CFR § 51.319(e). The end of every entrance facility is therefore a "point within [an incumbent] carrier's network" at which a competing LEC could request interconnection, 47 U. S. C. § 251(c)(2), and each entrance facility potentially provides a "technically feasible method of obtaining interconnection," 47 CFR § 51.321(a).

3

Finally, the FCC contends that providing access to the entrance facilities here for interconnection purposes is technically feasible. Under the Commission's regulations, an incumbent LEC bears the burden of showing that a requested method or point of interconnection is technically infeasible. See 47 CFR §§ 51.305(e), 51.321(d); see also §§ 51.305(d), 51.321(c) (previously successful interconnection is "substantial evidence" of technical feasibility). AT&T does not dispute technical feasibility here.[4]

C

The FCC's interpretation is not "plainly erroneous or inconsistent with the regulation[s]." *Auer*, *supra*, at 461 (internal quotation marks omitted). First, we disagree with AT&T's argument that entrance facilities are not a part of

[4] These cases concern only existing entrance facilities, and the Commission expressly declines to address whether it reads its regulations to require incumbent LECs to build new entrance facilities for interconnection. Brief for United States as *Amicus Curiae* 25, n. 7. The Commission suggests here, as it has before, that additional considerations of cost or reasonableness might be appropriate if a competitive LEC were to request that an incumbent LEC build new entrance facilities for interconnection. *Ibid.* (noting that the Commission's Wireline Competition Bureau has declined to require an incumbent LEC to bear the entire cost of building new entrance facilities); see also *Local Competition Order* ¶ 553 (explaining with respect to meet-point arrangements that "the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection"). We express no view on the matter.

incumbent LECs' networks. Indeed, the Commission's view on this question is more than reasonable; it is certainly not plainly erroneous. The *Triennial Review Remand Order* responded to the D. C. Circuit's decision questioning the Commission's earlier finding that entrance facilities are not network elements. It revised the definition of dedicated transport—a type of network element—to include entrance facilities. *Triennial Review Remand Order* ¶¶ 136–137; see 47 CFR § 51.319(e)(1) (defining dedicated transport to include "incumbent LEC transmission facilities . . . between wire centers or switches owned by incumbent LECs and switches owned by [competing] carriers"). Given that revised definition, it is perfectly sensible to conclude that entrance facilities are a part of incumbent LECs' networks.

Second, we are not persuaded by AT&T's argument that the Commission's views conflict with the definition of interconnection in § 51.5. That regulation provides: "Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." AT&T focuses on the definition's exclusion of "transport and termination of traffic." An entrance facility is a transport facility, AT&T argues, and it makes no sense to require an incumbent LEC to furnish a transport facility for interconnection when the definition of interconnection expressly excludes transport.

We think AT&T reads too much into the exclusion of "transport." The regulation cannot possibly mean that no transport can occur across an interconnection facility, as that would directly conflict with the statutory language. See § 251(c)(2) (requiring "interconnection . . . for the transmission and routing of [local] telephone exchange service"). The very reason for interconnection is the "mutual exchange of traffic." 47 CFR § 51.5; see also *Competitive Telecommunications Assn.* v. *FCC*, 117 F. 3d 1068, 1071–1072 (CA8 1997) ("[T]he transmission and routing of telephone exchange service" is "what the interconnection, the physical link, would be used for" (internal quotation marks omitted)).

The better reading of the regulation is that it merely reflects that the "transport and termination of traffic" is subject to different regulatory treatment than interconnection. Compensation for transport and termination—that is, for delivering local telephone calls placed by another carrier's customer—is governed by separate statutory provisions and regulations. See 47 U. S. C. §§ 251(b)(5), 252(d)(2); 47 CFR § 51.701. The Commission explains that a competitive LEC typically pays one fee for interconnection—"just for having the link"—and then an additional fee for the transport and termination of telephone calls. Tr. of Oral Arg. 28; see also Brief for United States as *Amicus Curiae* 3, n. 1. Entrance facilities, at least when used for the mutual exchange of traffic, seem to us to fall comfortably within the definition of interconnection. See 597 F. 3d, at 388 (Sutton, J., dissenting) (noting that entrance facilities are "designed for the very purpose of linking two carriers' networks" (internal quotation marks omitted)).

In sum, the Commission's interpretation of its regulations is neither plainly erroneous nor inconsistent with the regulatory text. Contrary to AT&T's assertion, there is no danger that deferring to the Commission would effectively "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[5] *Christensen* v. *Harris County*, 529 U. S. 576, 588 (2000).

D

Nor is there any other "reason to suspect that the interpretation does not reflect the agency's fair and considered

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[5] There is no merit to AT&T's assertion that the FCC is improperly amending the list of "[t]echnically feasible methods of obtaining interconnection" set forth in 47 CFR § 51.321(b). By its own terms, that list is nonexhaustive. See § 51.321(b) ("[t]echnically feasible methods of obtaining interconnection . . . include, but are not limited to," the listed examples); see also § 51.321(a) ("[A]n incumbent LEC shall provide . . . *any* technically feasible method of obtaining interconnection" (emphasis added)).

judgment on the matter in question." *Auer*, 519 U. S., at 462. We are not faced with a *post-hoc* rationalization by Commission counsel of agency action that is under judicial review. See *ibid.;* see also *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168–169 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; [*SEC* v.] *Chenery* [*Corp.*, 332 U. S. 194 (1947),] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself"). And although the FCC concedes that it is advancing a novel interpretation of its longstanding interconnection regulations, novelty alone is not a reason to refuse deference. The Commission explains that the issue in these cases did not arise until recently—when it initially eliminated unbundled access to entrance facilities in the *Triennial Review Order*. Until then, the Commission says, a competitive LEC typically would elect to lease a cost-priced entrance facility under § 251(c)(3) since entrance facilities leased under § 251(c)(3) could be used for any purpose—*i. e.*, both interconnection and backhauling—but entrance facilities leased under § 251(c)(2) can be used only for interconnection. We see no reason to doubt this explanation.

AT&T suggests that the Commission is attempting to require under § 251(c)(2) what courts have prevented it from requiring under § 251(c)(3) and what the Commission itself said was *not* required in the *Triennial Review Remand Order*. Tr. of Oral Arg. 50 ("[T]his is a rear guard effort to preserve [cost-based] pricing for things that the [C]ommission has said should no longer be available . . . at [such] pricing"). We do not think that AT&T is correct.

1

To begin with, AT&T's accusation does not square with the regulatory history. The Commission was not compelled to eliminate the obligation to lease unbundled entrance facilities at cost-based rates.

It is true that, prior to the *Triennial Review* orders, the Commission twice unsuccessfully attempted to impose sweeping unbundling requirements on incumbent LECs. See *Local Competition Order* ¶ 278; *In re Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696, 3771–3904, ¶¶ 162–464 (1999); see also 47 CFR § 51.319 (1997); § 51.319 (2000). Each time, the Commission's efforts were rejected for taking an unreasonably broad view of "impair[ment]" under § 251(d)(2). See *Iowa Utilities Bd.*, 525 U. S., at 392; *United States Telecom Assn.* v. *FCC*, 290 F. 3d 415, 421–428 (CADC 2002), cert. denied, 538 U. S. 940 (2003). In the *Triennial Review Order*, the Commission once again reinterpreted the "impair" standard and revised the list of network elements that incumbents must provide unbundled to competitors.

The Commission's initial decision to eliminate the obligation to unbundle entrance facilities, however, was not a result of the narrower view of impairment mandated by this Court and the D. C. Circuit. Instead, the Commission determined that entrance facilities need not be provided on an unbundled basis under § 251(c)(3) on the novel ground that they are not network elements at all—something no court had ever suggested.

Moreover, since its initial decision to eliminate the unbundling obligation for entrance facilities, the Commission has been committed to that position. When the D. C. Circuit questioned the Commission's finding that entrance facilities are not network elements, the Commission responded by observing that the court "did not reject our conclusion that incumbent LECs need not unbundle entrance facilities, only the analysis through which we reached that conclusion." *Triennial Review Remand Order* ¶ 137. The Commission then found another way to support that same conclusion.

2

More importantly, AT&T's characterization of what the Commission has done, and is doing, is inaccurate. The *Tri-*

ennial Review orders eliminated incumbent LECs' obligation under § 251(c)(3) to provide unbundled access to entrance facilities. But the FCC emphasized in both orders that it "d[id] not alter" the obligation on incumbent LECs under § 251(c)(2) to provide facilities for interconnection purposes. *Triennial Review Order* ¶ 366; *Triennial Review Remand Order* ¶ 140. Because entrance facilities are used for backhauling and interconnection purposes, the FCC effectively eliminated only unbundled access to entrance facilities for backhauling purposes—a nuance it expressly noted in the first *Triennial Review* order. *Triennial Review Order* ¶ 365. That distinction is neither unusual nor ambiguous.[6] In these cases, the Commission is simply explaining the interconnection obligation that it left undisturbed in the *Triennial Review* orders. We see no conflict between the *Triennial Review* orders and the Commission's views expressed here.[7]

We are not concerned that the *Triennial Review Remand Order* did not expressly distinguish between backhauling and interconnection, though AT&T makes much of that fact. AT&T argues that the Commission's holding in the *Triennial Review Remand Order* is broader than that in the *Triennial Review Order*. In AT&T's view, the Commission

[6] The Commission has long recognized that a single facility can be used for different functions and that its regulatory treatment can vary depending on its use. Unbundled network elements, for example, may not be used for the exclusive provision of mobile wireless or long-distance services. 47 CFR § 51.309(b) (2010). Similarly, interconnection arrangements may be used for local telephone service but not for long-distance services. § 51.305(b).

[7] The parties and their *amici* dispute whether an incumbent LEC has any way of knowing how a competitive LEC is using an entrance facility. This technical factual dispute simply underscores the appropriateness of deferring to the FCC. So long as the Commission is acting within the scope of its delegated authority and in accordance with prescribed procedures, it has greater expertise and stands in a better position than this Court to make the technical and policy judgments necessary to administer the complex regulatory program at issue here.

concluded in the *Triennial Review Remand Order* that competitors are not impaired if they lack cost-based access to entrance facilities for backhauling *or* interconnection.

There are two flaws with AT&T's reasoning. First, as we have discussed, the *Triennial Review Remand Order* reinstated the ultimate conclusion of the *Triennial Review Order* and changed only "the analysis through which [it] reached that conclusion." *Triennial Review Remand Order* ¶ 137. Second, unlike § 251(c)(3)'s unbundling obligation, § 251(c)(2)'s interconnection obligation does not require the Commission to consider impairment. As the dissent below observed, it would be surprising indeed if the FCC had taken the novel step of incorporating impairment into interconnection without comment. 597 F. 3d, at 389 (opinion of Sutton, J.).

* * *

The FCC as *amicus curiae* has advanced a reasonable interpretation of its regulations, and we defer to its views. The judgment of the United States Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

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

JUSTICE SCALIA, concurring.

I join the opinion of the Court. I would reach the same result even without benefit of the rule that we will defer to an agency's interpretation of its own regulations, a rule in recent years attributed to our opinion in *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997), though it first appeared in our jurisprudence more than half a century earlier, see *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). In this suit I have no need to rely on *Auer* deference, because I believe the FCC's interpretation is the fairest reading of the orders in question. Most cogently, ¶ 140 of the *Triennial Review*

Remand Order serves no purpose unless one accepts (as AT&T does not) the distinction between backhauling and interconnection that is referred to in footnotes to ¶¶ 138 and 141 of the order. 20 FCC Rcd. 2533, 2610–2612 (2005). The order would have been clearer, to be sure, if the distinction had been made in a footnote to ¶ 140 itself, but the distinction is there, and without it ¶ 140 has no point.

It is comforting to know that I would reach the Court's result even without *Auer*. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949).

Deferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power,

to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government. The seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.

There are undoubted advantages to *Auer* deference. It makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency's view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process. The defects of *Auer* deference, and the alternatives to it, are fully explored in Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996). We have not been asked to reconsider *Auer* in the present cases. When we are, I will be receptive to doing so.

Syllabus

DePIERRE *v.* UNITED STATES

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

No. 09–1533. Argued February 28, 2011—Decided June 9, 2011

In 1986, increasing public concern over the dangers of illicit drugs—in particular, the new phenomenon of crack cocaine—prompted Congress to revise the penalties for criminal offenses involving cocaine-related substances. Following several hearings, Congress enacted the Anti-Drug Abuse Act of 1986. The statute provides a mandatory 10-year minimum sentence for certain drug offenses involving "(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of . . . (II) cocaine, its salts, optical and geometric isomers; and salts of isomers; [or] (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base." 21 U. S. C. § 841(b)(1)(A). The statute similarly provides a 5-year sentence for offenses involving 500 grams of a substance enumerated in clause (ii) or 5 grams of one outlined in clause (iii). § 841(b)(1)(B).

In 2005, petitioner DePierre was indicted for distribution of 50 grams or more of cocaine base under §§ 841(a)(1) and (b)(1)(A)(iii). The District Court declined DePierre's request that the jury be instructed that, in order to find DePierre guilty of distribution of "cocaine base," it must find that his offense involved crack cocaine. DePierre was convicted, and the court sentenced him to the 120 months in prison mandated by the statute. The First Circuit affirmed, rejecting DePierre's argument that § 841(b)(1)(A)(iii) should be read only to apply to offenses involving crack cocaine. Instead, it adhered to its precedent holding that "cocaine base" refers to all forms of cocaine base.

Held: "[C]ocaine base," as used in § 841(b)(1), means not just "crack cocaine," but cocaine in its chemically basic form. Pp. 78–89.

(a) The most natural reading of "cocaine base" in clause (iii) is cocaine in its chemically basic form—*i. e.*, the molecule found in crack cocaine, freebase, and coca paste. On its plain terms, then, "cocaine base" reaches more broadly than just crack cocaine. In arguing to the contrary, DePierre urges the Court to stray far from the statute's text, which nowhere contains the term "crack cocaine." The Government's reading, on the other hand, follows the words Congress chose to use. DePierre is correct that "cocaine base" is technically redundant—chemically speaking, cocaine *is* a base. But Congress had good reason to use "cocaine base"—to make clear that clause (iii) does not apply to offenses

involving cocaine hydrochloride (*i. e.*, powder cocaine) or other nonbasic cocaine-related substances. At the time the statute was enacted, "cocaine" was commonly used to refer to powder cocaine, and the scientific and medical literature often uses "cocaine" to refer to *all* cocaine-related substances, including ones that are not chemically basic. Pp. 78–80.

(b) This reading of "cocaine base" is also consistent with § 841(b)(1)'s somewhat confusing structure. Subsection (b)(1)(A)(ii)(II) lists "cocaine," along with "its salts, optical and geometric isomers, and salts of isomers," as elements subject to clause (ii)'s higher quantity threshold. DePierre is correct that, because "cocaine" and "cocaine base" both refer to chemically basic cocaine, offenses involving a substance containing such cocaine will always be penalized according to the lower quantity threshold of clause (iii), and never the higher threshold clause (ii) establishes for mixtures and substances containing "cocaine." But the Court does not agree that the term "cocaine" in clause (ii) is therefore superfluous—in light of the structure of subclause (II), "cocaine" is needed as the reference point for "salts" and "isomers," which would otherwise be meaningless.

The term "cocaine" in clause (ii) also performs another critical function. Clause (iii) penalizes offenses involving a mixture or substance "described in clause (ii) which contains cocaine base." Thus, clause (ii) imposes a penalty for offenses involving cocaine-related substances generally, and clause (iii) imposes a higher penalty for a subset of those substances—the ones that "contai[n] cocaine base." For this structure to work, however, § 841(b)(1) must "describ[e] in clause (ii)" substances containing chemically basic cocaine, which then comprise the subset described in clause (iii). Congress thus had good reason to include the term "cocaine" in clause (ii), and the slight inconsistency created by its use of "cocaine base" in clause (iii) is insufficient reason to adopt DePierre's interpretation. Pp. 80–83.

(c) DePierre's additional arguments are unpersuasive. First, the records of the 1986 congressional hearings do not support his contention that Congress was exclusively concerned with offenses involving crack cocaine. Second, reading "cocaine base" to mean chemically basic cocaine, rather than crack cocaine, does not lead to an absurd result. Third, the fact that "cocaine base" in the Federal Sentencing Guidelines is defined as "crack" does not require that the statutory term be interpreted the same way. Fourth, the statute is sufficiently clear that the rule of lenity does not apply in DePierre's favor. Pp. 83–89.

599 F. 3d 25, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN,

JJ., joined, and in which SCALIA, J., joined except for Part III–A. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 89.

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Charles A. Rothfeld* and *Jeffrey A. Meyer*.

Nicole A. Saharsky argued the cause for the United States. With her on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, *Benjamin J. Horwich*, and *Deborah Watson*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

At the time of petitioner's conviction and sentence, federal law mandated a minimum 10-year sentence for persons convicted of certain drug offenses, 21 U. S. C. § 841(a), including those involving 50 grams or more of "a mixture or substance . . . which contains cocaine base," § 841(b)(1)(A)(iii), and a minimum 5-year sentence for offenses involving 5 grams or more of the same, § 841(b)(1)(B)(iii). This case requires us to decide whether the term "cocaine base" as used in this statute refers generally to cocaine in its chemically basic form or exclusively to what is colloquially known as "crack cocaine." We conclude that "cocaine base" means the former.

I

A

As a matter of chemistry, cocaine is an alkaloid with the molecular formula $C_{17}H_{21}NO_4$. Webster's Third New International Dictionary 434 (2002). An alkaloid is a base—that is, a compound capable of reacting with an acid to form

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**Shelley R. Sadin* filed a brief for Individual Physicians and Scientists as *amici curiae*.

a salt.[1] *Id.*, at 54, 180; see also Brief for Individual Physicians and Scientists as *Amici Curiae* 2–3 (hereinafter Physicians Brief). Cocaine is derived from the coca plant native to South America. The leaves of the coca plant can be processed with water, kerosene, sodium carbonate, and sulfuric acid to produce a pastelike substance. R. Weiss, S. Mirin, & R. Bartel, Cocaine 10 (2d ed. 1994). When dried, the resulting "coca paste" can be vaporized (through the application of heat) and inhaled, *i. e.*, "smoked." See United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 11–12 (1995) (hereinafter Commission Report). Coca paste contains $C_{17}H_{21}NO_4$—that is, cocaine in its base form.

Dissolving coca paste in water and hydrochloric acid produces (after several intermediate steps) cocaine hydrochloride, which is a salt with the molecular formula $C_{17}H_{22}NO_4^+Cl^-$. *Id.*, at 12; Physicians Brief 3. Cocaine hydrochloride, therefore, is not a base. It generally comes in powder form, which we will refer to as "powder cocaine." It is usually insufflated (breathed in through the nose), though it can also be ingested or diluted in water and injected. Because cocaine hydrochloride vaporizes at a much higher temperature than chemically basic cocaine (at which point the cocaine molecule tends to decompose), it is generally not smoked. See Commission Report 11, n. 15, 12–13.

Cocaine hydrochloride can be converted into cocaine in its base form by combining powder cocaine with water and a base, like sodium bicarbonate (also known as baking soda). *Id.*, at 14. The chemical reaction changes the cocaine hydrochloride molecule into a chemically basic cocaine molecule,

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[1] There are more detailed theories of how acids and bases interact. For our purposes, it is sufficient to note the fundamental proposition that a base and an acid can combine to form a salt, and all three are different types of compounds. See generally Brief for Individual Physicians and Scientists as *Amici Curiae* 8; A Dictionary of Chemistry 6–7, 62–63, 496 (J. Daintith ed., 5th ed. 2004).

Physicians Brief 4, and the resulting solid substance can be cooled and broken into small pieces and then smoked, Commission Report 14. This substance is commonly known as "crack" or "crack cocaine."[2] Alternatively, powder cocaine can be dissolved in water and ammonia (also a base); with the addition of ether, a solid substance—known as "freebase"—separates from the solution, and can be smoked. *Id.*, at 13. As with crack cocaine, freebase contains cocaine in its chemically basic form. *Ibid.*

Chemically, therefore, there is no difference between the cocaine in coca paste, crack cocaine, and freebase—all are cocaine in its base form. On the other hand, cocaine in its base form and in its salt form (*i. e.*, cocaine hydrochloride) are chemically different, though they have the same active ingredient and produce the same physiological and psychotropic effects. See *id.*, at 14–22. The key difference between them is the method by which they generally enter the body; smoking cocaine in its base form—whether as coca paste, freebase, or crack cocaine—allows the body to absorb the active ingredient quickly, thereby producing a shorter, more intense high than obtained from insufflating cocaine hydrochloride. *Ibid.;* see generally *Kimbrough* v. *United States*, 552 U. S. 85, 94 (2007).

B

In 1986, increasing public concern over the dangers associated with illicit drugs—and the new phenomenon of crack cocaine in particular—prompted Congress to revise the penalties for criminal offenses involving cocaine-related substances. See *id.*, at 95–96. At the time, federal law generally tied the penalties for drug offenses to both the type of drug and the quantity involved, with no provision for mandatory minimum sentences. See, *e. g.*, § 841(b)(1) (1982 ed., Supp. III). After holding several hearings specifically ad-

[2] Though the terms "crack" and "crack cocaine" are interchangeable, in this opinion we adopt DePierre's practice and generally employ the latter.

dressing the emergence of crack cocaine, Congress enacted the Anti-Drug Abuse Act of 1986 (ADAA), 100 Stat. 3207, which provided mandatory minimum sentences for controlled-substance offenses involving specific quantities of drugs.

As relevant here, the ADAA provided a mandatory 10-year sentence for certain drug offenses involving 5 kilograms or more of "a mixture or substance containing a detectable amount of" various cocaine-related elements, including coca leaves, cocaine, and cocaine salts; it also called for the same sentence for offenses involving only 50 grams or more of "a mixture or substance . . . *which contains cocaine base.*" § 1002, *id.*, at 3207–2 (amending §§ 841(b)(1)(A)(ii)–(iii)) (emphasis added). The ADAA also stipulated a mandatory 5-year sentence for offenses involving 500 grams of a mixture or substance containing coca leaves, cocaine, and cocaine salts, or 5 grams of a mixture or substance containing "cocaine base." *Id.*, at 3207–3 (amending §§ 841(b)(1)(B)(ii)–(iii)).

Thus, the ADAA established a 100-to-1 ratio for the threshold quantities of cocaine-related substances that triggered the statute's mandatory minimum penalties. That is, 5 grams or more of "a mixture or substance . . . which contains cocaine base" was penalized as severely as 100 times that amount of the other cocaine-related elements enumerated in the statute. These provisions were still in effect at the time of petitioner's conviction and sentence.[3] See §§ 841(b)(1)(A)–(B) (2000 ed. and Supp. V).

The United States Sentencing Commission subsequently promulgated Sentencing Guidelines for drug-trafficking of-

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[3] Due to a recent amendment, the quantity ratio in § 841(b)(1) is now roughly 18 to 1, but otherwise the relevant statutory provisions are unchanged from those in effect at the time DePierre was sentenced. See Fair Sentencing Act of 2010, § 2, 124 Stat. 2372 (changing the quantity in § 841(b)(1)(A)(iii) from 50 to 280 grams and in subparagraph (B)(iii) from 5 to 28 grams).

fenses. Under the Guidelines, the offense levels for drug crimes are tied to the drug type and quantity involved. See United States Sentencing Commission, Guidelines Manual §2D1.1(c) (Nov. 2010) (USSG). The Commission originally adopted the ADAA's 100-to-1 ratio for offenses involving "cocaine" and "cocaine base," though instead of setting only two quantity thresholds, as the ADAA did, the Guidelines "set sentences for the full range of possible drug quantities." Commission Report 1; see generally *Kimbrough*, 552 U. S., at 96–97.[4]

The original version of §2D1.1(c) did not define "cocaine base" as used in that provision, but in 1993 the Commission issued an amendment to explain that "'[c]ocaine base,' for the purposes of this guideline, means 'crack,'" that is, "the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." USSG App. C, Amdt. 487 (effective Nov. 1, 1993); see also §2D1.1(c), n. (D). The Commission noted that "forms of cocaine base other than crack (*e. g.*, coca paste . . .) will be treated as cocaine." App. C, Amdt. 487.[5]

C

In April 2005, petitioner Frantz DePierre sold two bags of drugs to a Government informant. DePierre was subsequently indicted on a charge of distributing 50 grams or more

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[4] In 2007, the Commission increased the quantity of cocaine base required to trigger each offense level, reducing the cocaine-base-to-cocaine-sentencing ratio under the Guidelines. See USSG Supp. App. C, Amdt. 706 (effective Nov. 1, 2007). Unless otherwise noted, we cite to the current versions of the relevant Guidelines provisions.

[5] The Guidelines' Drug Quantity Table only lists "cocaine" and "cocaine base" among its enumerated controlled substances, but the application notes make clear that the term "cocaine" includes "ecgonine and coca leaves," as well as "salts, isomers, [and] salts of isomers" of cocaine. §2D1.1(c), and comment., n. 5.

of cocaine base under §§ 841(a)(1) and (b)(1)(A)(iii).[6] At trial, a Government chemist testified that the substance in the bags, which weighed 55.1 grams, was "cocaine base." Tr. 488, 490. She was not able to identify any sodium bicarbonate. *Id.*, at 499. A police officer testified that the substance in question was "off-white [and] chunky." *Id.*, at 455.

DePierre asked the District Court to instruct the jury that, in order to find him guilty of distribution of cocaine base, it must find that his offense involved "the form of cocaine base known as crack cocaine." App. in No. 08–2101 (CA1), p. 43. His proposed jury instruction defined "crack" identically to the Guidelines definition. See *id.*, at 43–44; see also USSG § 2D1.1(c), n. (D). In addition, DePierre asked the court to instruct the jury that "[c]hemical analysis cannot establish a substance as crack because crack is chemically identical to other forms of cocaine base, although it can reveal the presence of sodium bicarbonate, which is usually used in the processing of crack." App. in No. 08–2101, at 44.

The court, however, instructed the jury that "the statute that's relevant asks about cocaine base. Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base . . . ." Tr. 585 (paragraph break omitted). The jury form asked whether the offense involved "over 50 grams of cocaine base." App. to Pet. for Cert. 17a. The jury found DePierre guilty of distributing 50 grams or more of cocaine base, and the court sentenced DePierre to 120 months in prison as required by the statute.

The United States Court of Appeals for the First Circuit affirmed, rejecting DePierre's argument that § 841(b)(1)(A)(iii) should be read only to apply to offenses involving crack cocaine. 599 F. 3d 25, 30–31 (2010). While noting the division on this question among the Courts of Ap-

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[6] DePierre was also indicted for distribution of powder cocaine under § 841(a)(1) and possession of a firearm with an obliterated serial number under 18 U. S. C. § 922(k). He was convicted by jury of the former offense and pleaded guilty to the latter prior to trial.

peals, *ibid.*, and nn. 3, 4, the First Circuit adhered to its own precedent and "read the statute according to its terms," holding that "'cocaine base' refers to 'all forms of cocaine base, including but not limited to crack cocaine.'" *Id.*, at 30–31 (quoting *United States* v. *Anderson*, 452 F. 3d 66, 86–87 (CA1 2006)). We granted certiorari to resolve the longstanding division in authority among the Courts of Appeals on this question. 562 U. S. 960 (2010).

II

A

We begin with the statutory text. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989). Section 841(b)(1)(A) provides a mandatory 10-year minimum sentence for certain drug offenses involving

> "(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—
>
> "(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
>
> "(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
>
> "(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
>
> "(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III); [or]
>
> "(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base."[7]

[7] As noted earlier, § 841(b)(1)(B) calls for a mandatory minimum 5-year sentence for offenses involving exactly the same substances; the only difference in subparagraph (B) is that the threshold quantity in clause (ii) is 500 grams, and in clause (iii) it is 5 grams. Because the 100-to-1 ratio is a feature of both §§ 841(b)(1)(A) and (B), and those subparagraphs are identical in all other respects, throughout this opinion we use the terms "clause (ii)" and "clause (iii)" to refer to those clauses as present in either subparagraph.

We agree with the Government that the most natural reading of the term "cocaine base" is "cocaine in its base form"—*i. e.*, $C_{17}H_{21}NO_4$, the molecule found in crack cocaine, freebase, and coca paste. On its plain terms, then, "cocaine base" reaches more broadly than just crack cocaine. In arguing to the contrary, DePierre asks us to stray far from the statute's text, as the term "crack cocaine" appears nowhere in the ADAA (or the United States Code, for that matter). While the Government's reading is not without its problems,[8] that reading follows from the words Congress chose to include in the text. See *United States* v. *Rodriquez*, 553 U. S. 377, 384 (2008) (eschewing an interpretation that was "not faithful to the statutory text"). In short, the term "cocaine base" is more plausibly read to mean the "chemically basic form of cocaine," Brief for United States 15, than it is "crack cocaine," Brief for Petitioner 24, 28.[9]

We agree with DePierre that using the term "cocaine base" to refer to $C_{17}H_{21}NO_4$ is technically redundant; as noted earlier, chemically speaking cocaine *is* a base. If Congress meant in clause (iii) to penalize more severely offenses

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[8] The Government urges us to give "cocaine base" its "settled, unambiguous scientific meaning," *i. e.*, "the form of cocaine classified chemically as a base, with the chemical formula $C_{17}H_{21}NO_4$ and a particular molecular structure." Brief for United States 20; cf. *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337, 342 (1991) ("In the absence of contrary indication, we assume that when a statute uses . . . a term [of art], Congress intended it to have its established meaning"). But the scientifically proper appellation for $C_{17}H_{21}NO_4$ is "cocaine" *tout court*, and the Government cites no source that uses "cocaine base" to refer to $C_{17}H_{21}NO_4$ (save lower court opinions construing the statute at issue in this case). Therefore, there is no "settled meaning"—scientific or otherwise—of "cocaine base" for us to apply to § 841(b)(1).

[9] The statute itself gives us good reason to reject DePierre's reading. Substituting "crack cocaine" for "cocaine base" would mean that clause (iii) only applies to a "mixture or substance . . . which contains [crack cocaine]." But crack cocaine is itself a "substance" involved in drug offenses; it is the end product that is bought, sold, and consumed. We are aware of no substance that "contains" crack cocaine.

involving "a mixture or substance . . . which contains" cocaine in its base form it could have simply (and more correctly) used the word "cocaine" instead. But Congress had good reason to use "cocaine base" in the ADAA—to distinguish the substances covered by clause (iii) from other cocaine-related substances. For example, at the time Congress enacted the statute, the word "cocaine" was commonly used to refer to cocaine hydrochloride, *i. e.*, powder cocaine. See, *e. g.*, *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 536, 544 (1985) (repeatedly referring to cocaine hydrochloride as "cocaine"); "Crack" Cocaine, Hearing before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 99th Cong., 2d Sess., 94 (1986) (hereinafter Crack Cocaine Hearing) (prepared statement of David L. Westrate, Assistant Administrator, Drug Enforcement Admin., Dept. of Justice) (discussing production of "a white, crystalline powder, cocaine hydrochloride, otherwise known simply as cocaine").

To make things more confusing, in the scientific and medical literature the word "cocaine" is often used to refer to *all* cocaine-related substances, including powder cocaine. See, *e. g.*, J. Fay, The Alcohol/Drug Abuse Dictionary and Encyclopedia 26–27 (1988); Weiss et al., Cocaine, at 15–25; R. Lewis, Hawley's Condensed Chemical Dictionary 317 (15th ed. 2007). Accordingly, Congress' choice to use the admittedly redundant term "cocaine base" to refer to chemically basic cocaine is best understood as an effort to make clear that clause (iii) does not apply to offenses involving powder cocaine or other nonbasic cocaine-related substances.

B

Notwithstanding DePierre's arguments to the contrary, reading "cocaine base" to mean chemically basic cocaine is also consistent with § 841(b)(1)'s somewhat confounding structure. DePierre is correct that the interpretation we adopt today raises the question why Congress included the

word "cocaine" in subclause (II) of clause (ii). That subclause lists "*cocaine,* its salts, optical and geometric isomers, and salts of isomers" as elements subject to clause (ii)'s higher quantity threshold. §§ 841(b)(1)(A)(ii)(II), (B)(ii)(II) (emphasis added). If, as we conclude, the terms "cocaine" and "cocaine base" both mean chemically basic cocaine, offenses involving a mixture or substance which contains such cocaine will always be penalized according to the lower quantity thresholds of clause (iii), and never the higher quantity thresholds clause (ii) establishes for mixtures and substances containing "cocaine."[10]

While this much is true, we do not agree with DePierre that the word "cocaine" in subclause (II) is therefore superfluous. For without the word "cocaine" subclause (II) makes no sense: It would provide a minimum sentence for offenses involving a specified quantity of simply "its salts, optical and geometric isomers, and salts of isomers." In light of the structure of the subclause, the word "cocaine" is needed as the reference point for "salts" and "isomers."

The word "cocaine" in subclause (II) also performs another critical function. Clause (iii) penalizes offenses involving "a mixture or substance *described in clause (ii)* which contains cocaine base." §§ 841(b)(1)(A)(iii), (B)(iii) (emphasis added). In other words, clause (ii) imposes a penalty for offenses involving cocaine-related substances generally, and clause (iii) imposes a higher penalty for a subset of those substances—the ones that "contai[n] cocaine base." For this structure to work, however, § 841(b)(1) must "describ[e] in clause (ii)" substances containing chemically basic cocaine, which then comprise the subset described in clause (iii). If

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[10] DePierre makes a similar argument with respect to coca leaves: Because they contain chemically basic cocaine, he contends, under the Government's interpretation offenses involving coca leaves will never be subject to the lower quantity threshold associated with subclause (I), rendering that provision superfluous. For reasons discussed later, see *infra*, at 85–87, we are not convinced.

such substances were not present in clause (ii), clause (iii) would only apply to substances that contain both chemically basic cocaine and one of the *other* elements enumerated in clause (ii). Presumably, the result would be that clause (iii) would not apply to crack cocaine, freebase, or coca paste offenses, as there is no indication that, in addition to "cocaine base" (*i. e.*, $C_{17}H_{21}NO_4$), those substances contain cocaine "salts" (*e. g.*, cocaine hydrochloride), ecgonine, or any of the other elements enumerated in clause (ii). In short, the exclusion of "cocaine" from clause (ii) would result in clause (iii) effectively describing a null set, which obviously was not Congress' intent.

Of course, this redundancy could have been avoided by simply drafting clause (iii) to penalize offenses involving "a mixture or substance which contains cocaine base," without reference to clause (ii)—that is, Congress could have drafted clause (iii) to specify a *separate* set of cocaine-related substances, not a *subset* of those in clause (ii). That we may rue inartful legislative drafting, however, does not excuse us from the responsibility of construing a statute as faithfully as possible to its actual text.[11] And as noted earlier, there

[11] At the time the ADAA was enacted, the definition of "narcotic drug" in the same subchapter of the United States Code included, as relevant, the following:

"(C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.

"(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.

"(E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

"(F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in [the preceding] subparagraphs . . . ." 21 U. S. C. § 802(17) (1982 ed., Supp. III).

Accordingly, the likely explanation for the ADAA's curious structure is that Congress simply adopted this pre-existing enumeration of cocaine-related controlled substances, and then engrafted clause (iii) to provide enhanced penalties for the subset of offenses involving chemically basic cocaine.

is no textual support for DePierre's interpretation of "cocaine base" to mean "crack cocaine."

We also recognize that our reading of "cocaine" in subclause (II) and "cocaine base" in clause (iii) to both refer to chemically basic cocaine is in tension with the usual rule that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004) (internal quotation marks omitted). However, because "Congress sometimes uses slightly different language to convey the same message," *Deal* v. *United States*, 508 U. S. 129, 134 (1993) (internal quotation marks omitted), we must be careful not to place too much emphasis on the marginal semantic divergence between the terms "cocaine" and "cocaine base." As we have already explained, Congress had good reason to employ the latter term in clause (iii), and the slight inconsistency in nomenclature is insufficient reason to adopt DePierre's interpretation. Cf. *Public Lands Council* v. *Babbitt*, 529 U. S. 728, 746–747 (2000) (suggesting that a "statute's basic purpose" might support the conclusion that "two sets of different words mean the same thing").

III

DePierre offers four additional arguments in support of his view that the term "cocaine base" in clause (iii) is best read to mean "crack cocaine." We do not find them convincing.

A

DePierre first argues that we should read "cocaine base" to mean "crack cocaine" because, in passing the ADAA, Congress in 1986 intended to penalize crack cocaine offenses more severely than those involving other substances containing $C_{17}H_{21}NO_4$. As is evident from the preceding discussion, this position is not supported by the statutory text. To be sure, the records of the contemporaneous congressional hear-

ings suggest that Congress was most concerned with the particular dangers posed by the advent of crack cocaine. See, *e. g.*, Crack Cocaine Hearing 1 (statement of Chairman Roth) ("[We] mee[t] today to examine a frightening and dangerous new twist in the drug abuse problem—the growing availability and use of a cheap, highly addictive, and deadly form of cocaine known on the streets as 'crack' "); see generally Commission Report 116–118; *Kimbrough*, 552 U. S., at 95–96.

It does not necessarily follow, however, that in passing the ADAA Congress meant for clause (iii)'s lower quantity thresholds to apply *exclusively* to crack cocaine offenses. Numerous witnesses at the hearings testified that the primary reason crack cocaine was so dangerous was because—contrary to powder cocaine—cocaine in its base form is smoked, which was understood to produce a faster, more intense, and more addictive high than powder cocaine. See, *e. g.*, Crack Cocaine Hearing 20 (statement of Dr. Robert Byck, Yale University School of Medicine) (stating that the ability to inhale vapor "is the reason why crack, or cocaine free-base, is so dangerous"). This is not, however, a feature unique to crack cocaine, and freebase and coca paste were also acknowledged as dangerous, smokeable forms of cocaine. See, *e. g.*, *id.*, at 70 (prepared statement of Dr. Charles R. Schuster, Director, National Institute on Drug Abuse) (reporting on the shift from snorting powder cocaine to "newer more dangerous routes of administration, such as freebase smoking"); *id.*, at 19–20 (statement of Dr. Byck) (describing the damaging effects of cocaine smoking on people in Peru).

Moreover, the testimony of witnesses before Congress did not clearly distinguish between these base forms of cocaine; witnesses repeatedly used terms like "cocaine base," "freebase," or "cocaine freebase" in a manner that grouped crack cocaine with other substances containing chemically basic forms of cocaine. See, *e. g.*, Trafficking and Abuse of "Crack" in New York City, Hearing before the House Select Committee on Narcotics Abuse and Control, 99th Cong., 2d

Sess., 258 (1986) (statement of Robert M. Stutman, Special Agent in Charge, Drug Enforcement Admin., Dept. of Justice) ("[C]ocaine in its alkaloid form [is] commonly known on the street as crack, rock, base, or freebase"); Crack Cocaine Hearing 71 (statement of Dr. Schuster) ("In other words, 'crack' is a street name for cocaine freebase"). In fact, prior to passage of the ADAA, multiple bills were introduced in Congress that imposed enhanced penalties on those who trafficked in "cocaine base," *e. g.*, S. 2787, 99th Cong., 2d Sess., § 1 (1986), as well as "cocaine freebase," *e. g.*, H. R. 5394, 99th Cong., 2d Sess., § 101 (1986); H. R. 5484, 99th Cong., 2d Sess., § 608(a) (1986).

Given crack cocaine's sudden emergence and the similarities it shared with other forms of cocaine, this lack of clarity is understandable, as is Congress' desire to adopt a statutory term that would encompass all forms. Congress faced what it perceived to be a new threat of massive scope. See, *e. g.*, Crack Cocaine Hearing 4 (statement of Sen. Nunn) ("[C]ocaine use, particularly in the more pure form known as crack, is at near epidemic proportions"); *id.*, at 21 (statement of Dr. Byck) ("We are dealing with a worse drug . . . than we have ever dealt with, or that anybody has ever dealt with in history"). Accordingly, Congress chose statutory language broad enough to meet that threat. As we have noted, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998). In the absence of any indication in the statutory text that Congress intended only to subject crack cocaine offenses to enhanced penalties, we cannot adopt DePierre's narrow construction. See *Lewis* v. *Chicago*, 560 U. S. 205, 215 (2010) ("It is not for us to rewrite [a] statute so that it covers only what we think is necessary to achieve what we think Congress really intended").

B

DePierre also argues that we should read the term "cocaine base" to mean "crack cocaine," rather than chemically

basic cocaine, because the latter definition leads to an absurd result. Cf. *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 120 (1988) (plurality opinion). He contends that, because coca leaves themselves contain cocaine, under the Government's approach an offense involving 5 grams of coca leaves will be subject to the 5-year minimum sentence in § 841(b)(1)(B)(iii), even though those leaves would produce only 0.05 grams of smokeable cocaine. See Brief for Petitioner 41–42. While we agree that it would be questionable to treat 5 grams of coca leaves as equivalent to 500 grams of powder cocaine for minimum-sentence purposes, we are not persuaded that such a result would actually obtain in light of our decision today.

To begin with, it is a matter of dispute between the parties whether coca leaves in their natural, unprocessed form actually contain chemically basic cocaine. Compare Brief for Petitioner 15, 17, n. 10, with Brief for United States 43. Even assuming that DePierre is correct as a matter of chemistry that coca leaves contain cocaine in its base form,[12] see Physicians Brief 2, 11, the Government has averred that it "would not be able to make that showing in court," Tr. of Oral Arg. 28, and that "coca leaves should not be treated as containing 'cocaine base' for purposes of Clause (iii)," Brief for United States 45.

It is unsurprising, therefore, that the Government in its brief disclaimed awareness of any prosecution in which it had sought, or the defendant had received, a statutory-minimum sentence enhanced under clause (iii) for an offense involving coca leaves. *Id.*, at 44. And although this question is not before us today, we note that Congress' deliberate choice to enumerate "coca leaves" in clause (ii) strongly indicates its intent that offenses involving such leaves be subject to the higher quantity thresholds of that clause. Accordingly,

[12] It appears that Congress itself is of the view that coca leaves contain "cocaine," as subclause (I) exempts offenses involving "coca leaves from which cocaine . . . ha[s] been removed." §§ 841(b)(1)(A)(ii)(I), (B)(ii)(I).

there is little danger that the statute will be read in the "absurd" manner DePierre fears.

C

In addition, DePierre suggests that because the Sentencing Commission has, since 1993, defined "cocaine base" to mean "crack" for the purposes of the Federal Sentencing Guidelines, we should do the same with respect to § 841(b)(1). We do not agree. We have never held that, when interpreting a term in a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines. Cf. *Neal* v. *United States*, 516 U. S. 284, 290–296 (1996). And we need not decide now whether such deference would be appropriate, because the Guidelines do not purport to interpret § 841(b)(1). See USSG § 2D1.1(c), n. (D) ("'Cocaine base,' *for the purposes of this guideline*, means 'crack'" (emphasis added)).[13]

We recognize that, because the definition of "cocaine base" in clause (iii) differs from the Guidelines definition, certain sentencing anomalies may result. For example, an offense involving 5 grams of crack cocaine and one involving 5 grams of coca paste both trigger a minimum 5-year sentence under § 841(b)(1)(B)(iii). But defendants convicted of offenses involving only 4 grams of each substance—which do not trigger the statutory minimums—would likely receive different sentences, because of the Guidelines' differential treatment of those substances with respect to offense level.[14] Compare

[13] We also disagree with DePierre's contention that Congress' failure to reject the Guidelines definition of "cocaine base" means that it has effectively adopted that interpretation with respect to the statute. See *Kimbrough* v. *United States*, 552 U. S. 85, 106 (2007) ("Ordinarily, we resist reading congressional intent into congressional inaction").

[14] In defining "cocaine base" as "crack," the Commission explained that "forms of cocaine base other than crack" are treated as "cocaine" for purposes of the Guidelines. USSG App. C, Amdt. 487 (effective Nov. 1, 1993). This includes coca paste, which the Commission described as "an intermediate step in the processing of coca leaves into cocaine hydrochlo-

USSG §2D1.1(c)(9) (providing an offense level of 22 for at least 4 grams of "cocaine base," *i. e.*, "crack") with §2D1.1(c)(14) (providing an offense level of 12 for less than 25 grams of "cocaine," which, under the Guidelines, includes coca paste). As we have noted in previous opinions, however, such disparities are the inevitable result of the dissimilar operation of the fixed minimum sentences Congress has provided by statute and the graduated sentencing scheme established by the Guidelines. See *Kimbrough*, 552 U. S., at 107–108; *Neal*, 516 U. S., at 291–292. Accordingly, we reject DePierre's suggestion that the term "cocaine base" as used in clause (iii) must be given the same definition as it has under the Guidelines.

D

Finally, DePierre argues that, because §841(b)(1) is at the very least ambiguous, the rule of lenity requires us to interpret the statute in his favor. See *United States* v. *Santos*, 553 U. S. 507, 514 (2008) (plurality opinion) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them"). As evinced by the preceding discussion, we cannot say that the statute is crystalline. The rule, however, is reserved for cases where, "after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 508 U. S. 223, 239 (1993) (internal quotation marks and brackets omitted). Applying the normal rules of statutory construction in this case, it is clear that Congress used the term "cocaine base" in clause (iii) to penalize more severely not only offenses involving "crack cocaine," but those involving substances containing chemically basic cocaine more generally. There is no persuasive justification for reading the statute otherwise. Because the statutory text

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ride." *Ibid.* As we have explained, however, coca paste is a smokeable form of cocaine in its own right, and we see no reason why, as a statutory matter, it should be subject to lesser penalties than crack or freebase.

allows us to make far more than "a guess as to what Congress intended," *Reno* v. *Koray,* 515 U. S. 50, 65 (1995) (internal quotation marks omitted), the rule of lenity does not apply in DePierre's favor.

* * *

We hold that the term "cocaine base" as used in § 841(b)(1) means not just "crack cocaine," but cocaine in its chemically basic form. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the Court's judgment and in all of its opinion except for Part III–A, which needlessly contradicts DePierre's version of legislative history. Our holding today is that the statutory term "cocaine base" refers to cocaine base, rather than, as DePierre contends, one particular type of cocaine base. This holding is in my view obvious, and the Court does not disagree. It begins its discussion of the legislative history by saying that DePierre's position "is not supported by the statutory text," *ante,* at 83; and ends the discussion by saying that "[i]n the absence of any indication in the statutory text that Congress intended only to subject crack cocaine offenses to enhanced penalties, we cannot adopt DePierre's narrow construction," *ante,* at 85.

Everything in between could and should have been omitted. Even if Dr. Byck had *not* lectured an undetermined number of likely somnolent Senators on "the damaging effects of cocaine smoking on people in Peru," *ante,* at 84, we would *still* hold that the words "cocaine base" mean cocaine base. And here, as always, the needless detour into legislative history is not harmless. It conveys the mistaken impression that legislative history *could* modify the text of a criminal statute as clear as this. In fact, however, even a

hypothetical House Report expressing the Committee's misunderstanding (or perhaps just the Committee staff's misunderstanding, who knows?) that "cocaine base means crack cocaine" could not have changed the outcome of today's opinion.

Syllabus

MICROSOFT CORP. *v.* i4i LIMITED PARTNERSHIP ET AL.

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

No. 10–290. Argued April 18, 2011—Decided June 9, 2011

In asserting patent invalidity as a defense to an infringement action, an alleged infringer must contend with § 282 of the Patent Act of 1952 (Act), under which "[a] patent shall be presumed valid" and "[t]he burden of establishing invalidity . . . shall rest on the party asserting" it. Since 1984, the Federal Circuit has read § 282 to require a defendant seeking to overcome the presumption to persuade the factfinder of its invalidity defense by clear and convincing evidence.

Respondents (collectively, i4i) hold the patent at issue, which claims an improved method for editing computer documents. After i4i sued petitioner Microsoft Corp. for willful infringement of that patent, Microsoft counterclaimed and sought a declaration that the patent was invalid under § 102(b)'s on-sale bar, which precludes patent protection for any "invention" that was "on sale in this country" more than one year prior to the filing of a patent application. The parties agreed that, more than a year before filing its patent application, i4i had sold a software program known as S4 in the United States, but they disagreed over whether that software embodied the invention claimed in i4i's patent. Relying on the undisputed fact that the S4 software was never presented to the Patent and Trademark Office (PTO) during its examination of the patent application, Microsoft objected to i4i's proposed jury instruction that the invalidity defense must be proved by clear and convincing evidence. The District Court nevertheless gave that instruction, rejecting Microsoft's alternative instruction proposing a preponderance of the evidence standard. The jury found that Microsoft willfully infringed the i4i patent and had failed to prove the patent's invalidity. The Federal Circuit affirmed, relying on its settled interpretation of § 282.

Held: Section 282 requires an invalidity defense to be proved by clear and convincing evidence. Pp. 99–114.

(a) The Court rejects Microsoft's contention that a defendant need only persuade the jury of a patent invalidity defense by a preponderance of the evidence. Where Congress has prescribed the governing standard of proof, its choice generally controls. *Steadman* v. *SEC*, 450 U. S. 91, 95. Congress has made such a choice here. While § 282 includes

no express articulation of the standard of proof, where Congress uses a common-law term in a statute, the Court assumes the "term . . . comes with a common law meaning." *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 58. Here, by stating that a patent is "presumed valid," § 282, Congress used a term with a settled common-law meaning. *Radio Corp. of America* v. *Radio Engineering Laboratories, Inc.*, 293 U. S. 1 *(RCA)*, is authoritative. There, tracing nearly a century of case law, the Court stated, *inter alia*, that "there is a presumption of [patent] validity [that is] not to be overthrown except by clear and cogent evidence," *id.*, at 2. Microsoft's contention that the Court's pre-Act precedents applied a clear-and-convincing standard only in two limited circumstances is unavailing, given the absence of those qualifications from the Court's cases. Also unpersuasive is Microsoft's argument that the Federal Circuit's interpretation must fail because it renders superfluous § 282's additional statement that "[t]he burden of establishing invalidity . . . shall rest on the party asserting" it. The canon against superfluity assists only where a competing interpretation gives effect "'to every clause and word of a statute.'" *Duncan* v. *Walker*, 533 U. S. 167, 174. Here, no interpretation of § 282 avoids excess language because, under either of Microsoft's alternative theories—that the presumption only allocates the burden of production or that it shifts both the burdens of production and persuasion—the presumption itself would be unnecessary in light of § 282's additional statement as to the challenger's burden. Pp. 99–107.

(b) Also rejected is Microsoft's argument that a preponderance standard must at least apply where the evidence before the factfinder was not before the PTO during the examination process. It is true enough that, in these circumstances, "the rationale underlying the presumption—that the PTO, in its expertise, has approved the claim—seems much diminished," *KSR Int'l Co.* v. *Teleflex Inc.*, 550 U. S. 398, 426, though other rationales may still animate the presumption. But the question remains whether Congress has specified the applicable standard of proof. As established here today, Congress did just that by codifying the common-law presumption of patent validity and, implicitly, the heightened standard of proof attached to it. The Court's pre-Act cases never adopted or endorsed Microsoft's fluctuating standard of proof. And they do not indicate, even in dicta, that anything less than a clear-and-convincing standard would ever apply to an invalidity defense. In fact, the Court indicated to the contrary. See *RCA*, 293 U. S., at 8. Finally, the Court often applied the heightened standard of proof without mentioning whether the relevant prior-art evidence had been before the PTO examiner, in circumstances strongly suggesting it had not. See, *e. g.*, *Smith* v. *Hall*, 301 U. S. 216, 227, 233. Nothing in § 282's text

suggests that Congress meant to depart from that understanding to enact a standard of proof that would rise and fall with the facts of each case. Indeed, had Congress intended to drop the heightened standard of proof where the evidence before the jury varied from that before the PTO, it presumably would have said so expressly. Those pre-Act cases where various Courts of Appeals observed that the presumption is weakened or dissipated where the evidence was never considered by the PTO should be read to reflect the commonsense principle that if the PTO did not have all material facts before it, its considered judgment may lose significant force. Cf. *KSR*, 550 U. S., at 427. Consistent with that principle, a jury may be instructed to evaluate whether the evidence before it is materially new, and if so, to consider that fact when determining whether an invalidity defense has been proved by clear and convincing evidence. Pp. 108–112.

(c) This Court is in no position to judge the comparative force of the parties' policy arguments as to the wisdom of the clear-and-convincing-evidence standard that Congress adopted. Congress specified the applicable standard of proof in 1952 when it codified the common-law presumption of patent validity. During the nearly 30 years that the Federal Circuit has interpreted § 282 as the Court does today, Congress has often amended § 282 and other patent laws, but apparently has never considered any proposal to lower the standard of proof. Indeed, Congress has left the Federal Circuit's interpretation in place despite ongoing criticism, both from within the Federal Government and without. Accordingly, any recalibration of the standard of proof remains in Congress' hands. Pp. 112–114.

598 F. 3d 831, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion, in which SCALIA and ALITO, JJ., joined, *post*, p. 114. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 115. ROBERTS, C. J., took no part in the consideration or decision of the case.

Thomas G. Hungar argued the cause for petitioner. With him on the briefs were *Theodore B. Olson*, *Matthew D. McGill*, *Matthew D. Powers*, *T. Andrew Culbert*, *Isabella Fu*, *Kevin Kudlac*, and *Amber H. Rovner*.

Seth P. Waxman argued the cause for respondents. With him on the brief were *Paul R. Q. Wolfson*, *Daniel S. Volchok*, *Francesco Valentini*, *Donald R. Dunner*, *Don O. Bur-*

ley, Erik Puknys, Kara F. Stoll, Douglas A. Cawley, Jeffrey A. Carter, Travis Gordon White, and *Robert Greene Sterne.*

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Acting Solicitor General Katyal, Assistant Attorney General West, Ginger D. Anders, Scott R. McIntosh, Raymond T. Chen,* and *William LaMarca.**

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*Briefs of *amici curiae* urging reversal were filed for Apotex, Inc., by *Roy T. Englert, Jr., Mark T. Stancil,* and *Shashank Upadhye;* for Apple Inc. et al. by *Deanne E. Maynard, Seth M. Galanter,* and *Marc A. Hearron;* for the Business Software Alliance by *Andrew J. Pincus;* for the Computer & Communications Industry Association by *Jonathan Band;* for CTIA—The Wireless Association by *Michael K. Kellogg, Gregory G. Rapawy,* and *Michael F. Altschul;* for the Fédération Internationale des Conseils en Propriété Industrielle by *John P. Sutton;* for the Hercules Open-Source Project by *E. Joshua Rosenkranz, Mark S. Davies,* and *Richard A. Rinkema;* for the Public Patent Foundation by *Daniel B. Ravicher;* for SAP America, Inc., et al. by *James W. Dabney, Stephen S. Rabinowitz, Henry C. Lebowitz,* and *John F. Duffy;* for the Securities Industry and Financial Markets Association et al. by *John A. Squires, Kate McSweeny,* and *Kevin Carroll;* for Synerx Pharma, LLC, by *D. Christopher Ohly* and *Douglass C. Hochstetler;* and for Timex Group USA, Inc., et al. by *John R. Horvack, Jr.,* and *Fatima Lahnin.* Briefs of *amici curiae* urging vacation were filed for Google Inc. et al. by *Paul D. Clement, Daryl Joseffer, Adam Conrad,* and *John Thorne;* for Internet Retailers by *Peter J. Brann;* for Teva Pharmaceuticals USA, Inc., by *Henry C. Dinger* and *Elaine Herrmann Blais;* and for the William Mitchell College of Law Intellectual Property Institute by *R. Carl Moy.*

Briefs of *amici curiae* urging affirmance were filed for Aberdare Ventures et al. by *Douglas Hallward-Driemeier;* for AmiCOUR IP Group, LLC, by *Kirstin M. Jahn* and *Robert A. Rowan;* for Bayer AG by *Kannon K. Shanmugam, Adam L. Perlman,* and *David M. Krinsky;* for the Biotechnology Industry Organization et al. by *Patricia A. Millett* and *Michael C. Small;* for Eagle Harbor Holdings, LLC, by *Kathryn E. Karcher;* for elcommerce.com.inc. by *Christopher M. Perry;* for the Intellectual Property Owners Association by *Paul H. Berghoff, Douglas K. Norman,* and *Kevin Rhodes;* for Intellectual Ventures Management et al. by *Justin A. Nelson, Brooke A. M. Taylor, Makan Delrahim,* and *Allen P. Grunes;* for IP Advocate by *Charles E. Miller;* for Pharmaceutical Research and Manufacturers of America by *Harry J. Roper* and *Elaine J. Goldenberg;* for Project Fastlane, Inc., by *Scott S. Kokka, Kenneth R. Backus, Jr.,* and *Chien-Ju Alice Chuang;* for the San Diego Intellectual Property Law

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Under § 282 of the Patent Act of 1952, "[a] patent shall be presumed valid" and "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." 35 U. S. C. § 282. We consider whether § 282 requires an invalidity defense to be proved by clear and convincing evidence. We hold that it does.

I

A

Pursuant to its authority under the Patent Clause, U. S. Const., Art. I, § 8, cl. 8, Congress has charged the United States Patent and Trademark Office (PTO) with the task of examining patent applications, 35 U. S. C. § 2(a)(1), and issu-

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Association et al. by *Douglas E. Olson* and *Timothy N. Tardibono;* for Unity Semiconductor Corp. by *Messrs. Kokka, Backus,* and *Ms. Chuang;* for 3M Co. et al. by *Thomas C. Goldstein;* and for Dr. Ron D. Katznelson by *Mr. Miller.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Donald R. Ware, Barbara A. Fiacco,* and *William G. Barber;* for the Bar Association of the District of Columbia Patent, Trademark & Copyright Section by *John E. Dubiansky;* for the Association of Practicing Entities by *Donald E. Lake III, Aaron P. Bradford,* and *William W. Cochran II;* for the Boston Patent Law Association by *Erik Paul Belt;* for Cisco Systems, Inc., et al. by *John D. Vandenberg* and *Joseph T. Jakubek;* for the Electronic Frontier Foundation et al. by *Michael Barclay, Corynne McSherry,* and *James S. Tyre;* for EMC Corp. by *Paul T. Dacier;* for Former USPTO Commissioners and Directors by *Alexander C. D. Giza* and *Larry C. Russ;* for Genentech, Inc., et al. by *Jerome B. Falk, Jr.,* and *Gary H. Loeb;* for International Business Machines Corp. by *Kenneth R. Adamo, Lawrence D. Rosenberg, Traci L. Lovitt,* and *Marian Underweiser;* for Seven Retired Naval Officers by *Robert P. Greenspoon* and *William W. Flachsbart;* for Tessera, Inc., et al. by *Joseph M. Lipner, Benjamin W. Hattenbach, Mark A. Kressel,* and *Keith A. Ashmus;* for University Patent Owners and Licensees by *Lawrence K. Nodine* and *Katrina M. Quicker;* for Lee A. Hollaar by *David M. Bennion;* for Roberta J. Morris by *Ms. Morris, pro se;* for Triantafyllos Tafas, Ph. D. by *Steven J. Moore;* and for 37 Law, Business, and Economics Professors by *Mark A. Lemley.*

ing patents if "it appears that the applicant is entitled to a patent under the law," § 131. Congress has set forth the prerequisites for issuance of a patent, which the PTO must evaluate in the examination process. To receive patent protection a claimed invention must, among other things, fall within one of the express categories of patentable subject matter, § 101, and be novel, § 102, and nonobvious, § 103. Most relevant here, the on-sale bar of § 102(b) precludes patent protection for any "invention" that was "on sale in this country" more than one year prior to the filing of a patent application. See generally *Pfaff* v. *Wells Electronics, Inc.*, 525 U. S. 55, 67–68 (1998). In evaluating whether these and other statutory conditions have been met, PTO examiners must make various factual determinations—for instance, the state of the prior art in the field and the nature of the advancement embodied in the invention. See *Dickinson* v. *Zurko*, 527 U. S. 150, 153 (1999).

Once issued, a patent grants certain exclusive rights to its holder, including the exclusive right to use the invention during the patent's duration. To enforce that right, a patentee can bring a civil action for infringement if another person "without authority makes, uses, offers to sell, or sells any patented invention, within the United States." § 271(a); see also § 281.

Among other defenses under § 282 of the Patent Act of 1952 (1952 Act), an alleged infringer may assert the invalidity of the patent—that is, he may attempt to prove that the patent never should have issued in the first place. See §§ 282(2), (3). A defendant may argue, for instance, that the claimed invention was obvious at the time and thus that one of the conditions of patentability was lacking. See § 282(2); see also § 103. "While the ultimate question of patent validity is one of law," *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 17 (1966) (citing *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 155 (1950) (Douglas, J., concurring)); see *post*, at 114 (BREYER, J., con-

curring), the same factual questions underlying the PTO's original examination of a patent application will also bear on an invalidity defense in an infringement action, see, *e. g.*, 383 U. S., at 17 (describing the "basic factual inquiries" that form the "background" for evaluating obviousness); *Pfaff*, 525 U. S., at 67–69 (same, as to the on-sale bar).

In asserting an invalidity defense, an alleged infringer must contend with the first paragraph of § 282, which provides that "[a] patent shall be presumed valid" and "[t]he burden of establishing invalidity . . . rest[s] on the party asserting such invalidity."[1] Under the Federal Circuit's reading of § 282, a defendant seeking to overcome this presumption must persuade the factfinder of its invalidity defense by clear and convincing evidence. Judge Rich, a principal drafter of the 1952 Act, articulated this view for the court in *American Hoist & Derrick Co.* v. *Sowa & Sons, Inc.*, 725 F. 2d 1350 (CA Fed. 1984). There, the Federal Circuit held that § 282 codified "the existing presumption of validity of patents," *id.*, at 1359 (internal quotation marks omitted)—what, until that point, had been a common-law presumption based on "the basic proposition that a government agency such as the [PTO] was presumed to do its job," *ibid.* Relying on this Court's pre-1952 precedent as to the "force of the presumption," *ibid.* (citing *Radio Corp. of America* v. *Radio Engineering Laboratories, Inc.*, 293 U. S. 1 (1934) *(RCA)*), Judge Rich concluded:

> "[Section] 282 creates a presumption that a patent is valid and imposes the burden of proving invalidity on the attacker. That burden is constant and never changes and is to convince the court of invalidity by clear evidence." 725 F. 2d, at 1360.

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[1] As originally enacted in 1952, the first paragraph of § 282 read: "A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it." 66 Stat. 812. Congress has since amended § 282, inserting two sentences not relevant here and modifying the language of the second sentence to that in the text.

In the nearly 30 years since *American Hoist*, the Federal Circuit has never wavered in this interpretation of § 282. See, *e. g.*, *Greenwood* v. *Hattori Seiko Co.*, 900 F. 2d 238, 240–241 (1990); *Ultra-Tex Surfaces, Inc.* v. *Hill Bros. Chemical Co.*, 204 F. 3d 1360, 1367 (2000); *ALZA Corp.* v. *Andrx Pharmaceuticals, LLC*, 603 F. 3d 935, 940 (2010).

B

Respondents i4i Limited Partnership and Infrastructures for Information Inc. (collectively, i4i) hold the patent at issue in this suit. The i4i patent claims an improved method for editing computer documents, which stores a document's content separately from the metacodes associated with the document's structure. In 2007, i4i sued petitioner Microsoft Corporation for willful infringement, claiming that Microsoft's manufacture and sale of certain Microsoft Word products infringed i4i's patent. In addition to denying infringement, Microsoft counterclaimed and sought a declaration that i4i's patent was invalid and unenforceable.

Specifically and as relevant here, Microsoft claimed that the on-sale bar of § 102(b) rendered the patent invalid, pointing to i4i's prior sale of a software program known as S4. The parties agreed that, more than one year prior to the filing of the i4i patent application, i4i had sold S4 in the United States. They presented opposing arguments to the jury, however, as to whether that software embodied the invention claimed in i4i's patent. Because the software's source code had been destroyed years before the commencement of this litigation, the factual dispute turned largely on trial testimony by S4's two inventors—also the named inventors on the i4i patent—both of whom testified that S4 did not practice the key invention disclosed in the patent.

Relying on the undisputed fact that the S4 software was never presented to the PTO examiner, Microsoft objected to i4i's proposed instruction that it was required to prove its invalidity defense by clear and convincing evidence. In-

stead, "if an instruction on the 'clear and convincing' burden were [to be] given," App. 124a, n. 8, Microsoft requested the following:

> "'Microsoft's burden of proving invalidity and unenforceability is by clear and convincing evidence. However, Microsoft's burden of proof with regard to its defense of invalidity based on prior art that the examiner did not review during the prosecution of the patent-in-suit is by preponderance of the evidence.'" *Ibid.*

Rejecting the hybrid standard of proof that Microsoft advocated, the District Court instructed the jury that "Microsoft has the burden of proving invalidity by clear and convincing evidence." App. to Pet. for Cert. 195a.

The jury found that Microsoft willfully infringed the i4i patent and that Microsoft failed to prove invalidity due to the on-sale bar or otherwise. Denying Microsoft's post-trial motions, the District Court rejected Microsoft's contention that the court improperly instructed the jury on the standard of proof. The Court of Appeals for the Federal Circuit affirmed.[2] 598 F. 3d 831, 848 (2010). Relying on its settled interpretation of § 282, the court explained that it could "discern [no] error" in the jury instruction requiring Microsoft to prove its invalidity defense by clear and convincing evidence. *Ibid.* We granted certiorari. 562 U. S. 1060 (2010).

II

According to Microsoft, a defendant in an infringement action need only persuade the jury of an invalidity defense by a preponderance of the evidence. In the alternative, Microsoft insists that a preponderance standard must apply at least when an invalidity defense rests on evidence that was

[2] Although not relevant here, the Court of Appeals modified the effective date of the permanent injunction that the District Court entered in favor of i4i. 598 F. 3d, at 863–864.

never considered by the PTO in the examination process. We reject both contentions.[3]

A

Where Congress has prescribed the governing standard of proof, its choice controls absent "countervailing constitutional constraints." *Steadman* v. *SEC*, 450 U. S. 91, 95 (1981). The question, then, is whether Congress has made such a choice here.

As stated, the first paragraph of § 282 provides that "[a] patent shall be presumed valid" and "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." Thus, by its express terms, § 282 establishes a presumption of patent validity, and it provides that a challenger must overcome that presumption to prevail on an invalidity defense. But, while the statute explicitly specifies the burden of proof, it includes no express articulation of the standard of proof.[4]

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[3] i4i contends that Microsoft forfeited the first argument by failing to raise it until its merits brief in this Court. The argument, however, is within the scope of the question presented, and because we reject it on its merits, we need not decide whether it has been preserved.

[4] A preliminary word on terminology is in order. As we have said, "[t]he term 'burden of proof' is one of the 'slipperiest members of the family of legal terms.'" *Schaffer* v. *Weast*, 546 U. S. 49, 56 (2005) (quoting 2 J. Strong, McCormick on Evidence § 342, p. 433 (5th ed. 1999) (alteration omitted)). Historically, the term has encompassed two separate burdens: the "burden of persuasion" (specifying which party loses if the evidence is balanced), as well as the "burden of production" (specifying which party must come forward with evidence at various stages in the litigation). 546 U. S., at 56. Adding more confusion, the term "burden of proof" has occasionally been used as a synonym for "standard of proof." *E. g.*, *Grogan* v. *Garner*, 498 U. S. 279, 286 (1991).

Here we use "burden of proof" interchangeably with "burden of persuasion" to identify the party who must persuade the jury in its favor to prevail. We use the term "standard of proof" to refer to the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion. See *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). In other words, the term

Our statutory inquiry, however, cannot simply end there. We begin, of course, with "the assumption that the ordinary meaning of [the] language" chosen by Congress "accurately expresses the legislative purpose." *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U. S. 246, 252 (2004) (internal quotation marks omitted). But where Congress uses a common-law term in a statute, we assume the "term . . . comes with a common law meaning, absent anything pointing another way." *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 58 (2007) (citing *Beck* v. *Prupis*, 529 U. S. 494, 500–501 (2000)). Here, by stating that a patent is "presumed valid," § 282, Congress used a term with a settled meaning in the common law.

Our decision in *RCA*, 293 U. S. 1, is authoritative. There, tracing nearly a century of case law from this Court and others, Justice Cardozo wrote for a unanimous Court that "there is a presumption of validity, a presumption not to be overthrown except by clear and cogent evidence." *Id.*, at 2. Although the "force" of the presumption found "varying expression" in this Court and elsewhere, *id.*, at 7, Justice Cardozo explained, one "common core of thought and truth" unified the decisions:

> "[O]ne otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance. If that is true where the assailant connects himself in some way with the title of the true inventor, it is so *a fortiori* where he is a stranger to the invention, without claim of title of his own. If it is

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"standard of proof" specifies how difficult it will be for the party bearing the burden of persuasion to convince the jury of the facts in its favor. Various standards of proof are familiar—beyond a reasonable doubt, by clear and convincing evidence, and by a preponderance of the evidence. See generally 21B C. Wright & K. Graham, Federal Practice & Procedure § 5122, pp. 405–411 (2d ed. 2005) (hereinafter Fed. Practice) (describing these and other standards of proof).

> true where the assailant launches his attack with evidence different, at least in form, from any theretofore produced in opposition to the patent, it is so a bit more clearly where the evidence is even verbally the same." *Id.*, at 8 (citation omitted).[5]

The common-law presumption, in other words, reflected the universal understanding that a preponderance standard of proof was too "dubious" a basis to deem a patent invalid. *Ibid.;* see also *id.*, at 7 ("[A] patent . . . is presumed to be valid until the presumption has been overcome by convincing evidence of error").

Thus, by the time Congress enacted § 282 and declared that a patent is "presumed valid," the presumption of patent validity had long been a fixture of the common law. According to its settled meaning, a defendant raising an invalidity defense bore "a heavy burden of persuasion," requiring proof of the defense by clear and convincing evidence. *Id.*, at 8. That is, the presumption encompassed not only an allocation of the burden of proof but also an imposition of a heightened standard of proof. Under the general rule that a common-law term comes with its common-law meaning, we cannot conclude that Congress intended to "drop" the heightened standard of proof from the presumption simply because § 282 fails to reiterate it expressly. *Neder* v. *United States*, 527

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[5] Among other cases, Justice Cardozo cited *Cantrell* v. *Wallick*, 117 U. S. 689, 695–696 (1886) ("Not only is the burden of proof to make good this defence upon the party setting it up, but . . . every reasonable doubt should be resolved against him" (internal quotation marks omitted)); *Coffin* v. *Ogden*, 18 Wall. 120, 124 (1874) ("The burden of proof rests upon [the defendant], and every reasonable doubt should be resolved against him"); *The Barbed Wire Patent*, 143 U. S. 275, 285 (1892) ("[This] principle has been repeatedly acted upon in the different circuits"); and *Washburn* v. *Gould*, 29 F. Cas. 312, 320 (No. 17,214) (CC Mass. 1844) (charging jury that "if it should so happen, that your minds are led to a reasonable doubt on the question, inasmuch as it is incumbent on the defendant to satisfy you beyond that doubt, you will find for the plaintiff").

U. S. 1, 23 (1999); see also *id.*, at 21 (" 'Where Congress uses terms that have accumulated settled meaning under . . . the common law, [we] must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms' " (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 322 (1992))); *Standard Oil Co. of N. J.* v. *United Sates*, 221 U. S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense . . . "). "On the contrary, we must *presume* that Congress intended to incorporate" the heightened standard of proof, "unless the statute otherwise dictates." *Neder*, 527 U. S., at 23 (internal quotation marks omitted).

We recognize that it may be unusual to treat a presumption as alone establishing the governing standard of proof. See, *e. g.*, J. Thayer, Preliminary Treatise on Evidence at the Common Law 336–337 (1898) (hereinafter Thayer) ("When . . . we read that the contrary of any particular presumption must be proved beyond a reasonable doubt, . . . it is to be recognized that we have something superadded to the rule of presumption, namely, another rule as to the amount of evidence which is needed to overcome the presumption"). But given how judges, including Justice Cardozo, repeatedly understood and explained the presumption of patent validity, we cannot accept Microsoft's argument that Congress used the words "presumed valid" to adopt only a procedural device for "shifting the burden of production," or for "shifting both the burden of production and the burden of persuasion." Brief for Petitioner 21–22 (emphasis deleted). Whatever the significance of a presumption in the abstract, basic principles of statutory construction require us to assume that Congress meant to incorporate "the cluster of ideas" attached to the common-law term it adopted. *Beck*, 529 U. S., at 501 (internal quotation marks omitted). And *RCA* leaves no doubt that attached to the common-law presumption of patent va-

lidity was an expression as to its "force," 293 U. S., at 7—that is, the standard of proof required to overcome it.[6]

Resisting the conclusion that Congress adopted the heightened standard of proof reflected in our pre-1952 cases, Microsoft contends that those cases applied a clear-and-convincing standard of proof only in two limited circumstances, not in every case involving an invalidity defense. First, according to Microsoft, the heightened standard of proof applied in cases "involving oral testimony of prior invention," simply to account for the unreliability of such testimony. Brief for Petitioner 25. Second, Microsoft tells us, the heightened standard of proof applied to "invalidity challenges based on priority of invention," where that issue had previously been litigated between the parties in PTO proceedings. *Id.*, at 28.

Squint as we may, we fail to see the qualifications that Microsoft purports to identify in our cases. They certainly make no appearance in *RCA*'s explanation of the presumption of patent validity. *RCA* simply said, without qualification, "that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance." 293 U. S., at 8; see also *id.*, at 7 ("A patent regularly issued, *and even more obviously* a patent issued after a hearing of all the rival claimants, is pre-

[6] Microsoft objects that this reading of § 282 "conflicts with the usual understanding of presumptions." Reply Brief for Petitioner 4. In support, it relies on the "understanding" reflected in Federal Rule of Evidence 301, which explains the ordinary effect of a presumption in federal civil actions. That Rule, however, postdates the 1952 Act by nearly 30 years, and it is not dispositive of how Congress in 1952 understood presumptions generally, much less the presumption of patent validity. In any event, the word "presumption" has often been used when another term might be more accurate. See Thayer 335 ("Often . . . maxims and ground principles get expressed in this form of a presumption perversely and inaccurately"). And, to the extent Congress used the words "presumed valid" in an imprecise way, we cannot fault it for following our lead.

sumed to be valid until the presumption has been overcome by convincing evidence of error" (emphasis added)). Nor do they appear in any of our cases as express limitations on the application of the heightened standard of proof. Cf., *e. g.*, *Smith* v. *Hall*, 301 U. S. 216, 233 (1937) (citing *RCA* for the proposition that a "heavy burden of persuasion . . . rests upon one who seeks to negative novelty in a patent by showing prior use"); *Mumm* v. *Jacob E. Decker & Sons*, 301 U. S. 168, 171 (1937) ("Not only is the burden to make good this defense upon the party setting it up, but his burden is a heavy one, as it has been held that every reasonable doubt should be resolved against him" (internal quotation marks omitted)). In fact, Microsoft itself admits that our cases "could be read as announcing a heightened standard applicable to all invalidity assertions." Brief for Petitioner 30 (emphasis deleted).

Furthermore, we cannot agree that Microsoft's proposed limitations are inherent—even if unexpressed—in our pre-1952 cases. As early as 1874 we explained that the burden of proving prior inventorship "rests upon [the defendant], and every reasonable doubt should be resolved against him," without tying that rule to the vagaries and manipulability of oral testimony. *Coffin* v. *Ogden*, 18 Wall. 120, 124 (1874). And, more than 60 years later, we applied that rule where the evidence in support of a prior-use defense included documentary proof—not just oral testimony—in a case presenting no priority issues at all. See *Smith*, 301 U. S., at 221, 233. Thus, even if Congress searched for some unstated limitations on the heightened standard of proof in our cases, it would have found none.[7]

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[7] In a similar vein, Microsoft insists that there simply was no settled presumption of validity for Congress to codify in 1952. Microsoft points to a handful of District Court decisions, which "question[ed] whether any presumption of validity was warranted," or which "required the patentee to prove the validity of his patent by a preponderance of the evidence." Brief for Petitioner 24 (emphasis deleted; brackets and internal quotation

Microsoft also argues that the Federal Circuit's interpretation of § 282's statement that "[a] patent shall be presumed valid" must fail because it renders superfluous the statute's additional statement that "[t]he burden of establishing invalidity of a patent . . . shall rest on the party asserting such invalidity." We agree that if the presumption imposes a heightened standard of proof on the patent challenger, then it alone suffices to establish that the defendant bears the burden of persuasion. Cf. *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267, 278 (1994) ("A standard of proof . . . can apply only to a burden of persuasion"). Indeed, the Federal Circuit essentially recognized as much in *American Hoist*. See 725 F. 3d, at 1359.

But the canon against superfluity assists only where a competing interpretation gives effect "'to every clause and word of a statute.'" *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955)); see *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 236 (2011). Here, no interpretation of § 282—including the two alternatives advanced by Microsoft—avoids excess language. That is, if the presumption only "allocates the bur-

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marks omitted); see, *e. g.*, *Ginsberg* v. *Railway Express Agency, Inc.*, 72 F. Supp. 43, 44 (SDNY 1947) (stating, in dicta, that "[i]t may now well be said that no presumption whatever arises from the grant of patent"); see also *post*, at 115–116 (THOMAS, J., concurring in judgment). *RCA* makes clear, however, that the presumption of patent validity had an established meaning traceable to the mid-19th century, 293 U. S. 1, 7–8 (1934); that some lower courts doubted its wisdom or even pretended it did not exist is of no moment. Microsoft may be correct that Congress enacted § 282 to correct lower courts that required the patentee to prove the validity of a patent. See *American Hoist & Derrick Co.* v. *Sowa & Sons, Inc.*, 725 F. 2d 1350, 1359 (CA Fed. 1984). But the language Congress selected reveals its intent not only to specify that the defendant bears the burden of proving invalidity but also that the evidence in support of the defense must be clear and convincing.

den of production," Brief for Petitioner 21, or if it instead "shift[s] both the burden of production and the burden of persuasion," *id.*, at 22 (emphasis deleted), then *it* would be unnecessary in light of § 282's statement that the challenger bears the "burden of establishing invalidity." See 21B Fed. Practice § 5122, at 401 ("[T]he same party who has the burden of persuasion also starts out with the burden of producing evidence"). "There are times when Congress enacts provisions that are superfluous," *Corley* v. *United States*, 556 U. S. 303, 325 (2009) (ALITO, J., dissenting), and the kind of excess language that Microsoft identifies in § 282 is hardly unusual in comparison to other statutes that set forth a presumption, a burden of persuasion, and a standard of proof. Cf., *e. g.*, 28 U. S. C. § 2254(e)(1).[8]

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[8] For those of us for whom it is relevant, the legislative history of § 282 provides additional evidence that Congress meant to codify the judge-made presumption of validity, not to set forth a new presumption of its own making. The accompanying House and Senate Reports both explain that § 282 "introduces a declaration of the presumption of validity of a patent, which is now a statement made by courts in decisions, but has had no expression in the statute." H. R. Rep. No. 1923, 82d Cong., 2d Sess., 10 (1952) (hereinafter H. R. Rep.); S. Rep. No. 1979, 82d Cong., 2d Sess., 9 (1952) (hereinafter S. Rep.). To the same effect, the Reviser's Note indicates that § 282's "first paragraph declares the existing presumption of validity of patents." Note following 35 U. S. C. § 282 (1952 ed.).

Prior to 1952, the existing patent laws already incorporated the sum and substance of the presumption as Microsoft would define it—that is, they "assign[ed] the burden of proving invalidity to the accused infringer," Brief for Petitioner 14 (emphasis deleted). See 35 U. S. C. § 69 (1946 ed.) (providing that a defendant in an infringement action "may plead" and "prove on trial" the invalidity of the patent as a defense); see also Patent Act of 1870, ch. 230, § 61, 16 Stat. 208 (same); Patent Act of 1836, ch. 357, § 15, 5 Stat. 123 (similar); Patent Act of 1793, ch. XI, § 6, 1 Stat. 322 (similar); *Coffin*, 18 Wall., at 124 (explaining that the Patent Act of 1836 "allowed a party sued for infringement to prove, among other defences, that the patentee was not the original and first inventor of the thing patented, or of a substantial and material part thereof claimed to be new" (internal quotation marks omitted)). The House and Senate Reports state, how-

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Reprising the more limited argument that it pressed below, Microsoft argues in the alternative that a preponderance standard must at least apply where the evidence before the factfinder was not before the PTO during the examination process. In particular, it relies on *KSR Int'l Co.* v. *Teleflex Inc.*, 550 U. S. 398 (2007), where we observed that, in these circumstances, "the rationale underlying the presumption—that the PTO, in its expertise, has approved the claim—seems much diminished." *Id.*, at 426.

That statement is true enough, although other rationales may animate the presumption in such circumstances. See *The Barbed Wire Patent*, 143 U. S. 275, 292 (1892) (explaining that because the patentee "first published this device; put it upon record; made use of it for a practical purpose; and gave it to the public . . . doubts . . . concerning the actual inventor . . . should be resolved in favor of the patentee"); cf. Brief for United States as *Amicus Curiae* 33 (arguing that even when the administrative correctness rationale has no relevance, the heightened standard of proof "serves to protect the patent holder's reliance interests" in disclosing an invention to the public in exchange for patent protection). The question remains, however, whether Congress has specified the applicable standard of proof. As established, Congress did just that by codifying the common-law presumption of patent validity and, implicitly, the heightened standard of proof attached to it.

Our pre-1952 cases never adopted or endorsed the kind of fluctuating standard of proof that Microsoft envisions. And they do not indicate, even in dicta, that anything less than a

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ever, that § 282 established a principle that previously "had no expression in the statute." H. R. Rep., at 10; S. Rep., at 9. Thus, because the only thing missing from § 282's predecessor was the heightened standard of proof itself, Congress must have understood the presumption of patent validity to include the heightened standard of proof attached to it.

clear-and-convincing standard would ever apply to an invalidity defense raised in an infringement action. To the contrary, the Court spoke on this issue directly in *RCA*, stating that because the heightened standard of proof applied where the evidence before the court was "different" from that considered by the PTO, it applied even more clearly where the evidence was identical. 293 U. S., at 8. Likewise, the Court's statement that a "dubious preponderance" will never suffice to sustain an invalidity defense, *ibid.*, admitted of no apparent exceptions. Finally, this Court often applied the heightened standard of proof without any mention of whether the relevant prior-art evidence had been before the PTO examiner, in circumstances strongly suggesting it had not. See, *e. g.*, *Smith*, 301 U. S., at 227, 233.[9]

Nothing in § 282's text suggests that Congress meant to depart from that understanding to enact a standard of proof that would rise and fall with the facts of each case. Indeed, had Congress intended to drop the heightened standard of proof where the evidence before the jury varied from that before the PTO—and thus to take the unusual and impractical step of enacting a variable standard of proof that must itself be adjudicated in each case, cf. *Santosky* v. *Kramer*,

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[9] Microsoft cites numerous Court of Appeals decisions as support for its claim that a preponderance standard must apply in the event that the evidence in the infringement action varies from that considered by the PTO. We see no hint of the hybrid standard of proof that Microsoft advocates in these cases. Indeed, in some of these cases it appears that the court even evaluated the evidence according to a heightened standard of proof. See *Jacuzzi Bros., Inc.* v. *Berkeley Pump Co.*, 191 F. 2d 632, 634 (CA9 1951) ("Although it is not expressly stated that th[e] conclusion [of invalidity] is based upon evidence establishing the thesis beyond a reasonable doubt, the Trial Court expressed no doubt. And the record shows that such conclusion was supported by substantial evidence"); *Western Auto Supply Co.* v. *American-National Co.*, 114 F. 2d 711, 713 (CA6 1940) (concluding that the patent was invalid where the court "entertain[ed] no doubt" on the question).

455 U. S. 745, 757 (1982)[10]—we assume it would have said so expressly.

To be sure, numerous Courts of Appeals in the years preceding the 1952 Act observed that the presumption of validity is "weakened" or "dissipated" in the circumstance that the evidence in an infringement action was never considered by the PTO. See *Jacuzzi Bros., Inc.* v. *Berkeley Pump Co.*, 191 F. 2d 632, 634 (CA9 1951) ("largely dissipated"); *H. Schindler & Co.* v. *C. Saladino & Sons, Inc.*, 81 F. 2d 649, 651 (CA1 1936) ("weakened"); *Gillette Safety Razor Co.* v. *Cliff Weil Cigar Co.*, 107 F. 2d 105, 107 (CA4 1939) ("greatly weakened"); *Butler Mfg. Co.* v. *Enterprise Cleaning Co.*, 81 F. 2d 711, 716 (CA8 1936) ("weakened"). But we cannot read these cases to hold or even to suggest that a preponderance standard would apply in such circumstances, and we decline to impute such a reading to Congress. Instead, we understand these cases to reflect the same commonsense principle that the Federal Circuit has recognized throughout its existence—namely, that new evidence supporting an invalidity defense may "carry more weight" in an infringement action than evidence previously considered by the PTO, *American Hoist*, 725 F. 2d, at 1360. As Judge Rich explained:

[10] Not the least of the impracticalities of such an approach arises from the fact that whether a PTO examiner considered a particular reference will often be a question without a clear answer. In granting a patent, an examiner is under no duty to cite every reference he considers. 1 Dept. of Commerce, PTO, Manual of Patent Examining Procedure § 904.03, p. 900–51 (8th rev. ed. 2010) ("The examiner is not called upon to cite all references that may be available, but only the 'best.' Multiplying references, any one of which is as good as, but no better than, the others, adds to the burden and cost of prosecution and should therefore be avoided" (emphasis deleted and citation omitted)); Manual of Patent Examining Procedure § 904.02, p. 129 (1st rev. ed. 1952) (same), http://www.uspto.gov/web/offices/pac/mpep/old/E1R3_900.pdf (all Internet materials as visited June 6, 2011, and available in Clerk of Court's case file); see also Brief for Respondents 45–46 (describing additional impracticalities). We see no indication in § 282 that Congress meant to require collateral litigation on such an inherently uncertain question.

> "When new evidence touching validity of the patent not considered by the PTO is relied on, the tribunal considering it is not faced with having to disagree with the PTO or with deferring to its judgment or with taking its expertise into account. The evidence may, therefore, carry more weight and go further toward sustaining the attacker's unchanging burden." *Ibid.* (emphasis deleted).

See also *SIBIA Neurosciences, Inc.* v. *Cadus Pharmaceutical Corp.*, 225 F. 3d 1349, 1355–1356 (CA Fed. 2000) ("[T]he alleged infringer's burden may be more easily carried because of th[e] additional [evidence]"); *Group One, Ltd.* v. *Hallmark Cards, Inc.*, 407 F. 3d 1297, 1306 (CA Fed. 2005) (similar).

Simply put, if the PTO did not have all material facts before it, its considered judgment may lose significant force. Cf. *KSR*, 550 U. S., at 427. And, concomitantly, the challenger's burden to persuade the jury of its invalidity defense by clear and convincing evidence may be easier to sustain. In this respect, although we have no occasion to endorse any particular formulation, we note that a jury instruction on the effect of new evidence can, and when requested, most often should, be given. When warranted, the jury may be instructed to consider that it has heard evidence that the PTO had no opportunity to evaluate before granting the patent. When it is disputed whether the evidence presented to the jury differs from that evaluated by the PTO, the jury may be instructed to consider that question. In either case, the jury may be instructed to evaluate whether the evidence before it is materially new, and if so, to consider that fact when determining whether an invalidity defense has been proved by clear and convincing evidence. Cf., *e. g.*, *Mendenhall* v. *Cedarapids, Inc.*, 5 F. 3d 1557, 1563–1564 (CA Fed. 1993); see also Brief for International Business Machines Corp. as *Amicus Curiae* 31–37. Although Microsoft emphasized in its argument to the jury that S4 was never considered by

the PTO, it failed to request an instruction along these lines from the District Court. Now, in its reply brief in this Court, Microsoft insists that an instruction of this kind was warranted. Reply Brief for Petitioner 22–23. That argument, however, comes far too late, and we therefore refuse to consider it. See *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 75–76 (2010); cf. Fed. Rule Civ. Proc. 51(d)(1)(B).

III

The parties and their *amici* have presented opposing views as to the wisdom of the clear-and-convincing-evidence standard that Congress adopted. Microsoft and its *amici* contend that the heightened standard of proof dampens innovation by unduly insulating "bad" patents from invalidity challenges. They point to the high invalidation rate as evidence that the PTO grants patent protection to too many undeserving "inventions." They claim that *inter partes* reexamination proceedings before the PTO cannot fix the problem, as some grounds for invalidation (like the on-sale bar at issue here) cannot be raised in such proceedings. They question the deference that the PTO's expert determinations warrant, in light of the agency's resources and procedures, which they deem inadequate. And, they insist that the heightened standard of proof essentially causes juries to abdicate their role in reviewing invalidity claims raised in infringement actions.

For their part, i4i and its *amici*, including the United States, contend that the heightened standard of proof properly limits the circumstances in which a lay jury overturns the considered judgment of an expert agency. They claim that the heightened standard of proof is an essential component of the patent "bargain," see *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 150–151 (1989), and the incentives for inventors to disclose their innovations to the public in exchange for patent protection. They disagree with the notion that the patent issuance rate is above the

optimal level. They explain that limits on the reexamination process reflect a judgment by Congress as to the appropriate degree of interference with patentees' reliance interests. Finally, they maintain that juries that are properly instructed as to the application of the clear-and-convincing-evidence standard can, and often do, find an invalidity defense established.

We find ourselves in no position to judge the comparative force of these policy arguments. For nearly 30 years, the Federal Circuit has interpreted § 282 as we do today. During this period, Congress has often amended § 282, see, *e. g.*, Pub. L. 104–141, § 2, 109 Stat. 352; Pub. L. 98–417, § 203, 98 Stat. 1603; not once, so far as we (and Microsoft) are aware, has it even considered a proposal to lower the standard of proof, see Tr. of Oral Arg. 10. Moreover, Congress has amended the patent laws to account for concerns about "bad" patents, including by expanding the reexamination process to provide for *inter partes* proceedings. See Optional Inter Partes Reexamination Procedure Act of 1999, 113 Stat. 1501A–567, codified at 35 U. S. C. § 311 *et seq.* Through it all, the evidentiary standard adopted in § 282 has gone untouched. Indeed, Congress has left the Federal Circuit's interpretation of § 282 in place despite ongoing criticism, both from within the Federal Government and without.[11]

Congress specified the applicable standard of proof in 1952 when it codified the common-law presumption of patent va-

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[11] See, *e. g.*, FTC, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy 28 (Oct. 2003), http://www.ftc.gov/os/2003/10/innovationrpt.pdf (recommending that "legislation be enacted specifying that challenges to the validity of a patent be determined based on a preponderance of the evidence"); Alsup, Memo to Congress: A District Judge's Proposal for Patent Reform, 24 Berkeley Tech. L. J. 1647, 1655 (2009) (same); Lichtman & Lemley, Rethinking Patent Law's Presumption of Validity, 60 Stan. L. Rev. 45, 60 (2007) (proposing "statutory amendment or . . . judicial reinterpretation of the existing statute and its associated case law" to lower the standard of proof to a preponderance of the evidence (footnote omitted)).

lidity. Since then, it has allowed the Federal Circuit's correct interpretation of § 282 to stand. Any recalibration of the standard of proof remains in its hands.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Federal Circuit is

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

JUSTICE BREYER, with whom JUSTICE SCALIA and JUSTICE ALITO join, concurring.

I join the Court's opinion in full. I write separately because, given the technical but important nature of the invalidity question, I believe it worth emphasizing that in this area of law as in others the evidentiary standard of proof applies to questions of fact and not to questions of law. See, *e. g.*, *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). Thus a factfinder must use the "clear and convincing" standard where there are disputes about, say, when a product was first sold or whether a prior art reference had been published.

Many claims of invalidity rest, however, not upon factual disputes, but upon how the law applies to facts as given. Do the given facts show that the product was previously "in public use"? 35 U. S. C. § 102(b). Do they show that the invention was "nove[l]" and that it was "non-obvious"? §§ 102, 103. Do they show that the patent applicant described his claims properly? § 112. Where the ultimate question of patent validity turns on the correct answer to legal questions—what these subsidiary legal standards mean or how they apply to the facts as given—today's strict standard of proof has no application. See, *e. g.*, *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 17 (1966); *Minnesota Mining & Mfg. Co.* v. *Chemque, Inc.*, 303 F. 3d 1294, 1301

(CA Fed. 2002); *Transocean Offshore Deepwater Drilling, Inc.* v. *Maersk Contractors USA, Inc.*, 617 F. 3d 1296, 1305 (CA Fed. 2010); cf. *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370 (1996).

Courts can help to keep the application of today's "clear and convincing" standard within its proper legal bounds by separating factual and legal aspects of an invalidity claim, say, by using instructions based on case-specific circumstances that help the jury make the distinction or by using interrogatories and special verdicts to make clear which specific factual findings underlie the jury's conclusions. See Fed. Rules Civ. Proc. 49 and 51. By isolating the facts (determined with help of the "clear and convincing" standard), courts can thereby ensure the proper interpretation or application of the correct legal standard (without use of the "clear and convincing" standard). By preventing the "clear and convincing" standard from roaming outside its fact-related reservation, courts can increase the likelihood that discoveries or inventions will not receive legal protection where none is due.

JUSTICE THOMAS, concurring in the judgment.

I am not persuaded that Congress codified a standard of proof when it stated in the Patent Act of 1952 that "[a] patent shall be presumed valid." 35 U. S. C. § 282; see *ante*, at 101. "[W]here Congress borrows terms of art," this Court presumes that Congress "knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952). But I do not think that the words "[a] patent shall be presumed valid" so clearly conveyed a particular standard of proof to the judicial mind in 1952 as to constitute a term of art. See, *e. g.*, *ante*, at 106, n. 7 ("[S]ome lower courts doubted [the presumption's] wisdom or even pretended it did not exist"); *Philip A. Hunt Co.* v. *Mallinckrodt Chemical Works*, 72 F. Supp. 865, 869

(EDNY 1947) ("[T]he impact upon the presumption of many late decisions seems to have rendered it as attenuated . . . as the shadow of a wraith"); *Myers* v. *Beall Pipe & Tank Corp.*, 90 F. Supp. 265, 268 (D Ore. 1948) ("[T]he presumption of [patent] validity . . . is treated by the appellate courts as evanescent as a cloud"); *American Hoist & Derrick Co.* v. *Sowa & Sons, Inc.*, 725 F. 2d 1350, 1359 (CA Fed. 1984) ("[I]n 1952, the case law was far from consistent—even contradictory—about the presumption"); cf. *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 255–258 (2011) (Congress' use of a word that is similar to a term of art does not codify the term of art). Therefore, I would not conclude that Congress' use of that phrase codified a standard of proof.

Nevertheless, I reach the same outcome as the Court. Because § 282 is silent as to the standard of proof, it did not alter the common-law rule. See *ante*, at 100 ("[Section 282] includes no express articulation of the standard of proof"). For that reason, I agree with the Court that the heightened standard of proof set forth in *Radio Corp. of America* v. *Radio Engineering Laboratories, Inc.*, 293 U. S. 1 (1934)—which has never been overruled by this Court or modified by Congress—applies.

Syllabus

NEVADA COMMISSION ON ETHICS *v.* CARRIGAN

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 10–568. Argued April 27, 2011—Decided June 13, 2011

Nevada's Ethics in Government Law requires public officials to recuse themselves from voting on, or advocating the passage or failure of, "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by," *inter alia*, "[h]is commitment in a private capacity to the interests of others," Nev. Rev. Stat. § 281A.420(2) (2007), which includes a "commitment to a [specified] person," *e. g.*, a member of the officer's household or the officer's relative, § 281A.420(8)(a)–(d), and "[a]ny other commitment or relationship that is substantially similar" to one enumerated in paragraphs (a)–(d), § 281A.420(8)(e).

Petitioner (Commission) administers and enforces Nevada's law. The Commission investigated respondent Carrigan, an elected local official who voted to approve a hotel/casino project proposed by a company that used Carrigan's long-time friend and campaign manager as a paid consultant. The Commission concluded that Carrigan had a disqualifying conflict of interest under § 281A.420(8)(e)'s catchall provision, and censured him for failing to abstain from voting on the project. Carrigan sought judicial review, arguing that the Nevada law violated the First Amendment. The State District Court denied the petition, but the Nevada Supreme Court reversed, holding that voting is protected speech and that § 281A.420(8)(e)'s catchall definition is unconstitutionally overbroad.

Held: The Nevada Ethics in Government Law is not unconstitutionally overbroad. Pp. 121–129.

(a) That law prohibits a legislator who has a conflict both from voting on a proposal and from advocating its passage or failure. If it was constitutional to exclude Carrigan from voting, then his exclusion from advocating during a legislative session was not unconstitutional, for it was a reasonable time, place, and manner limitation. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293. Pp. 121–122.

(b) "[A] 'universal and long-established' tradition of prohibiting certain conduct creates 'a strong presumption' that the prohibition is constitutional." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 785. Here, dispositive evidence is provided by "early congressional enactments," which offer "'contemporaneous and weighty evidence of the Constitution's meaning,'" *Printz* v. *United States*, 521 U. S. 898, 905.

Syllabus

Within 15 years of the founding, both the House and the Senate adopted recusal rules. Federal conflict-of-interest rules applicable to judges also date back to the founding. The notion that Nevada's recusal rules violate legislators' First Amendment rights is also inconsistent with longstanding traditions in the States, most of which have some type of recusal law. Pp. 122–125.

(c) Restrictions on legislators' voting are not restrictions on legislators' protected speech. A legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. He casts his vote "as trustee for his constituents, not as a prerogative of personal power." *Raines* v. *Byrd*, 521 U. S. 811, 821. Moreover, voting is not a symbolic action, and the fact that it is the product of a deeply held or highly unpopular personal belief does not transform it into First Amendment speech. Even if the mere vote itself could express depth of belief (which it cannot), this Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. See, *e. g.*, *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351. *Doe* v. *Reed*, 561 U. S. 186, distinguished. Pp. 125–128.

(d) The additional arguments raised in Carrigan's brief were not decided below or raised in his brief in opposition and are thus considered waived. Pp. 128–129.

126 Nev. 277, 236 P. 3d 616, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 129. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 132.

John P. Elwood argued the cause for petitioner. With him on the briefs were *Yvonne M. Nevarez-Goodson*, *David T. Goldberg*, *Mark T. Stancil*, *Daniel R. Ortiz*, and *Toby J. Heytens*.

E. Joshua Rosenkranz argued the cause for respondent. With him on the brief were *Mark S. Davies*, *Rachel M. McKenzie*, and *Richard L. Hasen*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Pamela Jo Bondi*, Attorney General of Florida, *Scott D. Makar*, Solicitor General, and *Courtney Brewer*, *Diane DeWolf*, and *Ronald A. Lathan*, Deputy Solicitors General, by *William H. Ryan, Jr.*, Act-

JUSTICE SCALIA delivered the opinion of the Court.

The Nevada Supreme Court invalidated a recusal provision of the State's Ethics in Government Law as unconstitutionally overbroad in violation of the First Amendment. We consider whether legislators have a personal, First Amendment right to vote on any given matter.

I

Nevada's Ethics in Government Law provides that "a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by," *inter alia*, "[h]is commitment in a private capacity to the interests of others." Nev. Rev. Stat. § 281A.420(2) (2007).[1] Section 281A.420(8)(a)–(d) of the law defines the term "commitment in a private capacity to the

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ing Attorney General of Pennsylvania, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Thomas C. Horne* of Arizona, *John W. Suthers* of Colorado, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Bill Schuette* of Michigan, *Steve Bullock* of Montana, *Greg Abbott* of Texas, and *Mark L. Shurtleff* of Utah; for the Nevada Legislature by *Kevin C. Powers* and *Brenda J. Erdoes;* for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve;* and for the Reporters Committee for Freedom of the Press et al. by *Lucy A. Dalglish, Gregg P. Leslie, Derek D. Green, Kevin M. Goldberg, David M. Giles, Peter Scheer, Mickey H. Osterreicher, René P. Milam,* and *Barbara L. Camens.*

Briefs of *amici curiae* urging affirmance were filed for the International Municipal Lawyers Association by *David Barber;* and for the James Madison Center for Free Speech et al. by *James Bopp, Jr.*

[1] At the time of the relevant events in this case, the disclosure and recusal provisions of the Ethics in Government Law were codified at Nev. Rev. Stat. § 281.501 (2003). They were recodified without relevant change in 2007 at § 281A.420, and all citations are to that version. The Nevada Legislature further amended the statute in 2009, see Nev. Stats., ch. 257, § 9.5, p. 1057, but those changes are not relevant here.

interests of others" to mean a "commitment to a person" who is a member of the officer's household; is related by blood, adoption, or marriage to the officer; employs the officer or a member of his household; or has a substantial and continuing business relationship with the officer. Paragraph (e) of the same subsection adds a catchall to that definition: "[a]ny other commitment or relationship that is substantially similar" to one of those listed in paragraphs (a)–(d).

The Ethics in Government Law is administered and enforced by the petitioner in this litigation, the Nevada Commission on Ethics. In 2005, the Commission initiated an investigation of Michael Carrigan, an elected member of the City Council of Sparks, Nevada, in response to complaints that Carrigan had violated § 281A.420(2) by voting to approve an application for a hotel/casino project known as the "Lazy 8." Carrigan, the complaints asserted, had a disabling conflict in the matter because his long-time friend and campaign manager, Carlos Vasquez, worked as a paid consultant for the Red Hawk Land Company, which had proposed the Lazy 8 project and would benefit from its approval.

Upon completion of its investigation, the Commission concluded that Carrigan had a disqualifying conflict of interest under § 281A.420(8)(e)'s catchall provision because his relationship with Vasquez was "substantially similar" to the prohibited relationships listed in § 281A.420(8)(a)–(d). Its written decision censured Carrigan for failing to abstain from voting on the Lazy 8 matter, but did not impose a civil penalty because his violation was not willful, see § 281A.480. (Before the hearing, Carrigan had consulted the Sparks city attorney, who advised him that disclosing his relationship with Vasquez before voting on the Lazy 8 project, which he did, would satisfy his obligations under the Ethics in Government Law.)

Carrigan filed a petition for judicial review in the First Judicial District Court of the State of Nevada, arguing that the provisions of the Ethics in Government Law that he was

found to have violated were unconstitutional under the First Amendment. The District Court denied the petition, but a divided Nevada Supreme Court reversed. The majority held that voting was protected by the First Amendment, and, applying strict scrutiny, found that § 281A.420(8)(e)'s catchall definition was unconstitutionally overbroad. 126 Nev. 277, 284–288, 236 P. 3d 616, 621–624 (2010).

We granted certiorari, 562 U. S. 1127 (2011).

II

The First Amendment prohibits laws "abridging the freedom of speech," which, "'as a general matter . . . means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (quoting *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65 (1983)). But the Amendment has no application when what is restricted is not protected speech. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476, 483 (1957) (obscenity not protected speech). The Nevada Supreme Court thought a legislator's vote to be protected speech because voting "is a core legislative function." 126 Nev., at 284, 236 P. 3d, at 621 (internal quotation marks omitted).

We disagree, for the same reason. But before discussing that issue, we must address a preliminary detail: The challenged law not only prohibits the legislator who has a conflict from voting on the proposal in question, but also forbids him to "advocate the passage or failure" of the proposal—evidently meaning advocating its passage or failure during the legislative debate. Neither Carrigan nor any of his *amici* contend that the prohibition on advocating can be unconstitutional if the prohibition on voting is not. And with good reason. Legislative sessions would become massive townhall meetings if those who had a right to speak were not limited to those who had a right to vote. If Carrigan was constitutionally excluded from voting, his exclusion from

"advocat[ing]" at the legislative session was a reasonable time, place, and manner limitation. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984).

III

"[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 785 (2002) (internal quotation marks omitted). Laws punishing libel and obscenity are not thought to violate "the freedom of speech" to which the First Amendment refers because such laws existed in 1791 and have been in place ever since. The same is true of legislative recusal rules. The Nevada Supreme Court and Carrigan have not cited a single decision invalidating a generally applicable conflict-of-interest recusal rule—and such rules have been commonplace for over 200 years.

"[E]arly congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning,'" *Printz* v. *United States*, 521 U. S. 898, 905 (1997) (quoting *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986)). That evidence is dispositive here. Within 15 years of the founding, both the House of Representatives and the Senate adopted recusal rules. The House rule—to which no one is recorded as having objected, on constitutional or other grounds, see D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, p. 10 (1997)—was adopted within a week of that chamber's first achieving a quorum.[2] The rule read: "No member shall vote on any question, in the event of which he is immediately and particularly interested." 1 Annals of

[2] The House first achieved a quorum on April 1, 1789, 1 Annals of Cong. 96, and it adopted rules governing its procedures on April 7, 1789, see *id.*, at 98–99.

Cong. 99 (1789). Members of the House would have been subject to this recusal rule when they voted to submit the First Amendment for ratification; their failure to note any inconsistency between the two suggests that there was none.

The first Senate rules did not include a recusal requirement, but Thomas Jefferson adopted one when he was President of the Senate. His rule provided as follows:

> "Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed, even after a division. In a case so contrary, not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to." A Manual of Parliamentary Practice for the Use of the Senate of the United States 31 (1801).

Contemporaneous treatises on parliamentary procedure track parts of Jefferson's formulation. See, *e. g.*, A. Clark, Manual, Compiled and Prepared for the Use of the [New York] Assembly 99 (1816); L. Cushing, Manual of Parliamentary Practice, Rules of Proceeding and Debate in Deliberative Assemblies 30 (7th ed. 1854).

Federal conflict-of-interest rules applicable to judges also date back to the founding. In 1792, Congress passed a law requiring district court judges to recuse themselves if they had a personal interest in a suit or had been counsel to a party appearing before them. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278–279. In 1821, Congress expanded these bases for recusal to include situations in which "the judge . . . is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit." Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. The statute was again expanded in 1911, to make any "personal

bias or prejudice" a basis for recusal. Act of Mar. 3, 1911, § 21, 36 Stat. 1090. The current version, which retains much of the 1911 version's language, is codified at 28 U. S. C. § 144. See generally *Liteky* v. *United States*, 510 U. S. 540, 544 (1994); Frank, Disqualification of Judges, 56 Yale L. J. 605, 626–630 (1947) (hereinafter Frank). There are of course differences between a legislator's vote and a judge's, and thus between legislative and judicial recusal rules; nevertheless, there do not appear to have been any serious challenges to judicial recusal statutes as having unconstitutionally restricted judges' First Amendment rights.[3]

The Nevada Supreme Court's belief that recusal rules violate legislators' First Amendment rights is also inconsistent with longstanding traditions in the States. A number of States, by common-law rule, have long required recusal of public officials with a conflict. See, *e. g.*, *In re Nashua*, 12 N. H. 425, 430 (1841) ("If one of the commissioners be interested, he shall not serve"); *Commissioners' Court* v. *Tarver*, 25 Ala. 480, 481 (1854) ("If any member . . . has a peculiar, personal interest, such member would be disqualified"); *Stubbs* v. *Florida State Finance Co.*, 118 Fla. 450, 452, 159 So. 527, 528 (1935) ("[A] public official cannot legally participate in his official capacity in the decision of a question in which he is personally and adversely interested").[4] Today,

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[3] We have held that restrictions on judges' speech during elections are a different matter. See *Republican Party of Minn.* v. *White*, 536 U. S. 765, 788 (2002) (holding that it violated the First Amendment to prohibit announcement of views on disputed legal and political issues by candidates for judicial election).

[4] A number of States enacted early judicial recusal laws as well. See, *e. g.*, 1797 Vt. Laws, § 23, p. 178 ("[N]o justice of the peace shall take cognizance of any cause, where he shall be within either the first, second, third, or fourth degree of affinity, or consanguinity, to either of the parties, or shall be directly or indirectly interested, in the cause or matter to be determined"); 1818 Mass. Laws, § 5, p. 632 ("[W]henever any Judge of Probate shall be interested in the estate of any person deceased, within the

virtually every State has enacted some type of recusal law, many of which, not unlike Nevada's, require public officials to abstain from voting on all matters presenting a conflict of interest. See National Conference of State Legislatures, Voting Recusal Provisions (2009), online at http://www.ncsl.org/?TabID=15357 (as visited June 9, 2011, and available in Clerk of Court's case file).

In an attempt to combat this overwhelming evidence of constitutional acceptability, Carrigan relies on a handful of lower-court cases from the 1980's and afterwards. See Brief for Respondent 25 (citing *Clarke* v. *United States*, 886 F. 2d 404 (CADC 1989); *Miller* v. *Hull*, 878 F. 2d 523 (CA1 1989); and *Camacho* v. *Brandon*, 317 F. 3d 153 (CA2 2003)). Even if they were relevant, those cases would be too little and too late to contradict the long-recognized need for legislative recusal. But they are not relevant. The first was vacated as moot, see *Clarke* v. *United States*, 915 F. 2d 699, 700, 706 (CADC 1990) (en banc), and the other two involve retaliation amounting to viewpoint discrimination. See *Miller*, *supra*, at 533; *Camacho*, *supra*, at 160. In the past we have applied heightened scrutiny to laws that are viewpoint discriminatory even as to speech *not* protected by the First Amendment, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 383–386 (1992). Carrigan does not assert that the recusal laws here are viewpoint discriminatory, nor could he: The statute is content-neutral and applies equally to all legislators regardless of party or position.

IV

But how can it be that restrictions upon legislators' voting are not restrictions upon legislators' protected speech? The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage

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county of such Judge, such estate shall be settled in the Probate Court of the most ancient next adjoining county . . . "); *Macon* v. *Huff*, 60 Ga. 221, 223–226 (1878). See generally Frank 609–626.

or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. As we said in *Raines* v. *Byrd*, 521 U. S. 811, 821 (1997), when denying Article III standing to legislators who claimed that their voting power had been diluted by a statute providing for a line-item veto, the legislator casts his vote "as trustee for his constituents, not as a prerogative of personal power." In this respect, voting by a legislator is different from voting by a citizen. While "a voter's franchise is a personal right," "[t]he procedures for voting in legislative assemblies . . . pertain to legislators not as individuals but as political representatives executing the legislative process." *Coleman* v. *Miller*, 307 U. S. 433, 469–470 (1939) (opinion of Frankfurter, J.).

Carrigan and JUSTICE ALITO say that legislators often "'us[e] their votes to express deeply held and highly unpopular views, often at great personal or political peril.'" *Post*, at 133 (opinion concurring in part and concurring in judgment) (quoting Brief for Respondent 23). How do they express those deeply held views, one wonders? Do ballots contain a check-one-of-the-boxes attachment that will be displayed to the public, reading something like "( ) I have a deeply held view about this; ( ) this is probably desirable; ( ) this is the least of the available evils; ( ) my personal view is the other way, but my constituents want this; ( ) my personal view is the other way, but my big contributors want this; ( ) I don't have the slightest idea what this legislation does, but on my way in to vote the party Whip said vote 'aye'"? There are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country's policies, see *Texas* v. *Johnson*, 491 U. S. 397, 406 (1989). But the act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the vic-

tim. But neither the one nor the other is an act of communication. Cf. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 66 (2006) (expressive value was "not created by the conduct itself but by the speech that accompanies it").

Moreover, the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech. Nor does the fact that action may have social consequences—such as the unpopularity that cost John Quincy Adams his Senate seat resulting from his vote in favor of the Embargo Act of 1807, see *post*, at 133. However unpopular Adams' vote may have made him, and however deeply Adams felt that his vote was the right thing to do, the act of voting was still nonsymbolic conduct engaged in for an independent governmental purpose.

Even if it were true that the vote itself could "express deeply held and highly unpopular views," the argument would still miss the mark. This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. For example, in *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351 (1997), we upheld a State's prohibition on multiple-party or "fusion" candidates for elected office against a First Amendment challenge. We admitted that a State's ban on a person's appearing on the ballot as the candidate of more than one party might prevent a party from "using the ballot to communicate to the public that it supports a particular candidate who is already another party's candidate," *id.*, at 362; but we nonetheless were "unpersuaded . . . by the party's contention that it has a right to use the ballot itself to send a particularized message." *Id.*, at 362–363; see also *Burdick* v. *Takushi*, 504 U. S. 428, 438 (1992). In like manner, a legislator has no right to use official powers for expressive purposes.

Carrigan and JUSTICE ALITO also cite *Doe* v. *Reed*, 561 U. S. 186 (2010), as establishing "the expressive character of voting." *Post*, at 133; see also Brief for Respondent 26. But *Reed* did no such thing. That case held only that a citizen's signing of a petition—"'core political speech,'" *Meyer* v. *Grant*, 486 U. S. 414, 421–422 (1988)—was not deprived of its protected status simply because, under state law, a petition that garnered a sufficient number of signatures would suspend the state law to which it pertained, pending a referendum. See *Reed*, 561 U. S., at 195; *id.*, at 221–222 (SCALIA, J., concurring in judgment). It is one thing to say that an inherently expressive act remains so despite its having governmental effect, but it is altogether another thing to say that a governmental act becomes expressive simply because the governmental actor wishes it to be so. We have never said the latter is true.[5]

V

Carrigan raises two additional arguments in his brief: that Nevada's catchall provision unconstitutionally burdens the right of association of officials and supporters, and that the provision is unconstitutionally vague. Whatever the merits of these arguments, we have no occasion to consider them. Neither was decided below: The Nevada Supreme Court made no mention of the former argument and said that it need not address the latter given its resolution of the overbreadth challenge, 126 Nev., at 282, n. 4, 236 P. 3d, at 619, n. 4. Nor was either argument raised in Carrigan's brief in

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[5] JUSTICE ALITO reasons as follows: (1) If an ordinary citizen were to vote in a straw poll on an issue pending before a legislative body, that vote would be speech; (2) if a member of the legislative body were to do the same, it would be no less expressive; therefore (3) the legislator's actual vote must also be expressive. This conclusion does not follow. A legislator voting on a bill is not fairly analogized to one simply discussing that bill or expressing an opinion for or against it. The former is performing a governmental act as a representative of his constituents, see *supra*, at 126; only the latter is exercising personal First Amendment rights.

opposition to the petition for writ of certiorari. Arguments thus omitted are normally considered waived, see this Court's Rule 15.2; *Baldwin* v. *Reese*, 541 U. S. 27, 34 (2004), and we find no reason to sidestep that Rule here.

* * *

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

It is so ordered.

JUSTICE KENNEDY, concurring.

For the reasons the Court explains, the act of casting an official vote is not itself protected by the Speech Clause of the First Amendment; and I join the Court's opinion.

It does seem appropriate to note that the opinion does not, and on this record should not, consider a free speech contention that would have presented issues of considerable import, were it to have been a proper part of the case. Neither in the submissions of the parties to this Court defining the issues presented, nor in the opinion of the Nevada Supreme Court, were the Nevada statutory provisions here at issue challenged or considered from the standpoint of burdens they impose on the First Amendment speech rights of legislators and constituents apart from an asserted right to engage in the act of casting a vote.

The statute may well impose substantial burdens on what undoubtedly is speech. The democratic process presumes a constant interchange of voices. Quite apart from the act of voting, speech takes place both in the election process and during the routine course of communications between and among legislators, candidates, citizens, groups active in the political process, the press, and the public at large. This speech and expression often finds powerful form in groups and associations with whom a legislator or candidate has long and close ties, ties made all the stronger by shared outlook

and civic purpose. The process is so intricate a part of communication in a democracy that it is difficult to describe in summary form, lest its fundamental character be understated. It may suffice, however, to note just a few examples.

Assume a citizen has strong and carefully considered positions on family life, the environment, economic principles, criminal justice, religious values, or the rights of persons. Assume, too, that based on those beliefs, he or she has personal ties with others who share those views. The occasion may arise when, to promote and protect these beliefs, close friends and associates, perhaps in concert with organized groups with whom the citizen also has close ties, urge the citizen to run for office. These persons and entities may offer strong support in an election campaign, support which itself can be expression in its classic form. The question then arises what application the Nevada statute has if a legislator who was elected with that support were to vote upon legislation central to the shared cause, or, for that matter, any other cause supported by those friends and affiliates.

As the Court notes, Nev. Rev. Stat. § 281A.420(2) (2007) provides:

> "[A] public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others."

There is, in my view, a serious concern that the statute imposes burdens on the communications and expressions just discussed. The immediate response might be that the statute does not apply because its application is confined to the legislator's "commitment in a private capacity to the interests of others." That proposition may be a debatable one. At least without the benefit of further submissions or argument or explanation, it seems that one fair interpretation, if

not the necessary one, is that the statute could apply to a legislator whose personal life is tied to the longstanding, close friendships he or she has forged in the common cause now at stake.

The application of the statute's language to the case just supposed, and to any number of variations on the supposition, is not apparent. And if the statute imposes unjustified burdens on speech or association protected by the First Amendment, or if it operates to chill or suppress the exercise of those freedoms by reason of vague terms or overbroad coverage, it is invalid. See *United States* v. *Williams*, 553 U. S. 285, 292–293, 304 (2008). A statute of this sort is an invitation to selective enforcement; and even if enforcement is undertaken in good faith, the dangers of suppression of particular speech or associational ties may well be too significant to be accepted. See *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, 1051 (1991).

The interests here at issue are at the heart of the First Amendment. "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (internal quotation marks omitted). And the Court has made it clear that "the right of citizens to band together in promoting among the electorate candidates who espouse their political views" is among the First Amendment's most pressing concerns. *Clingman* v. *Beaver*, 544 U. S. 581, 586 (2005) (internal quotation marks omitted).

The constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter is therefore a most serious matter from the standpoint of the logical and inevitable burden on speech and association that preceded the vote. The restriction may impose a significant burden on activities protected by the First Amendment. As a general matter, citizens voice their support and lend their aid because they

wish to confer the powers of public office on those whose positions correspond with their own. That dynamic, moreover, links the principles of participation and representation at the heart of our democratic government. Just as candidates announce positions in exchange for citizens' votes, *Brown* v. *Hartlage*, 456 U. S. 45, 55–56 (1982), so too citizens offer endorsements, advertise their views, and assist political campaigns based upon bonds of common purpose. These are the mechanisms that sustain representative democracy. See *ibid.*

The Court has held that due process may require recusal in the context of certain judicial determinations, see *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009); but as the foregoing indicates, it is not at all clear that a statute of this breadth can be enacted to extend principles of judicial impartiality to a quite different context. The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, see *ante*, at 124, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.

For these reasons, the possibility that Carrigan was censured because he was thought to be beholden to a person who helped him win an election raises constitutional concerns of the first magnitude.

As the Court observes, however, the question whether Nevada's recusal statute was applied in a manner that burdens the First Amendment freedoms discussed above is not presented in this case. *Ante*, at 128–129.

JUSTICE ALITO, concurring in part and concurring in the judgment.

I concur in the judgment, but I do not agree with the opinion of the Court insofar as it suggests that restrictions upon

legislators' voting are not restrictions upon legislators' speech. *Ante*, at 125–126. As respondent notes, "[o]ur history is rich with tales of legislators using their votes to express deeply held and highly unpopular views, often at great personal or political peril." Brief for Respondent 23. To illustrate this point, respondent notes, among other famous incidents, John Quincy Adams' vote in favor of the Embargo Act of 1807, a vote that is said to have cost him his Senate seat, and Sam Houston's vote against the Kansas-Nebraska Act, a vote that was deeply unpopular in the South. *Id.*, at 23–24 (citing J. Kennedy, Profiles in Courage 48, 109 (commemorative ed. 1991)).

In response to respondent's argument, the Court suggests that the "expressive value" of such votes is "'not created by the conduct itself but by the speech that accompanies it.'" *Ante*, at 127. This suggestion, however, is surely wrong. If John Quincy Adams and Sam Houston had done no more than cast the votes in question, their votes would still have spoken loudly and clearly to everyone who was interested in the bills in question. Voting has an expressive component in and of itself. The Court's strange understanding of the concept of speech is shown by its suggestion that the symbolic act of burning the American flag is speech but John Quincy Adams calling out "yea" on the Embargo Act was not. *Ibid.**

A legislative vote is not speech, the Court tells us, because the vote may express, not the legislator's sincere personal view, but simply the view that is favored by the legislator's constituents. See *ibid.* But the same is sometimes true of legislators' speeches.

Not only is the Court incorrect in its analysis of the expressive character of voting, but the Court's position is inconsistent with our reasoning just last Term in *Doe* v. *Reed*, 561 U. S. 186 (2010). There, respondents argued that "signing a petition is a legally operative legislative act and there-

*See 17 Annals of Congress 50 (1807); see also 15 *id.*, at 201 (1806).

fore 'does not involve any significant expressive element.'" *Id.*, at 195 (quoting Brief for Respondent Reed, O. T. 2009, No. 09–559, p. 31). But the Court rejected this argument, stating:

> "It is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment." 561 U. S., at 195.

But cf. *id.*, at 219 (SCALIA, J., concurring in judgment) ("I doubt whether signing a petition that has the effect of suspending a law fits within 'the freedom of speech' at all").

Our reasoning in *Reed* is applicable here. Just as the act of signing a petition is not deprived of its expressive character when the signature is given legal consequences, the act of voting is not drained of its expressive content when the vote has a legal effect. If an ordinary citizen casts a vote in a straw poll on an important proposal pending before a legislative body, that act indisputably constitutes a form of speech. If a member of the legislative body chooses to vote in the same straw poll, the legislator's act is no less expressive than that of an ordinary citizen. And if the legislator then votes on the measure in the legislative chamber, the expressive character of that vote is not eliminated simply because it may affect the outcome of the legislative process.

In Part III of its opinion, the Court demonstrates that legislative recusal rules were not regarded during the founding era as *impermissible* restrictions on freedom of speech. On that basis, I agree that the judgment below must be reversed.

Syllabus

JANUS CAPITAL GROUP, INC., ET AL. *v.* FIRST DERIVATIVE TRADERS

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

No. 09–525. Argued December 7, 2010—Decided June 13, 2011

Respondent First Derivative Traders (First Derivative), representing a class of stockholders in petitioner Janus Capital Group, Inc. (JCG), filed this private action under Securities and Exchange Commission Rule 10b–5, which forbids "any person . . . [t]o make any untrue statement of a material fact" in connection with the purchase or sale of securities. The complaint alleged, *inter alia*, that JCG and its wholly owned subsidiary, petitioner Janus Capital Management LLC (JCM), made false statements in mutual fund prospectuses filed by Janus Investment Fund—for which JCM was the investment adviser and administrator—and that those statements affected the price of JCG's stock. Although JCG created Janus Investment Fund, it is a separate legal entity owned entirely by mutual fund investors. The District Court dismissed the complaint for failure to state a claim. The Fourth Circuit reversed, holding that First Derivative had sufficiently alleged that JCG and JCM, by participating in the writing and dissemination of the prospectuses, made the misleading statements contained in the documents. Before this Court, First Derivative continues to argue that JCM made the statements but seeks to hold JCG liable only as a control person of JCM under § 20(a) of the Securities Exchange Act of 1934.

Held: Because the false statements included in the prospectuses were made by Janus Investment Fund, not by JCM, JCM and JCG cannot be held liable in a private action under Rule 10b–5. Pp. 141–148.

(a) Although neither Rule 10b–5 nor the statute it interprets, § 10(b) of the Act, expressly creates a private right of action, such an "action is implied under § 10(b)." *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9. That holding "remains the law," *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 165, but, in analyzing the question at issue, the Court is mindful that it must give "narrow dimensions . . . to a right . . . Congress did not authorize when it first enacted the statute and did not expand when it revisited" it, *id.*, at 167. Pp. 141–146.

(1) For Rule 10b–5 purposes, the maker of a statement is the person or entity with ultimate authority over the statement, including its

content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. This rule follows from *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 180, which held that Rule 10b–5's private right of action does not include suits against aiders and abettors who contribute "substantial assistance" to the making of a statement but do not actually make it. Reading "make" more broadly, to include persons or entities lacking ultimate control over a statement, would substantially undermine *Central Bank* by rendering aiders and abettors almost nonexistent. The Court's interpretation is also suggested by *Stoneridge*, 552 U. S., at 161, and accords with the narrow scope that must be given the implied private right of action, *id.*, at 167. Pp. 142–144.

(2) The Court rejects the Government's contention that "make" should be defined as "create," thereby allowing private plaintiffs to sue a person who provides the false or misleading information that another person puts into a statement. Adopting that definition would be inconsistent with *Stoneridge*, *supra*, at 161, which rejected a private Rule 10b–5 suit against companies involved in deceptive transactions, even when information about those transactions was later incorporated into false public statements. First Derivative notes the uniquely close relationship between a mutual fund and its investment adviser, but the corporate formalities were observed, and reapportionment of liability in light of this close relationship is properly the responsibility of Congress, not the courts. Furthermore, First Derivative's rule would read into Rule 10b–5 a theory of liability similar to—but broader than—control-person liability under § 20(a). Pp. 144–146.

(b) Although JCM may have been significantly involved in preparing the prospectuses, it did not itself "make" the statements at issue for Rule 10b–5 purposes. Its assistance in crafting what was said was subject to Janus Investment Fund's ultimate control. Pp. 146–148.

566 F. 3d 111, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 148.

Mark A. Perry argued the cause for petitioners. With him on the briefs was *Thomas G. Hungar.*

David C. Frederick argued the cause for respondent. With him on the brief were *Brendan J. Crimmins* and *Ira M. Press.*

Curtis E. Gannon argued the cause for the United States as *amicus curiae* in support of respondent. With him on the brief were *Acting Solicitor General Katyal*, *Deputy Solicitor General Stewart*, *David M. Becker*, *Mark D. Cahn*, *Jacob H. Stillman*, and *John W. Avery.**

JUSTICE THOMAS delivered the opinion of the Court.

This case requires us to determine whether Janus Capital Management LLC (JCM), a mutual fund investment adviser, can be held liable in a private action under Securities and Exchange Commission (SEC) Rule 10b–5 for false statements included in its client mutual funds' prospectuses. Rule 10b–5 prohibits "mak[ing] any untrue statement of a material fact" in connection with the purchase or sale of

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*Briefs of *amici curiae* urging reversal were filed for the Attorneys' Liability Assurance Society, Inc., by *John K. Villa* and *Kannon K. Shanmugam;* for the Chamber of Commerce of the United States of America by *Richard D. Bernstein*, *Barry P. Barbash*, *Robin S. Conrad*, and *Amar D. Sarwal;* for the Securities Industry and Financial Markets Association by *Carter G. Phillips*, *Jonathan F. Cohn*, *Daniel A. McLaughlin*, *Eric D. McArthur*, and *Kevin Carroll;* and for G. Eric Brunstad, Jr., et al. by *Mr. Brunstad*, *pro se*, *Robert W. Helm*, *Ruth S. Epstein*, *Collin O'Connor Udell*, and *Matthew J. Delude.*

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Jay E. Sushelsky* and *Michael R. Schuster;* for the Employees' Retirement System of the Government of the Virgin Islands by *Eric Alan Isaacson*, *Joseph D. Daley*, and *Ruby Menon;* for the New York State Common Retirement Fund et al. by *Jay W. Eisenhofer;* for William A. Birdthistle et al. by *Mr. Birdthistle*, *pro se;* and for John P. Freeman et al. by *Michael J. Brickman*, *James C. Bradley*, and *Nina H. Fields.*

Briefs of *amici curiae* were filed for the Center for Audit Quality by *Lawrence S. Robbins*, *Roy T. Englert, Jr.*, and *Donald J. Russell;* and for the Council of Institutional Investors by *Gregory S. Coleman* and *Christian J. Ward.*

securities. 17 CFR §240.10b–5 (2010). We conclude that JCM cannot be held liable because it did not make the statements in the prospectuses.

I

Janus Capital Group, Inc. (JCG), is a publicly traded company that created the Janus family of mutual funds. These mutual funds are organized in a Massachusetts business trust, the Janus Investment Fund. Janus Investment Fund retained JCG's wholly owned subsidiary, JCM, to be its investment adviser and administrator. JCG and JCM are the petitioners here.

Although JCG created Janus Investment Fund, Janus Investment Fund is a separate legal entity owned entirely by mutual fund investors. Janus Investment Fund has no assets apart from those owned by the investors. JCM provides Janus Investment Fund with investment advisory services, which include "the management and administrative services necessary for the operation of [Janus] Fun[d]," App. 225a, but the two entities maintain legal independence. At all times relevant to this case, all of the officers of Janus Investment Fund were also officers of JCM, but only one member of Janus Investment Fund's board of trustees was associated with JCM. This is more independence than is required: By statute, up to 60 percent of the board of a mutual fund may be composed of "interested persons." See 54 Stat. 806, as amended, 15 U. S. C. §80a–10(a); see also §80a–2(a)(19) (2006 ed. and Supp. IV) (defining "interested person").

As the securities laws require, Janus Investment Fund issued prospectuses describing the investment strategy and operations of its mutual funds to investors. See §§77b(a)(10), 77e(b)(2), 80a–8(b), 80a–2(a)(31), 80a–29(a)–(b) (2006 ed.). The prospectuses for several funds represented that the funds were not suitable for market timing and can be read to suggest that JCM would implement policies to

curb the practice.[1] For example, the Janus Mercury Fund prospectus dated February 25, 2002, stated that the fund was "not intended for market timing or excessive trading" and represented that it "may reject any purchase request . . . if it believes that any combination of trading activity is attributable to market timing or is otherwise excessive or potentially disruptive to the Fund." App. 141a. Although market timing is legal, it harms other investors in the mutual fund.

In September 2003, the attorney general of the State of New York filed a complaint against JCG and JCM alleging that JCG entered into secret arrangements to permit market timing in several funds run by JCM. After the complaint's allegations became public, investors withdrew significant amounts of money from the Janus Investment Fund mutual funds.[2] Because Janus Investment Fund compensated JCM based on the total value of the funds and JCM's management

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[1] Market timing is a trading strategy that exploits time delay in mutual funds' daily valuation system. The price for buying or selling shares of a mutual fund is ordinarily determined by the next net asset value (NAV) calculation after the order is placed. The NAV calculation usually happens once a day, at the close of the major U. S. markets. Because of certain time delays, however, the values used in these calculations do not always accurately reflect the true value of the underlying assets. For example, a fund may value its foreign securities based on the price at the close of the foreign market, which may have occurred several hours before the calculation. But events might have taken place after the close of the foreign market that could be expected to affect their price. If the event were expected to increase the price of the foreign securities, a market-timing investor could buy shares of a mutual fund at the artificially low NAV and sell the next day when the NAV corrects itself upward. See Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, 68 Fed. Reg. 70402 (proposed Dec. 17, 2003).

[2] In 2004, JCG and JCM settled these allegations and agreed to reduce their fees by $125 million and pay $50 million in civil penalties and $50 million in disgorgement to the mutual fund investors.

fees constituted a significant percentage of JCG's income, Janus Investment Fund's loss of value affected JCG's value as well. JCG's stock price fell nearly 25 percent, from $17.68 on September 2 to $13.50 on September 26.

Respondent First Derivative Traders (First Derivative) represents a class of plaintiffs who owned JCG stock as of September 3, 2003. Its complaint asserts claims against JCG and JCM for violations of Rule 10b–5 and § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. § 78j(b). First Derivative alleges that JCG and JCM "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [JCG and JCM] would implement measures to curb market timing in the Janus [mutual funds]." App. to Pet. for Cert. 60a. "Had the truth been known, Janus [mutual funds] would have been less attractive to investors, and consequently, [JCG] would have realized lower revenues, so [JCG's] stock would have traded at lower prices." *Id.*, at 72a.

First Derivative contends that JCG and JCM "materially misled the investing public" and that class members relied "upon the integrity of the market price of [JCG] securities and market information relating to [JCG and JCM]." *Id.*, at 109a. The complaint also alleges that JCG should be held liable for the acts of JCM as a "controlling person" under § 78t(a) (2006 ed., Supp. IV) (§ 20(a) of the Act).

The District Court dismissed the complaint for failure to state a claim.[3] *In re Mutual Funds Inv. Litigation*, 487 F. Supp. 2d 618, 620 (D Md. 2007). The Court of Appeals for the Fourth Circuit reversed, holding that First Deriva-

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[3] The elements of a private action under Rule 10b–5 are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 157 (2008).

tive had sufficiently alleged that "JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *In re Mutual Funds Inv. Litigation*, 566 F. 3d 111, 121 (2009) (emphasis in original). With respect to the element of reliance, the court found that investors would infer that JCM "played a role in preparing or approving the content of the Janus fund prospectuses," *id.*, at 127, but that investors would not infer the same about JCG, which could be liable only as a "control person" of JCM under § 20(a). *Id.*, at 128, 129–130.

II

We granted certiorari to address whether JCM can be held liable in a private action under Rule 10b–5 for false statements included in Janus Investment Fund's prospectuses. 561 U. S. 1024 (2010). Under Rule 10b–5, it is unlawful for "any person, directly or indirectly, . . . [t]o make any untrue statement of a material fact" in connection with the purchase or sale of securities. 17 CFR § 240.10b–5(b).[4] To be liable, therefore, JCM must have "made" the material misstatements in the prospectuses. We hold that it did not.[5]

A

The SEC promulgated Rule 10b–5 pursuant to authority granted under § 10(b) of the Securities Exchange Act of 1934,

[4] Rule 10b–5 makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ." 17 CFR § 240.10b–5(b).

[5] Although First Derivative argued below that JCG violated Rule 10b–5 by making the statements in the prospectuses, it now seeks to hold JCG liable solely as a control person of JCM under § 20(a). The only question we must answer, therefore, is whether JCM made the misstatements. Whether First Derivative has stated a claim against JCG as a control person depends on whether it has stated a claim against JCM.

15 U. S. C. § 78j(b). Although neither Rule 10b–5 nor § 10(b) expressly creates a private right of action, this Court has held that "a private right of action is implied under § 10(b)." *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9 (1971). That holding "remains the law," *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 165 (2008), but "[c]oncerns with the judicial creation of a private cause of action caution against its expansion," *ibid.* Thus, in analyzing whether JCM "made" the statements for purposes of Rule 10b–5, we are mindful that we must give "narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law." *Id.*, at 167.

1

One "makes" a statement by stating it. When "make" is paired with a noun expressing the action of a verb, the resulting phrase is "approximately equivalent in sense" to that verb. 6 Oxford English Dictionary 66 (def. 59) (1933) (hereinafter OED); accord, Webster's New International Dictionary 1485 (def. 43) (2d ed. 1934) ("*Make* followed by a noun with the indefinite article is often nearly equivalent to the verb intransitive corresponding to that noun"). For instance, "to make a proclamation" is the approximate equivalent of "to proclaim," and "to make a promise" approximates "to promise." See 6 OED 66 (def. 59). The phrase at issue in Rule 10b–5, "[t]o make any . . . statement," is thus the approximate equivalent of "to state."

For purposes of Rule 10b–5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circum-

stances is strong evidence that a statement was made by—and only by—the party to whom it is attributed. This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.

This rule follows from *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994), in which we held that Rule 10b–5's private right of action does not include suits against aiders and abettors. See *id.*, at 180. Such suits—against entities that contribute "substantial assistance" to the making of a statement but do not actually make it—may be brought by the SEC, see 15 U. S. C. § 78t(e), but not by private parties. A broader reading of "make," including persons or entities without ultimate control over the content of a statement, would substantially undermine *Central Bank*. If persons or entities without control over the content of a statement could be considered primary violators who "made" the statement, then aiders and abettors would be almost nonexistent.[6]

This interpretation is further supported by our recent decision in *Stoneridge*. There, investors sued "entities who, acting both as customers and suppliers, agreed to arrangements that allowed the investors' company to mislead its au-

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[6] The dissent correctly notes that *Central Bank* involved secondary, not primary, liability. *Post*, at 158 (opinion of BREYER, J.). But for *Central Bank* to have any meaning, there must be some distinction between those who are primarily liable (and thus may be pursued in private suits) and those who are secondarily liable (and thus may not be pursued in private suits).

We draw a clean line between the two—the maker is the person or entity with ultimate authority over a statement and others are not. In contrast, the dissent's only limit on primary liability is not much of a limit at all. It would allow for primary liability whenever "[t]he specific relationships alleged . . . warrant [that] conclusion"—whatever that may mean. *Post*, at 158.

ditor and issue a misleading financial statement." 552 U. S., at 152–153. We held that dismissal of the complaint was proper because the public could not have relied on the entities' undisclosed deceptive acts. *Id.*, at 166–167. Significantly, in reaching that conclusion we emphasized that "nothing [the defendants] did made it necessary or inevitable for [the company] to record the transactions as it did." *Id.*, at 161.[7] This emphasis suggests the rule we adopt today: that the maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it. Without such authority, it is not "necessary or inevitable" that any falsehood will be contained in the statement.

Our holding also accords with the narrow scope that we must give the implied private right of action. *Id.*, at 167. Although the existence of the private right is now settled, we will not expand liability beyond the person or entity that ultimately has authority over a false statement.

2

The Government contends that "make" should be defined as "create." Brief for United States as *Amicus Curiae* 14–15 (citing Webster's New International Dictionary 1485 (2d ed. 1958) (defining "make" as "[t]o cause to exist, appear, or occur")). This definition, although perhaps appropriate when "make" is directed at an object unassociated with a verb (*e. g.*, "to make a chair"), fails to capture its meaning when directed at an object expressing the action of a verb.

Adopting the Government's definition of "make" would also lead to results inconsistent with our precedent. The Government's definition would permit private plaintiffs

[7] We agree that "no one in *Stoneridge* contended that the equipment suppliers were, in fact, the *makers* of the cable company's misstatements." *Post*, at 156. If *Stoneridge* had addressed whether the equipment suppliers were "makers," today's decision would be unnecessary. The point is that *Stoneridge*'s analysis suggests that they were not.

to sue a person who "provides the false or misleading information that another person then puts into the statement." Brief for United States as *Amicus Curiae* 13.[8] But in *Stoneridge*, we rejected a private Rule 10b–5 suit against companies involved in deceptive transactions, even when information about those transactions was later incorporated into false public statements. 552 U. S., at 161. We see no reason to treat participating in the drafting of a false statement differently from engaging in deceptive transactions, when each is merely an undisclosed act preceding the decision of an independent entity to make a public statement.

For its part, First Derivative suggests that the "well-recognized and uniquely close relationship between a mutual fund and its investment adviser" should inform our decision. Brief for Respondent 21. It suggests that an investment adviser should generally be understood to be the "maker" of statements by its client mutual fund, like a playwright whose lines are delivered by an actor. We decline this invitation to disregard the corporate form. Although First Derivative and its *amici* persuasively argue that investment advisers

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[8] Because we do not find the meaning of "make" in Rule 10b–5 to be ambiguous, we need not consider the Government's assertion that we should defer to the SEC's interpretation of the word elsewhere. Brief for United States as *Amicus Curiae* 13 (citing Brief for SEC as *Amicus Curiae* in *Pacific Inv. Mgmt. Co. LLC* v. *Mayer Brown LLP*, No. 09–1619 (CA2), p. 7); see *Christensen* v. *Harris County*, 529 U. S. 576, 588 (2000). We note, however, that we have previously expressed skepticism over the degree to which the SEC should receive deference regarding the private right of action. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 41, n. 27 (1977) (noting that the SEC's presumed expertise "is of limited value" when analyzing "whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants"). This also is not the first time this Court has disagreed with the SEC's broad view of § 10(b) or Rule 10b–5. See, *e. g.*, *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 188–191 (1994); *Dirks* v. *SEC*, 463 U. S. 646, 666, n. 27 (1983); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 207 (1976); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 746, n. 10 (1975).

exercise significant influence over their client funds, see *Jones* v. *Harris Associates L. P.*, 559 U. S. 335, 338 (2010), it is undisputed that the corporate formalities were observed here. JCM and Janus Investment Fund remain legally separate entities, and Janus Investment Fund's board of trustees was more independent than the statute requires. 15 U. S. C. § 80a–10 (2006 ed.).[9] Any reapportionment of liability in the securities industry in light of the close relationship between investment advisers and mutual funds is properly the responsibility of Congress and not the courts. Moreover, just as with the Government's theory, First Derivative's rule would create the broad liability that we rejected in *Stoneridge*.

Congress also has established liability in § 20(a) for "[e]very person who, directly or indirectly, controls any person liable" for violations of the securities laws. § 78t(a) (2006 ed., Supp. IV). First Derivative's theory of liability based on a relationship of influence resembles the liability imposed by Congress for control. To adopt First Derivative's theory would read into Rule 10b–5 a theory of liability similar to—but broader in application than, see *post*, at 156—what Congress has already created expressly elsewhere.[10] We decline to do so.

B

Under this rule, JCM did not "make" any of the statements in the Janus Investment Fund prospectuses; Janus Invest-

[9] Nor does First Derivative contend that any statements made by JCM to Janus Investment Fund were "public statements" for the purposes of *Basic Inc.* v. *Levinson*, 485 U. S. 224, 227–228 (1988). We do not address whether and in what circumstances statements would qualify as "public." Cf. *post*, at 159–160 (citing cases involving liability for statements made to analysts); *In re Aetna, Inc. Securities Litigation*, 617 F. 3d 272, 275–277 (CA3 2010) (involving allegations that defendants "publicly tout[ed]" falsities on analyst conference calls).

[10] We do not address whether Congress created liability for entities that act through innocent intermediaries in 15 U. S. C. § 78t(b). See Tr. of Oral Arg. 6, 61.

ment Fund did. Only Janus Investment Fund—not JCM—bears the statutory obligation to file the prospectuses with the SEC. §§ 77e(b)(2), 80a–8(b), 80a–29(a)–(b); see also 17 CFR § 230.497 (imposing requirements on "investment companies"). The SEC has recorded that Janus Investment Fund filed the prospectuses. See JIF Group1 Standalone Prospectuses (Feb. 25, 2002), online at http://www.sec.gov/Archives/edgar/data/277751/000027775102000049/0000277751-02-000049.txt (as visited June 10, 2011, and available in Clerk of Court's case file) (recording the "Filer" of the Janus Mercury Fund prospectus as "Janus Investment Fund"). There is no allegation that JCM in fact filed the prospectuses and falsely attributed them to Janus Investment Fund. Nor did anything on the face of the prospectuses indicate that any statements therein came from JCM rather than Janus Investment Fund—a legally independent entity with its own board of trustees.[11]

First Derivative suggests that both JCM and Janus Investment Fund might have "made" the misleading state-

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[11] First Derivative suggests that "indirectly" in Rule 10b–5 may broaden the meaning of "make." We disagree. The phrase "directly or indirectly" is set off by itself in Rule 10b–5 and modifies not just "to make," but also "to employ" and "to engage." We think the phrase merely clarifies that as long as a statement is made, it does not matter whether the statement was communicated directly or indirectly to the recipient. A different understanding of "indirectly" would, like a broad definition of "make," threaten to erase the line between primary violators and aiders and abettors established by *Central Bank*.

In this case, we need not define precisely what it means to communicate a "made" statement indirectly because none of the statements in the prospectuses were attributed, explicitly or implicitly, to JCM. Without attribution, there is no indication that Janus Investment Fund was quoting or otherwise repeating a statement originally "made" by JCM. Cf. *Anixter* v. *Home-Stake Production Co.*, 77 F. 3d 1215, 1220, and n. 4 (CA10 1996) (quoting a signed "'Auditor's Report'" included in a prospectus); *Basic*, *supra*, at 227, n. 4 (quoting a news item reporting a statement by Basic's president). More may be required to find that a person or entity made a statement indirectly, but attribution is necessary.

ments within the meaning of Rule 10b–5 because JCM was significantly involved in preparing the prospectuses. But this assistance, subject to the ultimate control of Janus Investment Fund, does not mean that JCM "made" any statements in the prospectuses. Although JCM, like a speechwriter, may have assisted Janus Investment Fund with crafting what Janus Investment Fund said in the prospectuses, JCM itself did not "make" those statements for purposes of Rule 10b–5.[12]

* * *

The statements in the Janus Investment Fund prospectuses were made by Janus Investment Fund, not by JCM. Accordingly, First Derivative has not stated a claim against JCM under Rule 10b–5. The judgment of the United States Court of Appeals for the Fourth Circuit is reversed.

It is so ordered.

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

This case involves a private Securities and Exchange Commission (SEC) Rule 10b–5 action brought by a group of investors against Janus Capital Group, Inc., and Janus Capital Management LLC (Janus Management), a firm that acted as an investment adviser to a family of mutual funds (collectively, the Janus Fund or Fund). The investors claim

[12] That JCM provided access to Janus Investment Fund's prospectuses on its Web site is also not a basis for liability. Merely hosting a document on a Web site does not indicate that the hosting entity adopts the document as its own statement or exercises control over its content. Cf. *United States* v. *Ware*, 577 F. 3d 442, 448 (CA2 2009) (involving the issuance of false press releases through innocent companies). In doing so, we do not think JCM made any of the statements in Janus Investment Fund's prospectuses for purposes of Rule 10b–5 liability, just as we do not think that the SEC "makes" the statements in the many prospectuses available on its Web site.

that Janus Management knowingly made materially false or misleading statements that appeared in prospectuses issued by the Janus Fund. They say that they relied upon those statements, and that they suffered resulting economic harm.

Janus Management and the Janus Fund are closely related. Each of the Fund's officers is a Janus Management employee. Janus Management, acting through those employees (and other of its employees), manages the purchase, sale, redemption, and distribution of the Fund's investments. Janus Management prepares, modifies, and implements the Janus Fund's long-term strategies. And Janus Management, acting through those employees, carries out the Fund's daily activities.

Rule 10b–5 says in relevant part that it is unlawful for "any person, directly or indirectly . . . *[t]o make* any untrue statement of a material fact" in connection with the purchase or sale of securities. 17 CFR § 240.10b–5(b) (2010) (emphasis added). See also 15 U. S. C. § 78j(b) (2006 ed., Supp. IV) (§ 10(b) of the Securities Exchange Act of 1934). The specific legal question before us is whether Janus Management can be held responsible under the Rule for having "ma[d]e" certain false statements about the Janus Fund's activities. The statements in question appear in the Janus Fund's prospectuses.

The Court holds that only the Janus Fund, not Janus Management, could have "ma[d]e" those statements. The majority points out that the Janus Fund's board of trustees has "ultimate authority" over the content of the statements in a Fund prospectus. And in the majority's view, only "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it," can "make" a statement within the terms of Rule 10b–5. *Ante*, at 142.

In my view, however, the majority has incorrectly interpreted the Rule's word "make." Neither common English

nor this Court's earlier cases limit the scope of that word to those with "ultimate authority" over a statement's content. To the contrary, both language and case law indicate that, depending upon the circumstances, a management company, a board of trustees, individual company officers, or others, separately or together, might "make" statements contained in a firm's prospectus—even if a board of directors has ultimate content-related responsibility. And the circumstances here are such that a court could find that Janus Management made the statements in question.

I

Respondent's complaint sets forth the basic elements of a typical Rule 10b–5 "fraud on the market" claim. It alleges that Janus Management made statements that "created the misleading impression that" it "would implement measures to curb" a trading strategy called "market timing." Second Amended Complaint ¶ 6 (hereinafter Complaint), App. to Pet. for Cert. 60a. The complaint adds that Janus Management knew that these "market timing" statements were false; that the statements were material; that the market, in pricing securities (including related securities) relied upon the statements; that as a result, when the truth came out (that Janus Management indeed permitted "market timing" in the Janus Fund), the price of relevant shares fell; and the false statements thereby caused respondent significant economic losses. Complaint ¶¶ 4–10, *id.*, at 60a–63a. Cf. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 157 (2008) (identifying the elements of "a typical § 10(b) private action").

The majority finds the complaint fatally flawed, however, because (1) Rule 10b–5 says that no "person" shall "directly or indirectly . . . *make* any untrue statement of a material fact," (2) the statements at issue appeared in the *Janus Fund's* prospectuses, and (3) only "the person or entity with ultimate authority over the statement, including its content

and whether and how to communicate it," can "make" a false statement. *Ante,* at 138–139, 141–143.

But where can the majority find legal support for the rule that it enunciates? The English language does not impose upon the word "make" boundaries of the kind the majority finds determinative. Every day, hosts of corporate officials make statements with content that more senior officials or the board of directors have "ultimate authority" to control. So do cabinet officials make statements about matters that the Constitution places within the ultimate authority of the President. So do thousands, perhaps millions, of other employees make statements that, as to content, form, or timing, are subject to the control of another.

Nothing in the English language prevents one from saying that several different individuals, separately or together, "make" a statement that each has a hand in producing. For example, as a matter of English, one can say that a national political party has made a statement even if the only written communication consists of uniform press releases issued in the name of local party branches; one can say that one foreign nation has made a statement even when the officials of a different nation (subject to its influence) speak about the matter; and one can say that the President has made a statement even if his press officer issues a communication, sometimes in the press officer's own name. Practical matters related to context, including control, participation, and relevant audience, help determine who "makes" a statement and to whom that statement may properly be "attributed," see *ante,* at 147, n. 11—at least as far as ordinary English is concerned.

Neither can the majority find support in any relevant precedent. The majority says that its rule "follows from *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994)," in which the Court "held that Rule 10b–5's private right of action does not include suits against aiders and abettors." *Ante,* at 143. But *Central*

Bank concerns a different matter. And it no more requires the majority's rule than free air travel for small children requires free air travel for adults.

Central Bank is a case about *secondary* liability, liability attaching, not to an individual making a false statement, but to an individual helping *someone else* do so. *Central Bank* involved a bond issuer accused of having made materially false statements, which overstated the values of property that backed the bonds. *Central Bank* also involved a defendant that was a bank, serving as indenture trustee, which was supposed to check the bond issuer's valuations. The plaintiffs claimed that the bank delayed its valuation checks and thereby *helped* the issuer make its false statements credible. The question before the Court concerned the bank's liability—a *secondary* liability for "aiding and abetting" the bond issuer, who (on the theory set forth) was primarily liable.

The Court made this clear. The question presented was "whether private civil liability under § 10(b) extends . . . to those *who do not engage in the manipulative or deceptive practice*, but who aid and abet the violation." 511 U. S., at 167 (emphasis added). The Court wrote that "aiding and abetting liability reaches persons *who do not engage in the proscribed activities at all*, but who give a degree of aid to those who do." *Id.*, at 176 (emphasis added). The Court described civil law "aiding and abetting" as "'know-[ing] that *the other's conduct constitutes a breach of duty* and giv[ing] substantial assistance or encouragement to the other . . . .'" *Id.*, at 181 (quoting Restatement (Second) of Torts § 876(b) (1977); emphasis added). And it reviewed a Court of Appeals decision that had defined the elements of aiding and abetting as "(1) *a primary violation* of § 10(b); (2) recklessness by the aider and abettor as to the existence of the primary violation; and (3) *substantial assistance given to the primary violator* by the aider and abettor." 511 U. S., at 168 (emphasis added). Faced with this question,

the Court answered that § 10(b) and Rule 10b–5 do not provide for this kind of "aiding and abetting" liability in private suits.

By way of contrast, the present case is about *primary* liability—about individuals who allegedly themselves "make" materially false statements, not about those who help *others* to do so. The question is whether Janus Management is *primarily* liable for violating the Act, not whether it simply helped others violate the Act. The *Central Bank* defendant concededly did *not* make the false statements in question (others did), while here the defendants allegedly *did* make those statements. And a rule (the majority's rule) absolving those who allegedly *did* make false statements does not "follow from" a rule (*Central Bank*'s rule) absolving those who concededly did *not* do so.

The majority adds that to interpret the word "make" as including those "without ultimate control over the content of a statement" would "substantially undermine" *Central Bank*'s holding. *Ante*, at 143. Would it? The Court in *Central Bank* specifically wrote that its holding did

> "not mean that secondary actors in the securities markets are always free from liability under the securities Acts. *Any person or entity, including a lawyer, accountant, or bank, who* employs a manipulative device or *makes a material misstatement* (or omission) on which a purchaser or seller of securities relies *may be liable as a primary violator under 10b–5*, assuming *all* of the requirements for primary liability under Rule 10b–5 are met." 511 U. S., at 191 (some emphasis added).

Thus, as far as *Central Bank* is concerned, depending upon the circumstances, board members, senior firm officials, officials tasked to develop a marketing document, large investors, or others (taken together or separately) all might "make" materially false statements subjecting themselves to

primary liability. The majority's rule does not protect, it *extends*, *Central Bank*'s holding of no-liability into new territory that *Central Bank* explicitly placed outside that holding. And by ignoring the language in which *Central Bank* did so, the majority's rule itself undermines *Central Bank*. Where is the legal support for the majority's "draw[ing] a clean line," *ante*, at 143, n. 6, that so seriously conflicts with *Central Bank?* Indeed, where is the legal support for the majority's suggestion that plaintiffs must show some kind of "attribution" of a statement to a defendant, *ante*, at 147, n. 11—if it means plaintiffs must show, not only that the defendant "ma[d]e" the statement, but something more?

The majority also refers to *Stoneridge*, but that case offers it no help. In *Stoneridge*, firms that supplied electronic equipment to a cable television company agreed with the cable television company to enter into a series of fraudulent sales and purchases, for example, a sale at an unusually high price, thereby providing funds which the suppliers would use to buy advertising from the cable television company. These arrangements enabled the cable television company to fool its accountants (and ultimately the public) into believing that it had more revenue (for example, advertising revenue) than it really had. As part of the agreement, the companies exchanged letters and backdated contracts to conceal the fraud. Investors subsequently sued the cable television company, some of its officers, its auditors, and the equipment suppliers, as well, claiming that all of them had engaged in a scheme to defraud securities purchasers. In respect to most of the defendants, investors identified allegedly materially false statements contained in the cable television company's financial statements or similar documents. But in respect to the equipment suppliers, investors claimed that the relevant deceptive conduct was in the letters, backdated contracts, and related oral conversations about the scheme. The investors argued that the

equipment suppliers, "by participating in the transactions," violated § 10(b) and Rule 10b–5. *Stoneridge*, 552 U. S., at 155.

The Court held that the equipment suppliers could not be found liable for securities fraud in a private suit under § 10(b). But in doing so, it did not deny that the equipment suppliers *had made* the false statements contained in the letters, contracts, and conversations. See *id.*, at 158–159. Rather, the Court said the issue in the case was whether "any deceptive statement or act respondents made was not actionable because it did not have the requisite *proximate relation* to the investors' harm." *Ibid.* (emphasis added). And it held that these deceptive statements or actions could not provide a basis for liability because the investors could not prove sufficient *reliance* upon the particular false statements that the equipment suppliers had made.

The Court pointed out that the equipment suppliers "had no duty to disclose; and their deceptive acts were not communicated to the public." *Id.*, at 159. And the Court went on to say that "as a result," the investors "cannot show reliance upon any" of the equipment suppliers' actions, "except in an indirect chain that we find too remote for liability." *Ibid.* The Court concluded:

> "[The equipment suppliers'] deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance. It was [the cable company], not [the equipment suppliers], that misled its auditor and filed fraudulent financial statements; nothing [the equipment suppliers] did made it necessary or inevitable for [the cable company] to record the transactions as it did." *Id.*, at 161.

Insofar as the equipment suppliers' conduct was at issue, the fraudulent "arrangement . . . took place in the marketplace for goods and services, not in the investment sphere." *Id.*, at 166.

It is difficult for me to see how *Stoneridge* "support[s]" the majority's rule. *Ante*, at 143. No one in *Stoneridge* disputed the *making* of the relevant statements, the fraudulent contracts, and the like. And no one in *Stoneridge* contended that the equipment suppliers were, in fact, the *makers* of the cable company's misstatements. Rather, *Stoneridge* was concerned with whether the equipment suppliers' *separate* statements were sufficiently disclosed in the securities marketplace so as to be the basis for investor reliance. They were not. But this is a different inquiry than whether statements acknowledged to have been disclosed in the securities marketplace and ripe for reliance can be said to have been "ma[d]e" by one or another actor. How then does *Stoneridge* support the majority's new rule?

The majority adds that its rule is necessary to avoid "a theory of liability similar to—but broader in application than"—§ 20(a)'s liability, for "'[e]very person who, directly or indirectly, controls any person liable' for violations of the securities laws." *Ante*, at 146 (quoting 15 U. S. C. § 78t(a). But that is not so. This Court has explained that the possibility of an express remedy under the securities laws does not preclude a claim under § 10(b). *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 388 (1983).

More importantly, a person who is liable under § 20(a) controls another "*person*" *who is "liable"* for a securities violation. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 253, n. 2 (2010) ("Liability under § 20(a) is obviously derivative of liability under some other provision of the Exchange Act"). We here examine whether a person is primarily liable whether they do, or they do not, control another person *who is liable.* That is to say, here, the liability of some "other person" is not at issue.

And there is at least one significant category of cases that § 10(b) may address that derivative forms of liability, such as under § 20(a), cannot, namely, cases in which one actor exploits another as an innocent intermediary for its misstate-

ments. Here, it may well be that the Fund's board of trustees knew nothing about the falsity of the prospectuses. See, *e. g.*, *In re Lammert*, Release No. 348, 93 S. E. C. Docket 5676, 5700 (2008) (Janus Management was aware of market timing in the Janus Fund no later than 2002, but "[t]his knowledge was never shared with the Board"). And if so, § 20(a) would not apply.

The possibility of guilty management and innocent board is the 13th stroke of the new rule's clock. What is to happen when guilty management writes a prospectus (for the board) containing materially false statements and fools both board and public into believing they are true? Apparently under the majority's rule, in such circumstances *no one* could be found to have "ma[d]e" a materially false statement—even though under the common law the managers would likely have been guilty or liable (in analogous circumstances) for doing so as *principals* (and not as aiders and abettors). See, *e. g.*, 2 W. LaFave, Substantive Criminal Law § 13.1(a) (2d ed. 2003); 1 M. Hale, Pleas of the Crown 617 (1736); Perkins, Parties to Crime, 89 U. Pa. L. Rev. 581, 583 (1941) (one is guilty as a principal when one uses an innocent third party to commit a crime); Restatement (Second) of Torts § 533 (1976). Cf. *United States* v. *Giles*, 300 U. S. 41, 48–49 (1937).

Indeed, under the majority's rule it seems unlikely that the SEC itself in such circumstances could exercise the authority Congress has granted it to pursue primary violators who "make" false statements or the authority that Congress has specifically provided to prosecute aiders and abettors to securities violations. See § 104, 109 Stat. 757 (codified at 15 U. S. C. § 78t(e)) (granting SEC authority to prosecute aiders and abettors). That is because the managers, not having "ma[d]e" the statement, would not be liable as principals and there would be no other primary violator they might have tried to "aid" or "abet." *Ibid.; SEC* v. *DiBella*, 587 F. 3d 553, 566 (CA2 2009) (prosecution for aiding and abetting re-

quires primary violation to which offender gave "substantial assistance" (internal quotation marks omitted)).

If the majority believes, as its footnote hints, that § 20(b) could provide a basis for liability in this case, *ante*, at 146, n. 10, then it should remand the case for possible amendment of the complaint. "There is a dearth of authority construing Section 20(b)," which has been thought largely "superfluous in 10b–5 cases." 5B A. Jacobs, Disclosure and Remedies Under the Securities Law § 11–8, p. 11–72 (2011). Hence respondent, who reasonably thought that it referred to the proper securities law provision, is faultless for failing to mention § 20(b) as well.

In sum, I can find nothing in § 10(b) or in Rule 10b–5, its language, its history, or in precedent suggesting that Congress, in enacting the securities laws, intended a loophole of the kind that the majority's rule may well create.

II

Rejecting the majority's rule, of course, does not decide the question before us. We must still determine whether, in light of the complaint's allegations, Janus Management could have "ma[d]e" the false statements in the prospectuses at issue. In my view, the answer to this question is "Yes." The specific relationships alleged among Janus Management, the Janus Fund, and the prospectus statements warrant the conclusion that Janus Management did "make" those statements.

In part, my conclusion reflects the fact that this Court and lower courts have made clear that at least *sometimes* corporate officials and others can be held liable under Rule 10b–5 for having "ma[d]e" a materially false statement even when that statement appears in a document (or is made by a third person) that the officials do not legally control. In *Herman & MacLean*, for example, this Court pointed out that "certain individuals who play a part in preparing the registration statement," including corporate officers, lawyers, and

accountants, may be primarily liable even where "they are not named as having prepared or certified" the registration statement. 459 U. S., at 386, n. 22. And as I have already pointed out, this Court wrote in *Central Bank* that a "lawyer, accountant, or bank, who . . . makes a material misstatement (or omission) on which a purchaser or seller of securities relies *may be liable as a primary violator under 10b–5*, assuming *all* of the requirements for primary liability under Rule 10b–5 are met." 511 U. S., at 191 (some emphasis added).

Given the statements in our opinions, it is not surprising that lower courts have found primary liability for actors without "ultimate authority" over issued statements. One court, for example, concluded that an accountant could be primarily liable for having "ma[d]e" false statements, where he issued fraudulent opinion and certification letters reproduced in prospectuses, annual reports, and other corporate materials for which he was not ultimately responsible. *Anixter* v. *Home-Stake Production Co.*, 77 F. 3d 1215, 1225–1227 (CA10 1996). In a later case postdating *Stoneridge*, that court reaffirmed that an outside consultant could be primarily liable for having "ma[d]e" false statements, where he drafted fraudulent quarterly and annual filing statements later reviewed and certified by the firm's auditor, officers, and counsel. *SEC* v. *Wolfson*, 539 F. 3d 1249, 1261 (CA10 2008). And another court found that a corporation's chief financial officer could be held primarily liable as having "ma[d]e" misstatements that appeared in a form 10–K that she prepared but did not sign or file. *McConville* v. *SEC*, 465 F. 3d 780, 787 (CA7 2006).

One can also easily find lower court cases explaining that corporate officials may be liable for having "ma[d]e" false statements where those officials use innocent persons as conduits through which the false statements reach the public (without necessarily attributing the false statements to the officials). See, *e. g.*, *In re Navarre Corp. Securities Litiga-*

tion, 299 F. 3d 735, 743 (CA8 2002) (liability may be premised on use of analysts as a conduit to communicate false statements to market); *In re Cabletron Systems, Inc.*, 311 F. 3d 11, 38 (CA1 2002) (rejecting a test requiring legal "control" over third parties making statements as giving "company officials too much leeway to commit fraud on the market by using analysts as their mouthpieces" (internal quotation marks omitted)); *Novak* v. *Kasaks*, 216 F. 3d 300, 314–315 (CA2 2000); *Cooper* v. *Pickett*, 137 F. 3d 616, 624 (CA9 1997); *Freeland* v. *Iridium World Communications, Ltd.*, 545 F. Supp. 2d 59, 75–76 (DC 2008).

My conclusion also reflects the particular circumstances that the complaint alleges. The complaint states that "Janus Management, as investment advisor to the funds, is responsible for the day-to-day management of its investment portfolio and other business affairs of the funds. Janus Management furnishes advice and recommendations concerning the funds' investments, as well as administrative, compliance and accounting services for the funds." Complaint ¶ 18, App. to Pet. for Cert. 65a. Each of the Fund's 17 officers was a vice president of Janus Management. App. 250a–258a. The Fund has "no assets separate and apart from those they hold for shareholders." *In re Mutual Funds Inv. Litigation*, 384 F. Supp. 2d 845, 853, n. 3 (Md. 2005). Janus Management disseminated the Fund prospectuses through its parent company's Web site. Complaint ¶ 38, App. to Pet. for Cert. 72a. Janus Management employees drafted and reviewed the Fund prospectuses, including language about "market timing." Complaint ¶ 31, *id.*, at 69a; *In re Mutual Funds Inv. Litigation*, 590 F. Supp. 2d 741, 747 (Md. 2008). And Janus Management may well have kept the trustees in the dark about the true "market timing" facts. Complaint ¶ 51, App. to Pet. for Cert. 80a; *In re Lammert*, 93 S. E. C. Docket, at 5700.

Given these circumstances, as long as some managers, sometimes, can be held to have "ma[d]e" a materially false

statement, Janus Management can be held to have done so on the facts alleged here. The relationship between Janus Management and the Fund could hardly have been closer. Janus Management's involvement in preparing and writing the relevant statements could hardly have been greater. And there is a serious suggestion that the board itself knew little or nothing about the falsity of what was said. See *supra*, at 157, 160. Unless we adopt a formal rule (as the majority here has done) that would arbitrarily exclude from the scope of the word "make" those who manage a firm—even when those managers perpetrate a fraud through an unknowing intermediary—the management company at issue here falls within that scope. We should hold the allegations in the complaint in this respect legally sufficient.

With respect, I dissent.

Syllabus

UNITED STATES *v.* JICARILLA APACHE NATION

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

No. 10–382. Argued April 20, 2011—Decided June 13, 2011

Respondent Jicarilla Apache Nation's (Tribe) reservation contains natural resources that are developed pursuant to statutes administered by the Interior Department. Proceeds from these resources are held by the United States in trust for the Tribe. The Tribe filed a breach-of-trust action in the Court of Federal Claims (CFC), seeking monetary damages for the Government's alleged mismanagement of the Tribe's trust funds in violation of 25 U. S. C. §§ 161a–162a and other laws. During discovery, the Tribe moved to compel production of certain documents. The Government agreed to release some of the documents, but asserted that others were protected by, *inter alia*, the attorney-client privilege. The CFC granted the motion in part, holding that departmental communications relating to the management of trust funds fall within a "fiduciary exception" to the attorney-client privilege. Under that exception, which courts have applied to common-law trusts, a trustee who obtains legal advice related to trust administration is precluded from asserting the attorney-client privilege against trust beneficiaries.

Denying the Government's petition for a writ of mandamus directing the CFC to vacate its production order, the Federal Circuit agreed with the CFC that the trust relationship between the United States and the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception. The appeals court held that the United States cannot deny a tribe's request to discover communications between the Government and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the Government has not claimed that it or its attorneys considered a specific competing interest in those communications.

Held: The fiduciary exception to the attorney-client privilege does not apply to the general trust relationship between the United States and the Indian tribes. Pp. 169–187.

(a) The Court considers the bounds of the fiduciary exception and the nature of the Indian trust relationship. Pp. 169–178.

(1) Under English common law, when a trustee obtained legal advice to guide his trust administration and not for his own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice on the rationale that the advice was sought for

their benefit and obtained at their expense in that trust funds were used to pay the attorney. In the leading American case, *Riggs Nat. Bank of Washington, D. C.* v. *Zimmer*, 355 A. 2d 709, the Delaware Chancery Court applied the fiduciary exception to hold that trust beneficiaries could compel trustees to produce a legal memorandum related to the trust's administration because: (1) the trustees had obtained the legal advice as "mere representative[s]" of the beneficiaries, who were the "real clients" of the attorney, *id.*, at 711–712, and (2) the fiduciary duty to furnish trust-related information to the beneficiaries outweighed the trustees' interest in the attorney-client privilege, *id.*, at 714. The Federal Courts of Appeals apply the fiduciary exception based on the same two criteria. Pp. 170–173.

(2) The Federal Circuit analogized the Government to a private trustee. While the United States' responsibilities with respect to the management of tribal funds bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The Government's trust obligations to the tribes are established and governed by statute, not the common law, see, *e. g.*, *United States* v. *Navajo Nation*, 537 U. S. 488, 506 *(Navajo I)*, and in fulfilling its statutory duties, the Government acts not as a private trustee, but pursuant to its sovereign interest in the execution of federal law, see, *e. g.*, *Heckman* v. *United States*, 224 U. S. 413, 437. Once federal law imposes fiduciary obligations on the Government, the common law "could play a role," *United States* v. *Navajo Nation*, 556 U. S. 287, 301 *(Navajo II)*, *e. g.*, to inform the interpretation of statutes, see *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 475–476. But the applicable statutes and regulations control. When "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *Navajo II*, *supra*, at 302. Pp. 173–178.

(b) The two criteria justifying the fiduciary exception are absent in the trust relationship between the United States and Indian tribes. Pp. 178–186.

(1) In cases applying the fiduciary exception, courts identify the "real client" based on whether the advice was bought by the trust corpus, whether the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and whether the advice could have been intended for any purpose other than to benefit the trust. *Riggs*, 355 A. 2d, at 711–712. Applying these factors, the Court concludes that the United States does not obtain legal advice as a "mere representative" of the Tribe; nor is the Tribe the "real client" for whom that advice is intended. See *id.*, at 711. Here, the Government attorneys are paid out of congressional appropriations at no cost to the Tribe. The Gov-

ernment also seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe. Because its sovereign interest is distinct from the beneficiaries' private interests, the Government seeks legal advice in a personal, not a fiduciary, capacity. Moreover, the Government has too many competing legal concerns to allow a case-by-case inquiry into each communication's purpose. In addition to its duty to the Tribe, the Government may need to comply with other statutory duties, such as environmental and conservation obligations. It may also face conflicting duties to different tribes or individual Indians. It may seek the advice of counsel for guidance in balancing these competing interests or to help determine whether there are conflicting interests at all. For the attorney-client privilege to be effective, it must be predictable. See, *e. g.*, *Jaffee* v. *Redmond*, 518 U. S. 1, 18. The Government will not always be able to predict what considerations qualify as competing interests, especially before receiving counsel's advice. If the Government were required to identify the specific interests it considered in each communication, its ability to receive confidential legal advice would be substantially compromised. See *Upjohn Co.* v. *United States*, 449 U. S. 383, 393. Pp. 178–183.

(2) The Federal Circuit also decided that the fiduciary exception properly applied here because of the fiduciary's duty to disclose all trust-management-related information to the beneficiary. The Government, however, does not have the same common-law disclosure obligations as a private trustee. In this case, 25 U. S. C. § 162a(d) delineates the Government's "trust responsibilities." It identifies the Interior Secretary's obligation to supply tribal account holders "with periodic statements of their account performance" and to make "available on a daily basis" their account balances, § 162a(d)(5). The Secretary has complied with these requirements in regulations mandating that each tribe be provided with a detailed quarterly statement of performance. 25 CFR § 115.801. The common law of trusts does not override these specific trust-creating statutes and regulations. A statutory clause labeling the enumerated trust responsibilities as nonexhaustive, see § 162a(d), cannot be read to include a general common-law duty to disclose all information related to the administration of Indian trusts, since that would vitiate Congress' specification of narrowly defined disclosure obligations, see, *e. g.*, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837. By law and regulation, moreover, the documents at issue are classed "the property of the United States" while other records are "the property of the tribe." 25 CFR § 115.1000. This Court considers ownership of records to be a significant factor in deciding who "ought to have access to the document," *Riggs*, *supra*, at 712. Here, that privilege belongs to the United States. Pp. 183–186.

590 F. 3d 1305, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 187. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 188. KAGAN, J., took no part in the consideration or decision of the case.

Pratik A. Shah argued the cause for the United States. With him on the briefs were *Acting Solicitor General Katyal*, *Assistant Attorney General Moreno*, *Deputy Solicitor General Kneedler*, and *Brian C. Toth*.

Steven D. Gordon argued the cause for respondent. With him on the brief were *Shenan R. Atcitty* and *Stephen J. McHugh*.*

JUSTICE ALITO delivered the opinion of the Court.

The attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law. The common law, however, has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties. In such cases, courts have held, the trustee cannot withhold attorney-client communications from the beneficiary of the trust.

In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes. We hold that it does not. Although the Government's responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law. The reasons for the fiduciary exception—that

*Briefs of *amici curiae* urging affirmance were filed for the National Congress of American Indians et al. by *Carter G. Phillips*, *Matthew D. Krueger*, and *Lloyd B. Miller*; and for the Navajo Nation et al. by *Alan R. Taradash*, *Daniel I. S. J. Rey-Bear*, and *Timothy H. McLaughlin*.

the trustee has no independent interest in trust administration, and that the trustee is subject to a general common-law duty of disclosure—do not apply in this context.

I

The Jicarilla Apache Nation (Tribe) occupies a 900,000-acre reservation in northern New Mexico that was established by Executive Order in 1887. The land contains timber, gravel, and oil and gas reserves, which are developed pursuant to statutes administered by the Department of the Interior. Proceeds derived from these natural resources are held by the United States in trust for the Tribe pursuant to the American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239, and other statutes.

In 2002, the Tribe commenced a breach-of-trust action against the United States in the Court of Federal Claims (CFC). The Tribe sued under the Tucker Act, 28 U. S. C. § 1491 (2006 ed. and Supp. III), and the Indian Tucker Act, § 1505, which vest the CFC with jurisdiction over claims against the Government that are founded on the Constitution, laws, treaties, or contracts of the United States. The complaint seeks monetary damages for the Government's alleged mismanagement of funds held in trust for the Tribe. The Tribe argues that the Government violated various laws, including 25 U. S. C. §§ 161a and 162a, that govern the management of funds held in trust for Indian tribes. See 88 Fed. Cl. 1, 3 (2009).

From December 2002 to June 2008, the Government and the Tribe participated in alternative dispute resolution in order to resolve the claim. During that time, the Government turned over thousands of documents but withheld 226 potentially relevant documents as protected by the attorney-client privilege, the attorney work-product doctrine, or the deliberative-process privilege.

In 2008, at the request of the Tribe, the case was restored to the active litigation docket. The CFC divided the case

into phases for trial and set a discovery schedule. The first phase, relevant here, concerns the Government's management of the Tribe's trust accounts from 1972 to 1992. The Tribe alleges that during this period the Government failed to invest its trust funds properly. Among other things, the Tribe claims the Government failed to maximize returns on its trust funds, invested too heavily in short-term maturities, and failed to pool its trust funds with other tribal trusts. During discovery, the Tribe moved to compel the Government to produce the 226 withheld documents. In response, the Government agreed to withdraw its claims of deliberative-process privilege and, accordingly, to produce 71 of the documents. But the Government continued to assert the attorney-client privilege and attorney work-product doctrine with respect to the remaining 155 documents. The CFC reviewed those documents *in camera* and classified them into five categories: (1) requests for legal advice relating to trust administration sent by personnel at the Department of the Interior to the Office of the Solicitor, which directs legal affairs for the Department, (2) legal advice sent from the Solicitor's Office to personnel at the Interior and Treasury Departments, (3) documents generated under contracts between Interior and an accounting firm, (4) Interior documents concerning litigation with other tribes, and (5) miscellaneous documents not falling into the other categories.

The CFC granted the Tribe's motion to compel in part. The CFC held that communications relating to the management of trust funds fall within a "fiduciary exception" to the attorney-client privilege. Under that exception, which courts have applied in the context of common-law trusts, a trustee who obtains legal advice related to the execution of fiduciary obligations is precluded from asserting the attorney-client privilege against beneficiaries of the trust. The CFC concluded that the trust relationship between the United States and the Indian tribes is sufficiently analogous

to a common-law trust relationship that the exception should apply. Accordingly, the CFC held, the United States may not shield from the Tribe communications with attorneys relating to trust matters.

The CFC ordered disclosure of almost all documents in the first two categories because those documents "involve matters regarding the administration of tribal trusts, either directly or indirectly implicating the investments that benefit Jicarilla" and contain "legal advice relating to trust administration." *Id.*, at 14–15. The CFC allowed the Government to withhold most of the documents in the remaining categories as attorney work product,[1] but the court identified some individual documents that it determined were also subject to the fiduciary exception. *Id.*, at 18–19.

The Government sought to prevent disclosure of the documents by petitioning the Court of Appeals for the Federal Circuit for a writ of mandamus directing the CFC to vacate its production order. The Court of Appeals denied the petition because, in its view, the CFC correctly applied the fiduciary exception. The court held that "the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." *In re United States*, 590 F. 3d 1305, 1313 (CA Fed. 2009). In qualifying its holding, the court recognized that sometimes the Government may have other statutory obligations that clash with its fiduciary duties to the Indian tribes. But because the Government had not alleged that the legal advice in this case related to such conflicting interests, the

[1] The CFC held that there is no fiduciary exception to the work-product doctrine. 88 Fed. Cl. 1, 12 (2009). The Court of Appeals did not address that issue, *In re United States*, 590 F. 3d 1305, 1313 (CA Fed. 2009), and it is not before us.

court reserved judgment on how the fiduciary exception might apply in that situation. The court rejected the Government's argument that, because its duties to the Indian tribes were governed by statute rather than the common law, it had no general duty of disclosure that would override the attorney-client privilege. The court also disagreed with the Government's contention that a case-by-case approach made the attorney-client privilege too unpredictable and would impair the Government's ability to obtain confidential legal advice.

We granted certiorari, 562 U. S. 1128 (2011),[2] and now reverse and remand for further proceedings.

II

The Federal Rules of Evidence provide that evidentiary privileges "shall be governed by the principles of the common law . . . in the light of reason and experience." Fed. Rule Evid. 501. The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (J. McNaughton rev. 1961)). Its aim is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." 449 U. S., at 389; *Hunt* v. *Blackburn*, 128 U. S. 464, 470 (1888).

The objectives of the attorney-client privilege apply to governmental clients. "The privilege aids government en-

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[2] After the Federal Circuit denied the Government's mandamus petition, the Government produced the documents under a protective order that prevents disclosure to third parties until the case is resolved by this Court. App. to Pet. for Cert. 93a–97a. The Government's compliance with the production order does not affect our review. Our decision may still provide effective relief by preventing further disclosure and by excluding the evidence from trial. See *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 109 (2009).

tities and employees in obtaining legal advice founded on a complete and accurate factual picture." 1 Restatement (Third) of the Law Governing Lawyers § 74, Comment *b*, pp. 573–574 (1998). Unless applicable law provides otherwise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys. *Id.*, at 574 ("[G]overnmental agencies and employees enjoy the same privilege as nongovernmental counterparts"). The Tribe argues, however, that the common law also recognizes a fiduciary exception to the attorney-client privilege and that, by virtue of the trust relationship between the Government and the Tribe, documents that would otherwise be privileged must be disclosed. As preliminary matters, we consider the bounds of the fiduciary exception and the nature of the trust relationship between the United States and the Indian tribes.

A

English courts first developed the fiduciary exception as a principle of trust law in the 19th century. The rule was that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice. *Wynne* v. *Humberston*, 27 Beav. 421, 423–424, 54 Eng. Rep. 165, 166 (1858); *Talbot* v. *Marshfield*, 2 Dr. & Sm. 549, 550–551, 62 Eng. Rep. 728, 729 (1865). The courts reasoned that the normal attorney-client privilege did not apply in this situation because the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay the attorney's fees. *Ibid.; Wynne*, *supra*, at 423–424, 54 Eng. Rep., at 166.

The fiduciary exception quickly became an established feature of English common law, see, *e. g.*, *In re Mason*, 22 Ch. D. 609 (1883), but it did not appear in this country until the following century. American courts seem first to have ex-

pressed skepticism. See *In re Prudence-Bonds Corp.*, 76 F. Supp. 643, 647 (EDNY 1948) (declining to apply the fiduciary exception to the trustee of a bondholding corporation because of the "important right of such a corporate trustee . . . to seek legal advice and nevertheless act in accordance with its own judgment"). By the 1970's, however, American courts began to adopt the English common-law rule. See *Garner* v. *Wolfinbarger*, 430 F. 2d 1093, 1103–1104 (CA5 1970) (allowing shareholders, upon a showing of "good cause," to discover legal advice given to corporate management).[3]

The leading American case on the fiduciary exception is *Riggs Nat. Bank of Washington, D. C.* v. *Zimmer*, 355 A. 2d 709 (Del. Ch. 1976). In that case, the beneficiaries of a trust estate sought to compel the trustees to reimburse the estate for alleged breaches of trust. The beneficiaries moved to compel the trustees to produce a legal memorandum related to the administration of the trust that the trustees withheld on the basis of attorney-client privilege. The Delaware Chancery Court, observing that "American case law is practically nonexistent on the duty of a trustee in this context," looked to the English cases. *Id.*, at 712. Applying the common-law fiduciary exception, the court held that the

[3] Today, "[c]ourts differ on whether the [attorney-client] privilege is available for communications between the trustee and counsel regarding the administration of the trust." A. Newman, G. Bogert & G. Bogert, Law of Trusts and Trustees § 962, p. 68 (3d ed. 2010) (hereinafter Bogert). Some state courts have altogether rejected the notion that the attorney-client privilege is subject to a fiduciary exception. See, *e. g.*, *Huie* v. *DeShazo*, 922 S. W. 2d 920, 924 (Tex. 1996) ("The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships"); *Wells Fargo Bank* v. *Superior Ct.*, 22 Cal. 4th 201, 208–209, 990 P. 2d 591, 595 (2000) ("[T]he attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust" (internal quotation marks omitted)). Neither party before this Court disputes the existence of a common-law fiduciary exception, however, so in deciding this case we assume such an exception exists.

memorandum was discoverable. It identified two reasons for applying the exception.

First, the court explained, the trustees had obtained the legal advice as "mere representative[s]" of the beneficiaries because the trustees had a fiduciary obligation to act in the beneficiaries' interest when administering the trust. *Ibid.* For that reason, the beneficiaries were the "real clients" of the attorney who had advised the trustee on trust-related matters, and therefore the attorney-client privilege properly belonged to the beneficiaries rather than the trustees. *Id.*, at 711–712. The court based its "real client" determination on several factors: (1) When the advice was sought, no adversarial proceedings between the trustees and beneficiaries had been pending, and therefore there was no reason for the trustees to seek legal advice in a personal rather than a fiduciary capacity; (2) the court saw no indication that the memorandum was intended for any purpose other than to benefit the trust; and (3) the law firm had been paid out of trust assets. That the advice was obtained at the beneficiaries' expense was not only a "significant factor" entitling the beneficiaries to see the document but also "a strong indication of precisely who the real clients were." *Id.*, at 712. The court distinguished between "legal advice procured at the trustee's *own* expense and for his *own* protection," which would remain privileged, "and the situation where the trust itself is assessed for obtaining opinions of counsel where interests of the beneficiaries are presently at stake." *Ibid.* In the latter case, the fiduciary exception applied, and the trustees could not withhold those attorney-client communications from the beneficiaries.

Second, the court concluded that the trustees' fiduciary duty to furnish trust-related information to the beneficiaries outweighed their interest in the attorney-client privilege. "The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship," the court explained, "is here ultimately more important than the protection of the

trustees' confidence in the attorney for the trust." *Id.*, at 714. Because more information helped the beneficiaries to police the trustees' management of the trust, disclosure was, in the court's judgment, "a weightier public policy than the preservation of confidential attorney-client communications." *Ibid.*

The Federal Courts of Appeals apply the fiduciary exception based on the same two criteria. See, *e. g.*, *In re Long Island Lighting Co.*, 129 F. 3d 268, 272 (CA2 1997); *Wachtel* v. *Health Net, Inc.*, 482 F. 3d 225, 233–234 (CA3 2007); *Solis* v. *Food Employers Labor Relations Assn.*, 644 F. 3d 221, 227–228 (CA4 2011); *Wildbur* v. *ARCO Chemical Co.*, 974 F. 2d 631, 645 (CA5 1992); *United States* v. *Evans*, 796 F. 2d 264, 265–266 (CA9 1986) *(per curiam)*. Not until the decision below had a federal appellate court held the exception to apply to the United States as trustee for the Indian tribes.

B

In order to apply the fiduciary exception in this case, the Court of Appeals analogized the Government to a private trustee. 590 F. 3d, at 1313. We have applied that analogy in limited contexts, see, *e. g.*, *United States* v. *Mitchell*, 463 U. S. 206, 226 (1983) *(Mitchell II)*, but that does not mean the Government resembles a private trustee in every respect. On the contrary, this Court has previously noted that the relationship between the United States and the Indian tribes is distinctive, "different from that existing between individuals whether dealing at arm's length, *as trustees and beneficiaries*, or otherwise." *Klamath and Moadoc Tribes* v. *United States*, 296 U. S. 244, 254 (1935) (emphasis added). "The *general* relationship between the United States and the Indian tribes is not comparable to a private trust relationship." *Cherokee Nation of Okla.* v. *United States*, 21 Cl. Ct. 565, 573 (1990) (emphasis added).

The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship

between the Government and the Indians a "trust," see, *e. g.*, 25 U. S. C. § 162a, that trust is defined and governed by statutes rather than the common law. See *United States* v. *Navajo Nation*, 537 U. S. 488, 506 (2003) *(Navajo I)* ("[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions"). As we have recognized in prior cases, Congress may style its relations with the Indians a "trust" without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is "limited" or "bare" compared to a trust relationship between private parties at common law. *United States* v. *Mitchell*, 445 U. S. 535, 542 (1980) *(Mitchell I); Mitchell II*, *supra*, at 224.[4]

The difference between a private common-law trust and the statutory Indian trust follows from the unique position of the Government as sovereign. The distinction between "public rights" against the Government and "private rights" between private parties is well established. The Government consents to be liable to private parties "and may yield this consent upon such terms and under such restrictions as it may think just." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 283 (1856). This creates an important distinction "between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932).

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[4] "There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts § 4, Introductory Note, p. 15 (1957) (hereinafter Restatement 2d); see also *Begay* v. *United States*, 16 Cl. Ct. 107, 127, n. 17 (1987) ("[T]he provisions relating to private trustees and fiduciaries, while useful as analogies, cannot be regarded as finally dispositive in a government—Indian trustee—fiduciary relationship").

Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 169, n. 18 (1982) ("The United States retains plenary authority to divest the tribes of any attributes of sovereignty"); *United States* v. *Wheeler*, 435 U. S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government"); *Winton* v. *Amos*, 255 U. S. 373, 391 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property"); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government"); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts"); see also *United States* v. *Candelaria*, 271 U. S. 432, 439 (1926); *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315 (1911).

Because the Indian trust relationship represents an exercise of that authority, we have explained that the Government "has a real and direct interest" in the guardianship it exercises over the Indian tribes; "the interest is one which is vested in it as a sovereign." *United States* v. *Minnesota*, 270 U. S. 181, 194 (1926). This is especially so because the Government has often structured the trust relationship to pursue its own policy goals. Thus, while trust administration "relat[es] to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United

States." *Heckman* v. *United States*, 224 U. S. 413, 437 (1912); see also *Candelaria*, *supra*, at 443–444.

In *Heckman*, the Government brought suit to cancel certain conveyances of allotted lands by members of an Indian tribe because the conveyances violated restrictions on alienation imposed by Congress. This Court explained that the Government brought suit as the representative of the very Indian grantors whose conveyances it sought to cancel, and those Indians were thereby bound by the judgment. 224 U. S., at 445–446. But while it was formally acting as a trustee, the Government was in fact asserting its own sovereign interest in the disposition of Indian lands, and the Indians were precluded from intervening in the litigation to advance a position contrary to that of the Government. *Id.*, at 445. Such a result was possible because the Government assumed a fiduciary role over the Indians not as a common-law trustee but as the governing authority enforcing statutory law.

We do not question "the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U. S., at 225. The Government, following "a humane and self imposed policy . . . , has charged itself with moral obligations of the highest responsibility and trust," *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942), obligations "to the fulfillment of which the national honor has been committed," *Heckman*, *supra*, at 437. Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose. See *Mitchell I*, *supra*, at 544 (Congress intended the United States to hold land "'in trust'" under the General Allotment Act "simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation"); *Navajo I*, *supra*, at 507–508 (Indian Mineral Leasing Act imposes no

"detailed fiduciary responsibilities" nor is the Government "expressly invested with responsibility to secure 'the needs and best interests of the Indian owner' ").

In other cases, we have found that particular "statutes and regulations . . . clearly establish fiduciary obligations of the Government" in some areas. *Mitchell II*, *supra*, at 226; see also *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 475 (2003). Once federal law imposes such duties, the common law "could play a role." *United States* v. *Navajo Nation*, 556 U. S. 287, 301 (2009) *(Navajo II)*. We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed. See *White Mountain Apache Tribe*, *supra*, at 475–476. But the applicable statutes and regulations "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Mitchell II*, *supra*, at 224. When "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *Navajo II*, *supra*, at 302.[5] The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.[6]

Over the years, we have described the federal relationship with the Indian tribes using various formulations. The Indian tribes have been called "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831), under the "tutelage" of the United States, *Heckman*, *supra*, at 444, and subject to "the exercise of the Government's guardianship over . . . their affairs," *United States* v. *Sandoval*, 231 U. S. 28, 48 (1913). These concepts do not necessarily correspond

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[5] Thus, the dissent's reliance on the Government's "managerial control," *post*, at 194 (opinion of SOTOMAYOR, J.), is misplaced.

[6] Cf. Restatement 2d, § 25, Comment *a*, at 69 ("[A]lthough the settlor has called the transaction a trust[,] no trust is created unless he manifests an intention to impose duties which are enforceable in the courts").

to a common-law trust relationship. See, *e. g.*, Restatement 2d, § 7, at 22 ("A guardianship is not a trust"). That is because Congress has chosen to structure the Indian trust relationship in different ways. We will apply common-law trust principles where Congress has indicated it is appropriate to do so. For that reason, the Tribe must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes.

III

In this case, the Tribe's claim arises from 25 U. S. C. §§ 161a–162a and the American Indian Trust Fund Management Reform Act of 1994, § 4001 *et seq.* These provisions define "the trust responsibilities of the United States" with respect to tribal funds. § 162a(d). The Court of Appeals concluded that the trust relationship between the United States and the Indian tribes, outlined in these and other statutes, is "sufficiently similar to a private trust to justify applying the fiduciary exception." 590 F. 3d, at 1313. We disagree.

As we have discussed, the Government exercises its carefully delimited trust responsibilities in a sovereign capacity to implement national policy respecting the Indian tribes. The two features justifying the fiduciary exception—the beneficiary's status as the "real client" and the trustee's common-law duty to disclose information about the trust—are notably absent in the trust relationship Congress has established between the United States and the Tribe.

A

The Court of Appeals applied the fiduciary exception based on its determination that the Tribe rather than the Government was the "real client" with respect to the Government attorneys' advice. *Ibid.* In cases applying the fiduciary exception, courts identify the "real client" based on whether the advice was bought by the trust corpus, whether

the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and whether the advice could have been intended for any purpose other than to benefit the trust. *Riggs*, 355 A. 2d, at 711–712. Applying these factors, we conclude that the United States does not obtain legal advice as a "mere representative" of the Tribe; nor is the Tribe the "real client" for whom that advice is intended. See *ibid.*

Here, the Government attorneys are paid out of congressional appropriations at no cost to the Tribe. Courts look to the source of funds as a "strong indication of precisely who the real clients were" and a "significant factor" in determining who ought to have access to the legal advice. *Id.*, at 712. We similarly find it significant that the attorneys were paid by the Government for advice regarding the Government's statutory obligations.

The payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe. Undoubtedly, Congress intends the Indian tribes to benefit from the Government's management of tribal trusts. That intention represents "a humane and self imposed policy" based on felt "moral obligations." *Seminole Nation*, 316 U. S., at 296–297. This statutory purpose does not imply a full common-law trust, however. Cf. Restatement 2d, § 25, Comment *b*, at 69 ("No trust is created if the settlor manifests an intention to impose merely a moral obligation"). Congress makes such policy judgments pursuant to its sovereign governing authority, and the implementation of federal policy remains "distinctly an interest of the United States." *Heckman*, 224 U. S., at 437.[7] We have said that "the United States contin-

[7] Chief Justice Hughes, writing for a unanimous Court, insisted that the "national interest" in the management of Indian affairs "is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." *Heckman*, 224 U. S., at 437.

ue[s] as trustee to have an active interest" in the disposition of Indian assets because the terms of the trust relationship embody policy goals of the United States. *McKay* v. *Kalyton*, 204 U. S. 458, 469 (1907).

In some prior cases, we have found that the Government had established the trust relationship in order to impose its own policy on Indian lands. See *Mitchell I*, 445 U. S., at 544 (Congress "intended that the United States 'hold the land . . . in trust' . . . because it wished to prevent alienation of the land"). In other cases, the Government has invoked its trust relationship to prevent state interference with its policy toward the Indian tribes. See *Minnesota* v. *United States*, 305 U. S. 382, 386 (1939); *Candelaria*, 271 U. S., at 442–444; *United States* v. *Kagama*, 118 U. S. 375, 382–384 (1886). And the exercise of federal authority thereby established has often been "left under the acts of Congress to the discretion of the Executive Department." *Heckman*, *supra*, at 446. In this way, Congress has designed the trust relationship to serve the interests of the United States as well as to benefit the Indian tribes. See *United States* v. *Rickert*, 188 U. S. 432, 443 (1903) (trust relationship " 'authorizes the adoption on the part of the United States of such policy as their own public interests may dictate' " (quoting *Choctaw Nation* v. *United States*, 119 U. S. 1, 28 (1886))).[8]

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[8] Congress has structured the trust relationship to reflect its considered judgment about how the Indians ought to be governed. For example, the Indian General Allotment Act of 1887, 24 Stat. 388, was "a comprehensive congressional attempt to change the role of Indians in American society." F. Cohen, Handbook of Federal Indian Law § 1.04, p. 77 (2005 ed.) (hereinafter Cohen). Congress aimed to promote the assimilation of Indians by dividing Indian lands into individually owned allotments. The federal policy aimed "to substitute a new individual way of life for the older Indian communal way." *Id.*, at 79. The Indian Reorganization Act of 1934, 48 Stat. 984, marked a shift away "from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture." Cohen § 1.05, at 84. The Act prohibited further allotment and restored tribal

We cannot agree with the Tribe and its *amici* that "[t]he government and its officials who obtained the advice have no stake in [the] substance of the advice, beyond their trustee role," Brief for Respondent 9, or that "the United States' interests in trust administration were identical to the interests of the tribal trust fund beneficiaries," Brief for National Congress of American Indians et al. as *Amici Curiae* 5. The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration. Courts apply the fiduciary exception on the ground that "management does not manage for itself." *Garner*, 430 F. 2d, at 1101; *Wachtel*, 482 F. 3d, at 232 ("[O]f central importance in both *Garner* and *Riggs* was the fiduciary's lack of a legitimate personal interest in the legal advice obtained"). But the Government is never in that position. While one purpose of the Indian trust relationship is to benefit the tribes, the Government has its own independent interest in the implementation of federal Indian policy. For that reason, when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client relationship related to its sovereign interest in the execution

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ownership. *Id.*, at 86. The Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, and the Tribal Self-Governance Act of 1994, 108 Stat. 4270, enabled tribes to run health, education, economic development, and social programs for themselves. Cohen § 1.07, at 103. This strengthened self-government supported Congress' decision to authorize tribes to withdraw trust funds from Federal Government control and place the funds under tribal control. American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4242–4244; see 25 U. S. C. §§ 4021–4029 (2006 ed. and Supp. III). The control over the Indian tribes that has been exercised by the United States pursuant to the trust relationship—forcing the division of tribal lands, restraining alienation—does not correspond to the fiduciary duties of a common-law trustee. Rather, the trust relationship has been altered and administered as an instrument of federal policy.

of federal law. In other words, the Government seeks legal advice in a "personal" rather than a fiduciary capacity. See *Riggs*, 355 A. 2d, at 711.

Moreover, the Government has too many competing legal concerns to allow a case-by-case inquiry into the purpose of each communication. When "multiple interests" are involved in a trust relationship, the equivalence between the interests of the beneficiary and the trustee breaks down. *Id.*, at 714. That principle applies with particular force to the Government. Because of the multiple interests it must represent, "the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent." *Nevada* v. *United States*, 463 U. S. 110, 128 (1983).

As the Court of Appeals acknowledged, the Government may be obliged "to balance competing interests" when it administers a tribal trust. 590 F. 3d, at 1315. The Government may need to comply with other statutory duties, such as the environmental and conservation obligations that the Court of Appeals discussed. See *id.*, at 1314–1315. The Government may also face conflicting obligations to different tribes or individual Indians. See, *e. g.*, *Nance* v. *EPA*, 645 F. 2d 701, 711 (CA9 1981) (Federal Government has "conflicting fiduciary responsibilities" to the Northern Cheyenne and Crow Tribes); *Hoopa Valley Tribe* v. *Christie*, 812 F. 2d 1097, 1102 (CA9 1986) ("No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians"). Within the bounds of its "general trust relationship" with the Indian people, we have recognized that the Government has "discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide." *Lincoln* v. *Vigil*, 508 U. S. 182, 195 (1993); see also *ibid.* ("Federal Government 'does have a fiduciary obligation to the Indians; but it is a fiduciary obligation that is owed to *all* Indian tribes'" (quoting *Hoopa*

Valley Tribe, *supra*, at 1102)). And sometimes, we have seen, the Government has enforced the trust statutes to dispose of Indian property contrary to the wishes of those for whom it was nominally kept in trust. The Government may seek the advice of counsel for guidance in balancing these competing interests. Indeed, the point of consulting counsel may be to determine whether conflicting interests are at stake.

The Court of Appeals sought to accommodate the Government's multiple obligations by suggesting that the Government may invoke the attorney-client privilege if it identifies "a specific competing interest" that was considered in the particular communications it seeks to withhold. 590 F. 3d, at 1313. But the conflicting interests the Government must consider are too pervasive for such a case-by-case approach to be workable.

We have said that for the attorney-client privilege to be effective, it must be predictable. See *Jaffee* v. *Redmond*, 518 U. S. 1, 18 (1996); *Upjohn*, 449 U. S., at 393. If the Government were required to identify the specific interests it considered in each communication, its ability to receive confidential legal advice would be substantially compromised. The Government will not always be able to predict what considerations qualify as a "specific competing interest," especially in advance of receiving counsel's advice. Forcing the Government to monitor all the considerations contained in each communication with counsel would render its attorney-client privilege "little better than no privilege at all." *Ibid.*

B

The Court of Appeals also decided the fiduciary exception properly applied to the Government because "the fiduciary has a duty to disclose all information related to trust management to the beneficiary." 590 F. 3d, at 1312. In general, the common-law trustee of an irrevocable trust must produce trust-related information to the beneficiary on a reasonable

basis, though this duty is sometimes limited and may be modified by the settlor. Restatement (Third) of Trusts § 82 (2005) (hereinafter Restatement 3d); Bogert §§ 962, 965.[9] The fiduciary exception applies where this duty of disclosure overrides the attorney-client privilege. *United States* v. *Mett*, 178 F. 3d 1058, 1063 (CA9 1999) ("[T]he fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle").

The United States, however, does not have the same common-law disclosure obligations as a private trustee. As we have previously said, common-law principles are relevant only when applied to a "specific, applicable, trust-creating statute or regulation." *Navajo II*, 556 U. S., at 302. The relevant statute in this case is 25 U. S. C. § 162a(d), which delineates "trust responsibilities of the United States" that the Secretary of the Interior must discharge. The enumerated responsibilities include a provision identifying the Secretary's obligation to provide specific information to tribal

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[9] We assume for the sake of argument that an Indian trust is properly analogized to an irrevocable trust rather than to a revocable trust. A revocable trust imposes no duty of the trustee to disclose information to the beneficiary. "[W]hile a trust is revocable, only the person who may revoke it is entitled to receive information about it from the trustee." Bogert § 962, at 25, § 964; Restatement 3d, § 74, Comment *e*, at 31 ("[T]he trustee of a revocable trust is not to provide reports or accountings or other information concerning the terms or administration of the trust to other beneficiaries without authorization either by the settlor or in the terms of the trust or a statute"). In many respects, Indian trusts resemble revocable trusts at common law because Congress has acted as the settlor in establishing the trust and retains the right to alter the terms of the trust by statute, even in derogation of tribal property interests. See *Winton* v. *Amos*, 255 U. S. 373, 391 (1921) ("It is thoroughly established that Congress has plenary authority over the Indians . . . and full power to legislate concerning their tribal property"); Cohen § 5.02[4], at 401–403. The Government has not advanced the argument that the relationship here is similar to a revocable trust, and the point need not be addressed to resolve this case.

account holders: The Secretary must "suppl[y] account holders with periodic statements of their account performance" and must make "available on a daily basis" the "balances of their account." § 162a(d)(5). The Secretary has complied with these requirements by adopting regulations that instruct the Office of Trust Fund Management to provide each tribe with a quarterly statement of performance, 25 CFR § 115.801 (2010), that identifies "the source, type, and status of the trust funds deposited and held in a trust account; the beginning balance; the gains and losses; receipts and disbursements; and the ending account balance of the quarterly statement period," § 115.803. Tribes may request more frequent statements or further "information about account transactions and balances." § 115.802.

The common law of trusts does not override the specific trust-creating statute and regulations that apply here. Those provisions define the Government's disclosure obligation to the Tribe. The Tribe emphasizes, Brief for Respondent 34, that the statute identifies the list of trust responsibilities as nonexhaustive. See § 162a(d) (trust responsibilities "are not limited to" those enumerated). The Government replies that this clause "is best read to refer to other statutory and regulatory requirements" rather than to common-law duties. Brief for United States 38. Whatever Congress intended, we cannot read the clause to include a general common-law duty to disclose all information related to the administration of Indian trusts. When Congress provides specific statutory obligations, we will not read a "catchall" provision to impose general obligations that would include those specifically enumerated. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 141–142 (1985). "As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988). Reading the statute to incorporate the

full duties of a private, common-law fiduciary would vitiate Congress' specification of narrowly defined disclosure obligations.[10]

By law and regulation, moreover, the documents at issue in this case are classed "the property of the United States" while other records are "the property of the tribe." 25 CFR § 115.1000 (2010); see also §§ 15.502, 162.111, 166.1000. Just as the source of the funds used to pay for legal advice is highly relevant in identifying the "real client" for purposes of the fiduciary exception, we consider ownership of the resulting records to be a significant factor in deciding who "ought to have access to the document." See *Riggs*, 355 A. 2d, at 712. In this case, that privilege belongs to the United States.[11]

* * *

Courts and commentators have long recognized that "[n]ot every aspect of private trust law can properly govern the

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[10] Our reading of 25 U. S. C. § 162a(d) receives additional support from another statute in which Congress expressed its understanding that the Government retains evidentiary privileges allowing it to withhold information related to trust property from Indian tribes. The Indian Claims Limitation Act of 1982, 96 Stat. 1976, addressed Indian claims that the claimants desired to have litigated by the United States. If the Secretary of the Interior decided to reject a claim for litigation, he was required to furnish a report to the affected Indian claimants and, upon their request, to provide "any nonprivileged research materials or evidence gathered by the United States in the documentation of such claim." *Id.*, § 5(b), at 1978. That Congress authorized the withholding of information on grounds of privilege makes us doubt that Congress understood the Government's trust obligations to override so basic a privilege as that between attorney and client.

[11] The dissent tells us that applying the fiduciary exception is even more important against the Government than against a private trustee because of a "history of governmental mismanagement." *Post*, at 208. While it is not necessary to our decision, we note that the Indian tribes are not required to keep their funds in federal trust. See 25 U. S. C. § 4022 (authorizing tribes to withdraw funds held in trust by the United States); 25 CFR pt. 1200(B). If the Tribe wishes to have its funds managed by a "conventional fiduciary," *post*, at 197, it may seek to do so.

unique relationship of tribes and the federal government." Cohen § 5.05[2], at 434–435. The fiduciary exception to the attorney-client privilege ranks among those aspects inapplicable to the Government's administration of Indian trusts. The Court of Appeals denied the Government's petition for a writ of mandamus based on its erroneous view to the contrary. We leave it for that court to determine whether the standards for granting the writ are met in light of our opinion.[12] We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAGAN took no part in the consideration or decision of this case.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring in the judgment.

I agree with the Court that the Government is not an ordinary trustee. See *ante*, at 181–183. Unlike a private trustee, the Government has its own "distinc[t] interest" in the faithful carrying out of the laws governing the conduct of tribal affairs. *Heckman* v. *United States*, 224 U. S. 413, 437 (1912). This unique "national interest," *ibid.*, obligates Government attorneys, in rendering advice, to make their own "independent evaluation of the law and facts" in an effort "to arrive at a single position of the United States," App. to Pet. for Cert. 124a (Letter from Attorney General Griffin B. Bell to Secretary of the Interior Cecil D. Andrus (May 31, 1979)). "For that reason," as the Court explains, "the Government seeks legal advice in a 'personal' rather than a fiduciary capacity." *Ante*, at 181, 182. The attorney-client privilege thus protects the Government's communications with its attorneys from disclosure.

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[12] If the Court of Appeals declines to issue the writ, we assume that the CFC on remand will follow our holding here regarding the applicability of the fiduciary exception in the present context.

Going beyond attorney-client communications, the Court holds that the Government "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Ante*, at 177. The Court therefore concludes that the trust relationship described by 25 U. S. C. § 162a does not include the usual "common-law disclosure obligations." *Ante*, at 184. Because it is unnecessary to decide what information *other than* attorney-client communications the Government may withhold from the beneficiaries of tribal trusts, I concur only in the Court's judgment.

JUSTICE SOTOMAYOR, dissenting.

Federal Indian policy, as established by a network of federal statutes, requires the United States to act strictly in a fiduciary capacity when managing Indian trust fund accounts. The interests of the Federal Government as trustee and the Jicarilla Apache Nation (Nation) as beneficiary are thus entirely aligned in the context of Indian trust fund management. Where, as here, the governing statutory scheme establishes a conventional fiduciary relationship, the Government's duties include fiduciary obligations derived from common-law trust principles. Because the common-law rationales for the fiduciary exception fully support its application in this context, I would hold that the Government may not rely on the attorney-client privilege to withhold from the Nation communications between the Government and its attorneys relating to trust fund management.

The Court's decision to the contrary rests on false factual and legal premises and deprives the Nation and other Indian tribes of highly relevant evidence in scores of pending cases seeking relief for the Government's alleged mismanagement of their trust funds. But perhaps more troubling is the majority's disregard of our settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes. Indeed, as-

pects of the majority's opinion suggest that common-law principles have little or no relevance in the Indian trust context, a position this Court rejected long ago. Although today's holding pertains only to a narrow evidentiary issue, I fear the upshot of the majority's opinion may well be a further dilution of the Government's fiduciary obligations that will have broader negative repercussions for the relationship between the United States and Indian tribes.

I

A

Federal Rule of Evidence 501 provides in relevant part that "the privilege of a . . . government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 501 "was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them." *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 804, n. 25 (1984).

As the majority notes, the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981). But the majority neglects to explain that the privilege is a limited exception to the usual rules of evidence requiring full disclosure of relevant information. See 8 J. Wigmore, Evidence § 2192, p. 64 (3d ed. 1940) (common law recognizes "fundamental maxim that the public . . . has a right to every man's evidence" and that "any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule"). Because it "has the effect of withholding relevant information from the fact-finder," courts construe the privilege narrowly. *Fisher* v. *United States*, 425 U. S. 391, 403 (1976). It applies "only

where necessary to achieve its purpose," *ibid.;* "[w]here this purpose ends, so too does the protection of the privilege," *Wachtel* v. *Health Net, Inc.*, 482 F. 3d 225, 231 (CA3 2007).

The fiduciary exception to the attorney-client privilege has its roots in 19th-century English common-law cases holding that, "when a trustee obtained legal advice relating to his administration of the trust, and not in anticipation of adversarial legal proceedings against him, the beneficiaries of the trust had the right to the production of that advice." *Ibid.* (collecting cases). The fiduciary exception is now well recognized in the jurisprudence of both federal and state courts,[1] and has been applied in a wide variety of contexts, including in litigation involving common-law trusts, see, *e. g.*, *Riggs Nat. Bank of Washington, D. C.* v. *Zimmer*, 355 A. 2d 709 (Del. Ch. 1976), disputes between corporations and shareholders, see, *e. g.*, *Garner* v. *Wolfinbarger*, 430 F. 2d 1093 (CA5 1970), and Employee Retirement Income Security Act of 1974 enforcement actions, see, *e. g.*, *United States* v. *Doe*, 162 F. 3d 554 (CA9 1999).

The majority correctly identifies the two rationales courts have articulated for applying the fiduciary exception, *ante*, at 172–173, but its description of those rationales omits a number of important points. With regard to the first rationale, courts have characterized the trust beneficiary as the "real client" of legal advice relating to trust administration because such advice, provided to a trustee to assist in his management of the trust, is ultimately for the benefit of the trust

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[1] See, *e. g.*, *Solis* v. *Food Employers Labor Relations Assn.*, 644 F. 3d 221, 224–225 (CA4 2011); *Wachtel* v. *Health Net, Inc.*, 482 F. 3d 225, 232–234 (CA3 2007); *Bland* v. *Fiatallis North America, Inc.*, 401 F. 3d 779, 787–788 (CA7 2005); *United States* v. *Mett*, 178 F. 3d 1058, 1062–1064 (CA9 1999); *In re Long Island Lighting Co.*, 129 F. 3d 268, 271–272 (CA2 1997); *Wildbur* v. *ARCO Chemical Co.*, 974 F. 2d 631, 645 (CA5 1992); *Fausek* v. *White*, 965 F. 2d 126, 132–133 (CA6 1992); see also Restatement (Third) of Trusts § 82, Comment *f* and Reporter's Notes on § 82, pp. 187–188, 198–204 (2005); Restatement of Law (Third) Governing Lawyers § 84 (1998).

beneficiary, rather than for the trustee in his personal capacity. See, *e. g.*, *United States* v. *Mett*, 178 F. 3d 1058, 1063 (CA9 1999) ("'[A]s a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served'" (quoting *United States* v. *Evans*, 796 F. 2d 264, 266 (CA9 1986) *(per curiam)*)); *Riggs*, 355 A. 2d, at 713 (same). The majority places heavy emphasis on the source of payment for the legal advice, see *ante*, at 172, 179, but it is well settled that who pays for the legal advice, although "potentially relevant," "is not determinative in resolving issues of privilege." Restatement (Third) of Trusts § 82, Comment *f*, p. 188 (2005) (hereinafter Third Restatement). Instead, the linchpin of the "real client" inquiry is the identity of the ultimate beneficiary of the legal advice. See *Wachtel*, 482 F. 3d, at 232 ("[O]f central importance . . . [i]s the fiduciary's lack of a legitimate personal interest in the legal advice obtained"). If the advice was rendered for the benefit of the beneficiary and not for the trustee in any personal capacity, the "real client" of the advice is the beneficiary.

As to the second rationale for the fiduciary exception—rooted in the trustee's fiduciary duty to disclose all information related to trust management—the majority glosses over the fact that this duty of disclosure is designed "to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust." Third Restatement § 82, Comment *a(2)*, at 184. As the leading American case on the fiduciary exception explains, "[i]n order for the beneficiaries to hold the trustee to the proper standards of care and honesty and procure for themselves the benefits to which they are entitled, their knowledge of the affairs and mechanics of the trust management is crucial." *Riggs*, 355 A. 2d, at 712. Courts justifying the fiduciary exception under this rationale have thus concluded that "[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is . . . ultimately more

important than the protection of the trustees' confidence in the attorney for the trust." *Id.*, at 714; see *Mett*, 178 F. 3d, at 1063 (under this rationale, "the fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle"). The majority fails to appreciate the important oversight and accountability interests that underlie this rationale for the fiduciary exception, or explain why they operate with any less force in the Indian trust context.

B

The question in this case is whether the fiduciary exception applies in the Indian trust context such that the Government may not rely on the attorney-client privilege to withhold from the Nation communications between the Government and its attorneys relating to the administration of the Nation's trust fund accounts. Answering that question requires a proper understanding of the nature of the Government's trust relationship with Indian tribes, particularly with regard to its management of Indian trust funds.

Since 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes. See *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831) (Marshall, C. J.). Our decisions over the past century have repeatedly reaffirmed this "distinctive obligation of trust incumbent upon the Government" in its dealings with Indians. *Seminole Nation* v. *United States*, 316 U. S. 286, 296 (1942); see *United States* v. *Mitchell*, 463 U. S. 206, 225–226 (1983) *(Mitchell II)* (collecting cases and noting "the undisputed existence of a general trust relationship between the United States and the Indian people"). Congress, too, has recognized the general trust relationship between the United States and Indian tribes. Indeed, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government." F. Cohen, Handbook of

Federal Indian Law § 5.04[4][a], pp. 420–421 (2005 ed.) (hereinafter Cohen).[2]

Against this backdrop, Congress has enacted federal statutes that "define the contours of the United States' fiduciary responsibilities" with regard to its management of Indian tribal property and other trust assets. *Mitchell II*, 463 U. S., at 224. The Nation's claims as relevant in this case concern the Government's alleged mismanagement of its tribal trust fund accounts. See *ante*, at 167.

The system of trusteeship and federal management of Indian funds originated with congressional enactments in the 19th century directing the Government to hold and manage Indian tribal funds in trust. See, *e. g.*, Act of Jan. 9, 1837, 5 Stat. 135; see also Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H. R. Rep. No. 102–499, p. 6 (1992) (hereinafter Misplaced Trust). Through these and later congressional enactments, the United States has come to manage almost $3 billion in tribal funds and collects close to $380 million per year on behalf of tribes. Cohen § 5.03[3][b], at 407.[3]

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[2] See, *e. g.*, 25 U. S. C. § 458cc(a) (directing Secretary of the Interior to enter into funding agreements with Indian tribes "in a manner consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people"); § 3701 (finding that the Government "has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes"); 20 U. S. C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children").

[3] Trust fund accounts are "comprised mainly of money received through the sale or lease of trust lands and include timber stumpage, oil and gas royalties, and agriculture fees," as well as "judgment funds awarded to tribes." H. R. Rep. No. 103–778, p. 9 (1994). The Nation's claims involve proceeds derived from the Government's management of the Nation's timber, gravel, and other resources and leases of reservation lands. The Government has held these funds in trust for the Nation since the late 1880's. See App. to Pet. for Cert. 98a–100a, 105a.

Today, numerous statutes outline the Federal Government's obligations as trustee in managing Indian trust funds. In particular, the Secretary of the Treasury, at the request of the Secretary of the Interior, must invest "[a]ll funds held in trust by the United States . . . to the credit of Indian tribes" in certain securities "suitable to the needs of the fund involved." 25 U. S. C. § 161a(a). The Secretary of the Interior may deposit in the Treasury and pay mandatory interest on Indian trust funds when "the best interests of the Indians will be promoted by such deposits, in lieu of investments." § 161. Similarly, the Secretary of the Interior may invest tribal trust funds in certain public debt instruments "if he deems it advisable and for the best interest of the Indians." § 162a(a). And Congress has set forth a nonexhaustive list of the Secretary of the Interior's "trust responsibilities" with respect to Indian trust funds, which include a series of accounting, auditing, management, and disclosure obligations. § 162a(d). These and other statutory provisions[4] give the United States "full responsibility to manage Indian [trust fund accounts] for the benefit of the Indians." *Mitchell II*, 463 U. S., at 224.

"[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over [trust assets] belonging to Indians." *Id.*, at 225. Under the statutory regime described above, the Government has extensive managerial control over Indian trust funds, exercises considerable discretion with respect to their investment, and has assumed significant responsibilities to account to the tribal beneficiaries. As a result, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United

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[4] See, *e. g.*, 25 U. S. C. § 4011(a) (requiring Secretary of the Interior to account "for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe"); § 4041(1) (creating the Office of Special Trustee for American Indians "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes").

States), a beneficiary (the Indian [Tribe]), and a trust corpus (Indian . . . funds)." *Ibid.* Unlike in other contexts where the statutory scheme creates only a "bare trust" entailing only limited responsibilities, *United States* v. *Navajo Nation*, 537 U. S. 488, 505 (2003) *(Navajo I)* (internal quotation marks omitted),[5] the statutory regime governing the United States' obligations with regard to Indian trust funds "bears the hallmarks of a conventional fiduciary relationship," *United States* v. *Navajo Nation*, 556 U. S. 287, 301 (2009) (*Navajo II*) (internal quotation marks omitted); see *Lincoln* v. *Vigil*, 508 U. S. 182, 194 (1993) ("[T]he law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity' " (quoting *United States* v. *Cherokee Nation of Okla.*, 480 U. S. 700, 707 (1987))).

II

In light of Federal Rule of Evidence 501 and the Government's role as a conventional fiduciary in managing Indian trust fund accounts, I would hold as a matter of federal common law that the fiduciary exception is applicable in the Indian trust context, and thus the Government may not rely

[5] For example, in *United States* v. *Mitchell*, 445 U. S. 535 (1980) *(Mitchell I)*, this Court held that a federal statute which authorized the President to allot a specified number of acres to individual Indians residing on reservation lands did not "provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.*, at 542. Under the statute, "the Indian allottee, and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes." *Id.*, at 542–543. Accordingly, we concluded that Congress did not intend to "impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee" because the statute "created only a limited trust relationship between the United States and the allottee." *Id.*, at 542; see also *Navajo I*, 537 U. S., at 507–508 (concluding that Secretary of the Interior did not assume "fiduciary duties" under the relevant statutory scheme because "[t]he Secretary is neither assigned a comprehensive managerial role nor . . . expressly invested with responsibility to secure the needs and best interests of the Indian owner and his heirs" (internal quotation marks omitted)).

on the attorney-client privilege to withhold communications related to trust management. As explained below, the twin rationales for the fiduciary exception fully support its application in this context. The majority's conclusion to the contrary rests on flawed factual and legal premises.

A

When the Government seeks legal advice from a Government attorney on matters relating to the management of the Nation's trust funds, the "real client" of that advice for purposes of the fiduciary exception is the Nation, not the Government. The majority's rejection of that conclusion is premised on its erroneous view that the Government, in managing the Nation's trust funds, "has its own independent interest in the implementation of federal Indian policy" that diverges from the interest of the Nation as beneficiary. *Ante*, at 181; see also *ante*, at 187 (GINSBURG, J., concurring in judgment).

The majority correctly notes that, as a general matter, the Government has sovereign interests in managing Indian trusts that distinguish it from a private trustee. See, *e. g.*, *United States* v. *Minnesota*, 270 U. S. 181, 194 (1926). Throughout the history of the Federal Government's dealings with Indian tribes, Congress has altered and administered the trust relationship "as an instrument of federal policy." *Ante*, at 181, n. 8 (detailing shifts in policy); see generally *Cobell* v. *Norton*, 240 F. 3d 1081, 1086–1088 (CADC 2001) (same, and describing that history as "contentious and tragic").

In the specific context of Indian trust fund management, however, federal Indian policy entirely aligns the interests of the Government as trustee and the Indian tribe as beneficiary. As explained above, Congress has enacted an extensive network of statutes regulating the Government's management of Indian trust fund accounts. That statutory framework establishes a "conventional fiduciary relation-

ship" in the context of Indian trust fund administration. *Navajo II*, 556 U. S., at 301 (internal quotation marks omitted); see *supra*, at 194–195.

As a conventional fiduciary, the Government's management of Indian trust funds must "be judged by the most exacting fiduciary standards." *Seminole Nation*, 316 U. S., at 296–297. Among the most fundamental fiduciary obligations of a trustee is "to administer the trust solely in the interest of the beneficiaries." 2A A. Scott & W. Fratcher, Law of Trusts § 170, p. 311 (4th ed. 1987); see *Meinhard* v. *Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 546 (1928) (Cardozo, C. J.) ("Not honesty alone, but the punctilio of an honor the most sensitive," is "the standard of behavior" for trustees "bound by fiduciary ties"). Although Indian trust funds are deposited in the United States Treasury, "they are not part of the federal government's general funds and can be used only for the benefit of the tribe." Cohen § 5.03[3][b], at 408, and n. 140 (citing *Quick Bear* v. *Leupp*, 210 U. S. 50, 80–81 (1908)).

Because federal Indian policy requires the Government to act strictly as a conventional fiduciary in managing the Nation's trust funds, the Government acts in a "representative" rather than "persona[l]" capacity when managing the Nation's trust funds. *Riggs*, 355 A. 2d, at 713. By law, the Government cannot pursue any "independent" interest, *ante*, at 181, distinct from its responsibilities as a fiduciary. See Cohen § 5.03[3][b], at 408, and n. 141 ("Federal statutes forbid use of Indian tribal funds in any manner not authorized by treaty or express provisions of law" (citing 25 U. S. C. §§ 122, 123)). In other words, any uniquely sovereign interest the Government may have in other contexts of its trust relationship with Indian tribes does not exist in the specific context of Indian trust fund administration. It naturally follows, then, that when the Government seeks legal advice from Government attorneys relating to the management of the Nation's trust funds, the "real client" of the advice for

purposes of the fiduciary exception is the Nation, not the Government.

This conclusion holds true even though Government attorneys are "paid out of congressional appropriations at no cost to the [Nation]." *Ante*, at 179. As noted above, although the source of funding for legal advice may be relevant, the ultimate inquiry is for whose benefit the legal advice was rendered. See *supra*, at 191. And, for all the emphasis the majority places on the funding source here, see *ante*, at 172, 179, the majority never suggests that the fiduciary exception would apply if Congress amended federal law to permit Indian tribes to pay Government attorneys out of their own trust funds.[6]

The majority also suggests that, even if the interests of the United States and Indian tribes may be equivalent in some contexts, that "equivalence" "breaks down" when there are "multiple interests" involved in a trust relationship. *Ante*, at 182. According to the majority, "the Government has too many competing legal concerns to allow a case-by-case inquiry into the purpose of each communication." *Ibid.* As a result, the majority concludes that the fiduciary exception should not be applied at all in the Indian trust context. *Ibid.*

Preliminarily, while the Government in certain circumstances may have sovereign obligations that conflict with its duties as a fiduciary for Indian tribes, see, *e. g.*, *Nevada* v. *United States*, 463 U. S. 110 (1983),[7] the existence of compet-

[6] The majority also states that ownership of the requested documents is "a significant factor" in deciding whether the fiduciary exception applies, *ante*, at 186, but the only case it cites as support deals with the source of payment for the legal advice, not the ownership of the documents. See *ibid.* (citing *Riggs Nat. Bank of Washington, D. C.* v. *Zimmer*, 355 A. 2d 709, 712 (Del. Ch. 1976)).

[7] In *Nevada*, the Government represented certain tribes in litigation involving water rights even though it was also required by statute to represent the water rights of a reclamation project. See 463 U. S., at 128 (noting that Congress delegated to the Secretary of the Interior "both the

ing interests is not unique to the Government as trustee. Indeed, the issue of competing interests arises frequently in the private trust context. See, *e. g.*, Third Restatement § 78, Comment *c*, at 97–103 (describing duties of trustee with respect to "transactions that involve conflicting fiduciary and personal interests"); *id.*, § 79, Comment *b*, at 128–129 (describing trustee's duty of impartiality in "balancing . . . competing interests" of multiple beneficiaries). In such circumstances, "a trustee—and ultimately a court—may need to provide some response that offers a compromise between the confidentiality or privacy concerns of some and the interest-protection needs of others." *Id.*, § 82, Comment *f*, at 188. The majority provides no reason why federal courts applying the fiduciary exception in the Indian trust context could not similarly adopt a workable framework that adequately takes into account any unique governmental interests that bear on the application of the fiduciary exception in any given circumstance. See Fed. Rule Civ. Proc. 26(b)(2)(C) (authorizing courts to set limits on discovery based on equitable concerns).

The majority's categorical rejection of the fiduciary exception in the Indian trust context sweeps far broader than necessary. This case involves only the Government's alleged

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responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands"). Because of this dual litigating responsibility, we noted that "it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well." *Ibid.* We thus observed in the context of that case that "the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent." *Ibid.* We expressly distinguished the context "where only a relationship between the Government and the tribe is involved." *Id.*, at 142. In that context, we acknowledged that "the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Ibid.*

mismanagement of the Nation's trust fund accounts, and the Government did not claim below that the attorney-client communications at issue relate to any competing governmental obligations. See App. to Pet. for Cert. 18a–19a. To the extent the United States in other contexts has competing interests, the Government and its attorneys already have to identify those interests in determining how to balance them against their obligations to Indian tribes, and attorney-client communications relating to those interests may properly be withheld or redacted consistent with application of the fiduciary exception. See 88 Fed. Cl. 1, 13 (2009) (observing that redactions "allo[w] the privilege and exception to reign supreme within their respective spheres").

The majority's categorical approach fails to appreciate that privilege determinations are by their very nature made on a case-by-case—indeed, document-by-document—basis. Government attorneys, like private counsel, must review each requested document and make an individualized assessment of privilege, and courts reviewing privilege logs and challenges must do the same. "While such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of" of Rule 501, *Upjohn*, 449 U. S., at 396–397, which "'provide[s] the courts with the flexibility to develop rules of privilege on a case-by-case basis,'" *Trammel* v. *United States*, 445 U. S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate)); see S. Rep. No. 93–1277, p. 13 (1974) ("[T]he recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis").

Rather than fashioning a blanket rule against application of the fiduciary exception in the Indian trust context, I would, consistent with Rule 501 and principles of judicial restraint, decide the question solely on the facts before us. See *Upjohn*, 449 U. S., at 386 (noting that "we sit to decide concrete cases and not abstract propositions of law" and "de-

clin[ing] to lay down a broad rule or series of rules to govern all conceivable future questions in this area"). On those facts, the fiduciary exception applies to the communications in this case.

B

Like the "real client" rationale, the second rationale for the fiduciary exception, rooted in a trustee's fiduciary duty to disclose all matters relevant to trust administration to the beneficiary, fully supports disclosure of the communications in this case. As explained above, courts relying on this second rationale have recognized that "[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is . . . ultimately more important than the protection of the trustees' confidence in the attorney for the trust." *Riggs*, 355 A. 2d, at 714. Because the statutory scheme requires the Government to act as a conventional fiduciary in managing the Nation's trust funds, the Government's fiduciary duty to keep the Nation informed of matters relating to trust administration includes the concomitant duty to disclose attorney-client communications relating to trust fund management. See Third Restatement § 82, Comment *f*, at 187–188; Restatement of the Law (Third) Governing Lawyers § 84, pp. 627–628 (1998).

Notably, the majority does not suggest that the Nation needs less information than a private beneficiary to exercise effective oversight over the Government as trustee. Instead, the majority contends that the Nation is entitled to less disclosure because the Government's disclosure obligations are more limited than a private trustee. In particular, the majority states that the Government "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute," and thus the Nation "must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes." *Ante*, at 178. The majority cites a single statutory provision and its implementing regulations

as "defin[ing] the Government's disclosure obligation to the [Nation]." *Ante*, at 185; see *ante*, at 184–185 (citing 25 U. S. C. § 162a(d)(5) and 25 CFR §§ 115.801–115.803 (2010)). Because those "narrowly defined disclosure obligations" do not provide Indian tribes with a specific statutory right to disclosure of attorney-client communications relating to trust administration, *ante*, at 186, the majority concludes that the Government has no duty to disclose those communications to the Nation.

The majority's conclusion employs a fundamentally flawed legal premise. We have never held that all of the Government's trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To the contrary, where, as here, the statutory framework establishes that the relationship between the Government and an Indian tribe "bears the hallmarks of a conventional fiduciary relationship," *Navajo II*, 556 U. S., at 301 (internal quotation marks omitted), we have consistently looked to general trust principles to flesh out the Government's fiduciary obligations.

For example, in *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465 (2003), we construed a statute that vested the Government with discretionary authority to "use" trust property for certain purposes as imposing a concomitant duty to preserve improvements that had previously been made to the land. *Id.*, at 475 (quoting 74 Stat. 8). Even though the statute did not "expressly subject the Government to duties of management and conservation," we construed the Government's obligations under the statute by reference to "elementary trust law," which "confirm[ed] the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." 537 U. S., at 475. Similarly, in *Seminole Nation*, we relied on general trust principles to conclude that the Government had a fiduciary duty to prevent misappropriation of tribal trust funds by corrupt members of a tribe, even

though no specific statutory or treaty provision expressly imposed such a duty. See 316 U. S., at 296.[8]

Accordingly, although the "general 'contours' of the government's obligations" are defined by statute, the "interstices must be filled in through reference to general trust law." *Cobell*, 240 F. 3d, at 1101 (quoting *Mitchell II*, 463 U. S., at 224). This approach accords with our recognition in other trust contexts that "the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime." *Varity Corp.* v. *Howe*, 516 U. S. 489, 504 (1996) (emphasis deleted); cf. *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility"). Indeed, "[i]f the fiduciary duty applied to nothing more than activities already con-

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[8] To be sure, in decisions involving the jurisdiction of the Court of Federal Claims under the Tucker Act, we have explained that the jurisdictional analysis "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U. S., at 506. But even assuming, *arguendo*, that those jurisdictional decisions have relevance here, they do not stand for the proposition that the Government's fiduciary duties are defined exclusively by express statutory provisions. Indeed, those decisions relied specifically on general trust principles to determine whether the relevant statutory scheme permitted a damages remedy, a prerequisite for jurisdiction under the Tucker Act. See, *e. g.*, *Mitchell II*, 463 U. S., at 226 (noting that common-law trust sources establish that "a trustee is accountable in damages for breaches of trust" and that, "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties"); see also *Navajo II*, 556 U. S., at 301 (affirming that general "trust principles . . . could play a role in inferring that the trust obligation is enforceable by damages" (internal quotation marks and brackets omitted)).

trolled by other specific legal duties, it would serve no purpose." *Howe*, 516 U. S., at 504.

The majority pays lipservice to these precedents, acknowledging that "[w]e have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed." *Ante*, at 177. But despite its assurance that it "will apply common-law trust principles where Congress has indicated it is appropriate to do so," *ante*, at 178, the majority inexplicably rejects the application of common-law trust principles in this case. In doing so, the majority states that "[t]he common law of trusts does not override the specific trust-creating statute and regulations that apply here." *Ante*, at 185 (referring to § 162a(d)(5) and 25 CFR §§ 115.801–115.803). That statement evidences the majority's fundamental misunderstanding of the way in which common-law principles operate in the context of a conventional fiduciary relationship.

Contrary to the majority's view, the Government's disclosure obligations are not limited solely to the "narrowly defined disclosure obligations" set forth in § 162a(d)(5) and its implementing regulations, *ante*, at 186; rather, given that the statutory regime requires the Government to act as a conventional fiduciary in managing Indian trust funds, the Government's disclosure obligations include those of a fiduciary under common-law trust principles. See *supra*, at 202–204. Instead of "overrid[ing]" the specific disclosure duty set forth in § 162a(d)(5) and its implementing regulations, general trust principles flesh out the Government's disclosure obligations under the broader statutory regime, consistent with its role as a conventional fiduciary in this context.

This conclusion, moreover, is supported by the plain text of the very statute cited by the majority. Section 162a(d), which was enacted as part of the American Indian Trust Fund Management Reform Act of 1994 (1994 Act), 108 Stat. 4239, sets forth eight "trust responsibilities of the United States." But that provision also specifically states that the

Secretary of the Interior's "proper discharge of the trust responsibilities of the United States shall include *(but are not limited to)*" those specified duties. 25 U. S. C. § 162a(d) (emphasis added). By expressly including the italicized language, Congress recognized that the Government has preexisting trust responsibilities that arise out of the broader statutory scheme governing the management of Indian trust funds.[9] Indeed, Title I of the 1994 Act is entitled "*Recognition* of Trust Responsibility," 108 Stat. 4240 (emphasis added), and courts have similarly observed that the 1994 Act "recognized and reaffirmed . . . that the government has longstanding and substantial trust obligations to Indians." *Cobell*, 240 F. 3d, at 1098; see also H. R. Rep. No. 103–778, p. 9 (1994) ("The responsibility for management of Indian Trust Funds by the [Government] has been determined through a series of court decisions, treaties, and statutes"). That conclusion accords with common sense as not even the Government argues that it had no disclosure obligations with respect to Indian trust funds prior to the enactment of the 1994 Act.[10]

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[9] The majority invokes the canon against superfluity and argues that the "catchall" phrase (by which it means the "shall include (but are not limited to)" language) cannot be read to "include a general common-law duty to disclose all information related to the administration of Indian trusts" because doing so would "impose general obligations that would include those specifically enumerated." *Ante*, at 185. But the flaw in the majority's argument is that it misperceives the function of the relevant language. Rather than serving as a "catchall" provision that affirmatively "incorporate[s]" common-law trust duties into § 162a(d), *ibid.*, that language simply makes clear that § 162a(d) does not set forth an exhaustive list of the Government's trust responsibilities in managing Indian trust funds; nothing in that language itself imports any substantive obligations into the statute.

[10] The majority also contends that its reading of § 162a(d) is supported by a provision in the Indian Claims Limitation Act of 1982 (ICLA), 96 Stat. 1976, which provided that if the Secretary of the Interior rejected a claim for litigation by an Indian claimant, he was required to provide upon request "any nonprivileged research materials or evidence gathered by

The majority requires the Nation to "point to a right conferred by statute" to the attorney-client communications at issue, *ante*, at 178, and finding none, denies the Nation access to those communications. The upshot of that decision, I fear, may very well be to reinvigorate the position of the dissenting Justices in *White Mountain Apache* and *Mitchell II*, who rejected the use of common-law principles to inform the scope of the Government's fiduciary obligations to Indian tribes. See *White Mountain Apache*, 537 U. S., at 486–487 (THOMAS, J., dissenting); *Mitchell II*, 463 U. S., at 234–235 (Powell, J., dissenting). That approach was wrong when *Mitchell II* was decided nearly 30 years ago, and it is wrong today. Under our governing precedents, common-law trust principles play an important role in defining the Government's fiduciary duties where, as here, the statutory scheme establishes a conventional fiduciary relationship. Applying those principles in this context, I would hold that the fiduciary exception is fully applicable to the communications in this case.[11]

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the United States in the documentation of such claim," § 5(b), *id.*, at 1978. According to the majority, this provision reflected Congress' understanding that "the Government retains evidentiary privileges allowing it to withhold information related to trust property from Indian tribes." *Ante*, at 186, n. 10. But this provision cannot bear the weight the majority places on it. Even putting aside the undisputed fact that the ICLA is inapplicable to the claims in this case, the majority's reliance on the ICLA provision fails to recognize that documents subject to the fiduciary exception are, under the "real client" rationale, *per se* nonprivileged. See, *e. g.*, *Mett*, 178 F. 3d, at 1063. Accordingly, if anything, the ICLA's requirement that the Government disclose "nonprivileged" materials to Indian claimants supports the conclusion that Congress intended communications related to trust fund management to be disclosed to Indian tribes.

[11] The majority's errors are further compounded by its failure to accord proper consideration to the mandamus posture of this case. "This Court repeatedly has observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 289 (1988). "As the writ is one of the most potent weapons in the judicial arsenal, three conditions

III

We have described the Federal Government's fiduciary duties toward Indian tribes as consisting of "moral obligations of the highest responsibility and trust," to be fulfilled through conduct "judged by the most exacting fiduciary standards." *Seminole Nation*, 316 U. S., at 297; see also *Mitchell II*, 463 U. S., at 225–226 (collecting cases). The sad and well-documented truth, however, is that the Government has failed to live up to its fiduciary obligations in managing Indian trust fund accounts. See, *e. g.*, *Cobell*, 240 F. 3d, at 1089 ("The General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of [Indian] trust accounts over the past twenty years"); Misplaced Trust 8 ("[T]he [Government's] indifferent supervision and control of the Indian trust funds has consistently resulted in a failure to exercise its responsibility and [to

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must be satisfied before it may issue," *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 380 (2004) (internal quotation marks and citation omitted):

"First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.*, at 380–381 (internal quotation marks and citations omitted; alterations deleted).

The majority purports to leave the decision whether to grant mandamus relief to the Federal Circuit, but simultaneously drops a footnote stating that it "assume[s]" that the Court of Federal Claims on remand will "follow [its] holding" that the fiduciary exception is inapplicable here. *Ante*, at 187, and n. 12. By doing so, the majority virtually ensures that the Nation will not be able to use the communications at issue in this litigation, thereby effectively granting extraordinary relief to the Government upon no showing whatsoever that the stringent conditions for mandamus have been met.

meet] any reasonable expectations of the tribal and individual accountholders, Congress, and taxpayers"); *id.*, at 56 ("[H]ad this type of mismanagement taken place in any other trust arrangements such as Social Security, there would be war").

As Congress has recognized, "[t]he Indian trust fund is more than balance sheets and accounting procedures. These moneys are crucial to the daily operations of native American tribes and a source of income to tens of thousands of native Americans." *Id.*, at 5. Given the history of governmental mismanagement of Indian trust funds, application of the fiduciary exception is, if anything, even more important in this context than in the private trustee context. The majority's refusal to apply the fiduciary exception in this case deprives the Nation—as well as the Indian tribes in the more than 90 cases currently pending in the federal courts involving claims of tribal trust mismanagement, App. to Pet. for Cert. 126a–138a—of highly relevant information going directly to the merits of whether the Government properly fulfilled its fiduciary duties. Its holding only further exacerbates the concerns expressed by many about the lack of adequate oversight and accountability that has marked the Government's handling of Indian trust fund accounts for decades.

But perhaps even more troubling than the majority's refusal to apply the fiduciary exception in this case is its disregard of our established precedents that affirm the central role that common-law trust principles play in defining the Government's fiduciary obligations to Indian tribes. By rejecting the Nation's claim on the ground that it fails to identify a specific statutory right to the communications at issue, the majority effectively embraces an approach espoused by prior dissents that rejects the role of common-law principles altogether in the Indian trust context. Its decision to do so in a case involving only a narrow evidentiary issue is wholly unnecessary and, worse yet, risks further diluting the Government's fiduciary obligations in a manner that Congress

clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes. Because there is no warrant in precedent or reason for reaching that result, I respectfully dissent.

Per Curiam

FLORES-VILLAR *v.* UNITED STATES

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

No. 09–5801. Argued November 10, 2010—Decided June 13, 2011
536 F. 3d 990, affirmed by an equally divided Court.

Steven F. Hubachek, by appointment of the Court, 559 U. S. 1105, argued the cause for petitioner. With him on the briefs were *Elizabeth M. Barros* and *Vincent J. Brunkow.*

Deputy Solicitor General Kneedler argued the cause for the United States. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorneys General West* and *Breuer*, *Sarah E. Harrington*, *Donald E. Keener*, *Carol Federighi*, *Robert N. Markle*, and *William C. Brown.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE KAGAN took no part in the consideration or decision of this case.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Sandra S. Park*, *Steven R. Shapiro*, *Lenora M. Lapidus*, *Lee Gelernt*, *Lucas Guttentag*, *Jennifer Chang Newell*, and *David Blair-Loy;* for Equality Now et al. by *Martha F. Davis;* for the National Immigrant Justice Center et al. by *Brian J. Murray*, *Charles Roth*, and *Stephen W. Manning;* for the National Women's Law Center et al. by *Deanne E. Maynard*, *Brian R. Matsui*, *Seth M. Galanter*, *Marcia D. Greenberger*, and *Dina R. Lassow;* for Professors of History et al. by *Lorelie S. Masters* and *Lindsay C. Harrison;* and for Scholars on Statelessness by *Max Gitter.*

Michael M. Hethmon filed a brief for the Immigration Reform Law Institute as *amicus curiae.*

Syllabus

BOND *v.* UNITED STATES

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

No. 09–1227. Argued February 22, 2011—Decided June 16, 2011

When petitioner Bond discovered that her close friend was pregnant by Bond's husband, she began harassing the woman. The woman suffered a minor burn after Bond put caustic substances on objects the woman was likely to touch. Bond was indicted for violating 18 U. S. C. § 229, which forbids knowing possession or use, for nonpeaceful purposes, of a chemical that "can cause death, temporary incapacitation or permanent harm to humans," §§ 229(a); 229F(1); (7); (8), and which is part of a federal Act implementing a chemical weapons treaty ratified by the United States. The District Court denied Bond's motion to dismiss the § 229 charges on the ground that the statute exceeded Congress' constitutional authority to enact. She entered a conditional guilty plea, reserving the right to appeal the ruling on the statute's validity. She did just that, renewing her Tenth Amendment claim. The Third Circuit, however, accepted the Government's position that she lacked standing. The Government has since changed its view on Bond's standing.

Held: Bond has standing to challenge the federal statute on grounds that the measure interferes with the powers reserved to States. Pp. 216–226.

(a) The Third Circuit relied on a single sentence in *Tennessee Elec. Power Co.* v. *TVA*, 306 U. S. 118. Pp. 216–220.

(1) The Court has disapproved of *Tennessee Electric* as authoritative for purposes of Article III's case-or-controversy requirement. See *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 152–154. Here, Article III's standing requirement had no bearing on Bond's capacity to assert defenses in the District Court. And Article III's prerequisites are met with regard to her standing to appeal. Pp. 216–217.

(2) *Tennessee Electric* is also irrelevant with respect to prudential standing rules. There, the Court declined to reach the merits where private power companies sought to enjoin the federally chartered Tennessee Valley Authority (TVA) from producing and selling electric power, claiming that the statute creating the TVA exceeded the National Government's powers in violation of the Tenth Amendment. In doing so, the Court repeatedly stated that the problem with the power companies' suit was a lack of "standing" or a "cause of action," treating those concepts as interchangeable. *E. g.*, 306 U. S., at 139. The ques-

tion whether a plaintiff states a claim for relief typically "goes to the merits" of a case, however, not to the dispute's justiciability, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 92, and conflation of the two concepts can cause confusion. This happened with *Tennessee Electric*'s Tenth Amendment discussion. The statement on which the Third Circuit relied here, see 306 U. S., at 144, should be read to refer to the absence of a cause of action for injury caused by economic competition. To the extent the statement might instead be read to suggest a private party does not have standing to raise a Tenth Amendment issue, it is inconsistent with this Court's later precedents and should be deemed neither controlling nor instructive on the issue of standing as that term is now defined and applied. Pp. 217–220.

(b) *Amicus*, appointed to defend the judgment, contends that for Bond to argue the National Government has interfered with state sovereignty in violation of the Tenth Amendment is to assert only a State's legal rights and interests. But in arguing that the Government has acted in excess of the authority that federalism defines, Bond seeks to vindicate her own constitutional interests. Pp. 220–226.

(1) Federalism has more than one dynamic. In allocating powers between the States and National Government, federalism "'secures to citizens the liberties that derive from the diffusion of sovereign power,'" *New York* v. *United States*, 505 U. S. 144, 181. It enables States to enact positive law in response to the initiative of those who seek a voice in shaping the destiny of their own times, and it protects the liberty of all persons within a State by ensuring that law enacted in excess of delegated governmental power cannot direct or control their actions. See *Gregory* v. *Ashcroft*, 501 U. S. 452, 458. Federalism's limitations are not therefore a matter of rights belonging only to the States. In a proper case, a litigant may challenge a law as enacted in contravention of federalism, just as injured individuals may challenge actions that transgress, *e. g.*, separation-of-powers limitations, see, *e. g.*, *INS* v. *Chadha*, 462 U. S. 919. The claim need not depend on the vicarious assertion of a State's constitutional interests, even if those interests are also implicated. Pp. 220–224.

(2) The Government errs in contending that Bond should be permitted to assert only that Congress could not enact the challenged statute under its enumerated powers but that standing should be denied if she argues that the statute interferes with state sovereignty. Here, Bond asserts that the public policy of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the National Government. The law to which she is subject, the prosecution she seeks to counter, and the punishment she must face might not have come about had the

matter been left for Pennsylvania to decide. There is no support for the Government's proposed distinction between different federalism arguments for purposes of prudential standing rules. The principles of limited national powers and state sovereignty are intertwined. Impermissible interference with state sovereignty is not within the National Government's enumerated powers, and action exceeding the National Government's enumerated powers undermines the States' sovereign interests. Individuals seeking to challenge such measures are subject to Article III and prudential standing rules applicable to all litigants and claims, but here, where the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of the Government. Pp. 224–226.

(c) The Court expresses no view on the merits of Bond's challenge to the statute's validity. P. 226.

581 F. 3d 128, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 226.

Paul D. Clement argued the cause for petitioner. With him on the briefs were *Ashley C. Parrish*, *Candice Chiu*, *Robert E. Goldman*, and *Eric E. Reed.*

Deputy Solicitor General Dreeben argued the cause for the United States in support of petitioner. On the brief were *Acting Solicitor General Katyal*, *Assistant Attorneys General Kris* and *Breuer*, *Acting Deputy Solicitor General McLeese*, *Nicole A. Saharsky*, *John F. De Pue*, and *Kirby A. Heller.*

Stephen R. McAllister, by invitation of the Court, 562 U. S. 1038, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *David B. Rivkin, Jr.*, and *Lee A. Casey;* for the Center for Constitutional Jurisprudence et al. by *John C. Eastman*, *Anthony T. Caso*, *David L. Llewellyn, Jr.*, *Edwin Meese III*, and *Ilya Shapiro;* for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly;* and for the Gun Owners Foundation et al. by *William J. Olson*, *Herbert W. Titus*, and *John S. Miles.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents the question whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States.

The indicted defendant, petitioner here, sought to argue the invalidity of the statute. She relied on the Tenth Amendment, and, by extension, on the premise that Congress exceeded its powers by enacting it in contravention of basic federalism principles. The statute, 18 U. S. C. §229, was enacted to comply with a treaty; but petitioner contends that, at least in the present instance, the treaty cannot be the source of congressional power to regulate or prohibit her conduct.

The Court of Appeals held that because a State was not a party to the federal criminal proceeding, petitioner had no standing to challenge the statute as an infringement upon the powers reserved to the States. Having concluded that petitioner does have standing to challenge the federal statute on these grounds, this Court now reverses that determination. The merits of petitioner's challenge to the statute's validity are to be considered, in the first instance, by the Court of Appeals on remand and are not addressed in this opinion.

I

This case arises from a bitter personal dispute, leading to the criminal acts charged here. Petitioner Carol Anne Bond lived outside Philadelphia, Pennsylvania. After discovering that her close friend was pregnant and that the father was Bond's husband, Bond sought revenge. Bond subjected the woman to a campaign of harassing telephone calls and letters, acts that resulted in a criminal conviction on a minor state charge. Bond persisted in her hostile acts, placing caustic substances on objects the woman was likely to touch, including her mailbox, car door handle, and front

doorknob. Bond's victim suffered a minor burn on her hand and contacted federal investigators, who identified Bond as the perpetrator.

Bond was indicted in the United States District Court for the Eastern District of Pennsylvania for, among other offenses, two counts of violating § 229. Section 229 forbids knowing possession or use of any chemical that "can cause death, temporary incapacitation or permanent harm to humans or animals" where not intended for a "peaceful purpose." §§ 229(a); 229F(1); (7); (8). The statute was enacted as part of the Chemical Weapons Convention Implementation Act of 1998, 112 Stat. 2681–856, 22 U. S. C. § 6701 *et seq.;* 18 U. S. C. § 229 *et seq.* The Act implements provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, a treaty the United States ratified in 1997.

In the District Court, Bond moved to dismiss the § 229 charges, contending the statute was beyond Congress' constitutional authority to enact. The District Court denied the motion. Bond entered a conditional plea of guilty, reserving the right to appeal the ruling on the validity of the statute. She was sentenced to six years in prison.

In the Court of Appeals for the Third Circuit, Bond renewed her challenge to the statute, citing, among other authorities, the Tenth Amendment to the Constitution. The Court of Appeals asked for supplemental briefs on the question whether Bond had standing to raise the Tenth Amendment as a ground for invalidating a federal statute in the absence of a State's participation in the proceedings.

In its supplemental brief in the Court of Appeals, the Government took the position that Bond did not have standing. The Court of Appeals agreed. 581 F. 3d 128 (2009).

When Bond sought certiorari, the Government advised this Court that it had changed its position and that, in its view, Bond does have standing to challenge the constitutionality of § 229 on Tenth Amendment grounds. See Brief for

United States (filed July 9, 2010). The Court granted certiorari, 562 U. S. 960 (2010), and appointed an *amicus curiae* to defend the judgment of the Court of Appeals. Stephen McAllister, a member of the bar of this Court, filed an *amicus* brief and presented an oral argument that have been of considerable assistance to the Court.

II

To conclude that petitioner lacks standing to challenge a federal statute on grounds that the measure interferes with the powers reserved to States, the Court of Appeals relied on a single sentence from this Court's opinion in *Tennessee Elec. Power Co.* v. *TVA*, 306 U. S. 118 (1939). See 581 F. 3d, at 136–138. As the Court of Appeals noted here, other Courts of Appeals have taken a similar approach. *E. g.*, *United States* v. *Hacker*, 565 F. 3d 522, 525–527 (CA8 2009); *Oregon* v. *Legal Servs. Corp.*, 552 F. 3d 965, 971–972 (CA9 2009); *Brooklyn Legal Servs. Corp.* v. *Legal Servs. Corp.*, 462 F. 3d 219, 234–235 (CA2 2006); *Medeiros* v. *Vincent*, 431 F. 3d 25, 33–36 (CA1 2005); *United States* v. *Parker*, 362 F. 3d 1279, 1284–1285 (CA10 2004). That approach is in tension, if not conflict, with decisions of some other Courts of Appeals. See *Gillespie* v. *Indianapolis*, 185 F. 3d 693, 700–704 (CA7 1999); *Metrolina Family Practice Group, P. A.* v. *Sullivan*, 767 F. Supp. 1314 (WDNC 1989), aff'd, 929 F. 2d 693 (CA4 1991); *Atlanta Gas Light Co.* v. *United States Dept. of Energy*, 666 F. 2d 1359, 1368, n. 16 (CA11 1982); see also *United States* v. *Johnson*, 632 F. 3d 912, 918–921 (CA5 2011) (reserving issue); *Lomont* v. *O'Neill*, 285 F. 3d 9, 14, n. 5 (CADC 2002) (same); *Nance* v. *EPA*, 645 F. 2d 701, 716 (CA9 1981) (same).

Tennessee Electric is the appropriate place to begin. It should be clear that *Tennessee Electric* does not cast doubt on Bond's standing for purposes of Article III's case-or-controversy requirement. This Court long ago disapproved of the case as authoritative respecting Article III limitations.

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U. S. 150, 152–154 (1970). In the instant case, moreover, it is apparent—and in fact conceded not only by the Government but also by *amicus*—that Article III poses no barrier. One who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, see *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992), and, in addition, an "ongoing interest in the dispute" on the part of the opposing party that is sufficient to establish "concrete adverseness." *Camreta* v. *Greene*, 563 U. S. 692, 701 (2011) (internal quotation marks omitted). When those conditions are met, Article III does not restrict the opposing party's ability to object to relief being sought at its expense. The requirement of Article III standing thus had no bearing upon Bond's capacity to assert defenses in the District Court. As for Bond's standing to appeal, it is clear Article III's prerequisites are met. Bond's challenge to her conviction and sentence "satisfies the case-or-controversy requirement, because the incarceration . . . constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer* v. *Kemna*, 523 U. S. 1, 7 (1998).

To resolve the case, this Court must consider next whether *Tennessee Electric* is irrelevant with respect to prudential rules of standing as well. The question in *Tennessee Electric* was whether a group of private power companies could bring suit to enjoin the federally chartered Tennessee Valley Authority (TVA) from producing and selling electric power. It was conceded that competition from the TVA would "inflict substantial damage" upon the power companies. 306 U. S., at 137. According to the companies, the federal statute authorizing the creation and operation of the TVA was invalid because, among other reasons, it exceeded the powers of the National Government in violation of the Tenth Amendment.

Declining to reach the merits, the Court concluded the power companies' lawsuit should be dismissed. It explained that the suit was premised on the principle that a person threatened with injury by conduct "which, but for statutory authority for its performance, would be a violation of his legal rights" could request an injunction from a court of equity and by this means test the validity of the statute. *Ibid.* But the Court concluded that the TVA, even if it were shorn of congressional statutory authority, had done nothing more than compete as a supplier of electricity. *Id.*, at 138. And since state law did not purport to grant any of the power companies a monopoly, there was no basis for a suit in which the TVA might be forced to invoke its congressional authorization. *Id.*, at 138–143.

In that part of its analysis, and throughout its opinion, the *Tennessee Electric* Court stated that the problem with the power companies' suit was a lack of "standing" or a "cause of action." It treated those concepts as interchangeable. *E. g.*, *id.*, at 139 (no "standing" because no "legal cause of complaint"); *id.*, at 139–140 (no "standing" without "a cause of action or a right to sue"); *id.*, at 142 ("no standing," no "right to sue for an injunction"); *id.*, at 144 (no Tenth Amendment "standing" and no Ninth Amendment "cause of action" for same reasons); see also Bellia, Article III and the Cause of Action, 89 Iowa L. Rev. 777, 826–830 (2004).

Even though decisions since *Tennessee Electric* have been careful to use the terms "cause of action" and "standing" with more precision, the distinct concepts can be difficult to keep separate. If, for instance, the person alleging injury is remote from the zone of interests a statute protects, whether there is a legal injury at all and whether the particular litigant is one who may assert it can involve similar inquiries. *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 96–97, and n. 2 (1998) (noting that statutory standing and the existence of a cause of action are "closely connected" and "sometimes identical" questions).

Still, the question whether a plaintiff states a claim for relief "goes to the merits" in the typical case, not the justiciability of a dispute, *id.*, at 92, and conflation of the two concepts can cause confusion. This is the case with the Tenth Amendment discussion in *Tennessee Electric.* The *Tennessee Electric* Court noted that "[a] distinct ground upon which standing to maintain the suit is said to rest is that the acts of the Authority cannot be upheld without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." 306 U. S., at 143. The Court rejected the argument, however, concluding the Tenth Amendment did not give one business a right to keep another from competing. *Id.*, at 144 ("The sale of government property in competition with others is not a violation of the Tenth Amendment").

The Court then added the sentence upon which the Court of Appeals relied in the instant case, the sentence that has been the source of disagreement among Courts of Appeals:

> "As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment." *Ibid.*

The quoted statement was in the context of a decision which held that business competitors had no legal injury, and the word standing can be interpreted in that sense. On this reading, the statement reiterated an earlier point. The statement explained that the States in which the TVA operated exempted it from their public utilities regulations; and that even if the States had not done so and the TVA had violated those regulations, the regulations were for the States to enforce. See *id.*, at 141–142. They conferred no private right of action on business competitors. This reading is consistent with the *Tennessee Electric* Court's use of the term "standing" elsewhere in its opinion to refer to

the existence of a state-law cause of action. A holding that state utilities regulations did not supply a cause of action against a competitor is of no relevance to the instant case, and we need not explore all of its implications. See also *Data Processing*, 397 U. S., at 157–158 (cause of action under the Administrative Procedure Act, 5 U. S. C. § 702, permits suit based on injury from business competition).

Yet the quoted statement also could be read to refer to standing in the sense of whether the power companies were the proper litigants to raise a Tenth Amendment issue. To the extent that might have been the intention of the *Tennessee Electric* Court, it is, for reasons to be explained, inconsistent with our later precedents. The sentence from *Tennessee Electric* that we have quoted and discussed should be deemed neither controlling nor instructive on the issue of standing as that term is now defined and applied.

III

Amicus contends that federal courts should not adjudicate a claim like Bond's because of the prudential rule that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U. S. 490, 499, 500 (1975); see also *Kowalski* v. *Tesmer*, 543 U. S. 125, 129–130 (2004). In *amicus*' view, to argue that the National Government has interfered with state sovereignty in violation of the Tenth Amendment is to assert the legal rights and interests of States and States alone. That, however, is not so. As explained below, Bond seeks to vindicate her own constitutional interests. The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.

A

The federal system rests on what might at first seem a counterintuitive insight, that "freedom is enhanced by the

creation of two governments, not one." *Alden* v. *Maine*, 527 U. S. 706, 758 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.

Federalism has more than one dynamic. It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.

But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York* v. *United States*, 505 U. S. 144, 181 (1992) (quoting *Coleman* v. *Thompson*, 501 U. S. 722, 759 (1991) (Blackmun, J., dissenting)).

Some of these liberties are of a political character. The federal structure allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." *Gregory* v. *Ashcroft*, 501 U. S. 452, 458 (1991). Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case

or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. See *ibid.* By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. See *New York*, *supra*, at 181. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

The recognition of an injured person's standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.

In the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances. For example, the requirement that a bill enacted by Congress be presented to the President for signature before it can become law gives the President

a check over Congress' exercise of legislative power. See U. S. Const., Art. I, § 7. Yet individuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies. In *INS* v. *Chadha*, 462 U. S. 919 (1983), it was an individual who successfully challenged the so-called legislative veto—a procedure that Congress used in an attempt to invalidate an executive determination without presenting the measure to the President. The procedure diminished the role of the Executive, but the challenger sought to protect not the prerogatives of the Presidency as such but rather his own right to avoid deportation under an invalid order. Chadha's challenge was sustained. A cardinal principle of separation of powers was vindicated at the insistence of an individual, indeed one who was not a citizen of the United States but who still was a person whose liberty was at risk.

Chadha is not unique in this respect. Compare *Clinton* v. *City of New York*, 524 U. S. 417, 433–436 (1998) (injured parties have standing to challenge Presidential line-item veto), with *Raines* v. *Byrd*, 521 U. S. 811, 829–830 (1997) (Congress Members do not); see also, *e. g.*, *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211 (1995); *Bowsher* v. *Synar*, 478 U. S. 714 (1986); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.

Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a

law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State's constitutional interests, even if a State's constitutional interests are also implicated.

B

In this regard it is necessary to address a misconception in the position the Government now urges this Court to adopt. As noted, the Government agrees that petitioner has standing to challenge the validity of § 229. That concession, however, depends on describing petitioner's claim in a narrow way. The Government contends petitioner asserts only that Congress could not enact the challenged statute under its enumerated powers. Were she to argue, the Government insists, that the statute "interferes with a specific aspect of state sovereignty," either instead of or in addition to her enumerated powers contention, the Court should deny her standing. Brief for United States 18 (filed Dec. 3, 2010).

The premise that petitioner does or should avoid making an "interference-with-sovereignty" argument is flawed. *Id.*, at 33. Here she asserts, for example, that the conduct with which she is charged is "local in nature" and "should be left to local authorities to prosecute" and that congressional regulation of that conduct "signals a massive and unjustifiable expansion of federal law enforcement into state-regulated domain." Record in No. 2:07–cr–00528–JG–1 (ED Pa.), Doc. 27, pp. 6, 19. The public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the National Government. The law to which petitioner is subject, the prosecution she seeks to counter, and the punishment she must face might not have come about if the matter were left for the Commonwealth of Pennsylvania to decide. Indeed, petitioner argues that under Pennsylvania law the expected maximum term of imprisonment she could have received

for the same conduct was barely more than a third of her federal sentence.

There is no basis to support the Government's proposed distinction between different federalism arguments for purposes of prudential standing rules. The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, see *New York*, 505 U. S., at 155–159, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States. See *United States* v. *Lopez*, 514 U. S. 549, 564 (1995). The unconstitutional action can cause concomitant injury to persons in individual cases.

An individual who challenges federal action on these grounds is, of course, subject to the Article III requirements, as well as prudential rules, applicable to all litigants and claims. Individuals have "no standing to complain simply that their Government is violating the law." *Allen* v. *Wright*, 468 U. S. 737, 755 (1984). It is not enough that a litigant "suffers in some indefinite way in common with people generally." *Frothingham* v. *Mellon*, 262 U. S. 447, 488 (1923) (decided with *Massachusetts* v. *Mellon*). If, in connection with the claim being asserted, a litigant who commences suit fails to show actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision, the Federal Judiciary cannot hear the claim. *Lujan*, 504 U. S., at 560–561. These requirements must be satisfied before an individual may assert a constitutional claim; and in some instances, the result may be that a State is the only entity capable of demonstrating the requisite injury.

In this case, however, where the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of

the federal structure of our Government. Whether the Tenth Amendment is regarded as simply a "'truism,'" *New York*, *supra*, at 156 (quoting *United States* v. *Darby*, 312 U. S. 100, 124 (1941)), or whether it has independent force of its own, the result here is the same.

* * *

There is no basis in precedent or principle to deny petitioner's standing to raise her claims. The ultimate issue of the statute's validity turns in part on whether the law can be deemed "necessary and proper for carrying into Execution" the President's Article II, § 2, Treaty Power, see U. S. Const., Art. I, § 8, cl. 18. This Court expresses no view on the merits of that argument. It can be addressed by the Court of Appeals on remand.

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

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion and write separately to make the following observation. Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law. See Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1331–1333 (2000); Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 3. See also *North Carolina* v. *Pearce*, 395 U. S. 711, 739 (1969) (Black, J., concurring in part and dissenting in part) ("Due process . . . is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land.").

In this case, Bond argues that the statute under which she was charged, 18 U. S. C. § 229, exceeds Congress' enumerated powers and violates the Tenth Amendment. Other defend-

ants might assert that a law exceeds Congress' power because it violates the Ex Post Facto Clause, or the Establishment Clause, or the Due Process Clause. Whatever the claim, success on the merits would require reversal of the conviction. "An offence created by [an unconstitutional law]," the Court has held, "is not a crime." *Ex parte Siebold*, 100 U. S. 371, 376 (1880). "A conviction under [such a law] is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Id.*, at 376–377. If a law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free.

For this reason, a court has no "prudential" license to decline to consider whether the statute under which the defendant has been charged lacks constitutional application to her conduct. And that is so even where the constitutional provision that would render the conviction void is directed at protecting a party not before the Court. Our decisions concerning criminal laws infected with discrimination are illustrative. The Court must entertain the objection—and reverse the conviction—even if the right to equal treatment resides in someone other than the defendant. See *Eisenstadt* v. *Baird*, 405 U. S. 438, 452–455 (1972) (reversing conviction for distributing contraceptives because the law banning distribution violated the recipient's right to equal protection); cf. *Craig* v. *Boren*, 429 U. S. 190, 192, 210, and n. 24 (1976) (law penalizing sale of beer to males but not females aged 18 to 20 could not be enforced against vendor). See also *Grayned* v. *City of Rockford*, 408 U. S. 104, 107, n. 2 (1972); *Welsh* v. *United States*, 398 U. S. 333, 361–362 (1970) (Harlan, J., concurring in result) (reversal required even if, going forward, Congress would cure the unequal treatment by extending rather than invalidating the criminal proscription).

In short, a law "beyond the power of Congress," for any reason, is "no law at all." *Nigro* v. *United States*, 276 U. S.

332, 341 (1928). The validity of Bond's conviction depends upon whether the Constitution permits Congress to enact § 229. Her claim that it does not must be considered and decided on the merits.

Syllabus

DAVIS *v.* UNITED STATES

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

No. 09–11328. Argued March 21, 2011—Decided June 16, 2011

While conducting a routine vehicle stop, police arrested petitioner Willie Davis, a passenger, for giving a false name. After handcuffing Davis and securing the scene, the police searched the vehicle and found Davis' revolver. Davis was then indicted on charges of being a felon in possession of a firearm. In a suppression motion, Davis acknowledged that the search of the vehicle complied with existing Eleventh Circuit precedent interpreting *New York* v. *Belton*, 453 U. S. 454, but Davis raised a Fourth Amendment challenge to preserve the issue on appeal. The District Court denied the motion, and Davis was convicted. While his appeal was pending, this Court announced, in *Arizona* v. *Gant*, 556 U. S. 332, 343, a new rule governing automobile searches incident to arrests of recent occupants. The Eleventh Circuit held, under *Gant*, that the vehicle search at issue violated Davis' Fourth Amendment rights, but the court declined to suppress the revolver and affirmed Davis' conviction.

Held: Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. Pp. 236–250.

(a) The exclusionary rule's sole purpose is to deter future Fourth Amendment violations, *e. g.*, *Herring* v. *United States*, 555 U. S. 135, 141, and its operation is limited to situations in which this purpose is "thought most efficaciously served," *United States* v. *Calandra*, 414 U. S. 338, 348. For exclusion to be appropriate, the deterrence benefits of suppression must outweigh the rule's heavy costs. Under a line of cases beginning with *United States* v. *Leon*, 468 U. S. 897, the result of this cost-benefit analysis turns on the "flagrancy of the police misconduct" at issue. *Id.*, at 909, 911. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the benefits of exclusion tend to outweigh the costs. *Herring*, *supra*, at 144. But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrent value of suppression is diminished, and exclusion cannot "pay its way." See *Leon*, *supra*, at 909, 919, 908, n. 6; *Herring*, *supra*, at 137. Pp. 236–239.

(b) Although the search in this case turned out to be unconstitutional under *Gant*, Davis concedes that the officers' conduct was in strict com-

pliance with then-binding Circuit law and was not culpable in any way. Under this Court's exclusionary-rule precedents, the acknowledged absence of police culpability dooms Davis' claim. Pp. 239–241.

(c) The Court is not persuaded by arguments that other considerations should prevent the good-faith exception from applying in this case. Pp. 241–249.

(1) The argument that the availability of the exclusionary rule to enforce new Fourth Amendment precedent is a retroactivity issue, not a good-faith issue, is unpersuasive. This argument erroneously conflates retroactivity with remedy. Because Davis' conviction had not become final when *Gant* was announced, *Gant* applies retroactively in this case, and Davis may invoke its newly announced rule as a basis for seeking relief. See *Griffith* v. *Kentucky*, 479 U. S. 314, 326, 328. But retroactive application of a new rule does not determine the question of what remedy the defendant should obtain. See *Powell* v. *Nevada*, 511 U. S. 79, 83, 84. The remedy of exclusion does not automatically follow from a Fourth Amendment violation, see *Arizona* v. *Evans*, 514 U. S. 1, 13, and applies only where its "purpose is effectively advanced," *Illinois* v. *Krull*, 480 U. S. 340, 347. The application of the good-faith exception here neither contravenes *Griffith* nor denies retroactive effect to *Gant*. Pp. 242–245.

(2) Nor is the Court persuaded by the argument that applying the good-faith exception to searches conducted in reliance on binding precedent will stunt the development of Fourth Amendment law by discouraging criminal defendants from attacking precedent. Facilitating the overruling of precedent has never been a relevant consideration in this Court's exclusionary-rule cases. In any event, applying the good-faith exception in this context will not prevent this Court's review of Fourth Amendment precedents. If precedent from a federal court of appeals or state court of last resort upholds a particular type of search or seizure, defendants in jurisdictions where the question remains open will still have an undiminished incentive to litigate the issue, and this Court can grant certiorari in one of those cases. Davis' claim that *this* Court's Fourth Amendment precedents will be effectively insulated from challenge is overstated. In many cases, defendants will test this Court's Fourth Amendment precedents by arguing that they are distinguishable. And at most, this argument might suggest that, in a future case, the Court could allow a petitioner who secures a decision overruling one of this Court's precedents to obtain suppression of evidence in that one case. Pp. 245–249.

598 F. 3d 1259, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment, *post*, p. 250. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 252.

Orin S. Kerr argued the cause for petitioner. With him on the briefs was *William W. Whatley, Jr.*

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Anthony A. Yang*, and *John M. Pellettieri.**

JUSTICE ALITO delivered the opinion of the Court.

The Fourth Amendment protects the right to be free from "unreasonable searches and seizures," but it is silent about how this right is to be enforced. To supplement the bare text, this Court created the exclusionary rule, a deterrent

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**Rebecca Louise Pennell* and *Brett Sweitzer* filed a brief for the National Association of Federal Defenders as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *Douglas F. Gansler*, Attorney General of Maryland, and *Brian S. Kleinbord*, *Jeremy M. McCoy*, and *Carrie J. Williams*, Assistant Attorneys General, by *William H. Ryan, Jr.*, Acting Attorney General of Pennsylvania, and by the Attorneys General for their respective States as follows: *John J. Burns* of Alaska, *Tom Horne* of Arizona, *Kamala D. Harris* of California, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Jack Conway* of Kentucky, *William J. Schneider* of Maine, *Martha Coakley* of Massachusetts, *Bill Schuette* of Michigan, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Robert B. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for Wayne County, Michigan, by *Kym L. Worthy* and *Timothy A. Baughman;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation. The question here is whether to apply this sanction when the police conduct a search in compliance with binding precedent that is later overruled. Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

I

The question presented arises in this case as a result of a shift in our Fourth Amendment jurisprudence on searches of automobiles incident to arrests of recent occupants.

A

Under this Court's decision in *Chimel* v. *California*, 395 U. S. 752 (1969), a police officer who makes a lawful arrest may conduct a warrantless search of the arrestee's person and the area "within his immediate control." *Id.*, at 763 (internal quotation marks omitted). This rule "may be stated clearly enough," but in the early going after *Chimel* it proved difficult to apply, particularly in cases that involved searches "inside [of] automobile[s] after the arrestees [we]re no longer in [them]." See *New York* v. *Belton*, 453 U. S. 454, 458–459 (1981). A number of courts upheld the constitutionality of vehicle searches that were "substantially contemporaneous" with occupants' arrests.[1] Other courts disapproved of automobile searches incident to arrests, at least absent some continuing threat that the arrestee might gain access to the vehicle and "destroy evidence or grab a

[1] See, *e. g.*, *United States* v. *Sanders*, 631 F. 2d 1309, 1313–1314 (CA8 1980); *United States* v. *Dixon*, 558 F. 2d 919, 922 (CA9 1977); *United States* v. *Frick*, 490 F. 2d 666, 668–669 (CA5 1973); *Hinkel* v. *Anchorage*, 618 P. 2d 1069, 1069–1071 (Alaska 1980).

weapon."[2] In *New York* v. *Belton*, this Court granted certiorari to resolve the conflict. See *id.*, at 459–460.

In *Belton*, a police officer conducting a traffic stop lawfully arrested four occupants of a vehicle and ordered the arrestees to line up, unhandcuffed, along the side of the thruway. *Id.*, at 456; see Brief for Petitioner in *New York* v. *Belton*, O. T. 1980, No. 80–328, p. 3. The officer then searched the vehicle's passenger compartment and found cocaine inside a jacket that lay on the backseat. *Belton*, 453 U. S., at 456. This Court upheld the search as reasonable incident to the occupants' arrests. In an opinion that repeatedly stressed the need for a "straightforward," "workable rule" to guide police conduct, the Court announced "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.*, at 459–460 (footnote omitted).

For years, *Belton* was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search. See *Thornton* v. *United States*, 541 U. S. 615, 628 (2004) (SCALIA, J., concurring in judgment) (collecting cases). Even after the arrestee had stepped out of the vehicle and had been subdued by police, the prevailing understanding was that *Belton* still authorized a substantially contemporaneous search of the automobile's passenger compartment.[3]

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[2] See, *e. g.*, *United States* v. *Benson*, 631 F. 2d 1336, 1340 (CA8 1980); see also *United States* v. *Rigales*, 630 F. 2d 364, 366–367 (CA5 1980); *Ulesky* v. *State*, 379 So. 2d 121, 125–126 (Fla. App. 1979).

[3] See, *e. g.*, *United States* v. *Dorsey*, 418 F. 3d 1038, 1041, 1043–1044 (CA9 2005) (upholding automobile search conducted after the officer had "handcuffed [the arrestee] and put him in the back of [the] patrol car"); *United States* v. *Barnes*, 374 F. 3d 601, 604 (CA8 2004) (same).

Not every court, however, agreed with this reading of *Belton*. In *State* v. *Gant*, 216 Ariz. 1, 162 P. 3d 640 (2007), the Arizona Supreme Court considered an automobile search conducted after the vehicle's occupant had been arrested, handcuffed, and locked in a patrol car. The court distinguished *Belton* as a case in which "four unsecured" arrestees "presented an immediate risk of loss of evidence and an obvious threat to [a] lone officer's safety." 216 Ariz., at 4, 162 P. 3d, at 643. The court held that where no such "exigencies exis[t]"—where the arrestee has been subdued and the scene secured—the rule of *Belton* does not apply. 216 Ariz., at 4, 162 P. 3d, at 643.

This Court granted certiorari in *Gant*, see 552 U. S. 1230 (2008), and affirmed in a 5-to-4 decision. *Arizona* v. *Gant*, 556 U. S. 332 (2009). Four of the Justices in the majority agreed with the Arizona Supreme Court that *Belton*'s holding applies only where "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 556 U. S., at 343. The four dissenting Justices, by contrast, understood *Belton* to have explicitly adopted the simple, bright-line rule stated in the *Belton* Court's opinion. 556 U. S., at 357–358 (opinion of ALITO, J.); see *Belton*, *supra*, at 460 ("[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" (footnote omitted)). To limit *Belton* to cases involving unsecured arrestees, the dissenters thought, was to overrule the decision's clear holding. *Gant*, *supra*, at 357–358. JUSTICE SCALIA, who provided the fifth vote to affirm in *Gant*, agreed with the dissenters' understanding of *Belton*'s holding. 556 U. S., at 351–352 (concurring opinion). JUSTICE SCALIA favored a more explicit and complete overruling of *Belton*, but he joined what became the majority opinion to avoid "a 4-to-1-to-4" disposition. 556 U. S., at 354. As a result, the Court adopted a new, two-part rule under which an auto-

mobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains "evidence relevant to the crime of arrest." *Id.*, at 343 (citing *Thornton*, *supra*, at 632 (SCALIA, J., concurring in judgment); internal quotation marks omitted).

B

The search at issue in this case took place a full two years before this Court announced its new rule in *Gant*. On an April evening in 2007, police officers in Greenville, Alabama, conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens (for driving while intoxicated) and passenger Willie Davis (for giving a false name to police). The police handcuffed both Owens and Davis, and they placed the arrestees in the back of separate patrol cars. The police then searched the passenger compartment of Owens' vehicle and found a revolver inside Davis' jacket pocket.

Davis was indicted in the Middle District of Alabama on one count of possession of a firearm by a convicted felon. See 18 U. S. C. § 922(g)(1). In his motion to suppress the revolver, Davis acknowledged that the officers' search fully complied with "existing Eleventh Circuit precedent." App. 13–15. Like most courts, the Eleventh Circuit had long read *Belton* to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants. See *United States* v. *Gonzalez*, 71 F. 3d 819, 822, 824–827 (CA11 1996) (upholding automobile search conducted after the defendant had been "pulled from the vehicle, handcuffed, laid on the ground, and placed under arrest"). Davis recognized that the District Court was obligated to follow this precedent, but he raised a Fourth Amendment challenge to preserve "the issue for review" on appeal. App. 15. The District Court denied the motion, and Davis was convicted on the firearms charge.

While Davis' appeal was pending, this Court decided *Gant*. The Eleventh Circuit, in the opinion below, applied *Gant*'s new rule and held that the vehicle search incident to Davis' arrest "violated [his] Fourth Amendment rights." 598 F. 3d 1259, 1263 (CA11 2010). As for whether this constitutional violation warranted suppression, the Eleventh Circuit viewed that as a separate issue that turned on "the potential of exclusion to deter wrongful police conduct." *Id.*, at 1265 (quoting *Herring* v. *United States*, 555 U. S. 135, 137 (2009); internal quotation marks omitted). The court concluded that "penalizing the [arresting] officer" for following binding appellate precedent would do nothing to "dete[r] . . . Fourth Amendment violations." 598 F. 3d, at 1265–1266 (bracketing and internal quotation marks omitted). It therefore declined to apply the exclusionary rule and affirmed Davis' conviction. We granted certiorari. 562 U. S. 1002 (2010).

II

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment says nothing about suppressing evidence obtained in violation of this command. That rule—the exclusionary rule—is a "prudential" doctrine, *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 363 (1998), created by this Court to "compel respect for the constitutional guaranty." *Elkins* v. *United States*, 364 U. S. 206, 217 (1960); see *Weeks* v. *United States*, 232 U. S. 383 (1914); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Exclusion is "not a personal constitutional right," nor is it designed to "redress the injury" occasioned by an unconstitutional search. *Stone* v. *Powell*, 428 U. S. 465, 486 (1976); see *United States* v. *Janis*, 428 U. S. 433, 454, n. 29 (1976) (exclusionary rule "unsupportable as reparation or compensatory dispensation to the injured criminal" (internal quotation marks omitted)). The rule's sole purpose, we have repeatedly held, is to deter future Fourth

Amendment violations. *E. g.*, *Herring*, *supra*, at 141, and n. 2; *United States* v. *Leon*, 468 U. S. 897, 909, 921, n. 22 (1984); *Elkins*, *supra*, at 217 ("calculated to prevent, not to repair"). Our cases have thus limited the rule's operation to situations in which this purpose is "thought most efficaciously served." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Where suppression fails to yield "appreciable deterrence," exclusion is "clearly . . . unwarranted." *Janis*, *supra*, at 454.

Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. *Hudson* v. *Michigan*, 547 U. S. 586, 596 (2006). The analysis must also account for the "substantial social costs" generated by the rule. *Leon*, *supra*, at 907. Exclusion exacts a heavy toll on both the judicial system and society at large. *Stone*, 428 U. S., at 490–491. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. *Ibid.* And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. See *Herring*, *supra*, at 141. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." *Hudson*, *supra*, at 591. For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs. See *Herring*, *supra*, at 141; *Leon*, *supra*, at 910.

Admittedly, there was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine. "Expansive dicta" in several decisions, see *Hudson*, *supra*, at 591, suggested that the rule was a self-executing mandate implicit in the Fourth Amendment itself. See *Olmstead* v. *United States*, 277 U. S. 438, 462 (1928) (remarking on the "striking outcome of the *Weeks* case" that "the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction"); *Mapp*, *supra*, at 655 ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by

that same authority, inadmissible in a state court"). As late as our 1971 decision in *Whiteley* v. *Warden, Wyo. State Penitentiary*, 401 U. S. 560, 568–569, the Court "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule." *Arizona* v. *Evans*, 514 U. S. 1, 13 (1995). In time, however, we came to acknowledge the exclusionary rule for what it undoubtedly is—a "judicially created remedy" of this Court's own making. *Calandra*, *supra*, at 348. We abandoned the old, "reflexive" application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits. *Evans*, *supra*, at 13; see, *e. g.*, *Calandra*, *supra; Janis*, *supra; Stone*, *supra; INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984); *United States* v. *Havens*, 446 U. S. 620 (1980). In a line of cases beginning with *Leon*, 468 U. S. 897, we also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the "flagrancy of the police misconduct" at issue. *Id.*, at 909, 911.

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. *Herring*, 555 U. S., at 143. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.*, at 144. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, *Leon*, *supra*, at 909 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, *Herring*, *supra*, at 137, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way," *Leon*, *supra*, at 919, 908, n. 6 (quoting *United States* v. *Peltier*, 422 U. S. 531, 539 (1975)).

The Court has over time applied this "good-faith" exception across a range of cases. *Leon* itself, for example, held that the exclusionary rule does not apply when the police conduct a search in "objectively reasonable reliance" on a

warrant later held invalid. 468 U. S., at 922. The error in such a case rests with the issuing magistrate, not the police officer, and "punish[ing] the errors of judges" is not the office of the exclusionary rule. *Id.*, at 916; see also *Massachusetts* v. *Sheppard*, 468 U. S. 981, 990 (1984) (companion case declining to apply exclusionary rule where warrant held invalid as a result of judge's clerical error).

Other good-faith cases have sounded a similar theme. *Illinois* v. *Krull*, 480 U. S. 340 (1987), extended the good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes. *Id.*, at 349–350 ("legislators, like judicial officers, are not the focus of the rule"). In *Evans*, *supra*, the Court applied the good-faith exception in a case where the police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by judicial employees. *Id.*, at 14. Most recently, in *Herring*, *supra*, we extended *Evans* in a case where *police* employees erred in maintaining records in a warrant database. "[I]solated," "nonrecurring" police negligence, we determined, lacks the culpability required to justify the harsh sanction of exclusion. 555 U. S., at 137, 144.

III

The question in this case is whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent. At the time of the search at issue here, we had not yet decided *Gant*, 556 U. S. 332, and the Eleventh Circuit had interpreted our decision in *Belton*, 453 U. S. 454, to establish a bright-line rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest. *Gonzalez*, 71 F. 3d, at 825. The search incident to Davis' arrest in this case followed the Eleventh Circuit's *Gonzalez* precedent to the letter. Although the search turned out to be unconstitutional under *Gant*, all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not

culpable in any way. See Brief for Petitioner 49 ("suppression" in this case would "impl[y] no assignment of blame").

Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis' claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield "meaningfu[l]" deterrence, and culpable enough to be "worth the price paid by the justice system." *Herring*, 555 U. S., at 144. The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis' Fourth Amendment rights deliberately, recklessly, or with gross negligence. See *ibid.* Nor does this case involve any "recurring or systemic negligence" on the part of law enforcement. *Ibid.* The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.

Indeed, in 27 years of practice under *Leon*'s good-faith exception, we have "never applied" the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. *Herring*, *supra*, at 144. If the police in this case had reasonably relied on a warrant in conducting their search, see *Leon*, *supra*, or on an erroneous warrant record in a government database, *Herring*, *supra*, the exclusionary rule would not apply. And if Congress or the Alabama Legislature had enacted a statute codifying the precise holding of the Eleventh Circuit's decision in *Gonzalez*,[4] we

[4] Cf. Kan. Stat. Ann. §22–2501(c) (2007) ("When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of . . . [d]iscovering the fruits, instrumentalities, or evidence of a crime"). The Kansas Supreme Court recently struck this provision down in light of *Arizona* v. *Gant*, 556 U. S. 332 (2009). *State* v. *Henning*, 289 Kan. 136, 137, 209 P. 3d 711, 714 (2009). But it has applied *Illinois* v. *Krull*, 480 U. S. 340 (1987), and the good-faith exception to searches conducted in reasonable reliance on the statute. See *State* v. *Daniel*, 291 Kan. 490, 497–504, 242 P. 3d 1186, 1191–1195 (2010).

would swiftly conclude that "'[p]enalizing the officer for the [legislature's] error . . . cannot logically contribute to the deterrence of Fourth Amendment violations.'" *Krull*, 480 U. S., at 350. The same should be true of Davis' attempt here to "'[p]enaliz[e] the officer for the [appellate judges'] error.'" *Ibid.*

About all that exclusion would deter in this case is conscientious police work. Responsible law enforcement officers will take care to learn "what is required of them" under Fourth Amendment precedent and will conform their conduct to these rules. *Hudson*, 547 U. S., at 599. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "'ac[t] as a reasonable officer would and should act'" under the circumstances. *Leon*, 468 U. S., at 920 (quoting *Stone*, 428 U. S., at 539–540 (White, J., dissenting)). The deterrent effect of exclusion in such a case can only be to discourage the officer from "'do[ing] his duty.'" 468 U. S., at 920.

That is not the kind of deterrence the exclusionary rule seeks to foster. We have stated before, and we reaffirm today, that the harsh sanction of exclusion "should not be applied to deter objectively reasonable law enforcement activity." *Id.*, at 919. Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.

IV

JUSTICE BREYER's dissent and Davis argue that, although the police conduct in this case was in no way culpable, other considerations should prevent the good-faith exception from applying. We are not persuaded.

A

1

The principal argument of both the dissent and Davis is that the exclusionary rule's availability to enforce new Fourth Amendment precedent is a retroactivity issue, see *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), not a good-faith issue. They contend that applying the good-faith exception where police have relied on overruled precedent effectively revives the discarded retroactivity regime of *Linkletter* v. *Walker*, 381 U. S. 618 (1965). See *post*, at 254–256.

In *Linkletter*, we held that the retroactive effect of a new constitutional rule of criminal procedure should be determined on a case-by-case weighing of interests. For each new rule, *Linkletter* required courts to consider a three-factor balancing test that looked to the "purpose" of the new rule, "reliance" on the old rule by law enforcement and others, and the effect retroactivity would have "on the administration of justice." 381 U. S., at 636. After "weigh[ing] the merits and demerits in each case," courts decided whether and to what extent a new rule should be given retroactive effect. *Id.*, at 629. In *Linkletter* itself, the balance of interests prompted this Court to conclude that *Mapp* v. *Ohio*, 367 U. S. 643—which incorporated the exclusionary rule against the States—should not apply retroactively to cases already final on direct review. 381 U. S., at 639–640. The next year, we extended *Linkletter* to retroactivity determinations in cases on direct review. See *Johnson* v. *New Jersey*, 384 U. S. 719, 733 (1966) (holding that *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), applied retroactively only to trials commenced after the decisions were released).

Over time, *Linkletter* proved difficult to apply in a consistent, coherent way. Individual applications of the standard "produced strikingly divergent results," *Danforth* v. *Minnesota*, 552 U. S. 264, 273 (2008), that many saw as "incompatible" and "inconsistent," *Desist* v. *United States*, 394 U. S. 244, 258 (1969) (Harlan, J., dissenting). Justice Harlan in particu-

lar, who had endorsed the *Linkletter* standard early on, offered a strong critique in which he argued that "basic judicial" norms required full retroactive application of new rules to all cases still subject to direct review. 394 U. S., at 258–259; see also *Mackey* v. *United States*, 401 U. S. 667, 675–702 (1971) (Harlan, J., concurring in part and dissenting in part). Eventually, and after more than 20 years of toil under *Linkletter*, the Court adopted Justice Harlan's view and held that newly announced rules of constitutional criminal procedure must apply "retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception." *Griffith*, *supra*, at 328.

2

The dissent and Davis argue that applying the good-faith exception in this case is "incompatible" with our retroactivity precedent under *Griffith*. See *post*, at 254; Reply Brief for Petitioner 3–7. We think this argument conflates what are two distinct doctrines.

Our retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a *potential* ground for relief. Retroactive application under *Griffith* lifts what would otherwise be a categorical bar to obtaining redress for the government's violation of a newly announced constitutional rule. See *Danforth*, *supra*, at 271, n. 5 (noting that it may "make more sense to speak in terms of the 'redressability' of violations of new rules, rather than the 'retroactivity' of such new rules"). Retroactive application does not, however, determine what "appropriate remedy" (if any) the defendant should obtain. See *Powell* v. *Nevada*, 511 U. S. 79, 84 (1994) (noting that it "does not necessarily follow" from retroactive application of a new rule that the defendant will "gain . . . relief"). Remedy is a separate, analytically distinct issue. Cf. *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 189 (1990) (plurality opinion) ("[T]he Court has never equated its retroactivity principles with remedial principles"). As a result, the retroactive application of a new rule of substantive Fourth

Amendment law *raises* the question whether a suppression remedy applies; it does not answer that question. See *Leon*, 468 U. S., at 906 ("Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct' ").

When this Court announced its decision in *Gant*, Davis' conviction had not yet become final on direct review. *Gant* therefore applies retroactively to this case. Davis may invoke its newly announced rule of substantive Fourth Amendment law as a basis for seeking relief. See *Griffith*, *supra*, at 326, 328. The question, then, becomes one of remedy, and on that issue Davis seeks application of the exclusionary rule. But exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred. See *Evans*, 514 U. S., at 13–14. The remedy is subject to exceptions and applies only where its "purpose is effectively advanced." *Krull*, 480 U. S., at 347.

The dissent and Davis recognize that at least some of the established exceptions to the exclusionary rule limit its availability in cases involving new Fourth Amendment rules. Suppression would thus be inappropriate, the dissent and Davis acknowledge, if the inevitable-discovery exception were applicable in this case. See *post*, at 254; Reply Brief for Petitioner 22 ("Doctrines such as inevitable discovery, independent source, attenuated basis, [and] standing . . . sharply limit the impact of newly-announced rules"). The good-faith exception, however, is no less an established limit on the *remedy* of exclusion than is inevitable discovery. Its application here neither contravenes *Griffith* nor denies retroactive effect to *Gant*.[5]

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[5] The dissent argues that the good-faith exception is "unlike . . . inevitable discovery" because the former applies in all cases where the police reasonably rely on binding precedent, while the latter "applies only upon occasion." *Post*, at 254. We fail to see how this distinction makes any dif-

It is true that, under the old retroactivity regime of *Linkletter*, the Court's decisions on the "retroactivity problem in the context of the exclusionary rule" did take into account whether "law enforcement officers reasonably believed in good faith" that their conduct was in compliance with governing law. *Peltier*, 422 U. S., at 535–537. As a matter of retroactivity analysis, that approach is no longer applicable. See *Griffith*, 479 U. S. 314. It does not follow, however, that reliance on binding precedent is irrelevant in applying the good-faith exception to the exclusionary rule. When this Court adopted the good-faith exception in *Leon*, the Court's opinion explicitly relied on *Peltier* and imported its reasoning into the good-faith inquiry. See 468 U. S., at 918–919. That reasonable reliance by police was once a factor in our retroactivity cases does not make it any less relevant under our *Leon* line of cases.[6]

B

Davis also contends that applying the good-faith exception to searches conducted in reliance on binding precedent will stunt the development of Fourth Amendment

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ference. The same could be said—indeed, the same *was* said—of searches conducted in reasonable reliance on statutes. See *Krull*, 480 U. S., at 368–369 (O'Connor, J., dissenting) (arguing that result in *Krull* was inconsistent with *Griffith*). When this Court strikes down a statute on Fourth Amendment grounds, the good-faith exception may prevent the exclusionary rule from applying "in *every* case pending when [the statute] is overturned." *Post*, at 254. This result does not make the Court's newly announced rule of Fourth Amendment law any less retroactive. It simply limits the applicability of a suppression remedy. See *Krull*, *supra*, at 354–355, n. 11.

[6] Nor does *United States* v. *Johnson*, 457 U. S. 537 (1982), foreclose application of the good-faith exception in cases involving changing law. *Johnson* distinguished *Peltier* and held that all Fourth Amendment cases should be retroactive on direct review so long as the new decision is not a "clear break" from prior precedent. 457 U. S., at 562. *Johnson* had no occasion to opine on the good-faith exception to the exclusionary rule, which we adopted two years later in *Leon*.

law. With no possibility of suppression, criminal defendants will have no incentive, Davis maintains, to request that courts overrule precedent.[7]

1

This argument is difficult to reconcile with our modern understanding of the role of the exclusionary rule. We have never held that facilitating the overruling of precedent is a relevant consideration in an exclusionary-rule case. Rather, we have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement. See, *e. g.*, *Sheppard*, 468 U. S., at 990 ("'adopted to deter unlawful searches by police'"); *Evans*, *supra*, at 14 ("historically designed as a means of deterring police misconduct").

We have also repeatedly rejected efforts to expand the focus of the exclusionary rule beyond deterrence of culpable police conduct. In *Leon*, for example, we made clear that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges." 468 U. S., at 916; see *id.*, at 918 ("If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect . . . it must alter the behavior of individual law enforcement officers or the policies of their departments"). *Krull* too noted that "legislators, like judicial officers, are not the focus" of the exclusionary rule. 480 U. S., at 350. And in *Evans*, we said that the exclusionary rule was aimed at deterring "police misconduct, not mistakes by court employees." 514 U. S., at 14. These cases do not suggest that the exclusionary rule should be modified to serve a purpose other than deterrence of culpable law enforcement conduct.

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[7] Davis also asserts that a good-faith rule would permit "new Fourth Amendment decisions to be applied only prospectively," thus amounting to "a regime of rule-creation by advisory opinion." Brief for Petitioner 23, 25. For reasons discussed in connection with Davis' argument that application of the good-faith exception here would revive the *Linkletter* regime, this argument conflates the question of retroactivity with the question of remedy.

And in any event, applying the good-faith exception in this context will not prevent judicial reconsideration of prior Fourth Amendment precedents. In most instances, as in this case, the precedent sought to be challenged will be a decision of a federal court of appeals or state supreme court. But a good-faith exception for objectively reasonable reliance on binding precedent will not prevent review and correction of such decisions. This Court reviews criminal convictions from 12 Federal Courts of Appeals, 50 state courts of last resort, and the District of Columbia Court of Appeals. If one or even many of these courts uphold a particular type of search or seizure, defendants in jurisdictions in which the question remains open will still have an undiminished incentive to litigate the issue. This Court can then grant certiorari, and the development of Fourth Amendment law will in no way be stunted.[8]

Davis argues that Fourth Amendment precedents of *this* Court will be effectively insulated from challenge under a good-faith exception for reliance on appellate precedent. But this argument is overblown. For one thing, it is important to keep in mind that this argument applies to an exceedingly small set of cases. Decisions overruling this Court's Fourth Amendment precedents are rare. Indeed, it has been more than 40 years since the Court last handed down a decision of the type to which Davis refers. *Chimel* v. *California*, 395 U. S. 752 (overruling *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), and *Harris* v. *United States*, 331 U. S. 145 (1947)). And even in those cases, Davis points out that

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[8] The dissent does not dispute this point, but it claims that the good-faith exception will prevent us from "rely[ing] upon lower courts to work out Fourth Amendment differences among themselves." *Post*, at 256. If that is correct, then today's holding may well lead to *more* circuit splits in Fourth Amendment cases and a *fuller* docket of Fourth Amendment cases in this Court. See this Court's Rule 10. Such a state of affairs is unlikely to result in ossification of Fourth Amendment doctrine.

no fewer than eight separate doctrines may preclude a defendant who successfully challenges an existing precedent from getting any relief. Brief for Petitioner 50. Moreover, as a practical matter, defense counsel in many cases will test this Court's Fourth Amendment precedents in the same way that *Belton* was tested in *Gant*—by arguing that the precedent is distinguishable. See Brief for Respondent in *Arizona* v. *Gant*, O. T. 2008, No. 07–542, pp. 22–29.[9]

At most, Davis' argument might suggest that—to prevent Fourth Amendment law from becoming ossified—the petitioner in a case that results in the overruling of one of this Court's Fourth Amendment precedents should be given the benefit of the victory by permitting the suppression of evidence in that one case. Such a result would undoubtedly be a windfall to this one random litigant. But the exclusionary rule is "not a personal constitutional right." *Stone*, 428 U. S., at 486. It is a "judicially created" sanction, *Calandra*, 414 U. S., at 348, specifically designed as a "windfall" remedy to deter future Fourth Amendment violations. See *Stone*, *supra*, at 490. The good-faith exception is a judicially created exception to this judicially created rule. Therefore, in a future case, we could, if necessary, recognize a limited exception to the good-faith exception for a defendant who obtains a judgment overruling one of our Fourth Amendment precedents. Cf. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929, 952–953 (1965) ("[T]he same authority that empowered the Court to supplement the amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to

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[9] Where the search at issue is conducted in accordance with a municipal "policy" or "custom," Fourth Amendment precedents may also be challenged, without the obstacle of the good-faith exception or qualified immunity, in civil suits against municipalities. See 42 U. S. C. §1983; *Los Angeles County* v. *Humphries*, 562 U. S. 29, 36 (2010) (citing *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690–691 (1978)).

modify that rule as the lessons of experience may teach" (internal quotation marks and footnotes omitted)).[10]

But this is not such a case. Davis did not secure a decision overturning a Supreme Court precedent; the police in his case reasonably relied on binding Circuit precedent. See *Gonzalez*, 71 F. 3d 819. That sort of blameless police conduct, we hold, comes within the good-faith exception and is not properly subject to the exclusionary rule.

* * *

It is one thing for the criminal "to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926) (Cardozo, J.). It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs. We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate

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[10] Davis contends that a criminal defendant will lack Article III standing to challenge an existing Fourth Amendment precedent if the good-faith exception to the exclusionary rule precludes the defendant from obtaining relief based on police conduct that conformed to that precedent. This argument confuses weakness on the merits with absence of Article III standing. See *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 624 (1989) (standing does not " 'depen[d] on the merits of [a claim]' "). And as a practical matter, the argument is also overstated. In many instances, as in *Gant*, see 556 U. S., at 341, defendants will not simply concede that the police conduct conformed to the precedent; they will argue instead that the police conduct did not fall within the scope of the precedent.

In any event, even if some criminal defendants will be unable to challenge some precedents for the reason that Davis suggests, that provides no good reason for refusing to apply the good-faith exception. As noted, the exclusionary rule is not a personal right, see *Stone*, 428 U. S., at 486, 490, and therefore the rights of these defendants will not be impaired. And because (at least in almost all instances) the precedent can be challenged by others, Fourth Amendment case law will not be insulated from reconsideration.

precedent, the exclusionary rule does not apply. The judgment of the Court of Appeals for the Eleventh Circuit is

Affirmed.

JUSTICE SOTOMAYOR, concurring in the judgment.

Under our precedents, the primary purpose of the exclusionary rule is "to deter future Fourth Amendment violations." *Ante*, at 236–237; see, *e. g.*, *Herring* v. *United States*, 555 U. S. 135, 141 (2009); *Illinois* v. *Krull*, 480 U. S. 340, 347–348 (1987). Accordingly, we have held, application of the exclusionary rule is unwarranted when it "'does not result in appreciable deterrence.'" *Arizona* v. *Evans*, 514 U. S. 1, 11 (1995) (quoting *United States* v. *Janis*, 428 U. S. 433, 454 (1976)). In the circumstances of this case, where "binding appellate precedent specifically *authorize[d]* a particular police practice," *ante*, at 241—in accord with the holdings of nearly every other court in the country—application of the exclusionary rule cannot reasonably be expected to yield appreciable deterrence. I am thus compelled to conclude that the exclusionary rule does not apply in this case and to agree with the Court's disposition.

This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled. As we previously recognized in deciding whether to apply a Fourth Amendment holding retroactively, when police decide to conduct a search or seizure in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations:

> "If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubi-

> ous constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question." *United States* v. *Johnson*, 457 U. S. 537, 561 (1982) (footnote omitted).

The Court of Appeals recognized as much in limiting its application of the good-faith exception it articulated in this case to situations where its "precedent on a given point [is] unequivocal." 598 F. 3d 1259, 1266 (CA11 2010); see *id.*, at 1266–1267 ("[W]e do not mean to encourage police to adopt a ' "let's-wait-until-it's-decided approach" ' to 'unsettled' questions of Fourth Amendment law" (quoting *Johnson*, 457 U. S., at 561)). Whether exclusion would deter Fourth Amendment violations where appellate precedent does not specifically authorize a certain practice and, if so, whether the benefits of exclusion would outweigh its costs are questions unanswered by our previous decisions.

The dissent suggests that today's decision essentially answers those questions, noting that an officer who conducts a search in the face of unsettled precedent "is no more culpable than an officer who follows erroneous 'binding precedent.' " *Post*, at 258 (opinion of BREYER, J.). The Court does not address this issue. In my view, whether an officer's conduct can be characterized as "culpable" is not itself dispositive. We have never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground that the officer's conduct could be characterized as nonculpable. Rather, an officer's culpability is relevant because it may inform the overarching inquiry whether exclusion would result in appreciable deterrence. See *ante*, at 238 ("The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion var[y] with the culpability of the law enforcement conduct at issue" (internal quotation marks omitted; alteration in original)); see

also, *e. g.*, *Herring*, 555 U. S., at 143 ("The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct"); *United States* v. *Leon*, 468 U. S. 897, 919 (1984) (" 'Where the official action was pursued in complete good faith, . . . the deterrence rationale loses much of its force' " (quoting *Michigan* v. *Tucker*, 417 U. S. 433, 447 (1974))). Whatever we have said about culpability, the ultimate questions have always been, one, whether exclusion would result in appreciable deterrence and, two, whether the benefits of exclusion outweigh its costs. See, *e. g.*, *ante*, at 236–237; *Herring*, 555 U. S., at 141; *Krull*, 480 U. S., at 347.

As stated, whether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled. The Court's answer to the former question in this case thus does not resolve the latter one.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

In 2009, in *Arizona* v. *Gant*, 556 U. S. 332, this Court held that a police search of an automobile without a warrant violates the Fourth Amendment if the police have previously removed the automobile's occupants and placed them securely in a squad car. The present case involves these same circumstances, and it was pending on appeal when this Court decided *Gant*. Because *Gant* represents a "shift" in the Court's Fourth Amendment jurisprudence, *ante*, at 232, we must decide *whether* and *how Gant*'s new rule applies here.

I

I agree with the Court about *whether Gant*'s new rule applies. It does apply. Between 1965, when the Court decided *Linkletter* v. *Walker*, 381 U. S. 618, and 1987, when it decided *Griffith* v. *Kentucky*, 479 U. S. 314, that conclusion

would have been more difficult to reach. Under *Linkletter*, the Court determined a new rule's retroactivity by looking to several different factors, including whether the new rule represented a "clear break" with the past and the degree of "reliance by law enforcement authorities on the old standards." *Desist* v. *United States*, 394 U. S. 244, 248–249 (1969) (internal quotation marks omitted) (also citing "the purpose to be served by the new standards" and "the effect on the administration of justice" as factors (internal quotation marks omitted)). And the Court would often not apply the new rule to identical cases still pending on appeal. See *ibid.*

After 22 years of struggling with its *Linkletter* approach, however, the Court decided in *Griffith* that *Linkletter* had proved unfair and unworkable. It then substituted a clearer approach, stating that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U. S., at 328. The Court today, following *Griffith*, concludes that *Gant*'s new rule applies here. And to that extent I agree with its decision.

II

The Court goes on, however, to decide *how Gant*'s new rule will apply. And here it adds a fatal twist. While conceding that, like the search in *Gant*, this search violated the Fourth Amendment, it holds that, unlike Gant, this defendant is not entitled to a remedy. That is because the Court finds a new "good faith" exception which prevents application of the normal remedy for a Fourth Amendment violation, namely, suppression of the illegally seized evidence. *Weeks* v. *United States*, 232 U. S. 383 (1914); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Leaving Davis with a right but not a remedy, the Court "keep[s] the word of promise to our ear" but "break[s] it to our hope."

A

At this point I can no longer agree with the Court. A new "good faith" exception and this Court's retroactivity decisions are incompatible. For one thing, the Court's distinction between (1) retroactive application of a new rule and (2) availability of a remedy is highly artificial and runs counter to precedent. To determine that a new rule is retroactive *is* to determine that, at least in the normal case, there is a remedy. As we have previously said, the "source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law"; hence, "[w]hat we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Danforth* v. *Minnesota*, 552 U. S. 264, 271 (2008). The Court's "good faith" exception (unlike, say, inevitable discovery, a remedial doctrine that applies only upon occasion) creates "a categorical bar to obtaining redress" in *every* case pending when a precedent is overturned. *Ante*, at 243.

For another thing, the Court's holding re-creates the very problems that led the Court to abandon *Linkletter*'s approach to retroactivity in favor of *Griffith*'s. One such problem concerns workability. The Court says that its exception applies where there is "objectively reasonable" police "reliance on binding appellate precedent." *Ante*, at 232, 249–250. But to apply the term "binding appellate precedent" often requires resolution of complex questions of degree. Davis conceded that he faced binding anti-*Gant* precedent in the Eleventh Circuit. But future litigants will be less forthcoming. *Ante*, at 248. Indeed, those litigants will now have to create distinctions to show that previous circuit precedent was not "binding" lest they find relief foreclosed even if they win their constitutional claim.

At the same time, Fourth Amendment precedents frequently require courts to "slosh" their "way through the fact-bound morass of 'reasonableness.'" *Scott* v. *Harris*, 550 U. S. 372, 383 (2007). Suppose an officer's conduct is consistent with the language of a Fourth Amendment rule that a court of appeals announced in a case with clearly distinguishable facts? Suppose the case creating the relevant precedent did not directly announce any general rule but involved highly analogous facts? What about a rule that all other jurisdictions, but not the defendant's jurisdiction, had previously accepted? What rules can be developed for determining when, where, and how these different kinds of precedents do, or do not, count as relevant "binding precedent"? The *Linkletter*-like result is likely complex legal argument and police force confusion. See *Mackey* v. *United States*, 401 U. S. 667, 676 (1971) (opinion of Harlan, J.) (describing trying to follow *Linkletter* decisions as "almost as difficult" as trying to follow "the tracks made by a beast of prey in search of its intended victim").

Another such problem concerns fairness. Today's holding, like that in *Linkletter*, "violates basic norms of constitutional adjudication." *Griffith*, 479 U. S., at 322. It treats the defendant in a case announcing a new rule one way while treating similarly situated defendants whose cases are pending on appeal in a different way. See *ante*, at 248–249. Justice Harlan explained why this approach is wrong when he said:

> "We cannot release criminals from jail merely because we think one case is a particularly appropriate one [to announce a constitutional doctrine] . . . . Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from [our ordinary] model of judicial review." *Mackey*, *supra*, at 679.

And in *Griffith*, the Court "embraced to a significant extent the comprehensive analysis presented by Justice Harlan." 479 U. S., at 322.

Of course, the Court may, as it suggests, avoid this unfairness by refusing to apply the exclusionary rule even to the defendant in the very case in which it announces a "new rule." But that approach would make matters worse. What would then happen in the lower courts? How would courts of appeals, for example, come to reconsider their prior decisions when other circuits' cases lead them to believe those decisions may be wrong? Why would a defendant seek to overturn any such decision? After all, if the (incorrect) circuit precedent is clear, then even if the defendant wins (on the constitutional question), he loses (on relief). See *Stovall* v. *Denno*, 388 U. S. 293, 301 (1967). To what extent then could this Court rely upon lower courts to work out Fourth Amendment differences among themselves—through circuit reconsideration of a precedent that other circuits have criticized? See *Arizona* v. *Evans*, 514 U. S. 1, 23, n. 1 (1995) (GINSBURG, J., dissenting).

B

Perhaps more important, the Court's rationale for creating its new "good faith" exception threatens to undermine well-settled Fourth Amendment law. The Court correctly says that pre-*Gant* Eleventh Circuit precedent had held that a *Gant*-type search was constitutional; hence the police conduct in this case, consistent with that precedent, was "innocent." *Ante*, at 240. But the Court then finds this fact sufficient to create a new "good faith" exception to the exclusionary rule. It reasons that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations," *ante*, at 236–237. The "deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue," *ante*, at 238 (internal quotation marks and brackets omitted). Those benefits are sufficient to justify exclusion

where "police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights," *ibid.* (internal quotation marks omitted). But those benefits do not justify exclusion where, as here, the police act with "simple, isolated negligence" or an "objectively reasonable good-faith belief that their conduct is lawful," *ibid.* (internal quotation marks omitted).

If the Court means what it says, what will happen to the exclusionary rule, a rule that the Court adopted nearly a century ago for federal courts, *Weeks* v. *United States*, 232 U. S. 383, and made applicable to state courts a half century ago through the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643? The Court has thought of that rule not as punishment for the individual officer or as reparation for the individual defendant but more generally as an effective way to secure enforcement of the Fourth Amendment's commands. *Weeks*, *supra*, at 393 (without the exclusionary rule, the Fourth Amendment would be "of no value," and "might as well be stricken from the Constitution"). This Court has deviated from the "suppression" norm in the name of "good faith" only a handful of times and in limited, atypical circumstances: where a magistrate has erroneously issued a warrant, *United States* v. *Leon*, 468 U. S. 897 (1984); where a database has erroneously informed police that they have a warrant, *Arizona* v. *Evans*, *supra*, *Herring* v. *United States*, 555 U. S. 135 (2009); and where an unconstitutional statute purported to authorize the search, *Illinois* v. *Krull*, 480 U. S. 340 (1987). See *Herring*, *supra*, at 142 ("good faith" exception inaptly named).

The fact that such exceptions are few and far between is understandable. Defendants frequently move to suppress evidence on Fourth Amendment grounds. In many, perhaps most, of these instances the police, uncertain of how the Fourth Amendment applied to the particular factual circumstances they faced, will have acted in objective good faith. Yet, in a significant percentage of these instances, courts will

find that the police were wrong. And, unless the police conduct falls into one of the exceptions previously noted, courts have required the suppression of the evidence seized. 1 W. LaFave, Search and Seizure § 1.3, pp. 103–104 (4th ed. 2004) ("good faith" exception has not yet been applied to warrantless searches and seizures beyond the "rather special situations" of *Evans*, *Herring*, and *Krull*). See Valdes, Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations, 153 U. Pa. L. Rev. 1709, 1728 (2005) (suppression motions are filed in approximately 7% of criminal cases; approximately 12% of suppression motions are successful); LaFave, *supra*, at 64 ("Surely many more Fourth Amendment violations result from carelessness than from intentional constitutional violations"); Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1389 (1983) ("[T]he vast majority of fourth amendment violations . . . [are] motivated by commendable zeal, not condemnable malice").

But an officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous "binding precedent." Nor is an officer more culpable where circuit precedent is simply suggestive rather than "binding," where it only describes how to treat roughly analogous instances, or where it just does not exist. Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule. Indeed, our broad dicta in *Herring*—dicta the Court repeats and expands upon today—may already be leading

lower courts in this direction. See *United States* v. *Julius*, 610 F. 3d 60, 66–67 (CA2 2010) (assuming warrantless search was unconstitutional and remanding for District Court to "perform the cost/benefit analysis required by *Herring*" and to consider "whether the degree of police culpability in this case rose beyond mere . . . negligence" before ordering suppression); *United States* v. *Master*, 614 F. 3d 236, 243 (CA6 2010) ("[T]he *Herring* Court's emphasis seems weighed more toward preserving evidence for use in obtaining convictions, even if illegally seized . . . unless the officers engage in 'deliberate, reckless, or grossly negligent conduct'" (quoting *Herring*, *supra*, at 144)). Today's decision will doubtless accelerate this trend.

Any such change (which may already be underway) would affect not "an exceedingly small set of cases," *ante*, at 247, but a very large number of cases, potentially many thousands each year. See Valdes, *supra*, at 1728. And since the exclusionary rule is often the only sanction available for a Fourth Amendment violation, the Fourth Amendment would no longer protect ordinary Americans from "unreasonable searches and seizures." See *Wolf* v. *Colorado*, 338 U. S. 25, 41 (1949) (Murphy, J., dissenting) (In many circumstances, "there is but one alternative to the rule of exclusion. That is no sanction at all"), overruled by *Mapp* v. *Ohio*, *supra*; *Herring*, *supra*, at 152 (GINSBURG, J., dissenting) (the exclusionary rule is "an essential auxiliary" to the Fourth Amendment). It would become a watered down Fourth Amendment, offering its protection against only those searches and seizures that are *egregiously* unreasonable.

III

In sum, I fear that the Court's opinion will undermine the exclusionary rule. And I believe that the Court wrongly departs from *Griffith* regardless. Instead I would follow *Griffith*, apply *Gant*'s rule retroactively to this case, and re-

quire suppression of the evidence. Such an approach is consistent with our precedent, and it would indeed affect no more than "an exceedingly small set of cases." *Ante*, at 247.

For these reasons, with respect, I dissent.

Syllabus

J. D. B. *v.* NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 09–11121. Argued March 23, 2011—Decided June 16, 2011

Police stopped and questioned petitioner J. D. B., a 13-year-old, seventh-grade student, upon seeing him near the site of two home break-ins. Five days later, after a digital camera matching one of the stolen items was found at J. D. B.'s school and seen in his possession, Investigator DiCostanzo went to the school. A uniformed police officer on detail to the school took J. D. B. from his classroom to a closed-door conference room, where police and school administrators questioned him for at least 30 minutes. Before beginning, they did not give him *Miranda* warnings or the opportunity to call his grandmother, his legal guardian, nor tell him he was free to leave the room. He first denied his involvement, but later confessed after officials urged him to tell the truth and told him about the prospect of juvenile detention. DiCostanzo only then told him that he could refuse to answer questions and was free to leave. Asked whether he understood, J. D. B. nodded and provided further detail, including the location of the stolen items. He also wrote a statement, at DiCostanzo's request. When the schoolday ended, he was permitted to leave to catch the bus home. Two juvenile petitions were filed against J. D. B., charging him with breaking and entering and with larceny. His public defender moved to suppress his statements and the evidence derived therefrom, arguing that J. D. B. had been interrogated in a custodial setting without being afforded *Miranda* warnings and that his statements were involuntary. The trial court denied the motion. J. D. B. entered a transcript of admission to the charges, but renewed his objection to the denial of his motion to suppress. The court adjudicated him delinquent, and the North Carolina Court of Appeals and State Supreme Court affirmed. The latter court declined to find J. D. B.'s age relevant to the determination whether he was in police custody.

Held: A child's age properly informs *Miranda*'s custody analysis. Pp. 268–281.

(a) Custodial police interrogation entails "inherently compelling pressures," *Miranda* v. *Arizona*, 384 U. S. 436, 467, that "can induce a frighteningly high percentage of people to confess to crimes they never committed," *Corley* v. *United States*, 556 U. S. 303, 321. Recent studies suggest that risk is all the more acute when the subject of custodial interrogation is a juvenile. Whether a suspect is "in custody" for *Mi-*

randa purposes is an objective determination involving two discrete inquiries: "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." *Thompson* v. *Keohane*, 516 U. S. 99, 112 (footnote omitted). The police and courts must "examine all of the circumstances surrounding the interrogation," *Stansbury* v. *California*, 511 U. S. 318, 322, including those that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," *id.*, at 325. However, the test involves no consideration of the particular suspect's "actual mindset." *Yarborough* v. *Alvarado*, 541 U. S. 652, 667. By limiting analysis to objective circumstances, the test avoids burdening police with the task of anticipating each suspect's idiosyncrasies and divining how those particular traits affect that suspect's subjective state of mind. *Berkemer* v. *McCarty*, 468 U. S. 420, 430–431. Pp. 268–271.

(b) In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." *Stansbury*, 511 U. S., at 325. Courts can account for that reality without doing any damage to the objective nature of the custody analysis. A child's age is far "more than a chronological fact." *Eddings* v. *Oklahoma*, 455 U. S. 104, 115. It is a fact that "generates commonsense conclusions about behavior and perception," *Alvarado*, 541 U. S., at 674, that apply broadly to children as a class. Children "generally are less mature and responsible than adults," *Eddings*, 455 U. S., at 115; they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti* v. *Baird*, 443 U. S. 622, 635; and they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper* v. *Simmons*, 543 U. S. 551, 569. In the specific context of police interrogation, events that "would leave a man cold and unimpressed can overawe and overwhelm a" teen. *Haley* v. *Ohio*, 332 U. S. 596, 599. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Legal disqualifications on children as a class—*e. g.*, limitations on their ability to marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

Given a history "replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults, *Eddings*, 455 U. S., at 115–116, there is no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to a reasonable officer, including age as part of the custody analysis requires officers nei-

Syllabus

ther to consider circumstances "unknowable" to them, *Berkemer*, 468 U. S., at 430, nor to "'"anticipat[e] the frailties or idiosyncrasies"'" of the particular suspect being questioned, *Alvarado*, 541 U. S., at 662. Precisely because childhood yields objective conclusions, considering age in the custody analysis does not involve a determination of how youth affects a particular child's subjective state of mind. In fact, were the court precluded from taking J. D. B.'s youth into account, it would be forced to evaluate the circumstances here through the eyes of a reasonable adult, when some objective circumstances surrounding an interrogation at school are specific to children. These conclusions are not undermined by the Court's observation in *Alvarado* that accounting for a juvenile's age in the *Miranda* custody analysis "could be viewed as creating a subjective inquiry," 541 U. S., at 668. The Court said nothing about whether such a view would be correct under the law or whether it simply merited deference under the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214. So long as the child's age was known to the officer, or would have been objectively apparent to a reasonable officer, including age in the custody analysis is consistent with the *Miranda* test's objective nature. This does not mean that a child's age will be a determinative, or even a significant, factor in every case, but it is a reality that courts cannot ignore. Pp. 271–277.

(c) Additional arguments that the State and its *amici* offer for excluding age from the custody inquiry are unpersuasive. Pp. 277–281.

(d) On remand, the state courts are to address the question whether J. D. B. was in custody when he was interrogated, taking account of all of the relevant circumstances of the interrogation, including J. D. B.'s age at the time. P. 281.

363 N. C. 664, 686 S. E. 2d 135, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 281.

Barbara S. Blackman argued the cause for petitioner. With her on the briefs were *S. Hannah Demeritt*, *Benjamin Dowling-Sendor*, and *Staples S. Hughes*.

Roy Cooper, Attorney General of North Carolina, argued the cause for respondent. With him on the brief were *Christopher G. Browning, Jr.*, Solicitor General, *Robert C. Montgomery*, Special Deputy Attorney General, and *LaToya B. Powell*, Assistant Attorney General.

Eric J. Feigin argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *William C. Brown.**

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circum-

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Stephen N. Zack;* for the American Civil Liberties Union by *Dennis D. Parker* and *Steven R. Shapiro;* for the Center on Wrongful Convictions of Youth et al. by *Angela C. Vigil* and *Steven A. Drizin;* for the Juvenile Law Center et al. by *Marsha L. Levick* and *Jessica R. Feierman;* and for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green*, *Mark D. Hopson*, and *Jonathan Hacker.*

A brief of *amici curiae* urging affirmance was filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Stephen R. Creason*, *Andrew A. Kobe*, and *Ellen H. Meilaender*, Deputy Attorney General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and *William H. Ryan, Jr.*, Acting Attorney General of Pennsylvania, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *Dustin McDaniel* of Arkansas, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Leonardo M. Rapadas* of Guam, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Jack Conway* of Kentucky, *James D. Caldwell* of Louisiana, *William J. Schneider* of Maine, *Bill Schuette* of Michigan, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Guillermo A. Somoza-Colombani* of Puerto Rico, *E. Scott Pruitt* of Oklahoma, *Michael DeWine* of Ohio, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming.

John Charles Thomas and *Megan Miller* filed a brief for the National District Attorneys Association as *amicus curiae.*

stances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.

I

A

Petitioner J. D. B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina, when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J. D. B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J. D. B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J. D. B.'s grandmother—his legal guardian—as well as his aunt.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J. D. B.'s middle school and seen in J. D. B.'s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J. D. B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J. D. B. about the break-ins. Although DiCostanzo asked the school administrators to verify J. D. B.'s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J. D. B.'s grandmother.

The uniformed officer interrupted J. D. B.'s afternoon social studies class, removed J. D. B. from the classroom, and

escorted him to a school conference room.[1] There, J. D. B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J. D. B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J. D. B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.

Questioning began with small talk—discussion of sports and J. D. B.'s family life. DiCostanzo asked, and J. D. B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J. D. B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J. D. B. for additional detail about his efforts to obtain work; asked J. D. B. to explain a prior incident, when one of the victims returned home to find J. D. B. behind her house; and confronted J. D. B. with the stolen camera. The assistant principal urged J. D. B. to "do the right thing," warning J. D. B. that "the truth always comes out in the end." App. 99a, 112a.

Eventually, J. D. B. asked whether he would "still be in trouble" if he returned the "stuff." *Ibid.* In response, DiCostanzo explained that return of the stolen items would be helpful, but "this thing is going to court" regardless. *Id.*, at 112a; *ibid.* ("[W]hat's done is done[;] now you need to help yourself by making it right"); see also *id.*, at 99a. DiCostanzo then warned that he may need to seek a secure custody order if he believed that J. D. B. would continue to break into other homes. When J. D. B. asked what a secure custody

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[1] Although the State suggests that the "record is unclear as to who brought J. D. B. to the conference room, and the trial court made no factual findings on this specific point," Brief for Respondent 3, n. 1, the State agreed at the certiorari stage that "the SRO [school resource officer] escorted petitioner" to the room, Brief in Opposition 3.

order was, DiCostanzo explained that "it's where you get sent to juvenile detention before court." *Id.*, at 112a.

After learning of the prospect of juvenile detention, J. D. B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J. D. B. that he could refuse to answer the investigator's questions and that he was free to leave.[2] Asked whether he understood, J. D. B. nodded and provided further detail, including information about the location of the stolen items. Eventually J. D. B. wrote a statement, at DiCostanzo's request. When the bell rang indicating the end of the schoolday, J. D. B. was allowed to leave to catch the bus home.

B

Two juvenile petitions were filed against J. D. B., each alleging one count of breaking and entering and one count of larceny. J. D. B.'s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J. D. B. had been "interrogated by police in a custodial setting without being afforded *Miranda* warning[s]," *id.*, at 89a, and because his

[2] The North Carolina Supreme Court noted that the trial court's factual findings were "uncontested and therefore . . . binding" on it. *In re J. D. B.*, 363 N. C. 664, 668, 686 S. E. 2d 135, 137 (2009). The court described the sequence of events set forth in the text. See *id.*, at 670–671, 686 S. E. 2d, at 139 ("Immediately following J. D. B.'s initial confession, Investigator DiCostanzo informed J. D. B. that he did not have to speak with him and that he was free to leave" (internal quotation marks and alterations omitted)). Though less than perfectly explicit, the trial court's order indicates a finding that J. D. B. initially confessed prior to DiCostanzo's warnings. See App. 99a.

Nonetheless, both parties' submissions to this Court suggest that the warnings came after DiCostanzo raised the possibility of a secure custody order but before J. D. B. confessed for the first time. See Brief for Petitioner 5; Brief for Respondent 5. Because we remand for a determination whether J. D. B. was in custody under the proper analysis, the state courts remain free to revisit whether the trial court made a conclusive finding of fact in this respect.

statements were involuntary under the totality of the circumstances test, *id.*, at 142a; see *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973) (due process precludes admission of a confession where "a defendant's will was overborne" by the circumstances of the interrogation). After a suppression hearing at which DiCostanzo and J. D. B. testified, the trial court denied the motion, deciding that J. D. B. was not in custody at the time of the schoolhouse interrogation and that his statements were voluntary. As a result, J. D. B. entered a transcript of admission to all four counts, renewing his objection to the denial of his motion to suppress, and the court adjudicated J. D. B. delinquent.

A divided panel of the North Carolina Court of Appeals affirmed. *In re J. D. B.*, 196 N. C. App. 234, 674 S. E. 2d 795 (2009). The North Carolina Supreme Court held, over two dissents, that J. D. B. was not in custody when he confessed, "declin[ing] to extend the test for custody to include consideration of the age . . . of an individual subjected to questioning by police." *In re J. D. B.*, 363 N. C. 664, 672, 686 S. E. 2d 135, 140 (2009).[3]

We granted certiorari to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age. 562 U. S. 1001 (2010).

II

A

Any police interview of an individual suspected of a crime has "coercive aspects to it." *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) *(per curiam)*. Only those interrogations that occur while a suspect is in police custody, however, "heighte[n] the risk" that statements obtained are not the

[3] J. D. B.'s challenge in the North Carolina Supreme Court focused on the lower courts' conclusion that he was not in custody for purposes of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The North Carolina Supreme Court did not address the trial court's holding that the statements were voluntary, and that question is not before us.

product of the suspect's free choice. *Dickerson* v. *United States,* 530 U. S. 428, 435 (2000).

By its very nature, custodial police interrogation entails "inherently compelling pressures." *Miranda,* 384 U. S., at 467. Even for an adult, the physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely." *Ibid.* Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley* v. *United States,* 556 U. S. 303, 321 (2009) (citing Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N. C. L. Rev. 891, 906–907 (2004)); see also *Miranda,* 384 U. S., at 455, n. 23. That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* 21–22 (collecting empirical studies that "illustrate the heightened risk of false confessions from youth").

Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements," *Dickerson,* 530 U. S., at 435, this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U. S., at 444; see also *Florida* v. *Powell,* 559 U. S. 50, 60 (2010) ("The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed"). And, if a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a "prerequisit[e]" to the statement's admissibility as evi-

dence in the Government's case in chief, that the defendant "voluntarily, knowingly and intelligently" waived his rights.[4] *Miranda*, 384 U. S., at 444, 475–476; *Dickerson*, 530 U. S., at 443–444.

Because these measures protect the individual against the coercive nature of custodial interrogation, they are required "'only where there has been such a restriction on a person's freedom as to render him "in custody."'" *Stansbury* v. *California*, 511 U. S. 318, 322 (1994) *(per curiam)* (quoting *Mathiason*, 429 U. S., at 495). As we have repeatedly emphasized, whether a suspect is "in custody" is an objective inquiry.

> "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Thompson* v. *Keohane*, 516 U. S. 99, 112 (1995) (internal quotation marks, alteration, and footnote omitted).

See also *Yarborough* v. *Alvarado*, 541 U. S. 652, 662–663 (2004); *Stansbury*, 511 U. S., at 323; *Berkemer* v. *McCarty*, 468 U. S. 420, 442, and n. 35 (1984). Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to "examine all of the circumstances

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[4] *Amici* on behalf of J. D. B. question whether children of all ages can comprehend *Miranda* warnings and suggest that additional procedural safeguards may be necessary to protect their *Miranda* rights. Brief for Juvenile Law Center et al. 13–14, n. 7. Whatever the merit of that contention, it has no relevance here, where no *Miranda* warnings were administered at all.

surrounding the interrogation," *Stansbury*, 511 U. S., at 322, including any circumstance that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," *id.*, at 325. On the other hand, the "subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant. *Id.*, at 323. The test, in other words, involves no consideration of the "actual mindset" of the particular suspect subjected to police questioning. *Alvarado*, 541 U. S., at 667; see also *California* v. *Beheler*, 463 U. S. 1121, 1125, n. 3 (1983) *(per curiam)*.

The benefit of the objective custody analysis is that it is "designed to give clear guidance to the police." *Alvarado*, 541 U. S., at 668. But see *Berkemer*, 468 U. S., at 441 (recognizing the "occasiona[l] . . . difficulty" that police and courts nonetheless have in "deciding exactly when a suspect has been taken into custody"). Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind. See *id.*, at 430–431 (officers are not required to "make guesses" as to circumstances "unknowable" to them at the time); *Alvarado*, 541 U. S., at 668 (officers are under no duty "to consider . . . contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights").

B

The State and its *amici* contend that a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child's age "would have affected how a rea-

sonable person" in the suspect's position "would perceive his or her freedom to leave." *Stansbury*, 511 U. S., at 325. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

A child's age is far "more than a chronological fact." *Eddings* v. *Oklahoma*, 455 U. S. 104, 115 (1982); accord, *Gall* v. *United States*, 552 U. S. 38, 58 (2007); *Roper* v. *Simmons*, 543 U. S. 551, 569 (2005); *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993). It is a fact that "generates commonsense conclusions about behavior and perception." *Alvarado*, 541 U. S., at 674 (BREYER, J., dissenting). Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children "generally are less mature and responsible than adults," *Eddings*, 455 U. S., at 115–116; that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979) (plurality opinion); that they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper*, 543 U. S., at 569; and so on. See *Graham* v. *Florida*, 560 U. S. 48, 68 (2010) (finding no reason to "reconsider" these observations about the common "nature of juveniles"). Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley* v. *Ohio*, 332 U. S. 596, 599 (1948) (plurality opinion); see also *Gallegos* v. *Colorado*, 370 U. S. 49, 54 (1962) ("[N]o matter how sophisticated," a juvenile subject of police interrogation "cannot be compared" to an

adult subject). Describing no one child in particular, these observations restate what "any parent knows"—indeed, what any person knows—about children generally. *Roper*, 543 U. S., at 569.[5]

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. See, *e. g.*, 1 W. Blackstone, Commentaries on the Laws of England *464–*465 (hereinafter Blackstone) (explaining that limits on children's legal capacity under the common law "secure them from hurting themselves by their own improvident acts"). Like this Court's own generalizations, the legal disqualifications placed on children as a class—*e. g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.[6]

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[5] Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. See, *e. g.*, *Graham* v. *Florida*, 560 U. S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds").

[6] See, *e. g.*, 1 E. Farnsworth, Contracts §4.4, p. 379, and n. 1 (1990) ("Common law courts early announced the prevailing view that a minor's contract is 'voidable' at the instance of the minor" (citing 8 W. Holdsworth, History of English Law 51 (1926))); 1 D. Kramer, Legal Rights of Children §8.1, p. 663 (rev. 2d ed. 2005) ("[W]hile minor children have the right to acquire and own property, they are considered incapable of property management" (footnote omitted)); 2 J. Kent, Commentaries on American Law *78–*79, *90 (G. Comstock ed., 11th ed. 1867); see generally *id.*, at *233 (explaining that, under the common law, "[t]he necessity of guardians results from the inability of infants to take care of themselves . . . and this inability continues, in contemplation of law, until the infant has attained the age of [21]"); 1 Blackstone *465 ("It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor

Indeed, even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, "[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance" to be considered. Restatement (Third) of Torts § 10, Comment *b*, p. 117 (2005); see also *id.*, Reporters' Note, pp. 121–122 (collecting cases); Restatement (Second) of Torts § 283A, Comment *b*, p. 15 (1963–1964) ("[T]here is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of [children]").

As this discussion establishes, "[o]ur history is replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults. *Eddings*, 455 U. S., at 115–116. We see no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances "unknowable" to them, *Berkemer*, 468 U. S., at 430, nor to "anticipat[e] the frailties or idiosyncrasies" of the particular suspect whom they question, *Alvarado*, 541 U. S., at 662 (internal quotation marks omitted). The same "wide basis of community experience" that makes it possible, as an objective matter, "to determine what is to be expected" of children in other contexts, Restatement (Second) of Torts § 283A, at 15; see *supra*, at 273, and n. 6, likewise makes it possible to know what to expect of children subjected to police questioning.

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indeed any manner of contract, that will bind him"); *Roper* v. *Simmons*, 543 U. S. 551, 569 (2005) ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent").

In other words, a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action. *Alvarado* holds, for instance, that a suspect's prior interrogation history with law enforcement has no role to play in the custody analysis because such experience could just as easily lead a reasonable person to feel free to walk away as to feel compelled to stay in place. 541 U. S., at 668. Because the effect in any given case would be "contingent [on the] psycholog[y]" of the individual suspect, the Court explained, such experience cannot be considered without compromising the objective nature of the custody analysis. *Ibid.* A child's age, however, is different. Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are "most susceptible to influence," *Eddings*, 455 U. S., at 115, and "outside pressures," *Roper*, 543 U. S., at 569—considering age in the custody analysis in no way involves a determination of how youth "subjectively affect[s] the mindset" of any particular child, Brief for Respondent 14.[7]

In fact, in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age. This case is a prime example. Were the court precluded from taking J. D. B.'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school re-

[7] Thus, contrary to the dissent's protestations, today's holding neither invites consideration of whether a particular suspect is "unusually meek or compliant," *post*, at 289 (opinion of ALITO, J.), nor "'expand[s]'" the *Miranda* custody analysis, *post*, at 289, into a test that requires officers to anticipate and account for a suspect's every personal characteristic, see *post*, at 291–292.

source officer; being encouraged by his assistant principal to "do the right thing"; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances.

Indeed, although the dissent suggests that concerns "regarding the application of the *Miranda* custody rule to minors can be accommodated by considering the unique circumstances present when minors are questioned in school," *post*, at 297 (opinion of ALITO, J.), the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without asking whether the person "questioned in school" is a "minor," *ibid.*, the coercive effect of the schoolhouse setting is unknowable.

Our prior decision in *Alvarado* in no way undermines these conclusions. In that case, we held that a state-court decision that failed to mention a 17-year-old's age as part of the *Miranda* custody analysis was not objectively unreasonable under the deferential standard of review set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Like the North Carolina Supreme Court here, see 363 N. C., at 672, 686 S. E. 2d, at 140, we observed that accounting for a juvenile's age in the *Miranda* custody analysis "could be viewed as creating a subjective inquiry," 541 U. S., at 668. We said nothing, however, of whether such a view would be correct under the law. Cf. *Renico* v. *Lett*, 559 U. S. 766, 778, n. 3 (2010) ("[W]hether

the [state court] was right or wrong is not the pertinent question under AEDPA"). To the contrary, Justice O'Connor's concurring opinion explained that a suspect's age may indeed "be relevant to the 'custody' inquiry." *Alvarado*, 541 U. S., at 669.

Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.[8] This is not to say that a child's age will be a determinative, or even a significant, factor in every case. Cf. *ibid.* (O'Connor, J., concurring) (explaining that a state-court decision omitting any mention of the defendant's age was not unreasonable under AEDPA's deferential standard of review where the defendant "was almost 18 years old at the time of his interview"); *post*, at 296 (suggesting that "teenagers nearing the age of majority" are likely to react to an interrogation as would a "typical 18-year-old in similar circumstances"). It is, however, a reality that courts cannot simply ignore.

III

The State and its *amici* offer numerous reasons that courts must blind themselves to a juvenile defendant's age. None is persuasive.

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[8] This approach does not undermine the basic principle that an interrogating officer's unarticulated, internal thoughts are never—in and of themselves—objective circumstances of an interrogation. See *supra*, at 270–271; *Stansbury* v. *California*, 511 U. S. 318, 323 (1994) *(per curiam)*. Unlike a child's youth, an officer's purely internal thoughts have no conceivable effect on how a reasonable person in the suspect's position would understand his freedom of action. See *id.*, at 323–325; *Berkemer* v. *McCarty*, 468 U. S. 420, 442 (1984). Rather than "overtur[n]" that settled principle, *post*, at 293, the limitation that a child's age may inform the custody analysis only when known or knowable simply reflects our unwillingness to require officers to "make guesses" as to circumstances "unknowable" to them in deciding when to give *Miranda* warnings, *Berkemer*, 468 U. S., at 430–431.

To start, the State contends that a child's age must be excluded from the custody inquiry because age is a personal characteristic specific to the suspect himself rather than an "external" circumstance of the interrogation. Brief for Respondent 21; see also *id.*, at 18–19 (distinguishing "personal characteristics" from "objective facts related to the interrogation itself" such as the location and duration of the interrogation). Despite the supposed significance of this distinction, however, at oral argument counsel for the State suggested without hesitation that at least some undeniably personal characteristics—for instance, whether the individual being questioned is blind—are circumstances relevant to the custody analysis. See Tr. of Oral Arg. 41. Thus, the State's quarrel cannot be that age is a personal characteristic, without more.[9]

The State further argues that age is irrelevant to the custody analysis because it "go[es] to how a suspect may internalize and perceive the circumstances of an interrogation." Brief for Respondent 12; see also Brief for United States as *Amicus Curiae* 21 (hereinafter U. S. Brief) (arguing that a child's age has no place in the custody analysis because it goes to whether a suspect is "particularly susceptible" to the external circumstances of the interrogation (some internal quotation marks omitted)). But the same can be said of every objective circumstance that the State agrees is relevant to the custody analysis: Each circumstance goes to how a reasonable person would "internalize and perceive" every other. See, *e. g.*, *Stansbury*, 511 U. S., at 325. Indeed, this is the very reason that we ask whether the objective circumstances "add up to custody," *Keohane*, 516 U. S., at 113, instead of evaluating the circumstances one by one.

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[9] The State's purported distinction between blindness and age—that taking account of a suspect's youth requires a court "to get into the mind" of the child, whereas taking account of a suspect's blindness does not, Tr. of Oral Arg. 41–42—is mistaken. In either case, the question becomes how a reasonable person would understand the circumstances, either from the perspective of a blind person or, as here, a 13-year-old child.

In the same vein, the State and its *amici* protest that the "effect of . . . age on [the] perception of custody is internal," Brief for Respondent 20, or "psychological," U. S. Brief 21. But the whole point of the custody analysis is to determine whether, given the circumstances, "a reasonable person [would] have felt he or she was . . . at liberty to terminate the interrogation and leave." *Keohane*, 516 U. S., at 112. Because the *Miranda* custody inquiry turns on the mindset of a reasonable person in the suspect's position, it cannot be the case that a circumstance is subjective simply because it has an "internal" or "psychological" impact on perception. Were that so, there would be no objective circumstances to consider at all.

Relying on our statements that the objective custody test is "designed to give clear guidance to the police," *Alvarado*, 541 U. S., at 668, the State next argues that a child's age must be excluded from the analysis in order to preserve clarity. Similarly, the dissent insists that the clarity of the custody analysis will be destroyed unless a "one-size-fits-all reasonable-person test" applies. *Post*, at 293. In reality, however, ignoring a juvenile defendant's age will often make the inquiry more artificial, see *supra*, at 275–276, and thus only add confusion. And in any event, a child's age, when known or apparent, is hardly an obscure factor to assess. Though the State and the dissent worry about gradations among children of different ages, that concern cannot justify ignoring a child's age altogether. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. Indeed, they are competent to do so even though an interrogation room lacks the "reflective atmosphere of a [jury] deliberation room," *post*, at 295. The same is true of judges, including those whose childhoods have long since passed, see *post*, at 293. In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise

in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.

There is, however, an even more fundamental flaw with the State's plea for clarity and the dissent's singular focus on simplifying the analysis: Not once have we excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the fault line between custodial and noncustodial "brighter." Indeed, were the guiding concern clarity and nothing else, the custody test would presumably ask only whether the suspect had been placed under formal arrest. *Berkemer*, 468 U. S., at 441; see *ibid.* (acknowledging the "occasiona[l] . . . difficulty" police officers confront in determining when a suspect has been taken into custody). But we have rejected that "more easily administered line," recognizing that it would simply "enable the police to circumvent the constraints on custodial interrogations established by *Miranda*." *Ibid.;* see also *ibid.*, n. 33.[10]

Finally, the State and the dissent suggest that excluding age from the custody analysis comes at no cost to juveniles' constitutional rights because the due process voluntariness test independently accounts for a child's youth. To be sure, that test permits consideration of a child's age, and it erects its own barrier to admission of a defendant's inculpatory statements at trial. See *Gallegos*, 370 U. S., at 53–55; *Haley*, 332 U. S., at 599–601 (plurality opinion); see also *post*,

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[10] Contrary to the dissent's intimation, see *post*, at 288, *Miranda* does not answer the question whether a child's age is an objective circumstance relevant to the custody analysis. *Miranda* simply holds that warnings must be given once a suspect is in custody, without "paus[ing] to inquire in individual cases whether the defendant was aware of his rights without a warning being given." 384 U. S., at 468; see also *id.*, at 468–469 ("Assessments of the knowledge the defendant possessed, based on information as to age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact" (footnote omitted)). That conclusion says nothing about whether age properly informs whether a child is in custody in the first place.

at 297 ("[C]ourts should be instructed to take particular care to ensure that [young children's] incriminating statements were not obtained involuntarily"). But *Miranda*'s procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake. See 384 U. S., at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice"); *Dickerson*, 530 U. S., at 442 ("[R]eliance on the traditional totality-of-the-circumstances test raise[s] a risk of overlooking an involuntary custodial confession"); see also *supra*, at 268–270. To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.

* * *

The question remains whether J. D. B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J. D. B.'s age at the time. The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The Court's decision in this case may seem on first consideration to be modest and sensible, but in truth it is neither. It is fundamentally inconsistent with one of the main justifications for the *Miranda*[1] rule: the perceived need for a clear

[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

rule that can be easily applied in all cases. And today's holding is not needed to protect the constitutional rights of minors who are questioned by the police.

Miranda's prophylactic regime places a high value on clarity and certainty. Dissatisfied with the highly fact-specific constitutional rule against the admission of involuntary confessions, the *Miranda* Court set down rigid standards that often require courts to ignore personal characteristics that may be highly relevant to a particular suspect's actual susceptibility to police pressure. This rigidity, however, has brought with it one of *Miranda*'s principal strengths—"the ease and clarity of its application" by law enforcement officials and courts. See *Moran* v. *Burbine*, 475 U. S. 412, 425–426 (1986). A key contributor to this clarity, at least up until now, has been *Miranda*'s objective reasonable-person test for determining custody.

Miranda's custody requirement is based on the proposition that the risk of unconstitutional coercion is heightened when a suspect is placed under formal arrest or is subjected to some functionally equivalent limitation on freedom of movement. When this custodial threshold is reached, *Miranda* warnings must precede police questioning. But in the interest of simplicity, the custody analysis considers only whether, under the circumstances, a hypothetical reasonable person would consider himself to be confined.

Many suspects, of course, will differ from this hypothetical reasonable person. Some, including those who have been hardened by past interrogations, may have no need for *Miranda* warnings at all. And for other suspects—those who are unusually sensitive to the pressures of police questioning—*Miranda* warnings may come too late to be of any use. That is a necessary consequence of *Miranda*'s rigid standards, but it does not mean that the constitutional rights of these especially sensitive suspects are left unprotected. A vulnerable defendant can still turn to the constitutional rule

against *actual* coercion and contend that his confession was extracted against his will.

Today's decision shifts the *Miranda* custody determination from a one-size-fits-all reasonable-person test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today's decision by arbitrarily distinguishing a suspect's age from other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement—that may also correlate with susceptibility to coercive pressures. Or, if the Court is unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the *Miranda* custody test—from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory.

For at least three reasons, there is no need to go down this road. First, many minors subjected to police interrogation are near the age of majority, and for these suspects the one-size-fits-all *Miranda* custody rule may not be a bad fit. Second, many of the difficulties in applying the *Miranda* custody rule to minors arise because of the unique circumstances present when the police conduct interrogations at school. The *Miranda* custody rule has always taken into account the setting in which questioning occurs, and accounting for the school setting in such cases will address many of these problems. Third, in cases like the one now before us, where the suspect is especially young, courts applying the constitutional voluntariness standard can take special care to ensure that incriminating statements were not obtained through coercion.

Safeguarding the constitutional rights of minors does not require the extreme makeover of *Miranda* that today's decision may portend.

I

In the days before *Miranda*, this Court's sole metric for evaluating the admissibility of confessions was a voluntariness standard rooted in both the Fifth Amendment's Self-Incrimination Clause and the Due Process Clause of the Fourteenth Amendment. See *Bram* v. *United States*, 168 U. S. 532, 542 (1897) (Self-Incrimination Clause); *Brown* v. *Mississippi*, 297 U. S. 278 (1936) (due process). The question in these voluntariness cases was whether the particular "defendant's will" had been "overborne." *Lynumn* v. *Illinois*, 372 U. S. 528, 534 (1963). Courts took into account both "the details of the interrogation" *and* "the characteristics of the accused," *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973), and then "weigh[ed] . . . the circumstances of pressure against the power of resistance of the person confessing." *Stein* v. *New York*, 346 U. S. 156, 185 (1953).

All manner of individualized, personal characteristics were relevant in this voluntariness inquiry. Among the most frequently mentioned factors were the defendant's education, physical condition, intelligence, and mental health. *Withrow* v. *Williams*, 507 U. S. 680, 693 (1993); see *Clewis* v. *Texas*, 386 U. S. 707, 712 (1967) ("only a fifth-grade education"); *Greenwald* v. *Wisconsin*, 390 U. S. 519, 520–521 (1968) *(per curiam)* (had not taken blood-pressure medication); *Payne* v. *Arkansas*, 356 U. S. 560, 562, n. 4, 567 (1958) ("mentally dull" and "'slow to learn'"); *Fikes* v. *Alabama*, 352 U. S. 191, 193, 196, 198 (1957) ("low mentality, if not mentally ill"). The suspect's age also received prominent attention in several cases, *e. g.*, *Gallegos* v. *Colorado*, 370 U. S. 49, 54 (1962), especially when the suspect was a "mere child," *Haley* v. *Ohio*, 332 U. S. 596, 599 (1948) (plurality opinion). The weight assigned to any one consideration varied from case to case. But all of these factors, along with

anything else that might have affected the "individual's . . . capacity for effective choice," were relevant in determining whether the confession was coerced or compelled. See *Miranda* v. *Arizona*, 384 U. S. 436, 506–507 (1966) (Harlan, J., dissenting).

The all-encompassing nature of the voluntariness inquiry had its benefits. It allowed courts to accommodate a "complex of values," *Schneckloth*, *supra*, at 223, 224, and to make a careful, highly individualized determination as to whether the police had wrung "a confession out of [the] accused against his will," *Blackburn* v. *Alabama*, 361 U. S. 199, 206–207 (1960). But with this flexibility came a decrease in both certainty and predictability, and the voluntariness standard proved difficult "for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson* v. *United States*, 530 U. S. 428, 444 (2000).

In *Miranda*, the Court supplemented the voluntariness inquiry with a "set of prophylactic measures" designed to ward off the " 'inherently compelling pressures' of custodial interrogation." See *Maryland* v. *Shatzer*, 559 U. S. 98, 103 (2010) (quoting *Miranda*, 384 U. S., at 467). *Miranda* greatly simplified matters by requiring police to give suspects standard warnings before commencing any custodial interrogation. See *id.*, at 479. Its requirements are no doubt "rigid," see *Fare* v. *Michael C.*, 439 U. S. 1310, 1314 (1978) (Rehnquist, J., in chambers), and they often require courts to suppress "trustworthy and highly probative" statements that may be perfectly "voluntary under [a] traditional Fifth Amendment analysis," *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979). But with this rigidity comes increased clarity. *Miranda* provides "a workable rule to guide police officers," *New York* v. *Quarles*, 467 U. S. 649, 658 (1984) (internal quotation marks omitted), and an administrable standard for the courts. As has often been recognized, this gain in clarity and administrability is one of *Miranda*'s "principal advantages." *Berkemer* v. *McCarty*, 468 U. S. 420, 430 (1984); see

also *Missouri* v. *Seibert*, 542 U. S. 600, 622 (2004) (KENNEDY, J., concurring in judgment).

No less than other facets of *Miranda*, the threshold requirement that the suspect be in "custody" is "designed to give clear guidance to the police." *Yarborough* v. *Alvarado*, 541 U. S. 652, 668, 669 (2004). Custody under *Miranda* attaches where there is a "formal arrest" or a "restraint on freedom of movement" akin to formal arrest. *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983) *(per curiam)* (internal quotation marks omitted). This standard is "objective" and turns on how a hypothetical "reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Stansbury* v. *California*, 511 U. S. 318, 322–323, 325 (1994) *(per curiam)* (internal quotation marks omitted).

Until today, the Court's cases applying this test have focused solely on the "objective circumstances of the interrogation," *id.*, at 323, not the personal characteristics of the interrogated. *E. g.*, *Berkemer*, *supra*, at 442, and n. 35; but cf. *Schneckloth*, *supra*, at 226 (voluntariness inquiry requires consideration of "the details of the interrogation" *and* "the characteristics of the accused"). Relevant factors have included such things as where the questioning occurred,[2] how long it lasted,[3] what was said,[4] any physical restraints placed on the suspect's movement,[5] and whether the suspect was allowed to leave when the questioning was through.[6] The totality of *these* circumstances—the external circumstances, that is, of the interrogation itself—is what has mattered in this Court's cases. Personal characteristics of suspects have consistently been rejected or ignored as irrelevant under a one-size-fits-all reasonable-person standard. *Stansbury*, *supra*, at 323 ("[C]ustody depends on the objec-

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[2] *Maryland* v. *Shatzer*, 559 U. S. 98, 112–114 (2010).

[3] *Berkemer* v. *McCarty*, 468 U. S. 420, 437–438 (1984).

[4] *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) *(per curiam)*.

[5] *New York* v. *Quarles*, 467 U. S. 649, 655 (1984).

[6] *California* v. *Beheler*, 463 U. S. 1121, 1122–1123 (1983) *(per curiam)*.

tive circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned").

For example, in *Berkemer* v. *McCarty*, *supra*, police officers conducting a traffic stop questioned a man who had been drinking and smoking marijuana before he was pulled over. *Id.*, at 423. Although the suspect's inebriation was readily apparent to the officers at the scene, *ibid.*, the Court's analysis did not advert to this or any other individualized consideration. Instead, the Court focused only on the external circumstances of the interrogation itself. The opinion concluded that a typical "traffic stop" is akin to a "*Terry* stop"[7] and does not qualify as the equivalent of "formal arrest." *Id.*, at 439.

California v. *Beheler*, *supra*, is another useful example. There, the circumstances of the interrogation were "remarkably similar" to the facts of the Court's earlier decision in *Oregon* v. *Mathiason*, 429 U. S. 492 (1977) *(per curiam)*—the suspect was "not placed under arrest," he "voluntarily [came] to the police station," and he was "allowed to leave unhindered by police after a brief interview." 463 U. S., at 1123, 1121. A California court in *Beheler* had nonetheless distinguished *Mathiason* because the police knew that Beheler "had been drinking earlier in the day" and was "emotionally distraught." 463 U. S., at 1124–1125. In a summary reversal, this Court explained that the fact "[t]hat the police knew more" personal information about Beheler than they did about Mathiason was "irrelevant." *Id.*, at 1125. Neither one of them was in custody under the objective reasonable-person standard. *Ibid.;* see also *Alvarado*, *supra*, at 668, 669 (experience with law enforcement irrelevant to *Miranda* custody analysis "as a *de novo* matter").[8]

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[7] See *Terry* v. *Ohio*, 392 U. S. 1 (1968).

[8] The Court claims that "[n]ot once" have any of our cases "excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the fault line between custodial and noncustodial 'brighter.'" *Ante*, at 280. Surely this is incorrect. The very act

The glaring absence of reliance on personal characteristics in these and other custody cases should come as no surprise. To account for such individualized considerations would be to contradict *Miranda*'s central premise. The *Miranda* Court's decision to adopt its inflexible prophylactic requirements was expressly based on the notion that "[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation." 384 U. S., at 468–469.

II

In light of this established practice, there is no denying that, by incorporating age into its analysis, the Court is embarking on a new expansion of the established custody standard. And since *Miranda* is this Court's rule, "not a constitutional command," it is up to the Court "to justify its expansion." Cf. *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (KENNEDY, J., dissenting). This the Court fails to do.

In its present form, *Miranda*'s prophylactic regime already imposes "high cost[s]" by requiring suppression of confessions that are often "highly probative" and "voluntary" by any traditional standard. *Oregon* v. *Elstad*, 470 U. S. 298, 312 (1985); see *Dickerson*, 530 U. S., at 444 (under *Miranda* "statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result"). Nonetheless, a "core virtue" of *Miranda* has been the clarity and precision of its guidance to "police and courts." *Withrow*, 507 U. S., at 694 (internal quotation marks omitted); see *Moran*, 475 U. S., at 425 ("[O]ne of the principal advantages of *Miranda* is the ease and clarity of its application" (internal quotation marks omitted)). This

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of adopting a reasonable-person test necessarily excludes all sorts of "relevant and objective" circumstances—for example, all the objective circumstances of a suspect's life history—that might otherwise bear on a custody determination.

increased clarity "has been thought to outweigh the burdens" that *Miranda* imposes. *Fare*, 442 U. S., at 718. The Court has, however, repeatedly cautioned against upsetting the careful "balance" that *Miranda* struck, *Moran*, *supra*, at 424, and it has "refused to sanction attempts to expand [the] *Miranda* holding" in ways that would reduce its "clarity," *Quarles*, 467 U. S., at 658 (citing cases). Given this practice, there should be a "strong presumption" against the Court's new departure from the established custody test. See *United States* v. *Patane*, 542 U. S. 630, 640 (2004) (plurality opinion). In my judgment, that presumption cannot be overcome here.

A

The Court's rationale for importing age into the custody standard is that minors tend to lack adults' "capacity to exercise mature judgment" and that failing to account for that "reality" will leave some minors unprotected under *Miranda* in situations where they perceive themselves to be confined. See *ante*, at 273, 272. I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult. As the Court notes, our pre-*Miranda* cases were particularly attuned to this "reality" in applying the constitutional requirement of voluntariness in fact. *Ante*, at 272–273 (relying on *Haley*, 332 U. S., at 599 (plurality opinion), and *Gallegos*, 370 U. S., at 54). It is no less a "reality," however, that many persons *over* the age of 18 are also more susceptible to police pressure than the hypothetical reasonable person. See *Payne*, 356 U. S., at 567 (fact that defendant was a "mentally dull 19-year-old youth" relevant in voluntariness inquiry). Yet the *Miranda* custody standard has never accounted for the personal characteristics of these or any other individual defendants.

Indeed, it has always been the case under *Miranda* that the unusually meek or compliant are subject to the same fixed rules, including the same custody requirement, as those who are unusually resistant to police pressure. *Berkemer*,

468 U. S., at 442, and n. 35 ("only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"). *Miranda*'s rigid standards are both overinclusive and underinclusive. They are overinclusive to the extent that they provide a windfall to the most hardened and savvy of suspects, who often have no need for *Miranda*'s protections. Compare *Miranda*, *supra*, at 471–472 ("[N]o amount of circumstantial evidence that the person may have been aware of" his rights can overcome *Miranda*'s requirements), with *Orozco* v. *Texas*, 394 U. S. 324, 329 (1969) (White, J., dissenting) ("Where the defendant himself [w]as a lawyer, policeman, professional criminal, or otherwise has become aware of what his right to silence is, it is sheer fancy to assert that his answer to every question asked him is compelled unless he is advised of those rights with which he is already intimately familiar"). And *Miranda*'s requirements are underinclusive to the extent that they fail to account for "frailties," "idiosyncrasies," and other individualized considerations that might cause a person to bend more easily during a confrontation with the police. *Alvarado*, 541 U. S., at 662 (internal quotation marks omitted). Members of this Court have seen this rigidity as a major weakness in *Miranda*'s "code of rules for confessions." See 384 U. S., at 504 (Harlan, J., dissenting); *Fare*, 439 U. S., at 1314 (Rehnquist, J., in chambers) ("[T]he rigidity of [*Miranda*'s] prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court"). But if it is, then the weakness is an inescapable consequence of the *Miranda* Court's decision to supplement the more holistic voluntariness requirement with a one-size-fits-all prophylactic rule.

That is undoubtedly why this Court's *Miranda* cases have never before mentioned "the suspect's age" or any other individualized consideration in applying the custody standard. See *Alvarado*, *supra*, at 666. And unless the *Miranda* custody rule is now to be radically transformed into one that takes into account the wide range of individual charac-

teristics that are relevant in determining whether a confession is voluntary, the Court must shoulder the burden of explaining why age is different from these other personal characteristics.

Why, for example, is age different from intelligence? Suppose that an officer, upon going to a school to question a student, is told by the principal that the student has an IQ of 75 and is in a special-education class. Cf. *In re J. D. B.*, 363 N. C. 664, 666, 686 S. E. 2d 135, 136–137 (2009). Are those facts more or less important than the student's age in determining whether he or she "felt . . . at liberty to terminate the interrogation and leave"? *Thompson* v. *Keohane*, 516 U. S. 99, 112 (1995). An IQ score, like age, is more than just a number. *Ante*, at 272 ("[A]ge is far 'more than a chronological fact' "). And an individual's intelligence can also yield "conclusions" similar to those "we have drawn ourselves" in cases far afield of *Miranda*. *Ante*, at 275. Compare *ibid.* (relying on *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Roper* v. *Simmons*, 543 U. S. 551 (2005)) with *Smith* v. *Texas*, 543 U. S. 37, 44–45 (2004) *(per curiam)*.

How about the suspect's cultural background? Suppose the police learn (or should have learned, see *ante*, at 274) that a suspect they wish to question is a recent immigrant from a country in which dire consequences often befall any person who dares to attempt to cut short any meeting with the police.[9] Is this really less relevant than the fact that a suspect is a month or so away from his 18th birthday?

The defendant's education is another personal characteristic that may generate "conclusions about behavior and perception." *Ante*, at 272 (internal quotation marks omitted). Under today's decision, why should police officers and courts

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[9] Cf. *United States* v. *Chalan*, 812 F. 2d 1302, 1307 (CA10 1987) (rejecting claim that Native American suspect was "in custody" for *Miranda* purposes because, by custom, obedience to tribal authorities was "expected of all tribal members").

"blind themselves," *ante*, at 265, to the fact that a suspect has "only a fifth-grade education"? *Clewis*, 386 U. S., at 712 (voluntariness case). Alternatively, what if the police know or should know that the suspect is "a college-educated man with law school training"? *Crooker* v. *California*, 357 U. S. 433, 440 (1958), overruled by *Miranda*, *supra*, at 479, and n. 48. How are these individual considerations meaningfully different from age in their "relationship to a reasonable person's understanding of his freedom of action"? *Ante*, at 275. The Court proclaims that "[a] child's age . . . is different," *ibid.*, but the basis for this *ipse dixit* is dubious.

I have little doubt that today's decision will soon be cited by defendants—and perhaps by prosecutors as well—for the proposition that all manner of other individual characteristics should be treated like age and taken into account in the *Miranda* custody calculus. Indeed, there are already lower court decisions that take this approach. See *United States* v. *Beraun-Panez*, 812 F. 2d 578, 581 ("reasonable person who was an alien"), modified, 830 F. 2d 127 (CA9 1987); *In re Jorge D.*, 202 Ariz. 277, 280, 43 P. 3d 605, 608 (App. 2002) (age, maturity, and experience); *State* v. *Doe*, 130 Idaho 811, 818, 948 P. 2d 166, 173 (App. 1997) (same); *In re Joshua David C.*, 116 Md. App. 580, 594, 698 A. 2d 1155, 1162 (1997) ("education, age, and intelligence").

In time, the Court will have to confront these issues, and it will be faced with a difficult choice. It may choose to distinguish today's decision and adhere to the arbitrary proclamation that "age . . . is different." *Ante*, at 275. Or it may choose to extend today's holding and, in doing so, further undermine the very rationale for the *Miranda* regime.

B

If the Court chooses the latter course, then a core virtue of *Miranda*—the "ease and clarity of its application"—will be lost. *Moran*, 475 U. S., at 425; see *Fare*, 442 U. S., at 718 (noting that the clarity of *Miranda*'s requirements "has been

thought to outweigh the burdens that the decision . . . imposes"). However, even today's more limited departure from *Miranda*'s one-size-fits-all reasonable-person test will produce the very consequences that prompted the *Miranda* Court to abandon exclusive reliance on the voluntariness test in the first place: The Court's test will be hard for the police to follow, and it will be hard for judges to apply. See *Dickerson*, 530 U. S., at 444.

The Court holds that age must be taken into account when it "was known to the officer at the time of the interview," or when it "would have been objectively apparent" to a reasonable officer. *Ante*, at 274. The first half of this test overturns the rule that the "initial determination of custody" does not depend on the "subjective views harbored by . . . interrogating officers." *Stansbury*, 511 U. S., at 323. The second half will generate time-consuming satellite litigation over a reasonable officer's perceptions. When, as here, the interrogation takes place in school, the inquiry may be relatively simple. But not all police questioning of minors takes place in schools. In many cases, courts will presumably have to make findings as to whether a particular suspect had a sufficiently youthful look to alert a reasonable officer to the possibility that the suspect was under 18, or whether a reasonable officer would have recognized that a suspect's ID was a fake. The inquiry will be both "time-consuming and disruptive" for the police and the courts. See *Berkemer*, 468 U. S., at 432 (refusing to modify the custody test based on similar considerations). It will also be made all the more complicated by the fact that a suspect's dress and manner will often be different when the issue is litigated in court than it was at the time of the interrogation.

Even after courts clear this initial hurdle, further problems will likely emerge as judges attempt to put themselves in the shoes of the average 16-year-old, or 15-year-old, or 13-year-old, as the case may be. Consider, for example, a 60-year-old judge attempting to make a custody determina-

tion through the eyes of a hypothetical, average 15-year-old. Forty-five years of personal experience and societal change separate this judge from the days when he or she was 15 years old. And this judge may or may not have been an average 15-year-old. The Court's answer to these difficulties is to state that "no imaginative powers, knowledge of developmental psychology, [or] training in cognitive science" will be necessary. *Ante*, at 279. Judges "simply need the common sense," the Court assures, "to know that a 7-year-old is not a 13-year-old and neither is an adult." *Ante*, at 280. It is obvious, however, that application of the Court's new rule demands much more than this.

Take a fairly typical case in which today's holding may make a difference. A 16½-year-old moves to suppress incriminating statements made prior to the administration of *Miranda* warnings. The circumstances are such that, if the defendant were at least 18, the court would not find that he or she was in custody, but the defendant argues that a reasonable 16½-year-old would view the situation differently. The judge will not have the luxury of merely saying: "It is common sense that a 16½-year-old is not an 18-year-old. Motion granted." Rather, the judge will be required to determine whether the differences between a typical 16½-year-old and a typical 18-year-old with respect to susceptibility to the pressures of interrogation are sufficient to change the outcome of the custody determination. Today's opinion contains not a word of actual guidance as to how judges are supposed to go about making that determination.

C

Petitioner and the Court attempt to show that this task is not unmanageable by pointing out that age is taken into account in other legal contexts. In particular, the Court relies on the fact that the age of a defendant is a relevant factor under the reasonable-person standard applicable in negligence suits. *Ante*, at 274 (citing Restatement (Third) of

Torts § 10, Comment *b*, p. 117 (2005)). But negligence is generally a question for the jury, the members of which can draw on their varied experiences with persons of different ages. It also involves a *post hoc* determination, in the reflective atmosphere of a deliberation room, about whether the defendant conformed to a standard of care. The *Miranda* custody determination, by contrast, must be made in the first instance by police officers in the course of an investigation that may require quick decisionmaking. See *Quarles*, 467 U. S., at 658 (noting "the importance" under *Miranda* of providing "a workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront' "); *Alvarado*, 541 U. S., at 668, 669 ("[T]he custody inquiry states an objective rule designed to give clear guidance to the police").

Equally inapposite are the Eighth Amendment cases the Court cites in support of its new rule. *Ante*, at 272, 274, 275 (citing *Eddings*, 455 U. S. 104, *Roper*, 543 U. S. 551, and *Graham* v. *Florida*, 560 U. S. 48 (2010)). Those decisions involve the "judicial exercise of independent judgment" about the constitutionality of certain punishments. *E. g.*, *id.*, at 67. Like the negligence standard, they do not require on-the-spot judgments by the police.

Nor do state laws affording extra protection for juveniles during custodial interrogation provide any support for petitioner's arguments. See Brief for Petitioner 16–17. States are free to enact additional restrictions on the police over and above those demanded by the Constitution or *Miranda*. In addition, these state statutes generally create clear, workable rules to guide police conduct. See Brief for Petitioner 16–17 (citing statutes that require or permit parents to be present during custodial interrogation of a minor, that require minors to be advised of a statutory right to communicate with a parent or guardian, and that require parental consent to custodial interrogation). Today's decision, by

contrast, injects a new, complicating factor into what had been a clear, easily applied prophylactic rule. See *Alvarado*, *supra*, at 668–669.[10]

III

The Court's decision greatly diminishes the clarity and administrability that have long been recognized as "principal advantages" of *Miranda*'s prophylactic requirements. See, *e. g.*, *Moran*, 475 U. S., at 425. But what is worse, the Court takes this step unnecessarily, as there are other, less disruptive tools available to ensure that minors are not coerced into confessing.

As an initial matter, the difficulties that the Court's standard introduces will likely yield little added protection for most juvenile defendants. Most juveniles who are subjected to police interrogation are teenagers nearing the age of majority.[11] These defendants' reactions to police pressure are unlikely to be much different from the reaction of a typical 18-year-old in similar circumstances. A one-size-fits-all *Mi-*

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[10] The Court also relies on North Carolina's concession at oral argument that a court could take into account a suspect's blindness as a factor relevant to the *Miranda* custody determination. *Ante*, at 278, and n. 9. This is a farfetched hypothetical, and neither the parties nor their *amici* cite any case in which such a problem has actually arisen. Presumably such a case would involve a situation in which a blind defendant was given "a typed document advising him that he [was] free to leave." Brief for Juvenile Law Center et al. as *Amici Curiae* 23. In such a case, furnishing this advice in a form calculated to be unintelligible to the suspect would be tantamount to failing to provide the advice at all. And advice by the police that a suspect is or is not free to leave at will has always been regarded as a circumstance regarding the conditions of the interrogation that must be taken into account in making the *Miranda* custody determination.

[11] See Dept. of Justice, Federal Bureau of Investigation, 2008 Crime in the United States (Sept. 2009), online at http://www2.fbi.gov/ucr/cius2008/data/table_38.html (all Internet materials as visited June 8, 2011, and available in Clerk of Court's case file) (indicating that less than 30% of juvenile arrests in the United States are of suspects who are under 15).

randa custody rule thus provides a roughly reasonable fit for these defendants.

In addition, many of the concerns that petitioner raises regarding the application of the *Miranda* custody rule to minors can be accommodated by considering the unique circumstances present when minors are questioned in school. See Brief for Petitioner 10–11 (reciting at length the factors petitioner believes to be relevant to the custody determination here, including the fact that petitioner was removed from class by a police officer, that the interview took place in a school conference room, and that a uniformed officer and a vice principal were present). The *Miranda* custody rule has always taken into account the setting in which questioning occurs, restrictions on a suspect's freedom of movement, and the presence of police officers or other authority figures. See *Alvarado*, *supra*, at 665; *Shatzer*, 559 U. S., at 112–114. It can do so here as well.[12]

Finally, in cases like the one now before us, where the suspect is much younger than the typical juvenile defendant, courts should be instructed to take particular care to ensure that incriminating statements were not obtained involuntarily. The voluntariness inquiry is flexible and accommodating by nature, see *Schneckloth*, 412 U. S., at 224, and the Court's precedents already make clear that "special care" must be exercised in applying the voluntariness test where the confession of a "mere child" is at issue, *Haley*, 332 U. S., at 599 (plurality opinion). If *Miranda*'s rigid, one-size-fits-all standards fail to account for the unique needs of juveniles, the response should be to rigorously apply the constitutional rule against coercion to ensure that the rights of

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[12] The Court thinks it would be "absur[d]" to consider the school setting without accounting for age, *ante*, at 276, but the real absurdity is for the Court to require police officers to get inside the head of a reasonable minor while making the quick, on-the-spot determinations that *Miranda* demands.

minors are protected. There is no need to run *Miranda* off the rails.

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The Court rests its decision to inject personal characteristics into the *Miranda* custody inquiry on the principle that judges applying *Miranda* cannot "blind themselves to . . . commonsense reality." *Ante*, at 265, 272, 273–274, 277. But the Court's shift is fundamentally at odds with the clear prophylactic rules that *Miranda* has long enforced. *Miranda* frequently requires judges to blind themselves to the reality that many un-Mirandized custodial confessions are "by no means involuntary" or coerced. *Dickerson*, 530 U. S., at 444. It also requires police to provide a rote recitation of *Miranda* warnings that many suspects already know and could likely recite from memory.[13] Under today's new, "reality"-based approach to the doctrine, perhaps these and other principles of our *Miranda* jurisprudence will, like the custody standard, now be ripe for modification. Then, bit by bit, *Miranda* will lose the clarity and ease of application that has long been viewed as one of its chief justifications.

I respectfully dissent.

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[13] Surveys have shown that "[l]arge majorities" of the public are aware that "individuals arrested for a crime" have a right to "remai[n] silent (81%)," a right to "a lawyer (95%)," and a right to have a lawyer "appointed" if the arrestee "cannot afford one (88%)." Belden, Russonello, & Stewart, Developing a National Message for Indigent Defense: Analysis of National Survey 4 (Oct. 2001), online at http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf.

Syllabus

SMITH ET AL. *v.* BAYER CORP.

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

No. 09–1205. Argued January 18, 2011—Decided June 16, 2011

Respondent (Bayer) moved in Federal District Court for an injunction ordering a West Virginia state court not to consider a motion for class certification filed by petitioners (Smith), who were plaintiffs in the state court action. Bayer thought such an injunction warranted because, in a separate case, Bayer had persuaded the same Federal District Court to deny a similar class certification motion that had been filed against Bayer by a different plaintiff, George McCollins. The District Court had denied McCollins' certification motion under Fed. Rule Civ. Proc. 23.

The court granted Bayer's requested injunction against the state court proceedings, holding that its denial of certification in McCollins' case precluded litigation of the certification issue in Smith's case. The Court of Appeals for the Eighth Circuit affirmed. It first noted that the Anti-Injunction Act (Act) generally prohibits federal courts from enjoining state court proceedings. But it found that the Act's relitigation exception authorized this injunction because ordinary rules of issue preclusion barred Smith from seeking certification of his proposed class. In so doing, the court concluded that Smith was invoking a State Rule, W. Va. Rule Civ. Proc. 23, that was sufficiently similar to the Federal Rule McCollins had invoked, such that the certification issues presented in the two cases were the same. The court further held that Smith, as an unnamed member of McCollins' putative class action, could be bound by the judgment in McCollins' case.

Held: In enjoining the state court from considering Smith's class certification request, the federal court exceeded its authority under the "relitigation exception" to the Act. Pp. 306–318.

(a) Under that Act, a federal court "may not grant an injunction to stay proceedings in a State court except" in rare cases, when necessary to "protect or effectuate [the federal court's] judgments." 28 U. S. C. § 2283. The Act's "specifically defined exceptions," *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 286, "are narrow and are 'not [to] be enlarged by loose statutory construction,'" *Chick Kam Choo* v. *Exxon Corp.*, 486 U. S. 140, 146. Indeed, "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Atlantic*

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Coast Line R. Co., 398 U. S., at 297. The exception at issue in this case, known as the "relitigation exception," authorizes an injunction to prevent state litigation of a claim or issue "that previously was presented to and decided by the federal court." *Chick Kam Choo*, 486 U. S., at 147. This exception is designed to implement "well-recognized concepts" of claim and issue preclusion. *Ibid.* Because deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court—here, the West Virginia court—every benefit of the doubt goes toward the state court, see *Atlantic Coast Line*, 398 U. S., at 287, 297; an injunction can issue only if preclusion is clear beyond peradventure. For the federal court's class action determination to preclude the state court's adjudication of Smith's motion, at least two conditions must be met. First, the issue the federal court decided must be the same as the one presented in the state tribunal. And second, Smith must have been a party to the federal suit or must fall within one of a few discrete exceptions to the general rule against binding nonparties. Pp. 306–308.

(b) The issue the federal court decided was not the same as the one presented in the state tribunal. This case is little more than a rerun of *Chick Kam Choo*. There, a federal court dismissed a suit involving Singapore law on *forum non conveniens* grounds and then enjoined the plaintiff from pursuing the "same" claim in Texas state court. However, because the legal standards for *forum non conveniens* differed in the two courts, the issues before those courts differed, making an injunction unwarranted. Here, Smith's proposed class mirrored McCollins', and the two suits' substantive claims broadly overlapped. But the federal court adjudicated McCollins' certification motion under Federal Rule 23, whereas the state court was poised to consider Smith's proposed class under W. Va. Rule 23. And the State Supreme Court has generally stated that it will not necessarily interpret its Rule 23 as coterminous with the Federal Rule. Absent clear evidence that the state courts had adopted an approach to State Rule 23 tracking the federal court's analysis in McCollins' case, this Court could not conclude that they would interpret their Rule the same way and, thus, could not tell whether the certification issues in the two courts were the same. That uncertainty would preclude an injunction. And indeed, the case against an injunction here is even stronger, because the State Supreme Court has expressly disapproved the approach to Rule 23(b)(3)'s predominance requirement embraced by the Federal District Court. Pp. 308–312.

(c) The District Court's injunction was independently improper because Smith was not a party to the federal suit and was not covered by

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any exception to the rule against nonparty preclusion. Generally, a party "is '[o]ne by or against whom a lawsuit is brought,'" *United States ex rel. Eisenstein* v. *City of New York*, 556 U. S. 928, 933, or who "become[s] a party by intervention, substitution, or third-party practice," *Karcher* v. *May*, 484 U. S. 72, 77. The definition of "party" cannot be stretched so far as to cover a person like Smith, whom McCollins was denied leave to represent. The only exception to the rule against nonparty preclusion potentially relevant here is the exception that binds non-named members of "properly conducted class actions" to judgments entered in such proceedings. *Taylor* v. *Sturgell*, 553 U. S. 880, 894. But McCollins' suit was not a proper class action. Indeed, the very ruling that Bayer argues should have preclusive effect is the District Court's decision not to certify a class. Absent certification of a class under Federal Rule 23, the precondition for binding Smith was not met. Neither a proposed, nor a rejected, class action may bind nonparties. See *id.*, at 901. Bayer claims that this Court's approach to class actions would permit class counsel to try repeatedly to certify the same class simply by changing plaintiffs. But principles of *stare decisis* and comity among courts generally suffice to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. The right approach does not lie in binding nonparties to a judgment. And to the extent class actions raise special relitigation problems, the federal Class Action Fairness Act of 2005 provides a remedy that does not involve departing from the usual preclusion rules. Pp. 312–318.

593 F. 3d 716, reversed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which THOMAS, J., joined as to Parts I and II–A.

Richard A. Monahan argued the cause for petitioners. With him on the briefs were *Marvin W. Masters*, *Charles M. Love IV*, *Scott L. Nelson*, and *Allison M. Zieve*.

Philip S. Beck argued the cause for respondent. With him on the briefs were *Adam L. Hoeflich*, *Andrew C. Baak*, *Carter G. Phillips*, and *Eric D. McArthur*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Association for Justice by *Jeffrey R. White;* and for Steven J. Thorogood et al. by *Clinton A. Krislov* and *Mark A. Boling*.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *E. Joshua Rosen-*

JUSTICE KAGAN delivered the opinion of the Court.*

In this case, a Federal District Court enjoined a state court from considering a plaintiff's request to approve a class action. The District Court did so because it had earlier denied a motion to certify a class in a related case, brought by a different plaintiff against the same defendant alleging similar claims. The federal court thought its injunction appropriate to prevent relitigation of the issue it had decided.

We hold to the contrary. In issuing this order to a state court, the federal court exceeded its authority under the "relitigation exception" to the Anti-Injunction Act. That statutory provision permits a federal court to enjoin a state proceeding only in rare cases, when necessary to "protect or effectuate [the federal court's] judgments." 28 U. S. C. § 2283. Here, that standard was not met for two reasons. First, the issue presented in the state court was not identical to the one decided in the federal tribunal. And second, the plaintiff in the state court did not have the requisite connection to the federal suit to be bound by the District Court's judgment.

I

Because the question before us involves the effect of a former adjudication on this case, we begin our statement of the facts not with this lawsuit, but with another. In August 2001, George McCollins sued respondent Bayer Corporation in the Circuit Court of Cabell County, West Virginia, asserting various state-law claims arising from Bayer's sale of an allegedly hazardous prescription drug called Baycol (which Bayer withdrew from the market that same month). McCollins contended that Bayer had violated West Virginia's consumer protection statute and the company's express and im-

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kranz, *James L. Stengel*, *Robin S. Conrad*, *Daniel J. Tyukody*, and *Jason L. Krajcer;* and for the Product Liability Advisory Council, Inc., by *Kenneth S. Geller*, *David M. Gossett*, and *Archis A. Parasharami.*

*JUSTICE THOMAS joins Parts I and II–A of this opinion.

plied warranties by selling him a defective product. And pursuant to West Virginia Rule of Civil Procedure 23 (2011), McCollins asked the state court to certify a class of West Virginia residents who had also purchased Baycol, so that the case could proceed as a class action.

Approximately one month later, the suit now before us began in a different part of West Virginia. Petitioners Keith Smith and Shirley Sperlazza (Smith for short) filed state-law claims against Bayer, similar to those raised in McCollins' suit, in the Circuit Court of Brooke County, West Virginia. And like McCollins, Smith asked the court to certify under West Virginia's Rule 23 a class of Baycol purchasers residing in the State. Neither Smith nor McCollins knew about the other's suit.

In January 2002, Bayer removed McCollins' case to the United States District Court for the Southern District of West Virginia on the basis of diversity jurisdiction. See 28 U. S. C. §§ 1332, 1441. The case was then transferred to the District of Minnesota pursuant to a preexisting order of the Judicial Panel on Multi-District Litigation, which had consolidated all federal suits involving Baycol (numbering in the tens of thousands) before a single District Court Judge. See § 1407. Bayer, however, could not remove Smith's case to federal court because Smith had sued several West Virginia defendants in addition to Bayer, and so the suit lacked complete diversity. See § 1441(b).[1] Smith's suit thus remained in the state courthouse in Brooke County.

Over the next six years, the two cases proceeded along their separate pretrial paths at roughly the same pace. By 2008, both courts were preparing to turn to their respective plaintiffs' motions for class certification. The Federal District Court was the first to reach a decision.

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[1] The Class Action Fairness Act of 2005, 119 Stat. 4, which postdates and therefore does not govern this lawsuit, now enables a defendant to remove to federal court certain class actions involving nondiverse parties. See 28 U. S. C. §§ 1332(d), 1453(b); see also *infra*, at 317–318.

Applying Federal Rule of Civil Procedure 23,[2] the District Court declined to certify McCollins' proposed class of West Virginia Baycol purchasers. The District Court's reasoning proceeded in two steps. The court first ruled that, under West Virginia law, each plaintiff would have to prove "actual injury" from his use of Baycol to recover. App. to Pet. for Cert. 44a. The court then held that because the necessary showing of harm would vary from plaintiff to plaintiff, "individual issues of fact predominate[d]" over issues common to all members of the proposed class, and so the case was not suitable for class treatment. *Id.*, at 45a. In the same order, the District Court also dismissed McCollins' claims on the merits in light of his failure to demonstrate physical injury from his use of Baycol. McCollins chose not to appeal.

Although McCollins' suit was now concluded, Bayer asked the District Court for another order based upon it, this one affecting Smith's case in West Virginia. In a motion—receipt of which first apprised Smith of McCollins' suit—Bayer explained that the proposed class in Smith's case was identical to the one the federal court had just rejected. Bayer therefore requested that the federal court enjoin the West Virginia state court from hearing Smith's motion to certify a class. According to Bayer, that order was appropriate to protect the District Court's judgment in McCollins' suit denying class certification. The District Court agreed and granted the injunction.

The Court of Appeals for the Eighth Circuit affirmed. *In re Baycol Prods. Litigation*, 593 F. 3d 716 (2010). The court noted that the Anti-Injunction Act generally prohibits federal courts from enjoining state court proceedings. But the court held that the Act's relitigation exception authorized

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[2] Although McCollins had originally sought certification under W. Va. Rule of Civ. Proc. 23 (2011), federal procedural rules govern a case that has been removed to federal court. See *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393 (2010).

the injunction here because ordinary rules of issue preclusion barred Smith from seeking certification of his proposed class. According to the court, Smith was invoking a similar class action rule as McCollins had used to seek certification "of the same class" in a suit alleging "the same legal theories," *id.*, at 724; the issue in the state court therefore was "sufficiently identical" to the one the federal court had decided to warrant preclusion, *ibid.* In addition, the court held, the parties in the two proceedings were sufficiently alike: Because Smith was an unnamed member of the class McCollins had proposed, and because their "interests were aligned," Smith was appropriately bound by the federal court's judgment. *Ibid.*

We granted certiorari, 561 U. S. 1057 (2010), because the order issued here implicates two circuit splits arising from application of the Anti-Injunction Act's relitigation exception. The first involves the requirement of preclusion law that a subsequent suit raise the "same issue" as a previous case.[3] The second concerns the scope of the rule that a court's judgment cannot bind nonparties.[4] We think the

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[3] Compare *In re Baycol Prods. Litigation*, 593 F. 3d 716, 723 (CA8 2010) (case below) (holding that two cases involve the same issue when "[t]he state and federal [class] certification rules . . . are not significantly different"), with *J. R. Clearwater Inc.* v. *Ashland Chemical Co.*, 93 F. 3d 176, 180 (CA5 1996) (holding that two cases implicate different issues even when "[the state rule] is modeled on . . . the Federal Rules" because a "[state] court might well exercise [its] discretion in a different manner").

[4] Compare 593 F. 3d, at 724 ("[T]he denial of class certification is binding on unnamed [putative] class members" because they are "in privity to [the parties] in the prior action"), and *In re Bridgestone/Firestone, Inc., Tires Prods. Liability Litigation*, 333 F. 3d 763, 768–769 (CA7 2003) (same), with *In re Ford Motor Co.*, 471 F. 3d 1233, 1245 (CA11 2006) (holding that "[t]he denial of class certification" prevents a court from "binding" anyone other than "the parties appearing before it"), and *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litigation*, 134 F. 3d 133, 141 (CA3 1998) (holding that putative "class members are not parties" and so cannot be bound by a court's ruling when "there is no class pending").

District Court erred on both grounds when it granted the injunction, and we now reverse.

II

The Anti-Injunction Act, first enacted in 1793, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283.

The statute, we have recognized, "is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts." *Chick Kam Choo* v. *Exxon Corp.*, 486 U. S. 140, 146 (1988). And the Act's core message is one of respect for state courts. The Act broadly commands that those tribunals "shall remain free from interference by federal courts." *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 282 (1970). That edict is subject to only "three specifically defined exceptions." *Id.*, at 286. And those exceptions, though designed for important purposes, "are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo*, 486 U. S., at 146 (quoting *Atlantic Coast Line*, 398 U. S., at 287; alteration in original). Indeed, "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Id.*, at 297.

This case involves the last of the Act's three exceptions, known as the relitigation exception. That exception is designed to implement "well-recognized concepts" of claim and issue preclusion. *Chick Kam Choo*, 486 U. S., at 147. The provision authorizes an injunction to prevent state litigation of a claim or issue "that previously was presented to and decided by the federal court." *Ibid.* But in applying this exception, we have taken special care to keep it "strict and

narrow." *Id.*, at 148. After all, a court does not usually "get to dictate to other courts the preclusion consequences of its own judgment." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4405, p. 82 (2d ed. 2002) (hereinafter Wright & Miller). Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court (here, the one in West Virginia). So issuing an injunction under the relitigation exception is resorting to heavy artillery.[5] For that reason, every benefit of the doubt goes toward the state court, see *Atlantic Coast Line*, 398 U. S., at 287, 297; an injunction can issue only if preclusion is clear beyond peradventure.

The question here is whether the federal court's rejection of McCollins' proposed class precluded a later adjudication in state court of Smith's certification motion. For the federal court's determination of the class issue to have this preclusive effect, at least two conditions must be met.[6] First, the issue the federal court decided must be the same as the one presented in the state tribunal. See 18 Wright & Miller

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[5] That is especially so because an injunction is not the only way to correct a state trial court's erroneous refusal to give preclusive effect to a federal judgment. As we have noted before, "the state appellate courts and ultimately this Court" can review and reverse such a ruling. *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 287 (1970).

[6] We have held that federal common law governs the preclusive effect of a decision of a federal court sitting in diversity. See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 508 (2001). Smith assumes that federal common law should here incorporate West Virginia's preclusion law, see Brief for Petitioners 15–16, whereas Bayer favors looking only to federal rules of preclusion because of the federal interests at stake in this case, see Brief for Respondent 18. We do not think the question matters here. Neither party identifies any way in which federal and state principles of preclusion law differ in any relevant respect. Nor have we found any such divergence. Compare, *e. g.*, *Montana* v. *United States*, 440 U. S. 147, 153–154 (1979) (describing elements of issue preclusion), with *State* v. *Miller*, 194 W. Va. 3, 9, 459 S. E. 2d 114, 120 (1995) (same). We therefore need not decide whether, in general, federal common law ought to incorporate state law in situations such as this.

§ 4417, at 412. And second, Smith must have been a party to the federal suit, or else must fall within one of a few discrete exceptions to the general rule against binding nonparties. See 18A *id.*, § 4449, at 330. In fact, as we will explain, the issues before the two courts were not the same, and Smith was neither a party nor the exceptional kind of nonparty who can be bound. So the courts below erred in finding the certification issue precluded, and erred all the more in thinking an injunction appropriate.[7]

A

In our most recent case on the relitigation exception, *Chick Kam Choo* v. *Exxon*, we applied the "same issue" requirement of preclusion law to invalidate a federal court's injunction. 486 U. S., at 151. The federal court had dismissed a suit involving Singapore law on grounds of *forum non conveniens*. After the plaintiff brought the same claim in Texas state court, the federal court issued an injunction barring the plaintiff from pursuing relief in that alternate forum. We held that the District Court had gone too far. "[A]n essential prerequisite for applying the relitigation exception," we explained, "is that the . . . issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Id.*, at 148. That prerequisite, we thought, was not satisfied because the issue to be adjudicated in state court was not the one the federal court had resolved. The federal court had considered the permissibility of the claim under federal *forum non conveniens* principles. But the Texas courts, we thought, "would apply a significantly different *forum non conveniens* analysis," *id.*, at 149; they had in prior cases rejected the strictness of the federal doctrine. Our conclusion

[7] Because we rest our decision on the Anti-Injunction Act and the principles of issue preclusion that inform it, we do not consider Smith's argument, based on *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985), that the District Court's action violated the Due Process Clause.

followed: "[W]hether the Texas *state* courts are an appropriate forum for [the plaintiff's] Singapore law claims has not yet been litigated." *Ibid.* Because the legal standards in the two courts differed, the issues before the courts differed, and an injunction was unwarranted.

The question here closely resembles the one in *Chick Kam Choo*. The class Smith proposed in state court mirrored the class McCollins sought to certify in federal court: Both included all Baycol purchasers resident in West Virginia. Moreover, the substantive claims in the two suits broadly overlapped: Both complaints alleged that Bayer had sold a defective product in violation of the State's consumer protection law and the company's warranties. So far, so good for preclusion. But not so fast: a critical question—the question of the applicable legal standard—remains. The District Court ruled that the proposed class did not meet the requirements of Federal Rule 23 (because individualized issues would predominate over common ones). But the state court was poised to consider whether the proposed class satisfied *West Virginia* Rule 23. If those two legal standards differ (as federal and state *forum non conveniens* law differed in *Chick Kam Choo*)—then the federal court resolved an issue not before the state court. In that event, much like in *Chick Kam Choo*, "whether the [West Virginia] *state* cour[t]" should certify the proposed class action "has not yet been litigated." 486 U. S., at 149.

The Court of Appeals and Smith offer us two competing ways of deciding whether the West Virginia and Federal Rules differ, but we think the right path lies somewhere in the middle. The Eighth Circuit relied almost exclusively on the near-identity of the two Rules' texts. See 593 F. 3d, at 723. That was the right place to start, but not to end. Federal and state courts, after all, can and do apply identically worded procedural provisions in widely varying ways. If a State's procedural provision tracks the language of a Federal Rule, but a state court interprets that provision in a manner

federal courts have not, then the state court is using a different standard and thus deciding a different issue. See 18 Wright & Miller § 4417, at 454 (stating that preclusion is "inappropriate" when "different legal standards . . . masquerad[e] behind similar legal labels"). At the other extreme, Smith contends that the source of law is all that matters: a different sovereign must in each and every case "'have the opportunity, if it chooses, to construe its procedural rule differently.'" Brief for Petitioners 22 (quoting ALI, Principles of the Law, Aggregate Litigation § 2.11, Reporters' Notes, Comment *b*, p. 179 (2010)). But if state courts have made crystal clear that they follow the same approach as the federal court applied, we see no need to ignore that determination; in that event, the issues in the two cases would indeed be the same. So a federal court considering whether the relitigation exception applies should examine whether state law parallels its federal counterpart. But as suggested earlier, see *supra*, at 307, the federal court must resolve any uncertainty on that score by leaving the question of preclusion to the state courts.

Under this approach, the West Virginia Supreme Court has gone some way toward resolving the matter before us by declaring its independence from federal courts' interpretation of the Federal Rules—and particularly of Rule 23. In *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S. E. 2d 52 (2003) *(In re Rezulin)*, the West Virginia high court considered a plaintiff's motion to certify a class—coincidentally enough, in a suit about an allegedly defective pharmaceutical product. The court made a point of complaining about the parties' and lower court's near-exclusive reliance on federal cases about Federal Rule 23 to decide the certification question. Such cases, the court cautioned, "'may be persuasive, but [they are] not binding or controlling.'" *Id.*, at 61, 585 S. E. 2d, at 61. And lest anyone mistake the import of this message, the court went on: The aim of "this rule is to avoid having our legal analysis of our Rules 'amount to

nothing more than Pavlovian responses to federal decisional law.'" *Ibid.* (emphasis deleted). Of course, the state courts might still have adopted an approach to their Rule 23 that tracked the analysis the federal court used in McCollins' case. But absent clear evidence that the state courts had done so, we could not conclude that they would interpret their Rule in the same way. And if that is so, we could not tell whether the certification issues in the state and federal courts were the same. That uncertainty would preclude an injunction.

But here the case against an injunction is even stronger, because the West Virginia Supreme Court has *disapproved* the approach to Rule 23(b)(3)'s predominance requirement that the Federal District Court embraced. Recall that the federal court held that the presence of a single individualized issue—injury from the use of Baycol—prevented class certification. See *supra*, at 304. The court did not identify the common issues in the case; nor did it balance these common issues against the need to prove individual injury to determine which predominated. The court instead applied a strict test barring class treatment when proof of each plaintiff's injury is necessary.[8] By contrast, the West Virginia Supreme Court in *In re Rezulin* adopted an all-things-considered, balancing inquiry in interpreting its Rule 23. Rejecting any "rigid test," the state court opined that the predominance requirement "contemplates a review of many factors." 214 W. Va., at 72, 585 S. E. 2d, at 72. Indeed, the court noted, a "'single common issue'" in a case could outweigh "'numerous . . . individual questions.'" *Ibid.* That meant, the court further explained (quoting what it termed

[8] The District Court's approach to the predominance inquiry is consistent with the approach employed by the Eighth Circuit. See *In re St. Jude Medical, Inc.*, 522 F. 3d 836, 837–840 (2008) (holding that most commercial misrepresentation cases are "unsuitable for class treatment" because individual issues of reliance necessarily predominate). We express no opinion as to the correctness of this approach.

the "leading treatise" on the subject), that even objections to certification "'based on . . . causation, or reliance'"—which typically involve showings of individual injury—"'will not bar predominance satisfaction.'" *Ibid.* (quoting 2 A. Conte & H. Newberg, Newberg on Class Actions §4.26, p. 241 (4th ed. 2002)). So point for point, the analysis set out in *In re Rezulin* diverged from the District Court's interpretation of Federal Rule 23. A state court using the *In re Rezulin* standard would decide a different question than the one the federal court had earlier resolved.[9]

This case, indeed, is little more than a rerun of *Chick Kam Choo*. A federal court and a state court apply different law. That means they decide distinct questions. The federal court's resolution of one issue does not preclude the state court's determination of another. It then goes without saying that the federal court may not issue an injunction. The *Anti*-Injunction Act's *re*-litigation exception does not extend nearly so far.

B

The injunction issued here runs into another basic premise of preclusion law: A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions. See, *e. g.*, 18A Wright & Miller §4449, at 330. The

[9] Bayer argues that *In re Rezulin* does not preclude an injunction in this case because the West Virginia court there decided that common issues predominated over individual issues of damages, not over individual issues of liability (as exist here). See Brief for Respondent 25–26. We think Bayer is right about this distinction, but wrong about its consequence. Our point is not that *In re Rezulin* dictates the answer to the class certification question here; the two cases are indeed too dissimilar for that to be true. The point instead is that *In re Rezulin* articulated a general approach to the predominance requirement that differs markedly from the one the federal court used. Minor variations in the application of what is in essence the same legal standard do not defeat preclusion; but where, as here, the State's courts "would apply a significantly different . . . analysis," *Chick Kam Choo* v. *Exxon Corp.*, 486 U. S. 140, 149 (1988), the federal and state courts decide different issues.

importance of this rule and the narrowness of its exceptions go hand in hand. We have repeatedly "emphasize[d] the fundamental nature of the general rule" that only parties can be bound by prior judgments; accordingly, we have taken a "constrained approach to nonparty preclusion." *Taylor* v. *Sturgell*, 553 U. S. 880, 898 (2008). Against this backdrop, Bayer defends the decision below by arguing that Smith—an unnamed member of a proposed but uncertified class—qualifies as a party to the McCollins litigation. See Brief for Respondent 32–34. Alternatively, Bayer claims that the District Court's judgment binds Smith under the recognized exception to the rule against nonparty preclusion for members of class actions. See *id.*, at 34–39. We think neither contention has merit.

Bayer's first claim ill-comports with any proper understanding of what a "party" is. In general, "[a] 'party' to litigation is '[o]ne by or against whom a lawsuit is brought,'" *United States ex rel. Eisenstein* v. *City of New York*, 556 U. S. 928, 933 (2009), or one who "become[s] a party by intervention, substitution, or third-party practice," *Karcher* v. *May*, 484 U. S. 72, 77 (1987). And we have further held that an unnamed member of a *certified* class may be "considered a 'party' for the [particular] purpos[e] of appealing" an adverse judgment. *Devlin* v. *Scardelletti*, 536 U. S. 1, 7 (2002). But as the dissent in *Devlin* noted, no one in that case was "willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*" *Id.*, at 16, n. 1 (opinion of Scalia, J.). Still less does that argument make sense *once certification is denied.* The definition of the term "party" can on no account be stretched so far as to cover a person like Smith, whom the plaintiff in a lawsuit was denied leave to represent.[10] If the judgment in the McCollins litigation

[10] In support of its claim that Smith counts as a party, Bayer cites two cases in which we held that a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individ-

can indeed bind Smith, it must do so under principles of *non*-party preclusion.

As Bayer notes, see Brief for Respondent 37, one such principle allows unnamed members of a class action to be bound, even though they are not parties to the suit. See *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation"); see also *Taylor*, 553 U. S., at 894 (stating that nonparties can be bound in "properly conducted class actions"). But here Bayer faces a conundrum. If we know one thing about the McCollins suit, we know that it was *not* a class action. Indeed, the very ruling that Bayer argues ought to be given preclusive effect is the District Court's decision that a class could not properly be certified. So Bayer wants to bind Smith as a member of a class action (because it is only as such that a nonparty in Smith's situation can be bound) to a determination that there could not be a class action. And if the logic of that position is not immediately transparent, here is Bayer's attempt to clarify: "[U]ntil the moment when class certification was denied, the *McCollins* case *was* a properly conducted class action." Brief for Respondent 37. That is true, according to Bayer, because McCollins' interests were aligned with the members of the class he proposed and he

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ual claim or move to intervene in the suit. See Brief for Respondent 32–33 (citing *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977); *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974)). But these cases, which were specifically grounded in policies of judicial administration, demonstrate only that a person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding. See *id.*, at 553; *McDonald*, 432 U. S., at 394, n. 15. That result is consistent with a commonplace of preclusion law—that nonparties sometimes may benefit from, even though they cannot be bound by, former litigation. See *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326–333 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation*, 402 U. S. 313 (1971).

"act[ed] in a representative capacity when he sought class certification." *Id.*, at 36.

But wishing does not make it so. McCollins sought class certification, but he failed to obtain that result. Because the District Court found that individual issues predominated, it held that the action did not satisfy Federal Rule 23's requirements for class proceedings. In these circumstances, we cannot say that a properly conducted class action existed at any time in the litigation. Federal Rule 23 determines what is and is not a class action in federal court, where McCollins brought his suit. So in the absence of a certification under that Rule, the precondition for binding Smith was not met. Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23. But McCollins' lawsuit was never that.

We made essentially these same points in *Taylor* v. *Sturgell* just a few Terms ago. The question there concerned the propriety of binding nonparties under a theory of "virtual representation" based on "identity of interests and some kind of relationship between parties and nonparties." 553 U. S., at 901. We rejected the theory unanimously, explaining that it "would 'recogniz[e], in effect, a common-law kind of class action.'" *Ibid.* Such a device, we objected, would authorize preclusion "shorn of [Rule 23's] procedural protections." *Ibid.* Or as otherwise stated in the opinion: We could not allow "circumvent[ion]" of Rule 23's protections through a "virtual representation doctrine that allowed courts to 'create *de facto* class actions at will.'" *Ibid.* We could hardly have been more clear that a "properly conducted class action," with binding effect on nonparties, can come about in federal courts in just one way—through the procedure set out in Rule 23. Bayer attempts to distinguish *Taylor* by noting that the party in the prior litigation there did not propose a class action. But we do not see why that difference matters. Yes, McCollins wished to represent a

class, and made a motion to that effect. But it did not come to pass. To allow McCollins' suit to bind nonparties would be to adopt the very theory *Taylor* rejected.[11]

Bayer's strongest argument comes not from established principles of preclusion, but instead from policy concerns relating to use of the class action device. Bayer warns that under our approach class counsel can repeatedly try to certify the same class "by the simple expedient of changing the named plaintiff in the caption of the complaint." Brief for Respondent 47–48. And in this world of "serial relitigation of class certification," Bayer contends, defendants "would be forced in effect to buy litigation peace by settling." *Id.*, at 2, 12; see also *In re Bridgestone/Firestone, Inc., Tires Prods. Liability Litigation*, 333 F. 3d 763, 767 (CA7 2003) (objecting to "an asymmetric system in which class counsel can win but never lose" because of their ability to relitigate the issue of certification).

But this form of argument flies in the face of the rule against nonparty preclusion. That rule perforce leads to relitigation of many issues, as plaintiff after plaintiff after plaintiff (none precluded by the last judgment because none a party to the last suit) tries his hand at establishing some legal principle or obtaining some grant of relief. We confronted a similar policy concern in *Taylor*, which involved

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[11] The great weight of scholarly authority—from the Restatement of Judgments to the American Law Institute to Wright and Miller—agrees that an uncertified class action cannot bind proposed class members. See Restatement (Second) of Judgments § 41(1), p. 393 (1980) (A nonparty may be bound only when his interests are adequately represented by "[t]he representative of a class of persons similarly situated, designated as such with the approval of the court"); ALI, Principles of the Law Aggregate Litigation § 2.11, Reporters' Notes, Comment *b*, p. 181 (2010) ("[N]one of [the exceptions to the rule against nonparty preclusion] extend generally to the situation of a would-be absent class member with respect to a denial of class certification"); 18A Wright & Miller § 4455, at 457–458 ("[A]bsent certification there is no basis for precluding a nonparty" under the class action exception).

litigation brought under the Freedom of Information Act (FOIA). The Government there cautioned that unless we bound nonparties a "'potentially limitless'" number of plaintiffs, perhaps coordinating with each other, could "mount a series of repetitive lawsuits" demanding the selfsame documents. 553 U. S., at 903. But we rejected this argument, even though the payoff in a single successful FOIA suit—disclosure of documents to the public—could "trum[p]" or "subsum[e]" all prior losses, just as a single successful class certification motion could do. *In re Bridgestone/Firestone*, 333 F. 3d, at 766, 767. As that response suggests, our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. We have not thought that the right approach (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment.

And to the extent class actions raise special problems of relitigation, Congress has provided a remedy that does not involve departing from the usual rules of preclusion. In the Class Action Fairness Act of 2005 (CAFA), 28 U. S. C. §§ 1332(d), 1453 (2006 ed. and Supp. III), Congress enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship. Once removal takes place, Federal Rule 23 governs certification. And federal courts may consolidate multiple overlapping suits against a single defendant in one court (as the Judicial Panel on Multi-District Litigation did for the many actions involving Baycol). See § 1407. Finally, we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute. See, *e. g.*, *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U. S. 193, 198 (2000) (citing *Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936)). CAFA may be cold comfort to Bayer with respect to suits like this one beginning before its enactment. But Congress's decision to address the relitiga-

tion concerns associated with class actions through the mechanism of removal provides yet another reason for federal courts to adhere in this context to longstanding principles of preclusion.[12] And once again, that is especially so when the federal court is deciding whether to go so far as to enjoin a state proceeding.

* * *

The Anti-Injunction Act prohibits the order the District Court entered here. The Act's relitigation exception authorizes injunctions only when a former federal adjudication clearly precludes a state court decision. As we said more than 40 years ago, and have consistently maintained since that time, "[a]ny doubts . . . should be resolved in favor of permitting the state courts to proceed." *Atlantic Coast Line*, 398 U. S., at 297. Under this approach, close cases have easy answers: The federal court should not issue an injunction, and the state court should decide the preclusion question. But this case does not even strike us as close. The issues in the federal and state lawsuits differed because the relevant legal standards differed. And the mere proposal of a class in the federal action could not bind persons who were not parties there. For these reasons, the judgment of the Court of Appeals is

Reversed.

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[12] By the same token, nothing in our holding today forecloses legislation to modify established principles of preclusion should Congress decide that CAFA does not sufficiently prevent relitigation of class certification motions. Nor does this opinion at all address the permissibility of a change in the Federal Rules of Civil Procedure pertaining to this question. Cf. n. 7, *supra* (declining to reach Smith's due process claim).

Syllabus

TAPIA *v.* UNITED STATES

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

No. 10–5400. Argued April 18, 2011—Decided June 16, 2011

Petitioner Tapia was convicted of, *inter alia*, smuggling unauthorized aliens into the United States. The District Court imposed a 51-month prison term, reasoning that Tapia should serve that long in order to qualify for and complete the Bureau of Prisons' Residential Drug Abuse Program (RDAP). On appeal, Tapia argued that lengthening her prison term to make her eligible for RDAP violated 18 U. S. C. § 3582(a), which instructs sentencing courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." The Ninth Circuit disagreed. Relying on Circuit precedent, it held that a sentencing court cannot impose a prison term to assist a defendant's rehabilitation, but once imprisonment is chosen, the court may consider the defendant's rehabilitation needs in setting the sentence's length.

Held: Section 3582(a) does not permit a sentencing court to impose or lengthen a prison term in order to foster a defendant's rehabilitation. Pp. 323–335.

(a) For nearly a century, the Federal Government used an indeterminate sentencing system premised on faith in rehabilitation. *Mistretta* v. *United States*, 488 U. S. 361, 363. Because that system produced "serious disparities in [the] sentences" imposed on similarly situated defendants, *id.*, at 365, and failed to "achieve rehabilitation," *id.*, at 366, Congress enacted the Sentencing Reform Act of 1984 (SRA), replacing the system with one in which Sentencing Guidelines would provide courts with "a range of determinate sentences," *id.*, at 368. Under the SRA, a sentencing judge must impose at least imprisonment, probation, or a fine. See § 3551(b). In determining the appropriate sentence, judges must consider retribution, deterrence, incapacitation, and rehabilitation, § 3553(a)(2), but a particular purpose may apply differently, or not at all, depending on the kind of sentence under consideration. As relevant here, a court ordering imprisonment must "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." § 3582(a). A similar provision instructs the Sentencing Commission, as the Sentencing Guidelines' author, to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U. S. C. § 994(k). Pp. 323–326.

(b) Consideration of Tapia's claim starts with § 3582(a)'s clear text. Putting together the most natural definitions of "recognize"—"to acknowledge or treat as valid"—and not "appropriate"—not "suitable or fitting for a particular purpose"—§ 3582(a) tells courts to acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation. It also instructs courts to make that acknowledgment when "determining whether to impose a term of imprisonment, and . . . [when] determining the length of the term." *Amicus*, appointed to defend the judgment below, argues that the "recognizing" clause is merely a caution for judges not to put too much faith in the capacity of prisons to rehabilitate. But his alternative interpretation is unpersuasive, as Congress expressed itself clearly in § 3582(a). *Amicus* also errs in echoing the Ninth Circuit's reasoning that § 3582's term "imprisonment" relates to the decision whether to incarcerate, not the determination of the sentence's length. Because "imprisonment" most naturally means "the state of being confined" or "a period of confinement," it does not distinguish between the defendant's initial placement behind bars and his continued stay there.

Section 3582(a)'s context supports this textual conclusion. By restating § 3582(a)'s message to the Sentencing Commission, Congress ensured that all sentencing officials would work in tandem to implement the statutory determination to "reject imprisonment as a means of promoting rehabilitation." *Mistretta*, 488 U. S., at 367. Equally illuminating is the absence of any provision authorizing courts to ensure that offenders participate in prison rehabilitation programs. When Congress wanted sentencing courts to take account of rehabilitative needs, it gave them authority to do so. See, *e. g.*, § 3563(b)(9). In fact, although a sentencing court can recommend that an offender be placed in a particular facility or program, see § 3582(a), the authority to make the placement rests with the Bureau of Prisons, see, *e. g.*, § 3621(e). The point is well illustrated here, where the District Court's strong recommendations that Tapia participate in RDAP and be placed in a particular facility went unfulfilled. Finally, for those who consider legislative history useful, the key Senate Report on the SRA provides corroborating evidence. Pp. 326–332.

(c) *Amicus'* attempts to recast what the SRA says about rehabilitation are unavailing. Pp. 332–334.

(d) Here, the sentencing transcript suggests that Tapia's sentence may have been lengthened in light of her rehabilitative needs. A court does not err by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs. But the record indicates that the District Court may have increased the length of Tapia's sentence to ensure her completion of RDAP, something

a court may not do. The Ninth Circuit is left to consider on remand the effect of Tapia's failure to object to the sentence when imposed. Pp. 334–335.

376 Fed. Appx. 707, reversed and remanded.

KAGAN, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which ALITO, J., joined, *post*, p. 335.

Reuben Camper Cahn argued the cause for petitioner. With him on the briefs were *Shereen J. Charlick*, *Steven F. Hubachek*, and *James Fife*.

Matthew D. Roberts argued the cause for the United States. With him on the briefs were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Sangita K. Rao*.

Stephanos Bibas, by invitation of the Court, 562 U. S. 1132, argued the cause and filed a brief as *amicus curiae* in support of the judgment. With him on the brief were *James A. Feldman*, *Nancy Bregstein Gordon*, *Amy L. Wax*, *Stephen B. Kinnaird*, *Sean D. Unger*, and *Douglas A. Berman*.

JUSTICE KAGAN delivered the opinion of the Court.

We consider here whether the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation. We hold that it does.

I

Petitioner Alejandra Tapia was convicted of, *inter alia*, smuggling unauthorized aliens into the United States, in violation of 8 U. S. C. §§ 1324(a)(2)(B)(ii) and (iii). At sentencing, the District Court determined that the United States Sentencing Guidelines recommended a prison term of between 41 and 51 months for Tapia's offenses. The court decided to impose a 51-month term, followed by three years of supervised release. In explaining its reasons, the court referred several times to Tapia's need for drug treatment, citing in particular the Bureau of Prison's Residential Drug

Abuse Program (known as RDAP or the 500 Hour Drug Program). The court indicated that Tapia should serve a prison term long enough to qualify for and complete that program:

> "The sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program.
>
> . . . . .
>
> "Here I have to say that one of the factors that—I am going to impose a 51-month sentence, . . . and one of the factors that affects this is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program, number one." App. 27.

("Number two" was "to deter her from committing other criminal offenses." *Ibid.*) The court "strongly recommend[ed]" to the Bureau of Prisons (BOP) that Tapia "participate in [RDAP] and that she serve her sentence at" the Federal Correctional Institution in Dublin, California (FCI Dublin), where "they have the appropriate tools . . . to help her, to start to make a recovery." *Id.*, at 29. Tapia did not object to the sentence at that time. *Id.*, at 31.

On appeal, however, Tapia argued that the District Court had erred in lengthening her prison term to make her eligible for RDAP. 376 Fed. Appx. 707, 708 (CA9 2010). In Tapia's view, this action violated 18 U. S. C. § 3582(a), which instructs sentencing courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." The United States Court of Appeals for the Ninth Circuit disagreed, 376 Fed. Appx. 707 (2010), relying on its prior decision in *United States* v. *Duran*, 37 F. 3d 557 (1994). The Ninth Circuit had held there that § 3582(a) distinguishes between deciding to impose a term of imprisonment and determining its length. See *id.*, at 561. According to *Duran*, a sentencing court cannot impose a prison term to assist a defendant's rehabilitation. But "[o]nce imprisonment is chosen as a punishment," the court may con-

sider the defendant's need for rehabilitation in setting the length of the sentence. *Ibid.*

We granted certiorari to consider whether § 3582(a) permits a sentencing court to impose or lengthen a prison term in order to foster a defendant's rehabilitation. 562 U. S. 1104 (2010). That question has divided the Courts of Appeals.[1] Because the United States agrees with Tapia's interpretation of the statute, we appointed an *amicus curiae* to defend the judgment below.[2] We now reverse.

II

We begin with statutory background—how the relevant sentencing provisions came about and what they say. Aficionados of our sentencing decisions will recognize much of the story line.

"For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing." *Mistretta* v. *United States*, 488 U. S. 361, 363 (1989). Within "customarily wide" outer boundaries set by Congress, trial judges exercised "almost unfettered discretion" to select prison sentences for federal offenders. *Id.*, at 364. In the usual case, a judge also could reject prison time altogether, by imposing a "suspended" sentence. If the judge decided to impose a prison term, discretionary authority shifted to parole officials: Once the defendant had spent a third of his term behind bars, they could order his release. See K.

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[1] Three Circuits have held that § 3582(a) allows a court to lengthen, although not to impose, a prison term based on the need for rehabilitation. See *United States* v. *Duran*, 37 F. 3d 557 (CA9 1994); *United States* v. *Hawk Wing*, 433 F. 3d 622 (CA8 2006); *United States* v. *Jimenez*, 605 F. 3d 415 (CA6 2010). Two Courts of Appeals have ruled that § 3582(a) bars a court from either imposing or increasing a period of confinement for rehabilitative reasons. See *United States* v. *Manzella*, 475 F. 3d 152 (CA3 2007); *In re Sealed Case*, 573 F. 3d 844 (CADC 2009).

[2] We appointed Stephanos Bibas to brief and argue the case, 562 U. S. 1132 (2011), and he has ably discharged his responsibilities.

Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 18–20 (1998).

This system was premised on a faith in rehabilitation. Discretion allowed "the judge and the parole officer to [base] their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation." *Mistretta*, 488 U. S., at 363. A convict, the theory went, should generally remain in prison only until he was able to reenter society safely. His release therefore often coincided with "the successful completion of certain vocational, educational, and counseling programs within the prisons." S. Rep. No. 98–225, p. 40 (1983) (hereinafter S. Rep.). At that point, parole officials could "determin[e] that [the] prisoner had become rehabilitated and should be released from confinement." Stith & Cabranes, *supra*, at 18.[3]

But this model of indeterminate sentencing eventually fell into disfavor. One concern was that it produced "[s]erious disparities in [the] sentences" imposed on similarly situated defendants. *Mistretta*, 488 U. S., at 365. Another was that the system's attempt to "achieve rehabilitation of offenders had failed." *Id.*, at 366. Lawmakers and others increasingly doubted that prison programs could "rehabilitate individuals on a routine basis"—or that parole officers could

[3] The statutes governing punishment of drug-addicted offenders (like Tapia) provide an example of this system at work. If a court concluded that such an offender was "likely to be rehabilitated through treatment," it could order confinement "for treatment . . . for an indeterminate period of time" not to exceed the lesser of 10 years or the statutory maximum for the offender's crime. 18 U. S. C. § 4253(a) (1982 ed.); see also § 4251(c) ("'Treatment' includes confinement and treatment in an institution . . . and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services"). Once the offender had undergone treatment for six months, the Attorney General could recommend that the Board of Parole release him from custody, and the Board could then order release "in its discretion." § 4254.

"determine accurately whether or when a particular prisoner ha[d] been rehabilitated." S. Rep., at 40.

Congress accordingly enacted the Sentencing Reform Act of 1984, 98 Stat. 1987 (SRA or Act), to overhaul federal sentencing practices. The Act abandoned indeterminate sentencing and parole in favor of a system in which Sentencing Guidelines, promulgated by a new Sentencing Commission, would provide courts with "a range of determinate sentences for categories of offenses and defendants." *Mistretta*, 488 U. S., at 368. And the Act further channeled judges' discretion by establishing a framework to govern their consideration and imposition of sentences.

Under the SRA, a judge sentencing a federal offender must impose at least one of the following sanctions: imprisonment (often followed by supervised release), probation, or a fine. See § 3551(b). In determining the appropriate sentence from among these options, § 3553(a)(2) requires the judge to consider specified factors, including:

> "the need for the sentence imposed—
>
> "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> "(B) to afford adequate deterrence to criminal conduct;
>
> "(C) to protect the public from further crimes of the defendant; and
>
> "(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

These four considerations—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally, and a court must fashion a sentence "to achieve the[se] purposes . . . to the extent that they are applicable" in a given case. § 3551(a).

The SRA then provides additional guidance about how the considerations listed in § 3553(a)(2) pertain to each of the

Act's main sentencing options—imprisonment, supervised release, probation, and fines. See § 3582(a); § 3583; § 3562(a); § 3572(a). These provisions make clear that a particular purpose may apply differently, or even not at all, depending on the kind of sentence under consideration. For example, a court may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release. See § 3583(c).

Section 3582(a), the provision at issue here, specifies the "factors to be considered" when a court orders imprisonment. That section provides:

> "The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."

A similar provision addresses the Sentencing Commission in its capacity as author of the Sentencing Guidelines. The SRA instructs the Commission to:

> "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U. S. C. § 994(k).

With this statutory background established, we turn to the matter of interpretation.

III

A

Our consideration of Tapia's claim starts with the text of 18 U. S. C. § 3582(a)—and given the clarity of that provision's language, could end there as well. As just noted, that sec-

tion instructs courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." A common—and in context the most natural—definition of the word "recognize" is "to acknowledge or treat as valid." Random House Dictionary of the English Language 1611 (2d ed. 1987). And a thing that is not "appropriate" is not "suitable or fitting for a particular purpose." *Id.*, at 103. Putting these two definitions together, § 3582(a) tells courts that they should acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation. And when should courts acknowledge this? Section 3582(a) answers: when "determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, [when] determining the length of the term." So a court making these decisions should consider the specified rationales of punishment *except for* rehabilitation, which it should acknowledge as an unsuitable justification for a prison term.

As against this understanding, *amicus* argues that § 3582(a)'s "recognizing" clause is not a flat prohibition but only a "reminder" or a "guide [for] sentencing judges' cognitive processes." Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below 23–24 (hereinafter *Amicus* Brief) (emphasis deleted). *Amicus* supports this view by offering a string of other definitions of the word "recognize": "'recall to mind,' 'realize,' or 'perceive clearly.'" *Id.*, at 24 (quoting dictionary definitions). Once these are plugged in, *amicus* suggests, § 3582(a) reveals itself as a kind of looseygoosey caution not to put *too* much faith in the capacity of prisons to rehabilitate.

But we do not see how these alternative meanings of "recognize" help *amicus*'s cause. A judge who "perceives clearly" that imprisonment is not an appropriate means of promoting rehabilitation would hardly incarcerate someone for that purpose. Ditto for a judge who "realizes" or "recalls" that imprisonment is not a way to rehabilitate an offender. To be sure, the drafters of the "recognizing" clause

could have used still more commanding language: Congress could have inserted a "thou shalt not" or equivalent phrase to convey that a sentencing judge may never, ever, under any circumstances consider rehabilitation in imposing a prison term. But when we interpret a statute, we cannot allow the perfect to be the enemy of the merely excellent. Congress expressed itself clearly in § 3582(a), even if armchair legislators might come up with something even better. And what Congress said was that when sentencing an offender to prison, the court shall consider all the purposes of punishment except rehabilitation—because imprisonment is not an appropriate means of pursuing that goal.

Amicus also claims, echoing the Ninth Circuit's reasoning in *Duran*, that § 3582(a)'s "recognizing" clause bars courts from considering rehabilitation only when imposing a prison term, and not when deciding on its length. The argument goes as follows. Section 3582(a) refers to two decisions: "The court, [1] in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, [2] in determining the length of the term" must consider the purposes of punishment listed in § 3553(a)(2), subject to the caveat of the "recognizing" clause. But that clause says only that "imprisonment" is not an appropriate means of rehabilitation. Because the "primary meaning of 'imprisonment' is 'the act of confining a person,'" *amicus* argues, the clause relates only to [1] the decision to incarcerate, and not to [2] the separate determination of the sentence's length. *Amicus* Brief 52.

We again disagree. Under standard rules of grammar, § 3582(a) says: A sentencing judge shall recognize that imprisonment is not appropriate to promote rehabilitation when the court considers the applicable factors of § 3553(a)(2); and a court considers these factors when determining *both* whether to imprison an offender *and* what length of term to give him. The use of the word "imprisonment" in the "recognizing" clause does not destroy—but in-

stead fits neatly into—this construction. "Imprisonment" as used in the clause most naturally means "[t]he state of being confined" or "a period of confinement." Black's Law Dictionary 825 (9th ed. 2009); see also Webster's Third New International Dictionary 1137 (1993) (the "state of being imprisoned"). So the word does not distinguish between the defendant's initial placement behind bars and his continued stay there. As the D. C. Circuit noted in rejecting an identical argument, "[a] sentencing court deciding to keep a defendant locked up for an additional month is, as to that month, in fact choosing imprisonment over release." *In re Sealed Case*, 573 F. 3d 844, 850 (2009).[4] Accordingly, the word "imprisonment" does not change the function of the "recognizing" clause—to constrain a sentencing court's decision both to impose and to lengthen a prison term.[5]

The context of § 3582(a) puts an exclamation point on this textual conclusion. As noted earlier, *supra*, at 326, another provision of the SRA restates § 3582(a)'s message, but to a different audience. That provision, 28 U. S. C. § 994(k), directs the Sentencing Commission to ensure that the Guidelines "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educa-

[4] Indeed, we can scarcely imagine a reason why Congress would have wanted to draw the distinction that *amicus* urges on us. That distinction would prevent a court from considering rehabilitative needs in imposing a 1-month sentence rather than probation, but not in choosing a 60-month sentence over a 1-month term. The only policy argument *amicus* can offer in favor of this result is that "[t]he effects of imprisonment plateau a short while after the incarceration" and "'[t]he difference in harm between longer and shorter prison terms is smaller than typically assumed.'" *Amicus* Brief 56. But nothing in the SRA indicates that Congress is so indifferent to the length of prison terms.

[5] The Government argues that "Congress did not intend to prohibit courts from imposing *less* imprisonment in order to promote a defendant's rehabilitation." Brief for United States 40 (emphasis added). This case does not require us to address that question, and nothing in our decision expresses any views on it.

tional or vocational training, medical care, or other correctional treatment." In this way, Congress ensured that all sentencing officials would work in tandem to implement the statutory determination to "rejec[t] imprisonment as a means of promoting rehabilitation." *Mistretta*, 488 U. S., at 367 (citing 28 U. S. C. § 994(k)). Section 994(k) bars the Commission from recommending a "term of imprisonment"—a phrase that again refers both to the fact and to the length of incarceration—based on a defendant's rehabilitative needs. And § 3582(a) prohibits a court from considering those needs to impose or lengthen a period of confinement when selecting a sentence from within, or choosing to depart from, the Guidelines range. Each actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender.

Equally illuminating here is a statutory silence—the absence of any provision granting courts the power to ensure that offenders participate in prison rehabilitation programs. For when Congress wanted sentencing courts to take account of rehabilitative needs, it gave courts the authority to direct appropriate treatment for offenders. Thus, the SRA instructs courts, in deciding whether to impose probation or supervised release, to consider whether an offender could benefit from training and treatment programs. See 18 U. S. C. § 3562(a); § 3583(c). And so the SRA *also* authorizes courts, when imposing those sentences, to order an offender's participation in certain programs and facilities. § 3563(b)(9); § 3563(b)(11); § 3563(a)(4); § 3583(d). As a condition of probation, for example, the court may require the offender to "undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and [to] remain in a specified institution if required for that purpose." § 3563(b)(9).

If Congress had similarly meant to allow courts to base prison terms on offenders' rehabilitative needs, it would have given courts the capacity to ensure that offenders participate

in prison correctional programs. But in fact, courts do not have this authority. When a court sentences a federal offender, the BOP has plenary control, subject to statutory constraints, over "the place of the prisoner's imprisonment," § 3621(b), and the treatment programs (if any) in which he may participate, §§ 3621(e), (f); § 3624(f). See also 28 CFR pt. 544 (2010) (BOP regulations for administering inmate educational, recreational, and vocational programs); 28 CFR pt. 550, subpart F (drug abuse treatment programs). A sentencing court can *recommend* that the BOP place an offender in a particular facility or program. See § 3582(a). But decisionmaking authority rests with the BOP.

This case well illustrates the point. As noted earlier, the District Court "strongly recommend[ed]" that Tapia participate in RDAP, App. 29, and serve her sentence at FCI Dublin, "where they have the facilities to really help her," *id.*, at 28. But the court's recommendations were only recommendations—and in the end they had no effect. See *Amicus* Brief 42 ("[Tapia] was not admitted to RDAP, nor even placed in the prison recommended by the district court"); Reply Brief for United States 8, n. 1 ("According to BOP records, [Tapia] was encouraged to enroll [in RDAP] during her psychology intake screening at [the federal prison], but she stated that she was not interested, and she has not volunteered for the program"). The sentencing court may have had plans for Tapia's rehabilitation, but it lacked the power to implement them. That incapacity speaks volumes. It indicates that Congress did not intend that courts consider offenders' rehabilitative needs when imposing prison sentences.

Finally, for those who consider legislative history useful, the key Senate Report concerning the SRA provides one last piece of corroborating evidence. According to that Report, decades of experience with indeterminate sentencing, resulting in the release of many inmates after they completed correctional programs, had left Congress skeptical that "re-

habilitation can be induced reliably in a prison setting." S. Rep., at 38. Although some critics argued that "rehabilitation should be eliminated completely as a purpose of sentencing," Congress declined to adopt that categorical position. *Id.*, at 76. Instead, the Report explains, Congress barred courts from considering rehabilitation in imposing prison terms, *ibid.*, and n. 165, but not in ordering other kinds of sentences, *ibid.*, and n. 164. "[T]he purpose of rehabilitation," the Report stated, "is still important in determining whether a sanction *other than a term of imprisonment* is appropriate in a particular case." See *id.*, at 76–77 (emphasis added).

And so this is a case in which text, context, and history point to the same bottom line: Section 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation.

B

With all these sources of statutory meaning stacked against him, *amicus* understandably tries to put the SRA's view of rehabilitation in a wholly different frame. *Amicus* begins by conceding that Congress, in enacting the SRA, rejected the old "[r]ehabilitation [m]odel." *Amicus* Brief 1. But according to *amicus,* that model had a very limited focus: It was the belief that "isolation and prison routine" could alone produce "penitence and spiritual renewal." *Id.*, at 1, 11. What the rehabilitation model did *not* include—and the SRA therefore did not reject—was prison treatment programs (including for drug addiction) targeted to offenders' particular needs. See *id.*, at 21, 25, 27–28. So even after the passage of § 3582(a), *amicus* argues, a court may impose or lengthen a prison sentence to promote an offender's participation in a targeted treatment program. The only thing the court may not do is to impose a prison term on the ground that confinement itself—its inherent solitude and routine—will lead to rehabilitation.

We think this reading of the SRA is too narrow. For one thing, the relevant history shows that at the time of the SRA's enactment, prison rehabilitation efforts focused on treatment, counseling, and training programs, not on seclusion and regimentation. See Rotman, The Failure of Reform: United States, 1865–1965, in Oxford History of the Prison: The Practice of Punishment in Western Society 169, 189–190 (N. Morris & D. Rothman eds. 1995) (describing the pre-SRA "therapeutic model of rehabilitation" as characterized by "individualized treatment" and "vocational training and group counseling programs"); see also n. 3, *supra* (noting pre-SRA statutes linking the confinement of drug addicts to the completion of treatment programs). Indeed, Congress had in mind precisely these programs when it prohibited consideration of rehabilitation in imposing a prison term. See 28 U. S. C. § 994(k) (instructing the Sentencing Commission to prevent the use of imprisonment to "provid[e] the defendant with needed educational or vocational training . . . or other correctional treatment"); S. Rep., at 40 (rejecting the "model of 'coercive' rehabilitation—the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons"). Far from falling outside the "rehabilitation model," these programs practically defined it.

It is hardly surprising, then, that *amicus*'s argument finds little support in the statutory text. Read most naturally, 18 U. S. C. § 3582(a)'s prohibition on "promoting correction and rehabilitation" covers efforts to place offenders in rehabilitation programs. Indeed, § 3582(a)'s language recalls the SRA's description of the rehabilitative purpose of sentencing—"provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment." § 3553(a)(2)(D). That description makes clear that, under the SRA, treatment, training, and like programs are rehabilitation's sum and substance. So *amicus*'s efforts to exclude rehabilitation programs from the "recognizing"

clause's reach do not succeed. That section prevents a sentencing court from imposing or lengthening a prison term because the court thinks an offender will benefit from a prison treatment program.

IV

In this case, the sentencing transcript suggests the possibility that Tapia's sentence was based on her rehabilitative needs.

We note first what we do *not* disapprove about Tapia's sentencing. A court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs. To the contrary, a court properly may address a person who is about to begin a prison term about these important matters. And as noted earlier, a court may urge the BOP to place an offender in a prison treatment program. See *supra*, at 331. Section 3582(a) itself provides, just after the clause at issue here, that a court may "make a recommendation concerning the type of prison facility appropriate for the defendant"; and in this calculus, the presence of a rehabilitation program may make one facility more appropriate than another. So the sentencing court here did nothing wrong—and probably something very right—in trying to get Tapia into an effective drug treatment program.

But the record indicates that the court may have done more—that it may have selected the length of the sentence to ensure that Tapia could complete the 500 Hour Drug Program. "The sentence has to be sufficient," the court explained, "to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program." App. 27; see *supra*, at 321–322. Or again: The "number one" thing "is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program." App. 27; see *supra*, at 322. These statements suggest that the court may have calculated the length

of Tapia's sentence to ensure that she receive certain rehabilitative services. And that a sentencing court may not do. As we have held, a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.

For the reasons stated, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. Consistent with our practice, see, *e. g.*, *United States* v. *Marcus*, 560 U. S. 258, 266–267 (2010), we leave it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed. See Fed. Rule Crim. Proc. 52(b); *United States* v. *Olano*, 507 U. S. 725, 731 (1993).

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE ALITO joins, concurring.

I agree with the Court's conclusion that 18 U. S. C. § 3582(a) "precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation." *Ante*, at 321. I write separately to note my skepticism that the District Judge violated this proscription in this case.

At the sentencing hearing, the District Judge carefully reviewed the sentencing factors set forth in § 3553(a). First, he considered "[t]he nature and circumstances of the offense" committed by petitioner Alejandra Tapia—in this case, alien smuggling. App. 25–26; see § 3553(a)(1). He emphasized that Tapia's criminal conduct "created a substantial risk of death or serious bodily injury" to the smuggled aliens. *Id.*, at 26; see also *id.*, at 20 (noting that the aliens were secreted in the vehicle's gas tank compartment). Second, he reviewed Tapia's "history and characteristics," § 3553(a)(1), including her history of being abused and her associations "with the wrong people," *id.*, at 26. He noted his particular concern about Tapia's criminal conduct while released on bail, when

she failed to appear and was found in an apartment with methamphetamine, a sawed-off shotgun, and stolen mail. *Id.*, at 25–26. Third, he noted that the offense was "serious," warranting a "sufficient" sentence. *Id.*, at 26; see §3553(a)(2)(A). Fourth, he considered the need "to deter criminal conduct" and "to protect the public from further crimes of the defendant," which he characterized as a "big factor here, given [Tapia's] failure to appear and what she did out on bail." *Id.*, at 26; see §§3553(a)(2)(B), (C). Fifth, he took account of the need "to provide needed correctional treatment," in this case, the Bureau of Prisons' (BOP) "500 Hour Drug Program," more officially called the Residential Drug Abuse Treatment Program (RDAP). *Id.*, at 27; see §3553(a)(2)(D). And, finally, he noted the need "to avoid unwarranted sentencing disparities" and the need for the sentence "to be sufficient to effect the purposes of 3553(a) but not greater." *Id.*, at 27; see §§3553(a), (a)(6).

Tapia faced a mandatory minimum sentence of 36 months' incarceration, *id.*, at 18, but her Guidelines range was 41 to 51 months, *id.*, at 13. After reviewing the §3553(a) factors, the judge imposed a sentence of 51 months, the top of the Guidelines range. He offered two reasons for choosing this sentence: "number one," the need for drug treatment; and "[n]umber two," deterrence. *Id.*, at 27. With respect to the latter reason, the judge highlighted Tapia's criminal history and her criminal conduct while released on bail—which, he said, was "something that motivates imposing a sentence that in total is at the high end of the guideline range." *Id.*, at 27–28. He concluded, "I think that a sentence less than what I am imposing would not deter her and provide for sufficient time so she could begin to address these problems." *Id.*, at 28.

The District Judge's comments at sentencing suggest that he believed the need to deter Tapia from engaging in further criminal conduct warranted a sentence of 51 months' incarceration. Granted, the judge also mentioned the need to

provide drug treatment through the RDAP. The 51-month sentence he selected, however, appears to have had no connection to eligibility for the RDAP. See BOP Program Statement No. P5330.11, § 2.5.1(b) (Mar. 16, 2009) (providing that, to participate in the RDAP, an inmate must ordinarily have at least 24 months remaining on her sentence). Even the 36-month mandatory minimum would have qualified Tapia for participation in the RDAP. I thus find it questionable that the judge lengthened her term of imprisonment beyond that necessary for deterrence in the belief that a 51-month sentence was necessary for rehabilitation. Cf. S. Rep. No. 98–225, p. 176 (1983) ("A term imposed for another purpose of sentencing may . . . have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence").

Although I am skeptical that the thoughtful District Judge imposed or lengthened Tapia's sentence to promote rehabilitation, I acknowledge that his comments at sentencing were not perfectly clear. Given that Ninth Circuit precedent incorrectly permitted sentencing courts to consider rehabilitation in setting the length of a sentence, see *ante*, at 322–323, and that the judge stated that the sentence needed to be "long enough to get the 500 Hour Drug Program," App. 27, I cannot be certain that he did not lengthen Tapia's sentence to promote rehabilitation in violation of § 3582(a). I therefore agree with the Court's disposition of this case and join the Court's opinion in full.

Syllabus

WAL-MART STORES, INC. *v.* DUKES ET AL.

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

No. 10–277. Argued March 29, 2011—Decided June 20, 2011

Respondents, current or former employees of petitioner Wal-Mart, sought judgment against the company for injunctive and declaratory relief, punitive damages, and backpay, on behalf of themselves and a nationwide class of some 1.5 million female employees, because of Wal-Mart's alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964. They claim that local managers exercise their discretion over pay and promotions disproportionately in favor of men, which has an unlawful disparate impact on female employees; and that Wal-Mart's refusal to cabin its managers' authority amounts to disparate treatment. The District Court certified the class, finding that respondents satisfied Federal Rule of Civil Procedure 23(a), and Rule 23(b)(2)'s requirement of showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Ninth Circuit substantially affirmed, concluding, *inter alia*, that respondents met Rule 23(a)(2)'s commonality requirement and that their backpay claims could be certified as part of a (b)(2) class because those claims did not predominate over the declaratory and injunctive relief requests. It also ruled that the class action could be manageably tried without depriving Wal-Mart of its right to present its statutory defenses if the District Court selected a random set of claims for valuation and then extrapolated the validity and value of the untested claims from the sample set.

Held:

1. The certification of the plaintiff class was not consistent with Rule 23(a). Pp. 348–360.

(a) Rule 23(a)(2) requires a party seeking class certification to prove that the class has common "questions of law or fact." Their claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Here, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination. The crux of a Title VII inquiry is "the reason for a particular employment decision," *Cooper*

v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 876, and respondents wish to sue for millions of employment decisions at once. Without some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial discrimination question. Pp. 349–352.

(b) *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, describes the proper approach to commonality. On the facts of this case, the conceptual gap between an individual's discrimination claim and "the existence of a class of persons who have suffered the same injury," *id.*, at 157–158, must be bridged by "[s]ignificant proof that an employer operated under a general policy of discrimination," *id.*, at 159, n. 15. Such proof is absent here. Wal-Mart's announced policy forbids sex discrimination, and the company has penalties for denials of equal opportunity. Respondents' only evidence of a general discrimination policy was a sociologist's analysis asserting that Wal-Mart's corporate culture made it vulnerable to gender bias. But because he could not estimate what percent of Wal-Mart employment decisions might be determined by stereotypical thinking, his testimony was worlds away from "[s]ignificant proof" that Wal-Mart "operated under a general policy of discrimination." Pp. 352–355.

(c) The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of giving local supervisors discretion over employment matters. While such a policy could be the basis of a Title VII disparate-impact claim, recognizing that a claim "can" exist does not mean that every employee in a company with that policy has a common claim. In a company of Wal-Mart's size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common direction. Respondents' attempt to show such direction by means of statistical and anecdotal evidence falls well short. Pp. 355–360.

2. Respondents' backpay claims were improperly certified under Rule 23(b)(2). Pp. 360–367.

(a) Claims for monetary relief may not be certified under Rule 23(b)(2), at least where the monetary relief is not incidental to the requested injunctive or declaratory relief. It is unnecessary to decide whether monetary claims can ever be certified under the Rule because, at a minimum, claims for individualized relief, like backpay, are excluded. Rule 23(b)(2) applies only when a single, indivisible remedy would provide relief to each class member. The Rule's history and structure indicate that individualized monetary claims belong instead in Rule 23(b)(3), with its procedural protections of predominance, superiority, mandatory notice, and the right to opt out. Pp. 360–363.

Syllabus

(b) Respondents nonetheless argue that their backpay claims were appropriately certified under Rule 23(b)(2) because those claims do not "predominate" over their injunctive and declaratory relief requests. That interpretation has no basis in the Rule's text and does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify eliminating Rule 23(b)(3)'s procedural protections, and creates incentives for class representatives to place at risk potentially valid monetary relief claims. Moreover, a district court would have to reevaluate the roster of class members continuously to excise those who leave their employment and become ineligible for classwide injunctive or declaratory relief. By contrast, in a properly certified (b)(3) class action for backpay, it would be irrelevant whether the plaintiffs are still employed at Wal-Mart. It follows that backpay claims should not be certified under Rule 23(b)(2). Pp. 363–365.

(c) It is unnecessary to decide whether there are any forms of "incidental" monetary relief that are consistent with the above interpretation of Rule 23(b)(2) and the Due Process Clause because respondents' backpay claims are not incidental to their requested injunction. Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay. Once a plaintiff establishes a pattern or practice of discrimination, a district court must usually conduct "additional proceedings . . . to determine the scope of individual relief." *Teamsters* v. *United States*, 431 U. S. 324, 361. The company can then raise individual affirmative defenses and demonstrate that its action was lawful. *Id.*, at 362. The Ninth Circuit erred in trying to replace such proceedings with Trial by Formula. Because Rule 23 cannot be interpreted to "abridge, enlarge or modify any substantive right," 28 U. S. C. § 2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. Pp. 365–367.

603 F. 3d 571, reversed.

SCALIA, J., delivered the opinion of the Court, Parts I and III of which were unanimous, and Part II of which was joined by ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ. GINSBURG, J., filed an opinion concurring in part and dissenting in part, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 367.

Theodore J. Boutrous, Jr., argued the cause for petitioner. With him on the briefs were *Rachel S. Brass*, *Theane Evangelis Kapur*, *Theodore B. Olson*, *Mark A. Perry*, and *Amir C. Tayrani*.

Counsel

Joseph M. Sellers argued the cause for respondents. With him on the brief were *Brad Seligman*, *Jocelyn D. Larkin*, *Christine E. Webber*, *Jenny R. Yang*, *Kalpana Kotagal*, *Steven Stemerman*, *Elizabeth A. Lawrence*, *Arcelia Hurtado*, *Sheila Y. Thomas*, *Stephen Tinkler*, and *Merit Bennett*.*

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*Briefs of *amici curiae* urging reversal were filed for Altria Group, Inc., et al. by *Jeffrey A. Lamken*, *Robert K. Kry*, and *Martin V. Totaro;* for the Association of Global Automakers, Inc., by *Donald M. Falk*, *Dan Himmelfarb*, *Archis A. Parasharami*, and *Kevin Ranlett;* for the Atlantic Legal Foundation et al. by *Martin S. Kaufman*, *Martin J. Newhouse*, and *John Pagliaro;* for the California Employment Law Council by *Paul Grossman;* for the Chamber of Commerce of the United States of America by *John H. Beisner*, *Geoffrey M. Wyatt*, *Robin S. Conrad*, and *Shane B. Kawka;* for Costco Wholesale Corp. by *David B. Ross*, *Kenwood C. Youmans*, *David D. Kadue*, *Thomas J. Wybenga*, and *Gerald L. Maatman, Jr.;* for DRI–The Voice of the Defense Bar by *R. Matthew Cairns*, *Carter G. Phillips*, *Jonathan F. Cohn*, and *Matthew D. Krueger;* for the Equal Employment Advisory Council by *Rae T. Vann;* for Intel Corp. by *Roy T. Englert, Jr.*, *Mark T. Stancil*, and *A. Douglas Melamed;* for the International Association of Defense Counsel by *Mary-Christine Sungaila* and *Troy L. Booher;* for the Pacific Legal Foundation by *Timothy Sandefur;* for the Retail Litigation Center, Inc., by *Lisa S. Blatt;* for the Securities Industry and Financial Markets Association by *E. Joshua Rosenkranz*, *Michael Delikat*, *Jill L. Rosenberg*, *John D. Giansello*, *Gary R. Siniscalco*, and *Patricia K. Gillette;* for the Society for Human Resource Management et al. by *Camille A. Olson* and *James M. Harris;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *John Vail;* for the American Civil Liberties Union et al. by *Lenora M. Lapidus*, *Steven R. Shapiro*, *Marcia D. Greenberger*, *Dina R. Lassow*, and *Linda Lye;* for the American Sociological Association et al. by *Michael B. Trister;* for Civil Procedure Professors by *Melissa Hart*, *Arthur R. Miller*, and *Paul M. Secunda*, all *pro se;* for the Consumers Union of United States, Inc., et al. by *Kevin K. Green* and *Mark R. Savage;* for the Institute for Women's Policy Research by *Linda M. Dardarian;* for Law and Economics Professors by *Robert S. Libman* and *Benjamin Blustein;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *John Payton* and *Debo P. Adegbile;* for the National Employment Lawyers Association et al. by *Cyrus Mehri*, *Pamela Coukos*, *Janelle M. Carter*, *Rebecca M. Hamburg*, *Michael L. Foreman*, *James*

JUSTICE SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

I

A

Petitioner Wal-Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal-Mart operates approximately 3,400 stores and employs more than 1 million people.

M. Finberg, Paul W. Mollica, Reginald T. Shuford, and *William C. McNeil III;* for Public Citizen, Inc., by *Scott L. Nelson, Allison M. Zieve,* and *Brian Wolfman;* for Public Justice, P. C., et al. by *Monique Olivier, James C. Sturdevant, Arthur H. Bryant, F. Paul Bland, Jr., Victoria W. Ni,* and *Tracy D. Rezvani;* for the United Food and Commercial Workers International Union et al. by *Robert M. Weinberg, Andrew D. Roth, Laurence Gold, Patrick J. Szymanski, Edward P. Wendel,* and *Lynn K. Rhinehart;* and for the U. S. Women's Chamber of Commerce et al. by *Judith L. Lichtman* and *Sarah Crawford.*

Daniel B. Edelman filed a brief for Labor Economists and Statisticians as *amici curiae.*

Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." 222 F. R. D. 137, 145 (ND Cal. 2004). Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal-Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e. g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal-Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–1 *et seq.*[1]

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[1] The complaint included seven named plaintiffs, but only three remain part of the certified class as narrowed by the Court of Appeals.

Betty Dukes began working at a Pittsburg, California, Wal-Mart in 1994. She started as a cashier, but later sought and received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburg store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told [her] to 'doll up,' to wear some makeup, and to dress a little better." App. 1003a.

The final named plaintiff, Edith Arana, worked at a Wal-Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal-Mart's timekeeping policy.

These plaintiffs, respondents here, do not allege that Wal-Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, see 42 U. S. C.

§ 2000e–2(k). And, respondents say, because Wal-Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, see § 2000e–2(a). Their complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action.

C

Class certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), the party seeking certification must demonstrate, first, that

> "(1) the class is so numerous that joinder of all members is impracticable;
>
> "(2) there are questions of law or fact common to the class;
>
> "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> "(4) the representative parties will fairly and adequately protect the interests of the class."

Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or correspond-

ing declaratory relief is appropriate respecting the class as a whole."[2]

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of "'[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices.'" 222 F. R. D., at 141–142 (quoting Plaintiff's Motion for Class Certification in Case No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 37). As evidence that there were indeed "questions of law or fact common to" all the women of Wal-Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal-Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. 603 F. 3d 571, 601 (CA9 2010) (en banc).

Wal-Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements

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[2] Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications," or "(B) adjudications . . . that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Rule 23(b)(3) states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." The applicability of these provisions to the plaintiff class is not before us.

of commonality, typicality, and adequate representation. Wal-Mart further contended that respondents' monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal-Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed class.[3]

D

A divided en banc Court of Appeals substantially affirmed the District Court's certification order. 603 F. 3d 571. The majority concluded that respondents' evidence of commonality was sufficient to "raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." *Id.*, at 612 (emphasis deleted). It also agreed with the District Court that the named plaintiffs' claims were sufficiently typical of the class as a whole to satisfy Rule 23(a)(3), and that they could serve as adequate class representatives, see Rule 23(a)(4). *Id.*, at 614–615. With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents' backpay claims could be certified as part of a (b)(2) class because they did not "predominat[e]" over the requests for declaratory and injunctive relief, meaning they were not "superior in strength, influence, or authority" to

[3] The District Court excluded backpay claims based on promotion opportunities that had not been publicly posted, for the reason that no applicant data could exist for such positions. 222 F. R. D. 137, 182 (ND Cal. 2004). It also decided to afford class members notice of the action and the right to opt out of the class with respect to respondents' punitive-damages claim. *Id.*, at 173.

the nonmonetary claims. *Id.*, at 616 (internal quotation marks and brackets omitted).[4]

Finally, the Court of Appeals determined that the action could be manageably tried as a class action because the District Court could adopt the approach the Ninth Circuit approved in *Hilao* v. *Estate of Marcos*, 103 F. 3d 767, 782–787 (1996). There compensatory damages for some 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. See 603 F. 3d, at 625–626. The Court of Appeals "s[aw] no reason why a similar procedure to that used in *Hilao* could not be employed in this case." *Id.*, at 627. It would allow Wal-Mart "to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination." *Ibid.*, n. 56 (emphasis deleted).

We granted certiorari. 562 U. S. 1091 (2010).

II

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701 (1979). In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the

[4] To enable that result, the Court of Appeals trimmed the (b)(2) class in two ways: First, it remanded that part of the certification order which included respondents' punitive-damages claim in the (b)(2) class, so that the District Court might consider whether that might cause the monetary relief to predominate. 603 F. 3d, at 621. Second, it accepted in part Wal-Mart's argument that since class members whom it no longer employed had no standing to seek injunctive or declaratory relief, as to them monetary claims must predominate. It excluded from the certified class "those putative class members who were no longer Wal-Mart employees *at the time Plaintiffs' complaint was filed*," *id.*, at 623 (emphasis added).

class members." *East Tex. Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 403 (1977) (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 216 (1974)). Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 156 (1982) (quoting *General Telephone Co. of Northwest* v. *EEOC*, 446 U. S. 318, 330 (1980)).

A

The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact common to the class." Rule 23(a)(2).[5] That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.'" Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Com-

[5] We have previously stated in this context that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 157–158, n. 13 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

monality requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Falcon*, *supra*, at 157. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U. S., at 160, and that certification is proper only if "the trial court is satisfied, after a

rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," *id.*, at 161; see *id.*, at 160 ("[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable"). Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "'[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.*, at 160 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469 (1978); some internal quotation marks omitted).[6] Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve

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[6] A statement in one of our prior cases, *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 177 (1974), is sometimes mistakenly cited to the contrary: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that, see *id.*, at 165), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

Perhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud. Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. 804, 809 (2011), an issue they will surely have to prove *again* at trial in order to make out their case on the merits.

preliminary matters, *e. g.*, jurisdiction and venue, is a familiar feature of litigation. See *Szabo* v. *Bridgeport Machines, Inc.*, 249 F. 3d 672, 676–677 (CA7 2001) (Easterbrook, J.).

In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a *pattern or practice* of discrimination.[7] That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision," *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 876 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*

B

This Court's opinion in *Falcon* describes how the commonality issue must be approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. 457 U. S., at 152. We rejected that composite class for lack of commonality and typicality, explaining:

> "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or

[7] In a pattern-or-practice case, the plaintiff tries to "establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Teamsters* v. *United States*, 431 U. S. 324, 336 (1977); see also *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 772 (1976). If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify "an award of prospective relief," such as "an injunctive order against continuation of the discriminatory practice." *Teamsters*, *supra*, at 361.

> higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Id.*, at 157–158.

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Id.*, at 159, n. 15. Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Ibid.* We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other company-wide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires "[s]ignificant proof" that Wal-Mart "operated under a general policy of discrimination." That is entirely absent here. Wal-Mart's announced policy forbids sex discrimination, see App. 1567a–1596a, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity, 222 F. R. D., at 154. The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological

expert. Relying on "social framework" analysis, Bielby testified that Wal-Mart has a "strong corporate culture," that makes it "vulnerable" to "gender bias." *Id.*, at 152. He could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." 222 F. R. D. 189, 192 (ND Cal. 2004). The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of Evidence 702 and our *Daubert* case, see *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993).[8] The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. 222 F. R. D., at 191. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. "[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard

[8] Bielby's conclusions in this case have elicited criticism from the very scholars on whose conclusions he relies for his social-framework analysis. See Monahan, Walker, & Mitchell, Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks," 94 Va. L. Rev. 1715, 1747 (2008) ("[Bielby's] research into conditions and behavior at Wal-Mart did not meet the standards expected of social scientific research into stereotyping and discrimination"); *id.*, at 1745, 1747 ("[A] social framework necessarily contains only general statements about reliable patterns of relations among variables . . . and goes no further. . . . Dr. Bielby claimed to present a social framework, but he testified about social facts specific to Wal-Mart"); *id.*, at 1747–1748 ("Dr. Bielby's report provides no verifiable method for measuring and testing any of the variables that were crucial to his conclusions and reflects nothing more than Dr. Bielby's 'expert judgment' about how general stereotyping research applied to all managers across all of Wal-Mart's stores nationwide for the multi-year class period").

what he has to say. It is worlds away from "[s]ignificant proof" that Wal-Mart "operated under a general policy of discrimination."

C

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct," *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 990 (1988).

To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." *Id.*, at 990–991. But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements, see *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431–432 (1971). And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use

of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby's social-framework analysis that we have rejected. In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region by region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal-Mart . . . [and] these disparities . . . can be explained only by gender discrimination." 603 F. 3d, at 604 (internal quotation marks omitted). Bendick compared work-force data from Wal-Mart and competitive retailers and concluded that Wal-Mart "promotes a lower percentage of women than its competitors." *Ibid.*

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U. S., at 158. A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence

of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F. 3d, at 637. A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal-Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough.* "The plaintiff must begin by identifying the specific employment practice that is challenged." *Watson*, *supra*, at 994; accord, *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 656 (1989) (approving that statement), superseded by statute on other grounds, 42 U. S. C. § 2000e–2(k). That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.

Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters* v. *United States*, 431 U. S. 324 (1977), in addition to substantial statistical evidence of companywide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. See *id.*, at 338. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, *id.*, at 337, and the class itself consisted of around 334 persons, *United States* v. *T. I. M. E.-D. C., Inc.*, 517 F. 2d 299, 308 (CA5 1975), overruled on other grounds, *Teamsters*, *supra*. The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members. 517 F. 2d, at 315, and n. 30. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores. 603 F. 3d, at 634 (Ikuta, J., dissenting). More than half of these reports are concentrated in only 6 States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal-Mart's operations at all. *Id.*, at 634–635, and n. 10. Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate[s] under a general policy of discrimination," *Falcon*, 457 U. S., at 159, n. 15, which is what respondents must show to certify a companywide class.[9]

[9] The dissent says that we have adopted "a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class." *Post*, at 371, n. 4 (GINSBURG, J., concurring in part and dissenting in part). That is not quite accurate. A discrimina-

The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have "blend[ed]" Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions "predominate" over individual ones. See *post*, at 374–376 (GINSBURG, J., concurring in part and dissenting in part). That is not so. We quite agree that for purposes of Rule 23(a)(2) "'[e]ven a single [common] question'" will do, *post*, at 376, n. 9 (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 176, n. 110 (2003)). We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* "[e]ven a single [common] question." And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.[10]

In sum, we agree with Chief Judge Kozinski that the members of the class

> "held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of

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tion claimant is free to supply as few anecdotes as he wishes. But when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.

[10] For this reason, there is no force to the dissent's attempt to distinguish *Falcon* on the ground that in that case there were "'*no* common questions of law or fact' between the claims of the lead plaintiff and the applicant class," *post*, at 375, n. 7 (quoting 457 U. S., at 162 (Burger, C. J., concurring in part and dissenting in part)). Here also there is nothing to unite all of the plaintiffs' claims, since (contrary to the dissent's contention, *post*, at 375, n. 7) the same employment practices do not "touch and concern all members of the class."

> regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit." 603 F. 3d, at 652 (dissenting opinion).

III

We also conclude that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co.* v. *Brown*, 511 U. S. 117, 121 (1994) *(per curiam)*, expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Nagareda, 84 N. Y. U. L. Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not

authorize class certification when each class member would be entitled to an individualized award of monetary damages.

That interpretation accords with the history of the Rule. Because Rule 23 "stems from equity practice" that predated its codification, *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 613 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based, *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 841–845 (1999). As we observed in *Amchem*, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of what (b)(2) is meant to capture. 521 U. S., at 614. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. See Advisory Committee's Note, 28 U. S. C. App., pp. 1260–1261 (1964 ed., Supp. II) (citing cases); *e. g.*, *Potts* v. *Flax*, 313 F. 2d 284, 289, n. 5 (CA5 1963); *Brunson* v. *Board of Trustees of School Dist. No. 1, Clarendon Cty.*, 311 F. 2d 107, 109 (CA4 1962) *(per curiam); Frasier* v. *Board of Trustees of Univ. of N. C.*, 134 F. Supp. 589, 593 (MDNC 1955) (three-judge court), aff'd, 350 U. S. 979 (1956) *(per curiam)*.

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class,[11] or that the relief sought must per-

[11] Rule 23(b)(1) applies where separate actions by or against individual class members would create a risk of "establish[ing] incompatible standards of conduct for the party opposing the class," Rule 23(b)(1)(A), such as "where the party is obliged by law to treat the members of the class alike," *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 614 (1997), or where individual adjudications "as a practical matter, would be dispositive

force affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an "adventuresome innovation" of the 1966 amendments, *Amchem*, 521 U. S., at 614 (internal quotation marks omitted), framed for situations "in which 'class-action treatment is not as clearly called for,'" *id.*, at 615 (quoting Advisory Committee's Notes, 28 U. S. C. App., p. 697 (1994 ed.)). It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option. See Rule 23(c)(2)(B).

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating

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of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B), such as in "'limited fund' cases, . . . in which numerous persons make claims against a fund insufficient to satisfy all claims," *id.*, at 614.

the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process. See *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 812 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not "predominate" over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." 28 U. S. C. App., p. 1260 (1964 ed., Supp. II) (emphasis added). The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim

does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction.

Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

The predominance test would also require the District Court to reevaluate the roster of class members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs no longer employed by Wal-Mart lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified class, but to eliminate only those who had left the company's employ by the date

the complaint was filed. That solution has no logical connection to the problem, since those who have left their Wal-Mart jobs *since* the complaint was filed have no more need for prospective relief than those who left beforehand. As a consequence, even though the validity of a (b)(2) class depends on whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*," Rule 23(b)(2) (emphasis added), about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time. Which indeed it is, since if a backpay action were properly certified for class treatment under *(b)(3)*, the ability to litigate a plaintiff's backpay claim as part of the class would not turn on the irrelevant question whether she is still employed at Wal-Mart. What follows from this, however, is not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of "equitable" remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. See 42 U. S. C. § 2000e–5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief and the payment of "backpay," see § 2000e–5(g)(2)(A)).

C

In *Allison* v. *Citgo Petroleum Corp.*, 151 F. 3d 402, 415 (CA5 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it de-

fined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations." *Ibid.* We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.

Contrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." § 2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay." § 2000e–5(g)(2)(A).

We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings . . . to determine the scope of individual relief." *Teamsters,* 431 U. S., at 361. At this phase, the burden of proof will shift to the company, but it

will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.*, at 362.

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. 603 F. 3d, at 625–627. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U. S. C. § 2072(b); see *Ortiz*, 527 U. S., at 845, a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, *arguendo*, that "incidental" monetary relief can be awarded to a 23(b)(2) class.

* * *

The judgment of the Court of Appeals is

Reversed.

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

The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation

of Title VII, 42 U. S. C. §2000e *et seq.*, seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. See *ante*, at 360–367. A putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions "predominate" over issues affecting individuals—*e. g.*, qualification for, and the amount of, backpay or compensatory damages—and that a class action is "superior" to other modes of adjudication.

Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand.[1] The Court, however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the "commonality" line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: "[T]here are questions of law or fact common to the class."[2] The Rule "does not require that all questions of law or fact raised in the litigation be com-

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[1] The plaintiffs requested Rule 23(b)(3) certification as an alternative, should their request for (b)(2) certification fail. Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 55.

[2] Rule 23(a) lists three other threshold requirements for class-action certification: "(1) the class is so numerous that joinder of all members is impracticable"; "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." The numerosity requirement is clearly met and Wal-Mart does not contend otherwise. As the Court does not reach the typicality and adequacy requirements, *ante*, at 349, n. 5, I will not discuss them either, but will simply record my agreement with the District Court's resolution of those issues.

mon," 1 H. Newberg & A. Conte, Newberg on Class Actions § 3.10, pp. 3–48 to 3–49 (3d ed. 1992); indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement," Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 176, n. 110 (2003). See Advisory Committee's 1937 Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 138 (citing with approval cases in which "there was only a question of law or fact common to" the class members).

A "question" is ordinarily understood to be "[a] subject or point open to controversy." American Heritage Dictionary 1483 (3d ed. 1992). See also Black's Law Dictionary 1366 (9th ed. 2009) (defining "question of fact" as "[a] disputed issue to be resolved . . . [at] trial" and "question of law" as "[a]n issue to be decided by the judge"). Thus, a "question" "common to the class" must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims.[3]

B

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," 222 F. R. D. 137, 145 (ND Cal. 2004), found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. See *Califano* v. *Yamasaki*, 442 U. S. 682, 703 (1979) ("[M]ost issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court.").

[3] The Court suggests Rule 23(a)(2) must mean more than it says. See *ante*, at 349–350. If the word "questions" were taken literally, the majority asserts, plaintiffs could pass the Rule 23(a)(2) bar by "[r]eciting . . . questions" like "Do all of us plaintiffs indeed work for Wal-Mart?" *Ante*, at 349. Sensibly read, however, the word "questions" means disputed issues, not any utterance crafted in the grammatical form of a question.

The District Court certified a class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998." 222 F. R. D., at 141–143 (internal quotation marks omitted). The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal-Mart discriminates on the basis of gender in pay and promotions. They allege that the company "[r]eli[es] on gender stereotypes in making employment decisions such as . . . promotion[s] [and] pay." App. 55a. Wal-Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria." *Ibid.* Further alleged barriers to the advancement of female employees include the company's requirement, "as a condition of promotion to management jobs, that employees be willing to relocate." *Id.*, at 56a. Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men. See Dept. of Labor, Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 151 (1995).

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only "33 percent of management employees." 222 F. R. D., at 146. "[T]he higher one looks in the organization the lower the percentage of women." *Id.*, at 155. The plaintiffs' "largely uncontested descriptive statistics" also show that women working in the company's stores "are paid less than men in every region" and "that the salary gap widens over time even for men and women hired into the same jobs at the same time." *Ibid.*; cf. *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618, 643 (2007) (GINSBURG, J., dissenting).

The District Court identified "systems for . . . promoting in-store employees" that were "sufficiently similar across regions and stores" to conclude that "the manner in which

these systems affect the class raises issues that are common to all class members." 222 F. R. D., at 149. The selection of employees for promotion to in-store management "is fairly characterized as a 'tap on the shoulder' process," in which managers have discretion about whose shoulders to tap. *Id.*, at 148. Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions. *Ibid.*

Wal-Mart's compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a $2 band for every position's hourly pay rate. Wal-Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors. See *id.*, at 146–147.

Wal-Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal-Mart used to maintain a "carefully constructed . . . corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal-Mart TV," "broadcas[t] . . . into all stores." *Id.*, at 151–153 (internal quotation marks omitted).

The plaintiffs' evidence, including class members' tales of their own experiences,[4] suggests that gender bias suffused Wal-Mart's company culture. Among illustrations, senior management often refer to female associates as "little Janie

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[4] The majority purports to derive from *Teamsters* v. *United States*, 431 U. S. 324 (1977), a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class. *Ante*, at 358. *Teamsters*, the Court acknowledges, see *ante*, at 358, n. 9, instructs that statistical evidence alone may suffice, 431 U. S., at 339; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.

Qs." Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 21 (internal quotation marks omitted). One manager told an employee that "[m]en are here to make a career and women aren't." 222 F. R. D., at 166 (internal quotation marks omitted). A committee of female Wal-Mart executives concluded that "[s]tereotypes limit the opportunities offered to women." Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, at 24 (internal quotation marks omitted).

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal-Mart "can be explained only by gender discrimination and not by . . . neutral variables." 222 F. R. D., at 155. Using regression analyses, their expert, Richard Drogin, controlled for factors including, *inter alia*, job performance, length of time with the company, and the store where an employee worked. *Id.*, at 159.[5] The results, the District Court found, were sufficient to raise an "inference of discrimination." *Id.*, at 155–160.

C

The District Court's identification of a common question, whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases

[5] The Court asserts that Drogin showed only average differences at the "regional and national level" between male and female employees. *Ante*, at 356 (internal quotation marks omitted). In fact, his regression analyses showed there were disparities *within* stores. The majority's contention to the contrary reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs' favor. 222 F. R. D. 137, 157 (ND Cal. 2004). Appellate review is no occasion to disturb a trial court's handling of factual disputes of this order.

of which they are unaware.[6] The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

The plaintiffs' allegations resemble those in one of the prototypical cases in this area, *Leisner* v. *New York Tel. Co.*, 358 F. Supp. 359, 364–365 (SDNY 1973). In deciding on promotions, supervisors in that case were to start with objective measures; but ultimately, they were to "look at the individual as a total individual." *Id.*, at 365 (internal quotation marks omitted). The final question they were to ask and answer: "Is this person going to be successful in our business?" *Ibid.* (internal quotation marks omitted). It is hardly surprising that for many managers, the ideal candidate was someone with characteristics similar to their own.

We have held that "discretionary employment practices" can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. See *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 988, 991 (1988). But see *ante*, at 357 ("[P]roving that [a] discretionary system has produced a . . . disparity *is not enough*."). In *Watson*, as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the "discretionary promotion system"

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[6] An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin & Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 715–716 (2000). In the 1970's orchestras began hiring musicians through auditions open to all comers. *Id.*, at 716. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens. *Id.*, at 738.

caused a discriminatory effect based on race. 487 U. S., at 984 (internal quotation marks omitted). Four different supervisors had declined, on separate occasions, to promote the employee. *Id.*, at 982. Their reasons were subjective and unknown. The employer, we noted, "had not developed precise and formal criteria for evaluating candidates"; "[i]t relied instead on the subjective judgment of supervisors." *Ibid.*

Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." *Id.*, at 990–991. See also *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 657 (1989) (recognizing "the use of 'subjective decision making'" as an "employment practic[e]" subject to disparate-impact attack).

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.

II

A

The Court gives no credence to the key dispute common to the class: whether Wal-Mart's discretionary pay and promotion policies are discriminatory. See *ante*, at 349 ("Reciting" questions like "Is [giving managers discretion over pay] an unlawful employment practice?" "is not sufficient to obtain class certification."). "What matters," the Court asserts, "is not the raising of common 'questions,'" but whether there are "[d]issimilarities within the proposed

class" that "have the potential to impede the generation of common answers." *Ante,* at 350 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 132 (2009); some internal quotation marks omitted).

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer "easily satisfied," 5 J. Moore et al., Moore's Federal Practice § 23.23[2], p. 23–72 (3d ed. 2011).[7] Rule 23(b)(3) certification requires, in addition to the four 23(a) findings, determinations that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for . . . adjudicating the controversy."[8]

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[7] The Court places considerable weight on *General Telephone Co. of Southwest* v. *Falcon,* 457 U. S. 147 (1982). *Ante,* at 352–355. That case has little relevance to the question before the Court today. The lead plaintiff in *Falcon* alleged discrimination evidenced by the company's failure to promote him and other Mexican-American employees and failure to hire Mexican-American applicants. There were "*no* common questions of law or fact" between the claims of the lead plaintiff and the applicant class. 457 U. S., at 162 (Burger, C. J., concurring in part and dissenting in part) (emphasis added). The plaintiff-employee alleged that the defendant-employer had discriminated against him intentionally. The applicant class claims, by contrast, were "advanced under the 'adverse impact' theory," *ibid.,* appropriate for facially neutral practices. "[T]he only commonality [wa]s that respondent is a Mexican-American and he seeks to represent a class of Mexican-Americans." *Ibid.* Here the same practices touch and concern all members of the class.

[8] "A class action may be maintained if Rule 23(a) is satisfied and if:

"(1) prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications . . . [or] adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members . . . ;

"(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole; or

The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, *ante*, at 350 (internal quotation marks omitted), the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). See 84 N. Y. U. L. Rev., at 131 (Rule 23(b)(3) requires "some decisive degree of similarity across the proposed class" because it "speaks of common 'questions' that 'predominate' over individual ones").[9] "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 623 (1997). If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. See *id.*, at 623, n. 19 (Rule 23(b)(1)(B) "does not have a predominance requirement"); *Yamasaki*, 442 U. S., at 701 (Rule 23(b)(2) action in which the Court noted that "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal

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"(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. Rule Civ. Proc. 23(b).

[9] Cf. *supra*, at 369 (Rule 23(a) commonality prerequisite satisfied by "[e]ven a single question . . . common to the members of the class" (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 176, n. 110 (2003)).

issue"). For example, in *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747 (1976), a Rule 23(b)(2) class of African-American truckdrivers complained that the defendant had discriminatorily refused to hire black applicants. We recognized that the "qualification[s] and performance" of individual class members might vary. *Id.*, at 772 (internal quotation marks omitted). "Generalizations concerning such individually applicable evidence," we cautioned, "cannot serve as a justification for the denial of [injunctive] relief to the entire class." *Ibid.*

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them. Given the lack of standards for pay and promotions, the majority says, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Ante*, at 355–356.

Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. 487 U. S., at 990–991; see *supra*, at 373–374. A finding that Wal-Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for companywide discrimination. *Teamsters* v. *United States*, 431 U. S. 324, 359 (1977); see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415–423 (1975). That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e–5(g)(2)(A) (barring backpay if a plaintiff "was refused . . . advancement . . . for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

* * *

The Court errs in importing a "dissimilarities" notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

Syllabus

BOROUGH OF DURYEA, PENNSYLVANIA, ET AL. *v.* GUARNIERI

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

No. 09–1476. Argued March 22, 2011—Decided June 20, 2011

After petitioner borough fired respondent Guarnieri as its police chief, he filed a union grievance that led to his reinstatement. When the borough council later issued directives instructing Guarnieri how to perform his duties, he filed a second grievance, and an arbitrator ordered that some of the directives be modified or withdrawn. Guarnieri then filed this suit under 42 U. S. C. § 1983, alleging that the directives were issued in retaliation for the filing of his first grievance, thereby violating his First Amendment "right . . . to petition the Government for a redress of grievances"; he later amended his complaint to allege that the council also violated the Petition Clause by denying his request for overtime pay in retaliation for his having filed the § 1983 suit. The District Court instructed the jury, *inter alia*, that the suit and the grievances were constitutionally protected activity, and the jury found for Guarnieri. Affirming the compensatory damages award, the Third Circuit held that a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern. In so ruling, the court rejected the view of every other Circuit to have considered the issue that, to be protected, the petition must address a matter of public concern.

Held: A government employer's allegedly retaliatory actions against an employee do not give rise to liability under the Petition Clause unless the employee's petition relates to a matter of public concern. The Third Circuit's conclusion that the public concern test does not limit public employees' Petition Clause claims is incorrect. Pp. 386–399.

(a) A public employee suing his employer under the First Amendment's Speech Clause must show that he spoke as a citizen on a matter of public concern. *Connick* v. *Myers*, 461 U. S. 138, 147. Even where the employee makes that showing, however, courts balance his employee's right to engage in speech against the government's interest in promoting the efficiency and effectiveness of the public services it performs through its employees. *Pickering* v. *Board of Ed. of Township High*

School Dist. 205, Will Cty., 391 U. S. 563, 568. Although cases might arise in which special Petition Clause concerns would require a distinct analysis, public employees' retaliation claims do not call for this divergence. The close connection between the rights of speech and petition has led Courts of Appeals other than the Third Circuit to apply the public concern test to public employees' Petition Clause claims. This approach is justified by the substantial common ground in the definition and delineation of these rights. Pp. 386–389.

(b) The substantial government interests that justify a cautious and restrained approach to protecting public employees' speech are just as relevant in Petition Clause cases. A petition, no less than speech, can interfere with government's efficient and effective operation by, *e. g.*, seeking results that "contravene governmental policies or impair the proper performance of governmental functions," *Garcetti* v. *Ceballos*, 547 U. S. 410, 419. A petition taking the form of a lawsuit against the government employer may be particularly disruptive, consuming public officials' time and attention, burdening their exercise of legitimate authority, and blurring the lines of accountability between them and the public. Here, for example, Guarnieri's attorney invited the jury to review myriad details of government decisionmaking. It is precisely to avoid this sort of intrusion into internal governmental affairs that this Court has held that, "while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Id.*, at 420. Interpreting the Petition Clause to apply even where matters of public concern are not involved would be unnecessary, or even disruptive, when there is already protection for the public employees' rights to file grievances and litigate. Adopting a different rule for Petition Clause claims would provide a ready means for public employees to circumvent the public concern test's protections and aggravate potential harm to the government's interests by compounding the costs of complying with the Constitution. Pp. 389–393.

(c) Guarnieri's claim that applying the public concern test to the Petition Clause would be inappropriate in light of the private nature of many petitions for redress lacks merit. Although the Clause undoubtedly has force and application in the context of a personal grievance addressed to the government, petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole. The Clause's history reveals the frequent use of petitions to address a wide range of political, social, and other matters of great public import and interest. Pp. 394–398.

Syllabus

(d) The framework used to govern public employees' Speech Clause claims, when applied to the Petition Clause, will protect both the government's interests and the employee's First Amendment right. If a public employee petitions as an employee on a matter of purely private concern, his First Amendment interest must give way, as it does in speech cases. *San Diego* v. *Roe*, 543 U. S. 77, 82–83. If he petitions as a citizen on a matter of public concern, his First Amendment interest must be balanced against the government's countervailing interest in the effective and efficient management of its internal affairs. *Pickering*, *supra*, at 568. If that balance favors the public employee, the First Amendment claim will be sustained. If the balance favors the employer, the employee's First Amendment claim will fail even though the petition is on a matter of public concern. As under the Speech Clause, whether a petition relates to a matter of public concern will depend on its "content, form, and context . . . , as revealed by the whole record." *Connick*, *supra*, at 147–148, and n. 7. The forum in which a petition is lodged will also be relevant. See *Snyder* v. *Phelps*, 562 U. S. 443, 454–455. A petition filed with a government employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context. Pp. 398–399.

(e) Absent full briefs by the parties, the Court need not consider how the foregoing framework would apply to this case. P. 399.

364 Fed. Appx. 749, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 399. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 401.

Daniel R. Ortiz argued the cause for petitioners. With him on the briefs were *James E. Ryan*, *Toby J. Heytens*, *David T. Goldberg*, *John P. Elwood*, *Karoline Mehalchick*, and *Mark T. Stancil*.

Joseph R. Palmore argued the cause for the United States as *amicus curiae* in support of petitioners. On the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, *Acting Deputy Solicitor General Kruger*, *Ann O'Connell*, *William Kanter*, and *Michael E. Robinson*.

Eric Schnapper argued the cause for respondent. With him on the brief was *Cynthia L. Pollick.**

JUSTICE KENNEDY delivered the opinion of the court.

Among other rights essential to freedom, the First Amendment protects "the right of the people . . . to petition the Government for a redress of grievances." U. S. Const., Amdt. 1. This case concerns the extent of the protection, if any, that the Petition Clause grants public employees in routine disputes with government employers. Petitions are a form of expression, and employees who invoke the Petition Clause in most cases could invoke as well the Speech Clause of the First Amendment. To show that an employer interfered with rights under the Speech Clause, the employee, as a general rule, must show that his speech was on a matter

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Bill McCollum*, Attorney General of Florida, *Scott D. Makar*, Solicitor General, and *Ronald A. Lathan*, Deputy Solicitor General, by *Russell A. Suzuki*, Acting Attorney General of Hawaii, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Paula T. Dow* of New Jersey, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; for the National Conference of State Legislatures et al. by *L. Rachel Helyar;* and for the National School Boards Association by *Francisco M. Negrón, Jr.*, *Naomi E. Gittins*, and *Sonja H. Trainor.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Carter G. Phillips*, *Rebecca K. Troth*, *Witold J. Walczak*, *Steven R. Shapiro*, and *Seth F. Kreimer;* for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *James B. Coppess*, *Angelia D. Wade*, and *Laurence Gold;* for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart;* and for the National Fraternal Order of Police et al. by *Larry H. James* and *Christina L. Corl.*

of public concern, as that term is defined in the precedents of this and other courts. Here the issue is whether that test applies when the employee invokes the Petition Clause.

Alone among the Courts of Appeals to have addressed the issue, the Court of Appeals for the Third Circuit has held that the public concern test does not limit Petition Clause claims by public employees. For the reasons stated below, this conclusion is incorrect.

I

Charles Guarnieri filed a union grievance challenging his termination as chief of police for the borough of Duryea, a town of about 4,600 persons in northeastern Pennsylvania. His grievance proceeded to arbitration pursuant to the police union collective-bargaining agreement. The arbitrator found that the borough council, Duryea's legislative body and the entity responsible for Guarnieri's termination, committed procedural errors in connection with the termination; and the arbitrator also found that Guarnieri engaged in misconduct, including "attempting to intimidate Council members." App. 37, 38. The arbitrator ordered Guarnieri reinstated after a disciplinary suspension. *Id.*, at 38.

Upon Guarnieri's return to the job, the council issued 11 directives instructing Guarnieri in the performance of his duties. The council's attorney explained that the council "wanted to be sure that the chief understood what was going to be expected of him upon his return." Tr. 19:12–14 (Apr. 16, 2008). One directive prohibited Guarnieri from working overtime without the council's "express permission." App. 59, ¶ 1. Another indicated that "[t]he police car is to be used for official business only." *Id.*, at 60, ¶ 9. A third stated that the "Duryea municipal building is a smoke free building" and that the "police department is not exempt." *Id.*, at 61, ¶ 10. Guarnieri testified that, because of these and other directives, his "coming back wasn't a warm welcoming feeling." Tr. 65:7–8 (Apr. 15, 2008). Guarnieri filed a second union grievance challenging the directives. The arbi-

trator instructed the council to modify or withdraw some of the directives on the grounds that they were vague, interfered with the authority of the mayor, or were contrary to the collective-bargaining agreement.

Guarnieri filed this lawsuit against the borough, the borough council, and individual members of the council under Rev. Stat. § 1979, 42 U. S. C. § 1983. Guarnieri claimed that his first union grievance was a petition protected by the Petition Clause of the First Amendment, and he alleged that the directives issued upon his reinstatement were retaliation for that protected activity.

After this suit was filed, the council denied a request by Guarnieri for $338 in overtime. The United States Department of Labor investigated and concluded that Guarnieri was entitled to be paid. The council offered Guarnieri a check for the amount, but Guarnieri refused to accept it. Instead, Guarnieri amended his complaint to encompass the denial of overtime. Guarnieri alleged that his § 1983 lawsuit was a petition and that the denial of overtime constituted retaliation for his having filed the lawsuit.

Under the law of the Circuit, the defendants could not obtain judgment as a matter of law on the basis that the lawsuit and grievances were not on a matter of public concern. The case proceeded to a jury. Guarnieri's attorney argued that the council was "sending a message to" Guarnieri through the directives and the denial of overtime: "You might have won your arbitration, but we control you." Tr. 53:24–25 (Apr. 17, 2008). The District Court instructed the jury that the lawsuit and union grievances were "protected activity . . . under the constitution," and that the jury could find defendants liable if it found an adequate connection between the protected activity and the alleged retaliation. *Id.*, at 61:17–20; 62. The jury found in favor of Guarnieri. The jury awarded $45,000 in compensatory damages and $24,000 in punitive damages for the directives, as well as $358 in compensatory damages and $28,000 in punitive damages for

the denial of overtime. The District Court awarded $45,000 in attorney's fees and denied defendants' renewed motion for judgment as a matter of law.

Defendants appealed on the ground that Guarnieri's grievances and lawsuit did not address matters of public concern. Courts outside the Third Circuit have held that allegedly retaliatory actions by government employers against government employees may not give rise to liability under the Petition Clause unless the employee's petition related to a matter of public concern. See, *e. g.*, *Kirby* v. *Elizabeth City*, 388 F. 3d 440, 448–449 (CA4 2004); *Tang* v. *Rhode Island, Dept. of Elderly Affairs*, 163 F. 3d 7, 11–12 (CA1 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F. 2d 1049, 1059 (CA2 1993). These courts rely on a substantial overlap between the rights of speech and petition to justify the application of Speech Clause precedents to Petition Clause claims. They reason that, whether the grievance is considered under the Speech Clause or the Petition Clause, the government employer is entitled to take adverse action against the employee unless the dispute involves a matter of public concern.

Rejecting that view, the Court of Appeals here affirmed the award of compensatory damages, although it found insufficient evidence to sustain the award of punitive damages. The Court of Appeals concluded that "'a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern.'" 364 Fed. Appx. 749, 753 (CA3 2010) (quoting *Foraker* v. *Chaffinch*, 501 F. 3d 231, 236 (CA3 2007)). The decision of the Court of Appeals was consistent with the rule adopted and explained by that court in *San Filippo* v. *Bongiovanni*, 30 F. 3d 424, 442 (1994). This Court granted certiorari to resolve the conflict in the Courts of Appeals. 562 U. S. 960 (2010).

II

When a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern. *Connick* v. *Myers*, 461 U. S. 138, 147 (1983). If an employee does not speak as a citizen, or does not address a matter of public concern, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Ibid.* Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the First Amendment interest of the employee against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968).

This framework "reconcile[s] the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission." *San Diego* v. *Roe*, 543 U. S. 77, 82 (2004) *(per curiam)*. There are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment. "Our responsibility is to ensure that citizens are not deprived of [these] fundamental rights by virtue of working for the government." *Connick*, *supra*, at 147; see also *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605–606 (1967). Nevertheless, a citizen who accepts public employment "must accept certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U. S. 410, 418 (2006). The government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise the conduct of public employees. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract

from the agency's effective operation, the government employer must have some power to restrain her." *Waters* v. *Churchill*, 511 U. S. 661, 675 (1994) (plurality opinion). Restraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest.

This case arises under the Petition Clause, not the Speech Clause. The parties litigated the case on the premise that Guarnieri's grievances and lawsuit are petitions protected by the Petition Clause. This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. "[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 896–897 (1984); see also *BE&K Constr. Co.* v. *NLRB*, 536 U. S. 516, 525 (2002); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741 (1983); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 513 (1972). Although retaliation by a government employer for a public employee's exercise of the right of access to the courts may implicate the protections of the Petition Clause, this case provides no necessity to consider the correct application of the Petition Clause beyond that context.

Although this case proceeds under the Petition Clause, Guarnieri just as easily could have alleged that his employer retaliated against him for the speech contained within his grievances and lawsuit. That claim would have been subject to the public concern test already described. Because Guarnieri chose to proceed under the Petition Clause, however, the Court of Appeals applied a more generous rule. Following the decision of the Court of Appeals in *San Filippo*, *supra*, at 443, Guarnieri was deemed entitled to protection from retaliation so long as his petition was not a "sham." Under that rule, defendants and other public employers might be liable under the Petition Clause even if the same

conduct would not give rise to liability under the Speech Clause. The question presented by this case is whether the history and purpose of the Petition Clause justify the imposition of broader liability when an employee invokes its protection instead of the protection afforded by the Speech Clause.

It is not necessary to say that the two Clauses are identical in their mandate or their purpose and effect to acknowledge that the rights of speech and petition share substantial common ground. This Court has said that the right to speak and the right to petition are "cognate rights." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); see also *Wayte* v. *United States*, 470 U. S. 598, 610, n. 11 (1985). "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." *Thomas*, 323 U. S., at 530. Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. Beyond the political sphere, both speech and petition advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.

Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims. See *ibid.* (rights of speech and petition are "not identical"). Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, requests action by

the government to address those concerns. See *Sure-Tan, Inc.*, *supra*, at 896–897.

This Court's opinion in *McDonald* v. *Smith*, 472 U. S. 479 (1985), has sometimes been interpreted to mean that the right to petition can extend no further than the right to speak; but *McDonald* held only that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition. In those circumstances the Court found "no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions." *Id.*, at 485. There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.

As other Courts of Appeals have recognized, however, claims of retaliation by public employees do not call for this divergence. See *supra*, at 385. The close connection between these rights has led Courts of Appeals other than the Third Circuit to apply the public concern test developed in Speech Clause cases to Petition Clause claims by public employees. As will be explained further, this approach is justified by the extensive common ground in the definition and delineation of these rights. The considerations that shape the application of the Speech Clause to public employees apply with equal force to claims by those employees under the Petition Clause.

The substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees are just as relevant when public employees proceed under the Petition Clause. Petitions, no less than speech, can interfere with the efficient and effective operation of government. A petition may seek to achieve results that "contravene governmental policies or impair the proper performance of governmental functions." *Garcetti*, 547 U. S., at 419. Government must have authority, in appro-

priate circumstances, to restrain employees who use petitions to frustrate progress toward the ends they have been hired to achieve. A petition, like other forms of speech, can bring the "mission of the employer and the professionalism of its officers into serious disrepute." *Roe*, 543 U. S., at 81. A public employee might, for instance, use the courts to pursue personal vendettas or to harass members of the general public. That behavior could cause a serious breakdown in public confidence in the government and its employees. And if speech or petition were directed at or concerned other public employees, it could have a serious and detrimental effect on morale.

When a petition takes the form of a lawsuit against the government employer, it may be particularly disruptive. Unlike speech of other sorts, a lawsuit demands a response. Mounting a defense to even frivolous claims may consume the time and resources of the government employer. Outside the context of public employment, this Court has recognized that the Petition Clause does not protect "objectively baseless" litigation that seeks to "'interfere *directly* with the business relationships of a competitor.'" *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49, 60–61 (1993) (quoting *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 144 (1961)). In recognition of the substantial costs imposed by litigation, Congress has also required civil rights plaintiffs whose suits are "frivolous, unreasonable, or without foundation" to pay attorney's fees incurred by defendants. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421 (1978); see also Fed. Rule Civ. Proc. 11 (providing sanctions for claims that are "presented for [an] improper purpose," frivolous, or lacking evidentiary support). The government likewise has a significant interest in disciplining public employees who abuse the judicial process.

Unrestrained application of the Petition Clause in the context of government employment would subject a wide

range of government operations to invasive judicial superintendence. Employees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations. See Brief for National School Boards Association as *Amicus Curiae* 5. Every government action in response could present a potential federal constitutional issue. Judges and juries, asked to determine whether the government's actions were in fact retaliatory, would be required to give scrutiny to both the government's response to the grievance and the government's justification for its actions. This would occasion review of a host of collateral matters typically left to the discretion of public officials. Budget priorities, personnel decisions, and substantive policies might all be laid before the jury. This would raise serious federalism and separation-of-powers concerns. It would also consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public.

This case illustrates these risks and costs. Guarnieri's attorney invited the jury to review myriad details of government decisionmaking. She questioned the council's decision to issue directives in writing, rather than orally, Tr. 66 (Apr. 14, 2008); the council's failure to consult the mayor before issuing the directives, *id.*, at 105 (Apr. 15, 2008); the amount of money spent to employ "Philadelphia lawyers" to defend Guarnieri's legal challenges, *id.*, at 191 to 193:7–10 (Apr. 14, 2008), 152–153 (Apr. 16, 2008); and the wisdom of the council's decision to spend money to install Global Positioning System devices on police cars, *id.*, at 161–162 (same). Finally, the attorney invited the jury to evaluate the council's decisions in light of an emotional appeal on behalf of Guarnieri's "little dog Hercules, little white fluffy dog and half Shitsu." *Id.*, at 49:13–14 (Apr. 14, 2008). It is precisely to avoid this intrusion into internal governmental affairs that this Court has held that, "while the First Amendment invests public

employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Garcetti*, 547 U. S., at 420 (quoting *Connick*, 461 U. S., at 154).

If the Petition Clause were to apply even where matters of public concern are not involved, that would be unnecessary, or even disruptive, when there is already protection for the rights of public employees to file grievances and to litigate. The government can and often does adopt statutory and regulatory mechanisms to protect the rights of employees against improper retaliation or discipline, while preserving important government interests. Cf. *Garcetti*, *supra*, at 425 (noting a "powerful network of legislative enactments"). Employees who sue under federal and state employment laws often benefit from generous and quite detailed anti-retaliation provisions. See, *e. g.*, Pa. Stat. Ann., Tit. 43, § 1101.1201(a)(4) (Purdon 2009); § 1101.1302. These statutory protections are subject to legislative revision and can be designed for the unique needs of State, local, or Federal Governments, as well as the special circumstances of particular governmental offices and agencies. The Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances.

In light of the government's interests in the public employment context, it would be surprising if Petition Clause claims by public employees were not limited as necessary to protect the employer's functions and responsibilities. Even beyond the Speech Clause, this Court has explained that "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 599 (2008); see also *NASA* v. *Nelson*, 562 U. S. 134, 148–149 (2011). The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsi-

bilities may be affected. There is no reason to think the Petition Clause should be an exception.

The public concern test was developed to protect these substantial government interests. Adoption of a different rule for Petition Clause claims would provide a ready means for public employees to circumvent the test's protections. Consider Sheila Myers, who was the original plaintiff in *Connick*. She circulated "a questionnaire soliciting the views of her fellow staff members" on various office matters. 461 U. S., at 141. The Court held that Myers' claim for retaliation failed the public concern test because the questionnaire was "most accurately characterized as an employee grievance concerning internal office policy." *Id.*, at 154. It would undermine that principle if a different result would have obtained had Myers raised those same claims using a formal grievance procedure. Myers' employer "reasonably believed [Myers' complaints] would disrupt the office, undermine his authority, and destroy close working relationships." *Ibid.* These concerns would be no less significant in the context of a formal grievance. Employees should not be able to evade the rule articulated in the *Connick* case by wrapping their speech in the mantle of the Petition Clause.

Articulation of a separate test for the Petition Clause would aggravate potential harm to the government's interests by compounding the costs of compliance with the Constitution. A different rule for each First Amendment claim would require employers to separate petitions from other speech in order to afford them different treatment; and that, in turn, would add to the complexity and expense of compliance with the Constitution. Identifying petitions might be easy when employees employ formal grievance procedures, but the right to petition is not limited to petitions lodged under formal procedures. See, *e. g.*, *Brown* v. *Louisiana*, 383 U. S. 131 (1966). Indeed, the employee in *Connick* could have made a colorable argument that her questionnaire ought to be viewed as a petition for redress of grievances.

Guarnieri claims application of the public concern test to the Petition Clause would be inappropriate in light of the private nature of many petitions for redress of grievances. The Petition Clause undoubtedly does have force and application in the context of a personal grievance addressed to the government. See, *e. g.*, *Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964); *Thomas*, 323 U. S., at 530–531. At the founding, citizens petitioned on a wide range of subjects, including matters of both private and public concern. Petitions to the colonial legislatures concerned topics as diverse as debt actions, estate distributions, divorce proceedings, and requests for modification of a criminal sentence. Higginson, A Short History of the Right To Petition Government for the Redress of Grievances, 96 Yale L. J. 142, 146 (1986). Although some claims will be of interest only to the individual making the appeal, for that individual the need for a legal remedy may be a vital imperative. See, *e. g.*, *M. L. B.* v. *S. L. J.*, 519 U. S. 102 (1996); *Boddie* v. *Connecticut*, 401 U. S. 371 (1971). Outside the public employment context, constitutional protection for petitions does not necessarily turn on whether those petitions relate to a matter of public concern.

There is, however, no merit to the suggestion that the public concern test cannot apply under the Petition Clause because the majority of petitions to colonial legislatures addressed matters of purely private concern. In analogous cases under the Speech Clause, this Court has noted the "Constitution's special concern with threats to the right of citizens to participate in political affairs," *Connick*, *supra*, at 145, even though it is likely that, in this and any other age, most speech concerns purely private matters. The proper scope and application of the Petition Clause likewise cannot be determined merely by tallying up petitions to the colonial legislatures. Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty.

Petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole. Petition, as a word, a concept, and an essential safeguard of freedom, is of ancient significance in the English law and the Anglo-American legal tradition. See, *e. g.*, 1 W. Blackstone, Commentaries *143. The right to petition applied to petitions from nobles to the King, from Parliament to the King, and from the people to the Parliament, and it concerned both discrete, personal injuries and great matters of state.

The right to petition traces its origins to Magna Carta, which confirmed the right of barons to petition the King. W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 467 (rev. 2d ed. 1958). The Magna Carta itself was King John's answer to a petition from the barons. *Id.*, at 30–38. Later, the Petition of Right of 1628 drew upon centuries of tradition and Magna Carta as a model for the Parliament to issue a plea, or even a demand, that the Crown refrain from certain actions. 3 Car. 1, ch. 1 (1627), 5 Statutes of the Realm 23. The Petition of Right stated four principal grievances: taxation without consent of Parliament; arbitrary imprisonment; quartering or billeting of soldiers; and the imposition of martial law. After its passage by both Houses of Parliament, the Petition received the King's assent and became part of the law of England. See S. Gardiner, The First Two Stuarts and the Puritan Revolution, 1603–1660, pp. 60–61 (1886). The Petition of Right occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right of 1689.

The following years saw use of mass petitions to address matters of public concern. See 8 D. Hume, History of England from the Invasion of Julius Caesar to the Revolution in 1688, p. 122 (1763) ("Tumultuous petitioning . . . was an admirable expedient . . . for spreading discontent, and for uniting the nation in any popular clamour"). In 1680, for instance, more than 15,000 persons signed a petition regarding the

summoning and dissolution of Parliament, "one of the major political issues agitating the nation." Knights, London's 'Monster' Petition, 36 Historical Journal 39, 40–43 (1993). Nine years later, the Declaration of Right listed the illegal acts of the sovereign and set forth certain rights of the King's subjects, one of which was the right to petition the sovereign. It stated that "it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegall." 1 W. & M., ch. 2, 6 Statutes of the Realm 143; see also L. Schwoerer, The Declaration of Rights, 1689, pp. 69–71 (1981).

The Declaration of Independence of 1776 arose in the same tradition. After listing other specific grievances and wrongs, it complained, "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." The Declaration of Independence ¶ 30.

After independence, petitions on matters of public concern continued to be an essential part of contemporary debates in this country's early history. Two years before the adoption of the Constitution, James Madison's Memorial and Remonstrance against Religious Assessments, an important document in the history of the Establishment Clause, was presented to the General Assembly of the Commonwealth of Virginia as a petition. See 1 D. Laycock, Religious Liberty: Overviews and History 90 (2010); *Arizona Christian School Tuition Organization* v. *Winn*, 563 U. S. 125, 140–141 (2011). It attracted over 1,000 signatures. Laycock, *supra*, at 90, n. 153. During the ratification debates, Antifederalists circulated petitions urging delegates not to adopt the Constitution absent modification by a bill of rights. Boyd, Antifederalists and the Acceptance of the Constitution: Pennsylvania, 1787–1792, 9 Publius, No. 2, pp. 123, 128–133 (Spring 1979).

Petitions to the National Legislature also played a central part in the legislative debate on the subject of slavery in the years before the Civil War. See W. Miller, Arguing

About Slavery (1995). Petitions allowed participation in democratic governance even by groups excluded from the franchise. See Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Ford. L. Rev. 2153, 2182 (1998). For instance, petitions by women seeking the vote had a role in the early woman's suffrage movement. See Cogan & Ginzberg, 1846 Petition for Woman's Suffrage, New York State Constitutional Convention, 22 Signs 427, 437–438 (1997). The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.

Petitions to the courts and similar bodies can likewise address matters of great public import. In the context of the civil rights movement, litigation provided a means for "the distinctive contribution of a minority group to the ideas and beliefs of our society." *NAACP* v. *Button*, 371 U. S. 415, 431 (1963). Individuals may also "engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *In re Primus*, 436 U. S. 412, 431 (1978). Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.

The government may not misuse its role as employer unduly to distort this deliberative process. See *Garcetti*, 547 U. S., at 419. Public employees are "the members of a community most likely to have informed and definite opinions" about a wide range of matters related, directly or indirectly, to their employment. *Pickering*, 391 U. S., at 572. Just as the public has a right to hear the views of public employees, the public has a right to the benefit of those employees' participation in petitioning activity. Petitions may "allow the public airing of disputed facts" and "promote the evolution

of the law by supporting the development of legal theories," *BE&K Constr. Co.*, 536 U. S., at 532 (internal quotation marks omitted), and these and other benefits may not accrue if one class of knowledgeable and motivated citizens is prevented from engaging in petitioning activity. When a public employee seeks to participate, as a citizen, in the process of deliberative democracy, either through speech or petition, "it is necessary to regard the [employee] as the member of the general public he seeks to be." *Pickering*, *supra*, at 574.

The framework used to govern Speech Clause claims by public employees, when applied to the Petition Clause, will protect both the interests of the government and the First Amendment right. If a public employee petitions as an employee on a matter of purely private concern, the employee's First Amendment interest must give way, as it does in speech cases. *Roe*, 543 U. S., at 82–83. When a public employee petitions as a citizen on a matter of public concern, the employee's First Amendment interest must be balanced against the countervailing interest of the government in the effective and efficient management of its internal affairs. *Pickering*, *supra*, at 568. If that balance favors the public employee, the employee's First Amendment claim will be sustained. If the interference with the government's operations is such that the balance favors the employer, the employee's First Amendment claim will fail even though the petition is on a matter of public concern.

As under the Speech Clause, whether an employee's petition relates to a matter of public concern will depend on "the content, form, and context of [the petition], as revealed by the whole record." *Connick*, 461 U. S., at 147–148, and n. 7. The forum in which a petition is lodged will be relevant to the determination of whether the petition relates to a matter of public concern. See *Snyder* v. *Phelps*, 562 U. S. 443, 454–455 (2011). A petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context.

Of course in one sense the public may always be interested in how government officers are performing their duties. But as the *Connick* and *Pickering* test has evolved, that will not always suffice to show a matter of public concern. A petition that "involves nothing more than a complaint about a change in the employee's own duties" does not relate to a matter of public concern and accordingly "may give rise to discipline without imposing any special burden of justification on the government employer." *United States* v. *Treasury Employees*, 513 U. S. 454, 466 (1995). The right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process. It is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts.

III

Because the Third Circuit did not find it necessary to apply this framework, there has been no determination as to how it would apply in the context of this case. The parties did not address the issue in the opening brief or the response, and the United States did not address the issue in its brief as *amicus curiae*. In their reply brief, petitioners suggest that this Court should address the issue and resolve it in their favor. Yet in their opening brief petitioners sought only vacatur and remand. This Court need not consider this issue without the benefit of full briefs by the parties.

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

It is so ordered.

JUSTICE THOMAS, concurring in the judgment.

For the reasons set forth by JUSTICE SCALIA, I seriously doubt that lawsuits are "petitions" within the original meaning of the Petition Clause of the First Amendment. See *post*, at 403–404 (opinion concurring in judgment in part and dissenting in part). Unreasoned statements to the contrary

in this Court's prior decisions do not convince me otherwise. Like the Court, however, I need not decide that question today because "[t]he parties litigated the case on the premise that Guarnieri's grievances and lawsuit are petitions protected by the Petition Clause." *Ante*, at 387.

I also largely agree with JUSTICE SCALIA about the framework for assessing public employees' retaliation claims under the Petition Clause. The "public concern" doctrine of *Connick* v. *Myers*, 461 U. S. 138 (1983), is rooted in the First Amendment's core protection of speech on matters of public concern and has no relation to the right to petition. See *post*, at 404–407. I would not import that test into the Petition Clause. Rather, like JUSTICE SCALIA, I would hold that "the Petition Clause protects public employees against retaliation for filing petitions unless those petitions are addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign." *Post*, at 407.

But I would not end the analysis after determining that a petition was addressed to the government as sovereign. Recognizing "the realities of the employment context," we have held that "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 600, 599 (2008). Even where a public employee petitions the government in its capacity as sovereign, I would balance the employee's right to petition the sovereign against the government's interest as an employer in the effective and efficient management of its internal affairs. Cf. *Garcetti* v. *Ceballos*, 547 U. S. 410, 419 (2006) (noting that employees "speaking as citizens about matters of public concern" still must "face . . . speech restrictions that are necessary for their employers to operate efficiently and effectively"); *United States* v. *Treasury Employees*, 513 U. S. 454, 492 (1995) (Rehnquist, C. J., dissenting) ("In conducting this bal-

ance [in the Speech Clause context], we consistently have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved was on a matter of public concern"); *O'Connor* v. *Ortega*, 480 U. S. 709, 721–722 (1987) (plurality opinion) (balancing the "realities of the workplace" against the "legitimate privacy interests of public employees" to conclude that a warrant requirement would "seriously disrupt the routine conduct of business" and "be unduly burdensome"). In assessing a retaliation claim under the Petition Clause, courts should be able to conclude that, in instances when the petition is especially disruptive, as some lawsuits might be, the balance of interests may weigh in favor of the government employer.

Applying this framework, I would vacate the judgment and remand. The Court of Appeals erred with respect to both Guarnieri's union grievance and his 42 U. S. C. § 1983 suit. First, even assuming the grievance was a petition, it was addressed to the local government in its capacity as Guarnieri's employer. See *post*, at 408 (opinion of SCALIA, J.). Second, Guarnieri addressed his § 1983 suit to the Federal Government in its capacity as sovereign, not to the local government as his employer. See *ibid.* But the Court of Appeals did not consider whether the local government's interest as an employer "in achieving its goals as effectively and efficiently as possible" nevertheless outweighs Guarnieri's interest in petitioning the Federal Government regarding his local employment. *Engquist*, *supra*, at 598 (internal quotation marks omitted). I would vacate and remand for the Court of Appeals to conduct that analysis in the first instance.

JUSTICE SCALIA, concurring in the judgment in part and dissenting in part.

I disagree with two aspects of the Court's reasoning. First, the Court is incorrect to state that our "precedents

confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Ante*, at 387. Our first opinion clearly saying that lawsuits are "Petitions" under the Petition Clause came less than 40 years ago. In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972),[1] an opinion by Justice Douglas, the Court asserted that "[t]he right of access to the courts is indeed but one aspect of the right of petition." *Id.*, at 510. As authority it cited two habeas corpus cases, *Johnson* v. *Avery*, 393 U. S. 483 (1969), and *Ex parte Hull*, 312 U. S. 546 (1941), neither of which even mentioned the Petition Clause. The assertion, moreover, was pure dictum. The holding of *California Motor Transport* was that the *Noerr-Pennington* doctrine, a judicial gloss on the Sherman Act that had been held to immunize certain lobbying (legislature-petitioning) activity, did *not* apply to sham litigation that "sought to bar . . . competitors from meaningful access to adjudicatory tribunals," 404 U. S., at 510–512. The three other cases cited by the Court as holding that lawsuits are petitions, *ante*, at 387, are all statutory interpretation decisions construing the National Labor Relations Act, albeit against the backdrop of the Petition Clause. See *BE&K Constr. Co.* v. *NLRB*, 536 U. S. 516, 534–536 (2002); *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 896–897 (1984); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741–743 (1983). The Court has never actually *held* that a lawsuit is a constitutionally protected "Petition," nor does today's opinion hold that. The Court merely observes that "[t]he parties litigated the case on the premise that Guarnieri's grievances and lawsuit

[1] Respondent would agree, since he cited this case in argument as the earliest. Tr. of Oral Arg. 36. There were, however, three cases in the 1960's which adverted vaguely to lawsuits as involving the right to petition. See *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222–224 (1967); *Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 7 (1964); *NAACP* v. *Button*, 371 U. S. 415, 430 (1963).

are petitions protected by the Petition Clause," *ante*, at 387, and concludes that Guarnieri's 42 U. S. C. § 1983 claim would fail even if that premise were correct.

I find the proposition that a lawsuit is a constitutionally protected "Petition" quite doubtful. The First Amendment's Petition Clause states that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The reference to "the right of the people" indicates that the Petition Clause was intended to codify a pre-existing individual right, which means that we must look to historical practice to determine its scope. See *District of Columbia* v. *Heller*, 554 U. S. 570, 579, 592 (2008).

There is abundant historical evidence that "Petitions" were directed to the executive and legislative branches of government, not to the courts. In 1765, the Stamp Act Congress stated "[t]hat it is the right of the British subjects in these colonies to petition the King or either House of Parliament." Declaration of Rights and Grievances, Art. 13, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 195, 198 (1971); it made no mention of petitions directed to the courts. As of 1781, seven state constitutions protected citizens' right to apply or petition for redress of grievances; all seven referred only to legislative petitions. See Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St. L. J. 557, 604–605, n. 159 (1999). The Judiciary Act of 1789 did not grant federal trial courts jurisdiction to hear lawsuits arising under federal law; there is no indication anyone ever thought that this restriction infringed on the right of citizens to petition the Federal Government for redress of grievances. The fact that the Court never affirmed a First Amendment right to litigate until its unsupported dictum in 1972—after having heard almost 200 years' worth of lawsuits, untold numbers of which might have been affected by a First Amendment right to litigate—should give rise to a

strong suspicion that no such right exists. "[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." *Nevada Comm'n on Ethics* v. *Carrigan*, *ante*, at 122 (internal quotation marks omitted).

I acknowledge, however, that scholars have made detailed historical arguments to the contrary. See, *e. g.*, Andrews, *supra*, at 595–625; Pfander, Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government, 91 Nw. U. L. Rev. 899, 903–962 (1997). As the Court's opinion observes, the parties have not litigated the issue, and so I agree we should leave its resolution to another day.

Second, and of greater practical consequence, I disagree with the Court's decision to apply the "public concern" framework of *Connick* v. *Myers*, 461 U. S. 138 (1983), to retaliation claims brought under the Petition Clause. The Court correctly holds that the Speech Clause and Petition Clause are not coextensive, *ante*, at 388–389. It acknowledges, moreover, that the Petition Clause protects personal grievances addressed to the government, *ante*, at 394. But that is an understatement—rather like acknowledging that the Speech Clause protects verbal expression. "[T]he primary responsibility of colonial assemblies was the settlement of private disputes raised by petitions." Higginson, A Short History of the Right To Petition Government for the Redress of Grievances, 96 Yale L. J. 142, 145 (1986). "[T]he overwhelming majority of First Congress petitions presented private claims." 8 Documentary History of the First Federal Congress of the United States, 1789–1791, p. xviii (K. Bowling, W. diGiacomantonio, & C. Bickford eds. 1998). The Court nonetheless holds that, at least in public employment cases, the Petition Clause and Speech Clause should be

treated identically, so that since the Speech Clause does not prohibit retaliation against public employees for speaking on matters of private concern, neither does the Petition Clause. The Court gives two reasons for this: First, "[a] different rule for each First Amendment claim would . . . add to the complexity and expense of compliance with the Constitution" and "would provide a ready means for public employees to circumvent the test's protections," and second, "[p]etitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole." *Ante*, at 393, 395.

Neither reason is persuasive. As to the former: The complexity of treating the Petition Clause and Speech Clause separately is attributable to the inconsiderate disregard for judicial convenience displayed by those who ratified a First Amendment that included *both* provisions as *separate* constitutional rights. A plaintiff does not engage in pernicious "circumvention" of our Speech Clause precedents when he brings a claim premised on a separate enumerated right to which those precedents are inapplicable.

As to the latter: Perhaps petitions on matters of public concern do in some sense involve an "added dimension," but that "added dimension" does not obliterate what has traditionally been the principal dimension of the Petition Clause. The public-concern limitation makes sense in the context of the Speech Clause, because it is speech on matters of public concern that lies "within the core of First Amendment protection." *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 600 (2008). The Speech Clause "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 339 (2010) (internal quotation marks omitted). The unique protection granted to political speech is grounded in the history of the Speech Clause, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the

people." *Connick*, *supra*, at 145 (internal quotation marks omitted).

But the mere fact that we have a longstanding tradition of granting heightened protection to *speech* of public concern does not suggest that a "public concern" requirement should be written into other constitutional provisions. We would not say that religious proselytizing is entitled to more protection under the Free Exercise Clause than private religious worship because public proclamations are "core free exercise activity." Nor would we say that the due process right to a neutral adjudicator is heightened in the context of litigation of national importance because such litigation is somehow at the "core of the due process guarantee." Likewise, given that petitions to redress *private* grievances were such a high proportion of petitions at the founding—a proportion that is infinitely higher if lawsuits are considered to be petitions—it is ahistorical to say that petitions on matters of public concern constitute "core petitioning activity." In the Court's view, if Guarnieri had submitted a letter to one of the borough of Duryea's council members protesting a tax assessment that he claimed was mistaken; and if the borough had fired him in retaliation for that petition; Guarnieri would have no claim for a Petition Clause violation. That has to be wrong. It takes no account of, and thus frustrates, the principal purpose of the Petition Clause.

The Court responds that "[t]he proper scope and application of the Petition Clause . . . cannot be determined merely by tallying up petitions to the colonial legislatures," *ante*, at 394, but that misses the point. The text of the Petition Clause does not distinguish petitions of public concern from petitions of private concern. Accordingly, there should be no doctrinal distinction between them unless the history or tradition of the Petition Clause justifies it. The mere fact that the Court can enumerate several historical petitions of public importance, *ante*, at 395–397, does not establish such a tradition, given that petitions for redress of private griev-

ances vastly outnumbered them. Indeed, the Court's holding is contrary to this Court's historical treatment of the Petition Clause, assuming (as the Court believes) that the Clause embraces litigation: We have decided innumerable cases establishing constitutional rights with respect to litigation, and until today not a one of them has so much as hinted that litigation of public concern enjoys more of those rights than litigation of private concern. The Court's belief in the social importance of public petitions, and its reminiscences of some of the public-petition greats of yesteryear, *ibid.*, do not justify the proclamation of special constitutional rights for public petitions. It is the Constitution that establishes constitutional rights, not the Justices' notions of what is important, or the top numbers on their Petition Hit Parade. And there is no basis for believing that the Petition Clause gives special protection to public petitions.

Rather than shoehorning the "public concern" doctrine into a Clause where it does not fit, we should hold that the Petition Clause protects public employees against retaliation for filing petitions unless those petitions are addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign. As the Court states, we have long held that "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Ante*, at 392 (quoting *Engquist*, *supra*, at 599; internal quotation marks omitted). To apply to the Petition Clause context what we have said regarding the Speech Clause: When an employee files a petition with the government in its capacity as his employer, he is not acting "as [a] citize[n] for First Amendment purposes," because "there is no relevant analogue to [petitions] by citizens who are not government employees." *Garcetti* v. *Ceballos*, 547 U. S. 410, 421, 423–424 (2006). To be sure, the line between a petition addressed to government as the petitioner's employer and one addressed to it as sovereign is not always clear, but it is

no more fuzzy than the line between matters of private and matters of public concern.[2] The criterion I suggest would largely resolve the legitimate practical concerns identified by the Court, *ante*, at 390–393, while recognizing and giving effect to the difference between the Speech and Petition Clauses.

Under what I think to be the proper test, the Third Circuit judgment before us here should be reversed in part and affirmed in part. The portion of it upholding Guarnieri's claim of retaliation for having filed his union grievance must be reversed. A union grievance is the epitome of a petition addressed to the government in its capacity as the petitioner's employer. No analogous petitions to the government could have been filed by private citizens, who are not even permitted to avail themselves of Guarnieri's union grievance procedure. Contrariwise, the portion of the judgment upholding Guarnieri's claim of retaliation for having filed his § 1983 claim must be affirmed. Given that Guarnieri was not an employee of the Federal Government, it is impossible to say that the § 1983 claim was addressed to government in its capacity as his employer. I think it clear that retaliating against a state employee for writing a letter to his Congress-

[2] Compare, *e. g.*, *Alpha Energy Savers, Inc.* v. *Hansen*, 381 F. 3d 917, 927 (CA9 2004) (testimony concerning claim of employment discrimination by government contractor constituted matter of public concern because "[l]itigation seeking to expose . . . wrongful governmental activity is, by its very nature, a matter of public concern"), with *Padilla* v. *South Harrison R–II School Dist.*, 181 F. 3d 992, 997 (CA8 1999) (teacher's testimony approving sexual relationship between teacher and minor was matter of private concern because it "does not relate to the teacher's legitimate disagreement with a school board's policies"). And compare, *e. g.*, *Voigt* v. *Savell*, 70 F. 3d 1552, 1560 (CA9 1995) (speech regarding how judge handled two internal personnel matters was matter of public concern because "[t]he public has an interest in knowing whether the court treats its job applicants fairly"), with *Maggio* v. *Sipple*, 211 F. 3d 1346, 1353 (CA11 2000) (testimony at hearing concerning employee grievance was matter of private concern because it did "not allege . . . fraud or corruption in [defendant's] implementation of its personnel policies and appeal procedures").

man about his state job would run afoul of the Petition Clause. Assuming that the § 1983 lawsuit should be treated like a letter to a Congressman for Petition Clause purposes—a proposition which, I again emphasize, is doubtful, but which the parties do not dispute in this case—retaliation for having filed his lawsuit also violates the Clause.

Syllabus

AMERICAN ELECTRIC POWER CO., INC., ET AL. *v.* CONNECTICUT ET AL.

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

No. 10–174. Argued April 19, 2011—Decided June 20, 2011

In *Massachusetts* v. *EPA*, 549 U. S. 497, this Court held that the Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases, and that the Environmental Protection Agency (EPA) had misread that Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. In response, EPA commenced a rulemaking under § 111 of the Act, 42 U. S. C. § 7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired powerplants. Pursuant to a settlement finalized in March 2011, EPA has committed to issuing a final rule by May 2012.

The lawsuits considered here began well before EPA initiated efforts to regulate greenhouse gases. Two groups of plaintiffs, respondents here, filed separate complaints in a Federal District Court against the same five major electric power companies, petitioners here. One group of plaintiffs included eight States and New York City; the second joined three nonprofit land trusts. According to the complaint, the defendants are the largest emitters of carbon dioxide in the Nation. By contributing to global warming, the plaintiffs asserted, the defendants' emissions substantially and unreasonably interfered with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. All plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually.

The District Court dismissed both suits as presenting nonjusticiable political questions, but the Second Circuit reversed. On the threshold questions, the Circuit held that the suits were not barred by the political question doctrine and that the plaintiffs had adequately alleged Article III standing. On the merits, the court held that the plaintiffs had stated a claim under the "federal common law of nuisance," relying on this Court's decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry, see, *e. g.*, *Illinois* v. *Milwaukee*, 406 U. S. 91, 93 *(Milwaukee I)*. The court further determined that the Clean Air Act did not "displace" federal common law.

Syllabus

Held:

1. The Second Circuit's exercise of jurisdiction is affirmed by an equally divided Court. P. 420.

2. The Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants. Pp. 420–429.

(a) Since *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78, recognized that there "is no federal general common law," a new federal common law has emerged for subjects of national concern. When dealing "with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I*, 406 U. S., at 103. Decisions of this Court predating *Erie*, but compatible with the emerging distinction between general common law and the new federal common law, have approved federal common-law suits brought by one State to abate pollution emanating from another State. See, *e. g.*, *Missouri* v. *Illinois*, 180 U. S. 208, 241–243. The plaintiffs contend that their right to maintain this suit follows from such cases. But recognition that a subject is meet for federal law governance does not necessarily mean that federal courts should create the controlling law. The Court need not address the question whether, absent the Clean Air Act and the EPA actions it authorizes, the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions. Pp. 420–423.

(b) "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee* v. *Illinois*, 451 U. S. 304, 314 *(Milwaukee II)*. Legislative displacement of federal common law does not require the "same sort of evidence of a clear and manifest [congressional] purpose" demanded for preemption of state law. *Id.*, at 317. Rather, the test is simply whether the statute "speak[s] directly to [the] question" at issue. *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625. Here, *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Clean Air Act. 549 U. S., at 528–529. And it is equally plain that the Act "speak[s] directly" to emissions of carbon dioxide from the defendants' plants. The Act directs EPA to establish emissions standards for categories of stationary sources that, "in [the Administrator's] judgment," "caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). Once EPA lists a category, it must establish performance standards for emission of pollutants from new or modified sources

within that category, § 7411(b)(1)(B), and, most relevant here, must regulate existing sources within the same category, § 7411(d). The Act also provides multiple avenues for enforcement. If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. See § 7607(b)(1). The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic powerplants—the same relief the plaintiffs seek by invoking federal common law. There is no room for a parallel track. Pp. 423–425.

(c) The Court rejects the plaintiffs' argument, and the Second Circuit's holding, that federal common law is not displaced until EPA actually exercises its regulatory authority by setting emissions standards for the defendants' plants. The relevant question for displacement purposes is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U. S., at 324. The Clean Air Act is no less an exercise of the Legislature's "considered judgment" concerning air pollution regulation because it permits emissions until EPA acts. The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; the delegation displaces federal common law. If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse is to seek Court of Appeals review, and, ultimately, to petition for certiorari.

The Act's prescribed order of decisionmaking—first by the expert agency, and then by federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in a particular greenhouse gas-producing sector requires informed assessment of competing interests. The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators. The expert agency is surely better equipped to do the job than federal judges, who lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. The plaintiffs' proposal to have federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable" and what level of reduction is necessary cannot be reconciled with Congress' scheme. Pp. 425–429.

(d) The plaintiffs also sought relief under state nuisance law. The Second Circuit did not reach those claims because it held that federal common law governed. In light of the holding here that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.

Syllabus

Because none of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law, the matter is left for consideration on remand. P. 429.

582 F. 3d 309, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, BREYER, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 430. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Peter D. Keisler argued the cause for petitioners. With him on the briefs were *Carter G. Phillips*, *Quin M. Sorenson*, *F. William Brownell*, *Norman W. Fichthorn*, *Allison D. Wood*, *Shawn Patrick Regan*, *Martin H. Redish*, *Donald B. Ayer*, *Kevin P. Holewinski*, *Thomas E. Fennell*, and *Michael L. Rice*.

Acting Solicitor General Katyal argued the cause for respondent Tennessee Valley Authority in support of petitioners under this Court's Rule 12.6. With him on the briefs were *Assistant Attorney General Moreno*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Shenkman*, *Curtis E. Gannon*, *Douglas N. Letter*, *Lisa E. Jones*, *H. Thomas Byron*, *Justin R. Pidot*, *Ralph E. Rodgers*, *Harriet A. Cooper*, and *Maria V. Gillen*.

Barbara D. Underwood, Solicitor General of New York, argued the cause for respondents. With her on the brief for respondents State of Connecticut et al. were *Eric T. Schneiderman*, Attorney General of New York, *Benjamin N. Gutman*, Deputy Solicitor General, *Monica Wagner*, Assistant Solicitor General, and *Michael J. Myers*, *Morgan A. Costello*, and *Robert Rosenthal*, Assistant Attorneys General, as well as Attorneys General *George Jepsen* of Connecticut, *Kamala D. Harris* of California, *Thomas J. Miller* of Iowa, *Peter F. Kilmartin* of Rhode Island, *William H. Sorrell* of Vermont, and *Michael A. Cardozo*. *Matthew F. Pawa*, *David D. Doni-*

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ger, *Gerald Goldman*, *Michael K. Kellogg*, and *Gregory G. Rapawy* filed a brief for respondents Open Space Institute, Inc., et al.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Heather Hagan McVeigh* and *Ashley Tatman Harwel*, Deputy Attorneys General, by *William H. Ryan, Jr.*, Acting Attorney General of Pennsylvania, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *John J. Burns* of Alaska, *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Chris Koster* of Missouri, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty Jackley* of South Dakota, *Mark L. Shurtleff* of Utah, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; for the American Chemistry Council et al. by *Richard O. Faulk* and *John S. Gray;* for the Association of Global Automakers et al. by *Raymond B. Ludwiszewski;* for the Business Roundtable by *Robert P. Charrow*, *Laura Metcoff Klaus*, and *David G. Mandelbaum;* for the Cato Institute by *Megan L. Brown* and *Ilya Shapiro;* for the Chamber of Commerce of the United States of America by *Gregory G. Garre*, *Richard P. Bress*, *Gabriel K. Bell*, and *Robin S. Conrad;* for Chevron U. S. A., Inc., et al. by *Paul D. Clement*, *Ashley C. Parrish*, *Daniel P. Collins*, *Raymond Michael Ripple*, *Donna L. Goodman*, *Russell C. Swartz*, *Tracie J. Renfroe*, *Andrew B. Clubok*, and *Susan E. Engel;* for the Consumer Energy Alliance et al. by *Tristan L. Duncan* and *Jonathan S. Massey;* for DRI—The Voice of the Defense Bar by *R. Matthew Cairns*, *John Parker Sweeney*, *T. Sky Woodward*, *Michael T. Nilan*, *Peter Gray*, *Cynthia P. Arends*, and *Benjamin J. Rolf;* for the Edison Electric Institute et al. by *Christopher T. Handman*, *Dominic F. Perella*, *Edward H. Comer*, *William L. Fang*, *Susan N. Kelly*, and *Rae E. Cronmiller;* for Law Professors by *David B. Rivkin, Jr.*, and *Lee A. Casey;* for the Mountain States Legal Foundation by *Steven J. Lechner;* for the National Black Chamber of Commerce et al. by *Peter S. Glaser*, *Mark E. Nagle*, and *Douglas A. Henderson;* for the National Federation of Independent Business Small Business Legal Center et al. by *Victor E. Schwartz*, *Philip S. Goldberg*, *Christopher E. Appel*, *Karen R. Harned*, *Elizabeth Milito*, and *Douglas T. Nelson;* for the Pacific Legal Foundation by *R. S. Radford* and *Damien M. Schiff;* for

JUSTICE GINSBURG delivered the opinion of the Court.

We address in this opinion the question whether the plaintiffs (several States, the city of New York, and three private land trusts) can maintain federal common-law public nuisance claims against carbon-dioxide emitters (four private power companies and the federal Tennessee Valley Authority). As relief, the plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually. The Clean Air Act and the Environmental Protection Agency action the Act authorizes, we hold, displace the claims the plaintiffs seek to pursue.

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the Southeastern Legal Foundation, Inc., et al. by *Shannon Lee Goessling*, *Harry W. MacDougald*, and *Edward A. Kazmarek;* for the Washington Legal Foundation by *Daniel J. Popeo* and *Cory L. Andrews;* for Nicholas Johnson by *John P. Krill, Jr.*, and *Christopher D. Kratovil;* and for Representative Fred Upton et al. by *Mary B. Neumayr*.

Briefs of *amici curiae* urging affirmance were filed for the State of North Carolina et al. by *Roy Cooper*, Attorney General of North Carolina, *Christopher G. Browning, Jr.*, Solicitor General, *James C. Gulick*, Senior Deputy Attorney General, and *Marc D. Bernstein*, Special Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Lisa Madigan* of Illinois, *Douglas F. Gansler* of Maryland, and *Martha Coakley* of Massachusetts; for AllEarth Renewables, Inc., et al. by *Lori Potter;* for Law Professors by *James R. May* and *Stuart Banner;* for the North Coast Rivers Alliance et al. by *Stephan C. Volker;* for Tort Law Scholars by *Douglas A. Kysar, pro se;* and for the Unitarian Universalist Ministry for Earth et al. by *Ned Miltenberg*.

Briefs of *amici curiae* were filed for the American Farm Bureau Federation et al. by *Peter S. Glaser*, *Mark E. Nagle*, *Douglas A. Henderson*, and *Ellen Steen;* for the American Petroleum Institute et al. by *Charles Fried* and *Jeffrey Bates;* for the Center for Constitutional Jurisprudence by *John Eastman*, *Anthony T. Caso*, and *Edwin Meese III;* for Defenders of Wildlife et al. by *Eric R. Glitzenstein*, *William S. Eubanks II*, *Jason C. Rylander*, and *Sean H. Donahue;* for Environmental Law Professors by *Amanda C. Leiter, pro se;* for the National Association of Home Builders by *Amy C. Chai* and *Thomas J. Ward;* and for James G. Anderson, Ph. D., et al. by *Richard Webster*, *James M. Hecker*, *Matthew W. H. Wessler*, and *Arthur H. Bryant*.

I

In *Massachusetts* v. *EPA*, 549 U. S. 497 (2007), this Court held that the Clean Air Act, 69 Stat. 322, as amended, 42 U. S. C. § 7401 *et seq.*, authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. "[N]aturally present in the atmosphere and . . . also emitted by human activities," greenhouse gases are so named because they "trap . . . heat that would otherwise escape from the [Earth's] atmosphere, and thus form the greenhouse effect that helps keep the Earth warm enough for life." 74 Fed. Reg. 66499 (2009).[1] *Massachusetts* held that the Environmental Protection Agency (EPA or Agency) had misread the Clean Air Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. 549 U. S., at 510–511. Greenhouse gases, we determined, qualify as "air pollutant[s]" within the meaning of the governing Clean Air Act provision, *id.*, at 528–529 (quoting § 7602(g)); they are therefore within EPA's regulatory ken. Because EPA had authority to set greenhouse gas emission standards and had offered no "reasoned explanation" for failing to do so, we concluded that the Agency had not acted "in accordance with law" when it denied the requested rulemaking. *Id.*, at 534–535 (quoting § 7607(d)(9)(A)).

Responding to our decision in *Massachusetts*, EPA undertook greenhouse gas regulation. In December 2009, the Agency concluded that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," the Act's regulatory trigger. § 7521(a)(1); 74 Fed. Reg. 66496. The Agency observed that "atmospheric greenhouse gas concentrations are now at elevated and essentially unprecedented levels," almost entirely "due to anthropogenic

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[1] In addition to carbon dioxide, the primary greenhouse gases emitted by human activities include methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. 74 Fed. Reg. 66499.

emissions," *id.*, at 66517; mean global temperatures, the Agency continued, demonstrate an "unambiguous warming trend over the last 100 years," and particularly "over the past 30 years," *ibid.* Acknowledging that not all scientists agreed on the causes and consequences of the rise in global temperatures, *id.*, at 66506, 66518, 66523–66524, EPA concluded that "compelling" evidence supported the "attribution of observed climate change to anthropogenic" emissions of greenhouse gases, *id.*, at 66518. Consequent dangers of greenhouse gas emissions, EPA determined, included increases in heat-related deaths; coastal inundation and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods, and other "extreme weather events" that cause death and destroy infrastructure; drought due to reductions in mountain snowpack and shifting precipitation patterns; destruction of ecosystems supporting animals and plants; and potentially "significant disruptions" of food production. *Id.*, at 66524–66535.[2]

EPA and the Department of Transportation subsequently issued a joint final rule regulating emissions from light-duty vehicles, see 75 Fed. Reg. 25324 (2010), and initiated a joint rulemaking covering medium- and heavy-duty vehicles, see *id.*, at 74152. EPA also began phasing in requirements that new or modified "[m]ajor [greenhouse gas] emitting facilities" use the "best available control technology." § 7475(a)(4); 75 Fed. Reg. 31520–31521. Finally, EPA commenced a rulemaking under § 111 of the Act, 42 U. S. C. § 7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired powerplants. Pursuant to a settlement finalized in March 2011, EPA has committed to issuing a proposed rule by July 2011, and a final rule by May 2012. See

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[2] For views opposing EPA's, see, *e. g.*, Dawidoff, The Civil Heretic, N. Y. Times Magazine, Mar. 29, 2009, p. 32. The Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change.

75 Fed. Reg. 82392; Reply Brief for Tennessee Valley Authority 18.

II

The lawsuits we consider here began well before EPA initiated the efforts to regulate greenhouse gases just described. In July 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York against the same five major electric power companies. The first group of plaintiffs included eight States [3] and New York City, the second joined three nonprofit land trusts; [4] both groups are respondents here. The defendants, now petitioners, are four private companies [5] and the Tennessee Valley Authority, a federally owned corporation that operates fossil-fuel fired powerplants in several States. According to the complaints, the defendants "are the five largest emitters of carbon dioxide in the United States." App. 57, 118. Their collective annual emissions of 650 million tons constitute 25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, *ibid.*, and 2.5 percent of all anthropogenic emissions worldwide, App. to Pet. for Cert. 72a.

By contributing to global warming, the plaintiffs asserted, the defendants' carbon-dioxide emissions created a "substantial and unreasonable interference with public rights," in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. App. 103–105, 145–147. The States and New York City alleged that public lands, infrastructure, and health were at risk from climate change. *Id.*, at 88–93. The trusts urged that climate change would

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[3] California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, although New Jersey and Wisconsin are no longer participating. Brief for Respondent Connecticut et al. 3, n. 1.

[4] Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire.

[5] American Electric Power Company, Inc. (and a wholly owned subsidiary), Southern Company, Xcel Energy Inc., and Cinergy Corporation.

destroy habitats for animals and rare species of trees and plants on land the trusts owned and conserved. *Id.*, at 139–145. All plaintiffs sought injunctive relief requiring each defendant "to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." *Id.*, at 110, 153.

The District Court dismissed both suits as presenting nonjusticiable political questions, citing *Baker* v. *Carr*, 369 U. S. 186 (1962), but the Second Circuit reversed, 582 F. 3d 309 (2009). On the threshold questions, the Court of Appeals held that the suits were not barred by the political question doctrine, *id.*, at 332, and that the plaintiffs had adequately alleged Article III standing, *id.*, at 349.

Turning to the merits, the Second Circuit held that all plaintiffs had stated a claim under the "federal common law of nuisance." *Id.*, at 358, 371. For this determination, the court relied dominantly on a series of this Court's decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry. *Id.*, at 350–351; see, *e. g.*, *Illinois* v. *Milwaukee*, 406 U. S. 91, 93, (1972) *(Milwaukee I)* (recognizing right of Illinois to sue in federal district court to abate discharge of sewage into Lake Michigan).

The Court of Appeals further determined that the Clean Air Act did not "displace" federal common law. In *Milwaukee* v. *Illinois*, 451 U. S. 304, 316–319 (1981) *(Milwaukee II)*, this Court held that Congress had displaced the federal common-law right of action recognized in *Milwaukee I* by adopting amendments to the Clean Water Act, 33 U. S. C. § 1251 *et seq.* That legislation installed an all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively with interstate water pollution. The legislation itself prohibited the discharge of pollutants into the waters of the United States without a permit from a proper permitting authority. *Milwaukee II*, 451 U. S., at 310–311 (citing § 1311). At the time of the Second

Circuit's decision, by contrast, EPA had not yet promulgated any rule regulating greenhouse gases, a fact the court thought dispositive. 582 F. 3d, at 379–381. "Until EPA completes the rulemaking process," the court reasoned, "we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'spea[k] directly' to the 'particular issue' raised here by Plaintiffs." *Id.*, at 380.

We granted certiorari. 562 U. S. 1091 (2010).

III

The petitioners contend that the federal courts lack authority to adjudicate this case. Four Members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions, 549 U. S., at 520–526; and, further, that no other threshold obstacle bars review.[6] Four Members of the Court, adhering to a dissenting opinion in *Massachusetts*, *id.*, at 535 (opinion of ROBERTS, C. J.), or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits. See *Nye* v. *United States*, 313 U. S. 33, 44 (1941).

IV

A

"There is no federal general common law," *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938), famously recognized. In the wake of *Erie,* however, a keener understanding devel-

[6] In addition to renewing the political question argument made below, the petitioners now assert an additional threshold obstacle: They seek dismissal because of a "prudential" bar to the adjudication of generalized grievances, purportedly distinct from Article III's bar. See Brief for Tennessee Valley Authority 14–24; Brief for Petitioners 30–31.

oped. See generally Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N. Y. U. L. Rev. 383 (1964). *Erie* "le[ft] to the states what ought be left to them," 39 N. Y. U. L. Rev., at 405, and thus required "federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states," *id.*, at 422. *Erie* also sparked "the emergence of a federal decisional law in areas of national concern." 39 N. Y. U. L. Rev., at 405. The "new" federal common law addresses "subjects within national legislative power where Congress has so directed" or where the basic scheme of the Constitution so demands. *Id.*, at 408, n. 119, 421–422. Environmental protection is undoubtedly an area "within national legislative power," one in which federal courts may fill in "statutory interstices," and, if necessary, even "fashion federal law." *Id.*, at 421–422. As the Court stated in *Milwaukee I*: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." 406 U. S., at 103.

Decisions of this Court predating *Erie*, but compatible with the distinction emerging from that decision between "general common law" and "specialized federal common law," Friendly, *supra*, at 405, have approved federal common-law suits brought by one State to abate pollution emanating from another State. See, *e. g.*, *Missouri* v. *Illinois*, 180 U. S. 208, 241–243 (1901) (permitting suit by Missouri to enjoin Chicago from discharging untreated sewage into interstate waters); *New Jersey* v. *City of New York*, 283 U. S. 473, 477, 481–483 (1931) (ordering New York City to stop dumping garbage off New Jersey coast); *Georgia* v. *Tennessee Copper Co.*, 240 U. S. 650 (1916) (ordering private copper companies to curtail sulfur-dioxide discharges in Tennessee that caused harm in Georgia). See also *Milwaukee I*, 406 U. S., at 107 (post-*Erie* decision upholding suit by Illinois to abate sewage discharges into Lake Michigan). The plaintiffs contend that their right to maintain this suit follows inexorably from that line of decisions.

Recognition that a subject is meet for federal law governance, however, does not necessarily mean that federal courts should create the controlling law. Absent a demonstrated need for a federal rule of decision, the Court has taken "the prudent course" of "adopt[ing] the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 740 (1979); see *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell*, 352 U. S. 29, 32–34 (1956). And where, as here, borrowing the law of a particular State would be inappropriate, the Court remains mindful that it does not have creative power akin to that vested in Congress. See *Missouri* v. *Illinois*, 200 U. S. 496, 519 (1906) ("fact that this court must decide does not mean, of course, that it takes the place of a legislature"); cf. *United States* v. *Standard Oil Co. of Cal.*, 332 U. S. 301, 308, 314 (1947) (holding that federal law determines whether Government could secure indemnity from a company whose truck injured a United States soldier, but declining to impose such an indemnity absent action by Congress, "the primary and most often the exclusive arbiter of federal fiscal affairs").

In the cases on which the plaintiffs heavily rely, States were permitted to sue to challenge activity harmful to their citizens' health and welfare. We have not yet decided whether private citizens (here, the land trusts) or political subdivisions (New York City) of a State may invoke the federal common law of nuisance to abate out-of-state pollution. Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders.

The defendants argue that considerations of scale and complexity distinguish global warming from the more bounded pollution giving rise to past federal nuisance suits. Greenhouse gases once emitted "become well mixed in the atmosphere," 74 Fed. Reg. 66514; emissions in New Jersey may contribute no more to flooding in New York than emissions in China. Cf. Brief for Petitioners 18–19. The plaintiffs, on

the other hand, contend that an equitable remedy against the largest emitters of carbon dioxide in the United States is in order and not beyond judicial competence. See Brief for Respondent Open Space Institute et al. 32–35. And we have recognized that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances. *Missouri*, 200 U. S., at 522 (adjudicating claim though it did not concern "nuisance of the simple kind that was known to the older common law"); see also *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 472 (1942) (Jackson, J., concurring) ("federal courts are free to apply the traditional common-law technique of decision" when fashioning federal common law).

We need not address the parties' dispute in this regard. For it is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.

B

"[W]hen Congress addresses a question previously governed by a decision rested on federal common law," the Court has explained, "the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee II*, 451 U. S., at 314 (holding that amendments to the Clean Water Act displaced the nuisance claim recognized in *Milwaukee I*). Legislative displacement of federal common law does not require the "same sort of evidence of a clear and manifest [congressional] purpose" demanded for preemption of state law. 451 U. S., at 317. "'[D]ue regard for the presuppositions of our embracing federal system . . . as a promoter of democracy,'" *id.*, at 316 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959)), does not enter the calculus, for it is primarily the office of

Congress, not the federal courts, to prescribe national policy in areas of special federal interest, *TVA* v. *Hill*, 437 U. S. 153, 194 (1978). The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute "speak[s] directly to [the] question" at issue. *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625 (1978); see *Milwaukee II*, 451 U. S., at 315; *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 236–237 (1985).

We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. 549 U. S., at 528–529. And we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants.

Section 111 of the Act directs the EPA Administrator to list "categories of stationary sources" that "in [her] judgment . . . caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). Once EPA lists a category, the Agency must establish standards of performance for emission of pollutants from new or modified sources within that category. § 7411(b)(1)(B); see also § 7411(a)(2). And, most relevant here, § 7411(d) then requires regulation of existing sources within the same category.[7] For existing sources, EPA issues emissions guidelines, see 40 CFR §§ 60.22, 60.23 (2009); in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, § 7411(d)(1).

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[7] There is an exception: EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the "hazardous air pollutants" program, § 7412. See § 7411(d)(1).

The Act provides multiple avenues for enforcement. See *County of Oneida*, 470 U. S., at 237–239 (reach of remedial provisions is important to determination whether statute displaces federal common law). EPA may delegate implementation and enforcement authority to the States, §§ 7411(c)(1), (d)(1), but the Agency retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court. §§ 7411(c)(2), (d)(2), 7413, 7414. In specified circumstances, the Act imposes criminal penalties on any person who knowingly violates emissions standards issued under § 7411. See § 7413(c). And the Act provides for private enforcement. If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits "any person" to bring a civil enforcement action in federal court. § 7604(a).

If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. See § 7607(b)(1); *Massachusetts*, 549 U. S., at 516–517, 529. As earlier noted, see *supra*, at 417–418, EPA is currently engaged in a § 7411 rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired powerplants. To settle litigation brought under § 7607(b) by a group that included the majority of the plaintiffs in this very case, the Agency agreed to complete that rulemaking by May 2012. 75 Fed. Reg. 82392. The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic powerplants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.

C

The plaintiffs argue, as the Second Circuit held, that federal common law is not displaced until EPA actually exercises its regulatory authority, *i. e.*, until it sets standards

governing emissions from the defendants' plants. We disagree.

The sewage discharges at issue in *Milwaukee II*, we do not overlook, were subject to effluent limits set by EPA; under the displacing statute, "[e]very point source discharge" of water pollution was "prohibited unless covered by a permit." 451 U. S., at 318–320 (emphasis deleted). As *Milwaukee II* made clear, however, the relevant question for purposes of displacement is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.*, at 324. Of necessity, Congress selects different regulatory regimes to address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing.

The Clean Air Act is no less an exercise of the Legislature's "considered judgment" concerning the regulation of air pollution because it permits emissions *until* EPA acts. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 22, n. 32 (1981) (finding displacement although Congress "allowed some continued dumping of sludge" prior to a certain date). The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the Agency's expert determination.

EPA's judgment, we hasten to add, would not escape judicial review. Federal courts, we earlier observed, see *supra*, at 425, can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted. As we have noted, see *supra*, at 424, the Clean Air Act directs EPA to establish emissions standards for categories of stationary sources that, "in [the Administrator's] judg-

ment," "caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). "[T]he use of the word 'judgment,'" we explained in *Massachusetts*, "is not a roving license to ignore the statutory text." 549 U. S., at 533. "It is but a direction to exercise discretion within defined statutory limits." *Ibid.* EPA may not decline to regulate carbon-dioxide emissions from powerplants if refusal to act would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 7607(d)(9)(A). If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in this Court.

Indeed, this prescribed order of decisionmaking—the first decider under the Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: As with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.

The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators. Each "standard of performance" EPA sets must "tak[e] into account the cost of achieving [emissions] reduction and any nonair quality health and environmental impact and energy requirements." §§ 7411(a)(1), (b)(1)(B), (d)(1); see also 40 CFR § 60.24(f) (EPA may permit state plans to deviate from generally applicable emissions standards upon demonstration that costs are "[u]nreasonable"). EPA may "distinguish among classes, types, and sizes" of stationary sources in apportioning responsibility for emissions reduc-

tions. §§ 7411(b)(2), (d); see also 40 CFR § 60.22(b)(5). And the Agency may waive compliance with emission limits to permit a facility to test drive an "innovative technological system" that has "not [yet] been adequately demonstrated." § 7411(j)(1)(A). The Act envisions extensive cooperation between federal and state authorities, see §§ 7401(a), (b), generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain, see §§ 7411(c)(1), (d)(1)–(2).

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. See generally *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865–866 (1984). Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.

Notwithstanding these disabilities, the plaintiffs propose that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable," App. 103, 145, and then decide what level of reduction is "practical, feasible and economically viable," *id.*, at 58, 119. These determinations would be made for the defendants named in the two lawsuits launched by the plaintiffs. Similar suits could be mounted, counsel for the States and New York City estimated, against "thousands or hundreds or tens" of other defendants fitting the description

"large contributors" to carbon-dioxide emissions. Tr. of Oral Arg. 57.

The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action "arbitrary, capricious, . . . or otherwise not in accordance with law." § 7607(d)(9).

V

The plaintiffs also sought relief under state law, in particular, the law of each State where the defendants operate powerplants. See App. 105, 147. The Second Circuit did not reach the state-law claims because it held that federal common law governed. 582 F. 3d, at 392; see *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 488 (1987) (if a case "should be resolved by reference to federal common law[,] . . . state common law [is] pre-empted"). In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act. *Id.*, at 489, 491, 497 (holding that the Clean Water Act does not preclude aggrieved individuals from bringing a "nuisance claim pursuant to the law of the *source* State"). None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.

* * *

For the reasons stated, we reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I concur in the judgment, and I agree with the Court's displacement analysis on the assumption (which I make for the sake of argument because no party contends otherwise) that the interpretation of the Clean Air Act, 42 U. S. C. § 7401 *et seq.*, adopted by the majority in *Massachusetts* v. *EPA*, 549 U. S. 497 (2007), is correct.

Syllabus

TURNER *v.* ROGERS ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 10–10. Argued March 23, 2011—Decided June 20, 2011

After a South Carolina family court ordered petitioner Turner to pay $51.73 per week to respondent Rogers to help support their child, Turner repeatedly failed to pay the amount due and was held in contempt five times. For the first four, he was sentenced to 90 days' imprisonment, but he ultimately paid what he owed (twice without being jailed, twice after spending a few days in custody). The fifth time he did not pay but completed a 6-month sentence. After his release, the family court clerk issued a new "show cause" order against Turner because he was $5,728.76 in arrears. Both he and Rogers were unrepresented by counsel at his brief civil contempt hearing. The judge found Turner in willful contempt and sentenced him to 12 months in prison without making any finding as to his ability to pay or indicating on the contempt order form whether he was able to make support payments. After Turner completed his sentence, the South Carolina Supreme Court rejected his claim that the Federal Constitution entitled him to counsel at his contempt hearing, declaring that civil contempt does not require all the constitutional safeguards applicable in criminal contempt proceedings.

Held:

1. Even though Turner has completed his 12-month sentence, and there are not alleged to be collateral consequences of the contempt determination that might keep the dispute alive, this case is not moot, because it is "capable of repetition" while "evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515. A case remains live if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149. Here, the "challenged action," Turner's imprisonment for up to 12 months, is "in its duration too short to be fully litigated" through the state courts (and arrive here) prior to its "expiration." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 774. And there is a more than "reasonable" likelihood that Turner will again be "subjected to the same action" because he has frequently failed to make his support payments, has been the subject of several civil contempt proceedings, has been imprisoned several times, and is, once again, the subject of civil contempt proceed-

ings for failure to pay. *DeFunis* v. *Odegaard*, 416 U. S. 312, and *St. Pierre* v. *United States*, 319 U. S. 41, distinguished. Pp. 439–441.

2. The Fourteenth Amendment's Due Process Clause does not *automatically* require the State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. In particular, that Clause does not require that counsel be provided where the opposing parent or other custodian is not represented by counsel and the State provides alternative procedural safeguards equivalent to adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court findings as to the supporting parent's ability to comply with the support order. Pp. 441–449.

(a) This Court's precedents provide no definitive answer to the question whether counsel must be provided. The Sixth Amendment grants an indigent criminal defendant the right to counsel, see, *e. g.*, *United States* v. *Dixon*, 509 U. S. 688, 696, but does not govern civil cases. Civil and criminal contempt differ. A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks* v. *Feiock*, 485 U. S. 624, 638, n. 9. And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Id.*, at 633. The Due Process Clause allows a State to provide fewer procedural protections in civil contempt proceedings than in a criminal case. *Id.*, at 637–641. Cases directly concerning a right to counsel in civil cases have found a presumption of such a right "*only*" in cases involving incarceration, but have not held that a right to counsel exists in *all* such cases. See *In re Gault*, 387 U. S. 1; *Vitek* v. *Jones*, 445 U. S. 480; and *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18. Pp. 441–443.

(b) Because a contempt proceeding to compel support payments is civil, the question whether the "specific dictates of due process" require appointed counsel is determined by examining the "distinct factors" this Court has used to decide what specific safeguards are needed to make a civil proceeding fundamentally fair. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. As relevant here those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." *Ibid.*

The "private interest that will be affected" argues strongly for the right to counsel here. That interest consists of an indigent defendant's

loss of personal liberty through imprisonment. Freedom "from bodily restraint" lies "at the core of the liberty protected by the Due Process Clause." *Foucha* v. *Louisiana*, 504 U. S. 71, 80. Thus, accurate decisionmaking as to the "ability to pay"—which marks a dividing line between civil and criminal contempt, *Hicks*, *supra*, at 635, n. 7—must be assured because an incorrect decision can result in a wrongful incarceration. And because ability to comply divides civil and criminal contempt proceedings, an erroneous determination would also deprive a defendant of the procedural protections a criminal proceeding would demand. Questions about ability to pay are likely to arise frequently in child custody cases. On the other hand, due process does not always require the provision of counsel in civil proceedings where incarceration is threatened. See *Gagnon* v. *Scarpelli*, 411 U. S. 778. To determine whether a right to counsel is required here, opposing interests and the probable value of "additional or substitute procedural safeguards" must be taken into account. *Mathews*, *supra*, at 335.

Doing so reveals three related considerations that, taken together, argue strongly against requiring counsel in every proceeding of the present kind. First, the likely critical question in these cases is the defendant's ability to pay, which is often closely related to his indigence and relatively straightforward. Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel. A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would "alter significantly the nature of the proceeding," *Gagnon*, *supra*, at 787, creating a degree of formality or delay that would unduly slow payment to those immediately in need and make the proceedings *less* fair overall. Third, as the Federal Government points out, an available set of "substitute procedural safeguards," *Mathews*, *supra*, at 335, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. These include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.

This decision does not address civil contempt proceedings where the underlying support payment is owed to the State, *e. g.*, for reimbursement of welfare funds paid to the custodial parent, or the question what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate," *Gagnon*, *supra*, at 788. Pp. 443–449.

Syllabus

3. Under the circumstances, Turner's incarceration violated due process because he received neither counsel nor the benefit of alternative procedures like those the Court describes. He did not have clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. And the trial court did not find that he was able to pay his arrearage, but nonetheless found him in civil contempt and ordered him incarcerated. P. 449.

387 S. C. 142, 691 S. E. 2d 470, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ROBERTS, C. J., and ALITO, J., joined as to Parts I–B and II, *post*, p. 450.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Paul R. Q. Wolfson*, *Catherine M. A. Carroll*, *Derek J. Enderlin*, and *Kathrine Haggard Hudgins.*

Acting Principal Deputy Solicitor General Kruger argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, *Joseph R. Palmore*, *Leonard Schaitman*, *Edward Himmelfarb*, and *Robert E. Keith.*

Stephanos Bibas argued the cause for respondents. With him on the brief were *James A. Feldman*, *Amy Wax*, *Stephen B. Kinnaird*, and *Panteha Abdollahi.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Stephen N. Zack* and *Nicholas P. Gellert;* for the Center for Family Policy and Practice by *Michael D. Leffel;* for the Constitution Project by *David M. Raim*, *Kate McSweeny*, and *Virginia E. Sloan;* for the Legal Aid Society of the District of Columbia et al. by *Peter D. Keisler*, *Edward R. McNicholas*, *Rebecca K. Troth*, and *David A. Reiser;* and for Elizabeth G. Patterson et al. by *Lisa S. Blatt*, *Anthony J. Franze*, and *Sheila B. Scheuerman.*

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Jonathan F. Mitchell*, Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Bill Cobb*, Deputy Attorney General, and *David C. Mattax*, and

JUSTICE BREYER delivered the opinion of the Court.

South Carolina's Family Court enforces its child support orders by threatening with incarceration for civil contempt those who are (1) subject to a child support order, (2) able to comply with that order, but (3) fail to do so. We must decide whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an *indigent* person potentially faced with such incarceration. We conclude that where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that ensure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.

I

A

South Carolina family courts enforce their child support orders in part through civil contempt proceedings. Each month the family court clerk reviews outstanding child support orders, identifies those in which the supporting parent has fallen more than five days behind, and sends that parent

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by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Thomas C. Horne* of Arizona, *John W. Suthers* of Colorado, *Pamela Jo Bondi* of Florida, *David M. Louie* of Hawaii, *William J. Schneider* of Maine, *Jim Hood* of Mississippi, *Michael A. Delaney* of New Hampshire, *Alan Wilson* of South Carolina, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, and *Bruce A. Salzburg* of Wyoming; for Benjamin Barton et al. by *Adam K. Mortara* and *Mr. Barton*, *pro se;* and for Senator Jim DeMint et al. by *Noel J. Francisco.*

Stephen J. McConnell, *Malia N. Brink*, *Jeffrey T. Green*, *Edwin A. Burnette*, *Sarah Geraghty,* and *Steven R. Shapiro* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae.*

an order to "show cause" why he should not be held in contempt. S. C. Rule Family Ct. 24 (2011). The "show cause" order and attached affidavit refer to the relevant child support order, identify the amount of the arrearage, and set a date for a court hearing. At the hearing that parent may demonstrate that he is not in contempt, say, by showing that he is not able to make the required payments. See *Moseley* v. *Mosier*, 279 S. C. 348, 351, 306 S. E. 2d 624, 626 (1983) ("When the parent is *unable* to make the required payments, he is not in contempt"). If he fails to make the required showing, the court may hold him in civil contempt. And it may require that he be imprisoned unless and until he purges himself of contempt by making the required child support payments (but not for more than one year regardless). See S. C. Code Ann. §63–3–620 (Supp. 2010) (imprisonment for up to one year of "adult who wilfully violates" a court order); *Price* v. *Turner*, 387 S. C. 142, 145, 691 S. E. 2d 470, 472 (2010) (civil contempt order must permit purging of contempt through compliance).

B

In June 2003 a South Carolina family court entered an order, which (as amended) required petitioner, Michael Turner, to pay $51.73 per week to respondent, Rebecca Rogers, to help support their child. (Rogers' father, Larry Price, currently has custody of the child and is also a respondent before this Court.) Over the next three years, Turner repeatedly failed to pay the amount due and was held in contempt on five occasions. The first four times he was sentenced to 90 days' imprisonment, but he ultimately paid the amount due (twice without being jailed, twice after spending two or three days in custody). The fifth time he did not pay but completed a 6-month sentence.

After his release in 2006 Turner remained in arrears. On March 27, 2006, the clerk issued a new "show cause" order. And after an initial postponement due to Turner's failure to appear, Turner's civil contempt hearing took place on Janu-

ary 3, 2008. Turner and Rogers were present, each without representation by counsel.

The hearing was brief. The court clerk said that Turner was $5,728.76 behind in his payments. The judge asked Turner if there was "anything you want to say." Turner replied:

> "Well, when I first got out, I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me." App. to Pet. for Cert. 17a.

The judge then said, "[o]kay," and asked Rogers if she had anything to say. *Ibid.* After a brief discussion of federal benefits, the judge stated:

> "If there's nothing else, this will be the Order of the Court. I find the Defendant in willful contempt. I'm [going to] sentence him to twelve months in the Oconee County Detention Center. He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release. I've also placed a lien on any SSI or other benefits." *Id.*, at 18a.

The judge added that Turner would not receive good-time or work credits, but "[i]f you've got a job, I'll make you eligible for work release." *Ibid.* When Turner asked why he could not receive good-time or work credits, the judge said, "[b]ecause that's my ruling." *Ibid.*

The court made no express finding concerning Turner's ability to pay his arrearage (though Turner's wife had volun-

tarily submitted a copy of Turner's application for disability benefits, cf. *post*, at 455, n. 3 (THOMAS, J., dissenting); App. 135a–136a). Nor did the judge ask any followup questions or otherwise address the ability-to-pay issue. After the hearing, the judge filled out a prewritten form titled "Order for Contempt of Court," which included the statement:

> "Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due." *Id.*, at 60a, 61a.

But the judge left this statement as is without indicating whether Turner was able to make support payments.

C

While serving his 12-month sentence, Turner, with the help of *pro bono* counsel, appealed. He claimed that the Federal Constitution entitled him to counsel at his contempt hearing. The South Carolina Supreme Court decided Turner's appeal after he had completed his sentence. And it rejected his "right to counsel" claim. The court pointed out that civil contempt differs significantly from criminal contempt. The former does not require all the "constitutional safeguards" applicable in criminal proceedings. 387 S. C., at 145, 691 S. E. 2d, at 472. And the right to government-paid counsel, the Supreme Court held, was one of the "safeguards" not required. *Ibid.*

Turner sought certiorari. In light of differences among state courts (and some federal courts) on the applicability of a "right to counsel" in civil contempt proceedings enforcing child support orders, we granted the writ. Compare, *e. g.*, *Pasqua* v. *Council*, 186 N. J. 127, 141–146, 892 A. 2d 663, 671–674 (2006); *Black* v. *Division of Child Support Enforcement*, 686 A. 2d 164, 167–168 (Del. 1996); *Mead* v. *Batchlor*, 435 Mich. 480, 488–505, 460 N. W. 2d 493, 496–504 (1990); *Ridgway* v. *Baker*, 720 F. 2d 1409, 1413–1415 (CA5 1983) (all finding a federal constitutional right to counsel for indigents

facing imprisonment in a child support civil contempt proceeding), with *Rodriguez* v. *Eighth Judicial Dist. Ct., County of Clark*, 120 Nev. 798, 808–813, 102 P. 3d 41, 48–51 (2004) (no right to counsel in civil contempt hearing for nonsupport, except in "rarest of cases"); *Andrews* v. *Walton*, 428 So. 2d 663, 666 (Fla. 1983) *(per curiam)* ("no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support"). Compare also *In re Grand Jury Proceedings*, 468 F. 2d 1368, 1369 (CA9 1972) *(per curiam)* (general right to counsel in civil contempt proceedings), with *Duval* v. *Duval*, 114 N. H. 422, 425–427, 322 A. 2d 1, 3–4 (1974) (no general right, but counsel may be required on case-by-case basis).

II

Respondents argue that this case is moot. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 480 (1923) (Article III judicial power extends only to actual "cases" and "controversies"); *Alvarez* v. *Smith*, 558 U. S. 87, 92 (2009) ("An actual controversy must be extant at all stages of review" (internal quotation marks omitted)). They point out that Turner completed his 12-month prison sentence in 2009. And they add that there are no "collateral consequences" of that particular contempt determination that might keep the dispute alive. Compare *Sibron* v. *New York*, 392 U. S. 40, 55–56 (1968) (release from prison does not moot a *criminal* case because "collateral consequences" are presumed to continue), with *Spencer* v. *Kemna*, 523 U. S. 1, 14 (1998) (declining to extend the presumption to parole revocation).

The short, conclusive answer to respondents' mootness claim, however, is that this case is not moot because it falls within a special category of disputes that are "capable of repetition" while "evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). A dispute falls into that category, and a case based on that dispute remains live, if "(1) the challenged action [is] in its duration too short

to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975) *(per curiam)*.

Our precedent makes clear that the "challenged action," Turner's imprisonment for up to 12 months, is "in its duration too short to be fully litigated" through the state courts (and arrive here) prior to its "expiration." See, *e. g.*, *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 774 (1978) (internal quotation marks omitted) (18-month period too short); *Southern Pacific Terminal Co.*, *supra*, at 514–516 (2-year period too short). At the same time, there is a more than "reasonable" likelihood that Turner will again be "subjected to the same action." As we have pointed out, *supra*, at 436, Turner has frequently failed to make his child support payments. He has been the subject of several civil contempt proceedings. He has been imprisoned on several of those occasions. Within months of his release from the imprisonment here at issue he was again the subject of civil contempt proceedings. And he was again imprisoned, this time for six months. As of December 9, 2010, Turner was $13,814.72 in arrears, and another contempt hearing was scheduled for May 4, 2011. App. 104a; Reply Brief for Petitioner 3, n. 1. These facts bring this case squarely within the special category of cases that are not moot because the underlying dispute is "capable of repetition, yet evading review." See, *e. g.*, *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546–547 (1976) (internal quotation marks omitted).

Moreover, the underlying facts make this case unlike *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974) *(per curiam)*, and *St. Pierre* v. *United States*, 319 U. S. 41 (1943) *(per curiam)*, two cases that respondents believe require us to find this case moot regardless. *DeFunis* was moot, but that is because the plaintiff himself was unlikely to again suffer the conduct of which he complained (and others likely to suffer

from that conduct could bring their own lawsuits). Here petitioner himself *is* likely to suffer future imprisonment.

St. Pierre was moot because the petitioner (a witness held in contempt and sentenced to five months' imprisonment) had failed to "apply to this Court for a stay" of the federal-court order imposing imprisonment. 319 U. S., at 42–43. And, like the witness in *St. Pierre*, Turner did not seek a stay of the contempt order requiring his imprisonment. But this case, unlike *St. Pierre*, arises out of a state-court proceeding. And respondents give us no reason to believe that we would have (or that we could have) granted a timely request for a stay had one been made. Cf. 28 U. S. C. § 1257 (granting this Court jurisdiction to review *final* state-court judgments). In *Sibron*, we rejected a similar "mootness" argument for just that reason. 392 U. S., at 53, n. 13. And we find this case similar in this respect to *Sibron*, not to *St. Pierre*.

III

A

We must decide whether the Due Process Clause grants an indigent defendant, such as Turner, a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration. This Court's precedents provide no definitive answer to that question. This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a *criminal* case. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). And we have held that this same rule applies to *criminal contempt* proceedings (other than summary proceedings). *United States* v. *Dixon*, 509 U. S. 688, 696 (1993); *Cooke* v. *United States*, 267 U. S. 517, 537 (1925).

But the Sixth Amendment does not govern civil cases. Civil contempt differs from criminal contempt in that it seeks only to "coerc[e] the defendant to do" what a court had previously ordered him to do. *Gompers* v. *Bucks Stove &*

Range Co., 221 U. S. 418, 442 (1911). A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks* v. *Feiock*, 485 U. S. 624, 638, n. 9 (1988). And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Id.*, at 633 (he "carr[ies] the keys of [his] prison in [his] own pockets" (internal quotation marks omitted)).

Consequently, the Court has made clear (in a case not involving the right to counsel) that, where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case. *Id.*, at 637–641 (State may place the burden of proving inability to pay on the defendant).

This Court has decided only a handful of cases that more directly concern a right to counsel in civil matters. And the application of those decisions to the present case is not clear. On the one hand, the Court has held that the Fourteenth Amendment requires the State to pay for representation by counsel in a *civil* "juvenile delinquency" proceeding (which could lead to incarceration). *In re Gault*, 387 U. S. 1, 35–42 (1967). Moreover, in *Vitek* v. *Jones*, 445 U. S. 480, 496–497 (1980), a plurality of four Members of this Court would have held that the Fourteenth Amendment requires representation by counsel in a proceeding to transfer a prison inmate to a state hospital for the mentally ill. Further, in *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18 (1981), a case that focused upon civil proceedings leading to loss of parental rights, the Court wrote that the

> "pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.*, at 25.

And the Court then drew from these precedents "the presumption that an indigent litigant has a right to appointed

counsel only when, if he loses, he may be deprived of his physical liberty." *Id.*, at 26–27.

On the other hand, the Court has held that a criminal offender facing revocation of probation and imprisonment does *not* ordinarily have a right to counsel at a probation revocation hearing. *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); see also *Middendorf* v. *Henry*, 425 U. S. 25 (1976) (no due process right to counsel in summary court-martial proceedings). And, at the same time, *Gault*, *Vitek*, and *Lassiter* are readily distinguishable. The civil juvenile delinquency proceeding at issue in *Gault* was "little different" from, and "comparable in seriousness" to, a criminal prosecution. 387 U. S., at 28, 36. In *Vitek*, the controlling opinion found *no* right to counsel. 445 U. S., at 499–500 (Powell, J., concurring in part) (assistance of mental health professionals sufficient). And the Court's statements in *Lassiter* constitute part of its rationale for *denying* a right to counsel in that case. We believe those statements are best read as pointing out that the Court previously had found a right to counsel "*only*" in cases involving incarceration, not that a right to counsel exists in *all* such cases (a position that would have been difficult to reconcile with *Gagnon*).

B

Civil contempt proceedings in child support cases constitute one part of a highly complex system designed to assure a noncustodial parent's regular payment of funds typically necessary for the support of his children. Often the family receives welfare support from a state-administered federal program, and the State then seeks reimbursement from the noncustodial parent. See 42 U. S. C. §§ 608(a)(3) (2006 ed., Supp. III), 656(a)(1) (2006 ed.); S. C. Code Ann. §§ 43–5–65(a)(1), (2) (2010 Cum. Supp.). Other times the custodial parent (often the mother, but sometimes the father, a grandparent, or another person with custody) does not receive government benefits and is entitled to receive the support payments herself.

The Federal Government has created an elaborate procedural mechanism designed to help both the government and custodial parents to secure the payments to which they are entitled. See generally *Blessing* v. *Freestone*, 520 U. S. 329, 333 (1997) (describing the "interlocking set of cooperative federal-state welfare programs" as they relate to child support enforcement); 45 CFR pt. 303 (2010) (prescribing standards for state child support agencies). These systems often rely upon wage withholding, expedited procedures for modifying and enforcing child support orders, and automated data processing. 42 U. S. C. §§ 666(a), (b), 654(24). But sometimes States will use contempt orders to ensure that the custodial parent receives support payments or the government receives reimbursement. Although some experts have criticized this last-mentioned procedure, and the Federal Government believes that "the routine use of contempt for nonpayment of child support is likely to be an ineffective strategy," the Government also tells us that "coercive enforcement remedies, such as contempt, have a role to play." Brief for United States as *Amicus Curiae* 21–22, and n. 8 (citing Dept. of Health and Human Services, National Child Support Enforcement, Strategic Plan: FY 2005–2009, pp. 2, 10). South Carolina, which relies heavily on contempt proceedings, agrees that they are an important tool.

We here consider an indigent's right to paid counsel at such a contempt proceeding. It is a civil proceeding. And we consequently determine the "specific dictates of due process" by examining the "distinct factors" that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute pro-

cedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." *Ibid.* See also *Lassiter*, 452 U. S., at 27–31 (applying the *Mathews* framework).

The "private interest that will be affected" argues strongly for the right to counsel that Turner advocates. That interest consists of an indigent defendant's loss of personal liberty through imprisonment. The interest in securing that freedom, the freedom "from bodily restraint," lies "at the core of the liberty protected by the Due Process Clause." *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992). And we have made clear that its threatened loss through legal proceedings demands "due process protection." *Addington* v. *Texas*, 441 U. S. 418, 425 (1979).

Given the importance of the interest at stake, it is obviously important to ensure accurate decisionmaking in respect to the key "ability to pay" question. Moreover, the fact that ability to comply marks a dividing line between civil and criminal contempt, *Hicks*, 485 U. S., at 635, n. 7, reinforces the need for accuracy. That is because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding. See, *e. g.*, *Dixon*, 509 U. S., at 696 (proof beyond a reasonable doubt, protection from double jeopardy); *Codispoti* v. *Pennsylvania*, 418 U. S. 506, 512–513, 517 (1974) (jury trial where the result is more than six months' imprisonment). And since 70% of child support arrears nationwide are owed by parents with either no reported income or income of $10,000 per year or less, the issue of ability to pay may arise fairly often. See E. Sorensen, L. Sousa, & S. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 22 (2007) (prepared by The Urban Institute), online at http://aspe.hhs.gov/hsp/07/assessing-CS-debt/report.pdf (as visited June 16, 2011, and available in

Clerk of Court's case file); *id.*, at 23 ("[R]esearch suggests that many obligors who do not have reported quarterly wages have relatively limited resources"); Patterson, Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison, 18 Cornell J. L. & Pub. Pol'y 95, 117 (2008). See also, *e. g.*, *McBride* v. *McBride*, 334 N. C. 124, 131, n. 4, 431 S. E. 2d 14, 19, n. 4 (1993) (surveying North Carolina contempt orders and finding that the "failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent").

On the other hand, the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened. See *Gagnon*, 411 U. S. 778. And in determining whether the Clause requires a right to counsel here, we must take account of opposing interests, as well as consider the probable value of "additional or substitute procedural safeguards." *Mathews*, *supra*, at 335.

Doing so, we find three related considerations that, when taken together, argue strongly against the Due Process Clause requiring the State to provide indigents with counsel in every proceeding of the kind before us.

First, the critical question likely at issue in these cases concerns, as we have said, the defendant's ability to pay. That question is often closely related to the question of the defendant's indigence. But when the right procedures are in place, indigence can be a question that in many—but not all—cases is sufficiently straightforward to warrant determination *prior* to providing a defendant with counsel, even in a criminal case. Federal law, for example, requires a criminal defendant to provide information showing that he is indigent, and therefore entitled to state-funded counsel, *before* he can receive that assistance. See 18 U. S. C. § 3006A(b).

Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel.

See Dept. of Health and Human Services, Office of Child Support Enforcement, Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State 5, 6 (2004) (51% of nationwide arrears, and 58% in South Carolina, are not owed to the government). The custodial parent, perhaps a woman with custody of one or more children, may be relatively poor, unemployed, and unable to afford counsel. Yet she may have encouraged the court to enforce its order through contempt. Cf. Tr. Contempt Proceedings (Sept. 14, 2005), App. 44a–45a (Rogers asks court, in light of pattern of nonpayment, to confine Turner). She may be able to provide the court with significant information. Cf. *id.*, at 41a–43a (Rogers describes where Turner lived and worked). And the proceeding is ultimately for her benefit.

A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would "alter significantly the nature of the proceeding." *Gagnon*, *supra*, at 787. Doing so could mean a degree of formality or delay that would unduly slow payment to those immediately in need. And, perhaps more important for present purposes, doing so could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis. Cf. *post*, at 458–459 (opinion of THOMAS, J.).

Third, as the Solicitor General points out, there is available a set of "substitute procedural safeguards," *Mathews*, 424 U. S., at 335, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for

the defendant to respond to statements and questions about his financial status (*e. g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. See Tr. of Oral Arg. 26–27; Brief for United States as *Amicus Curiae* 23–25. In presenting these alternatives, the Government draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders. See *supra*, at 444. It does not claim that they are the only possible alternatives, and this Court's cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient. Cf. *Vitek*, 445 U. S., at 499–500 (Powell, J., concurring in part) (provision of mental health professional). But the Government does claim that these alternatives can ensure the "fundamental fairness" of the proceeding even where the State does not pay for counsel for an indigent defendant.

While recognizing the strength of Turner's arguments, we ultimately believe that the three considerations we have just discussed must carry the day. In our view, a categorical right to counsel in proceedings of the kind before us would carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned. We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).

We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. See *supra*, at 443. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938) ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel*" (emphasis added)). And this kind of proceeding is not before us. Neither do we address what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate." *Gagnon*, 411 U. S., at 788; see also Reply Brief for Petitioner 18–20 (not claiming that Turner's case is especially complex).

IV

The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant "finding" section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances Turner's incarceration violated the Due Process Clause.

We vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom THE CHIEF JUSTICE and JUSTICE ALITO join as to Parts I–B and II, dissenting.

The Due Process Clause of the Fourteenth Amendment does not provide a right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings. Therefore, I would affirm. Although the Court agrees that appointed counsel was not required in this case, it nevertheless vacates the judgment of the South Carolina Supreme Court on a different ground, which the parties have never raised. Solely at the invitation of the United States as *amicus curiae*, the majority decides that Turner's contempt proceeding violated due process because it did not include "alternative procedural safeguards." *Ante*, at 448. Consistent with this Court's longstanding practice, I would not reach that question.[1]

I

The only question raised in this case is whether the Due Process Clause of the Fourteenth Amendment creates a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. It does not.

A

Under an original understanding of the Constitution, there is no basis for concluding that the guarantee of due process secures a right to appointed counsel in civil contempt proceedings. It certainly does not do so to the extent that the Due Process Clause requires "'that our Government must proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions.'" *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 589 (2004) (THOMAS, J., dissenting) (quoting *In re Winship*, 397 U. S. 358, 382 (1970)

[1] I agree with the Court that this case is not moot because the challenged action is likely to recur yet is so brief that it otherwise evades our review. *Ante*, at 439–441.

(Black, J., dissenting)). No one contends that South Carolina law entitles Turner to appointed counsel. Nor does any federal statute or constitutional provision so provide. Although the Sixth Amendment secures a right to "the Assistance of Counsel," it does not apply here because civil contempt proceedings are not "criminal prosecutions." U. S. Const., Amdt. 6; see *ante*, at 441–442. Moreover, as originally understood, the Sixth Amendment guaranteed only the "right to employ counsel, or to use volunteered services of counsel"; it did not require the court to appoint counsel in any circumstance. *Padilla* v. *Kentucky*, 559 U. S. 356, 389 (2010) (SCALIA, J., dissenting); see also *United States* v. *Van Duzee*, 140 U. S. 169, 173 (1891); W. Beaney, The Right to Counsel in American Courts 21–22, 28–29 (1955); F. Heller, The Sixth Amendment to the Constitution of the United States 110 (1951).

Appointed counsel is also not required in civil contempt proceedings under a somewhat broader reading of the Due Process Clause, which takes it to approve "'[a] process of law, which is not otherwise forbidden, . . . [that] can show the sanction of settled usage.'" *Weiss* v. *United States*, 510 U. S. 163, 197 (1994) (SCALIA, J., concurring in part and concurring in judgment) (quoting *Hurtado* v. *California*, 110 U. S. 516, 528 (1884)). Despite a long history of courts exercising contempt authority, Turner has not identified any evidence that courts appointed counsel in those proceedings. See *Mine Workers* v. *Bagwell*, 512 U. S. 821, 831 (1994) (describing courts' traditional assumption of "inherent contempt authority"); see also 4 W. Blackstone, Commentaries on the Laws of England 280–285 (1769) (describing the "summary proceedings" used to adjudicate contempt). Indeed, Turner concedes that contempt proceedings without appointed counsel have the blessing of history. See Tr. of Oral Arg. 15–16 (admitting that there is no historical support for Turner's rule); see also Brief for Respondents 47–48.

B

Even under the Court's modern interpretation of the Constitution, the Due Process Clause does not provide a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. Such a reading would render the Sixth Amendment right to counsel—as it is currently understood—superfluous. Moreover, it appears that even cases applying the Court's modern interpretation of due process have not understood it to categorically require appointed counsel in circumstances outside those otherwise covered by the Sixth Amendment.

1

Under the Court's current jurisprudence, the Sixth Amendment entitles indigent defendants to appointed counsel in felony cases and other criminal cases resulting in a sentence of imprisonment. See *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963); *Argersinger* v. *Hamlin*, 407 U. S. 25, 37 (1972); *Scott* v. *Illinois*, 440 U. S. 367, 373–374 (1979); *Alabama* v. *Shelton*, 535 U. S. 654, 662 (2002). Turner concedes that, even under these cases, the Sixth Amendment does not entitle him to appointed counsel. See Reply Brief for Petitioner 12 (acknowledging that "civil contempt is not a 'criminal prosecution' within the meaning of the Sixth Amendment"). He argues instead that "the right to the assistance of counsel for persons facing incarceration arises not only from the Sixth Amendment, but also from the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment." Brief for Petitioner 28. In his view, this Court has relied on due process to "rejec[t] formalistic distinctions between criminal and civil proceedings, instead concluding that incarceration or other confinement triggers the right to counsel." *Id.*, at 33.

But if the Due Process Clause created a right to appointed counsel in all proceedings with the potential for detention, then the Sixth Amendment right to appointed counsel would

be unnecessary. Under Turner's theory, every instance in which the Sixth Amendment guarantees a right to appointed counsel is covered also by the Due Process Clause. The Sixth Amendment, however, is the only constitutional provision that even mentions the assistance of counsel; the Due Process Clause says nothing about counsel. Ordinarily, we do not read a general provision to render a specific one superfluous. Cf. *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general"). The fact that one constitutional provision expressly provides a right to appointed counsel in specific circumstances indicates that the Constitution does not also *sub silentio* provide that right far more broadly in another, more general, provision. Cf. *Albright* v. *Oliver*, 510 U. S. 266, 273 (1994) (plurality opinion) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" (some internal quotation marks omitted)); *id.*, at 281 (KENNEDY, J., concurring in judgment) ("I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process"); *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702, 721 (2010) (opinion of SCALIA, J.) (applying *Albright* to the Takings Clause).

2

Moreover, contrary to Turner's assertions, the holdings in this Court's due process decisions regarding the right to counsel are actually quite narrow. The Court has never found in the Due Process Clause a categorical right to appointed counsel outside of criminal prosecutions or proceedings "functionally akin to a criminal trial." *Gagnon* v.

Scarpelli, 411 U. S. 778, 789, n. 12 (1973) (discussing *In re Gault*, 387 U. S. 1 (1967)). This is consistent with the conclusion that the Due Process Clause does not expand the right to counsel beyond the boundaries set by the Sixth Amendment.

After countless factors weighed, mores evaluated, and practices surveyed, the Court has not determined that due process principles of fundamental fairness categorically require counsel in any context outside criminal proceedings. See, *e. g.*, *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18, 31–32 (1981); *Wolff* v. *McDonnell*, 418 U. S. 539, 569–570 (1974); see also *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 307–308, 320–326 (1985); *Goss* v. *Lopez*, 419 U. S. 565, 583 (1975). Even when the defendant's liberty is at stake, the Court has not concluded that fundamental fairness requires that counsel always be appointed if the proceeding is not criminal.[2] See, *e. g.*, *Scarpelli*, *supra*, at 790 (probation revocation); *Middendorf* v. *Henry*, 425 U. S. 25, 48 (1976) (summary court-martial); *Parham* v. *J. R.*, 442 U. S. 584, 599–600, 606–607, 610, n. 18 (1979) (commitment of minor to mental hospital); *Vitek* v. *Jones*, 445 U. S. 480, 497–500 (1980) (Powell, J., controlling opinion concurring in part) (transfer of prisoner to mental hospital). Indeed, the only circumstance in which the Court has found that due process categorically requires appointed counsel is juvenile delinquency proceedings, which the Court has described as "functionally akin to a criminal trial." *Scarpelli*, *supra*, at 789, n. 12 (discussing *In re Gault*, *supra*); see *ante*, at 443.

Despite language in its opinions that suggests it could find otherwise, the Court's consistent judgment has been that

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[2] "Criminal contempt is a crime in the ordinary sense"; therefore, criminal contemners are entitled to "the protections that the Constitution requires of such criminal proceedings," including the right to counsel. *Mine Workers* v. *Bagwell*, 512 U. S. 821, 826 (1994) (citing *Cooke* v. *United States*, 267 U. S. 517, 537 (1925); internal quotation marks omitted).

fundamental fairness does not categorically require appointed counsel in any context outside of criminal proceedings. The majority is correct, therefore, that the Court's precedent does not require appointed counsel in the absence of a deprivation of liberty. *Ibid.* But a more complete description of this Court's cases is that even when liberty is at stake, the Court has required appointed counsel in a category of cases only where it would have found the Sixth Amendment required it—in criminal prosecutions.

II

The majority agrees that the Constitution does not entitle Turner to appointed counsel. But at the invitation of the Federal Government as *amicus curiae*, the majority holds that his contempt hearing violated the Due Process Clause for an entirely different reason, which the parties have never raised: The family court's procedures "were inadequate to ensure an accurate determination of [Turner's] present ability to pay." Brief for United States as *Amicus Curiae* 19 (capitalization and boldface type deleted); see *ante*, at 447–449. I would not reach this issue.

There are good reasons not to consider new issues raised for the first and only time in an *amicus* brief. As here, the new issue may be outside the question presented.[3] See Pet. for Cert. i ("Whether . . . an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration"); see also *ante*, at 438 (identifying the conflict among lower courts as regarding

[3] Indeed, the new question is not one that would even merit certiorari. See this Court's Rule 10. Because the family court received a form detailing Turner's finances and the judge could not hold Turner in contempt without concluding that he could pay, the due process question that the majority answers reduces to a factbound assessment of the family court's performance. See *ante*, at 447–449; Reply Brief for Petitioner 14–15 ("[I]n advance of his hearing, Turner supplied to the family court just such a form").

"the right to counsel"). As here, the new issue may not have been addressed by, or even presented to, the state court. See 387 S. C. 142, 144, 691 S. E. 2d 470, 472 (2010) (describing the only question as whether "the Sixth and Fourteenth Amendments of the United States Constitution guarantee [Turner], as an indigent defendant in family court, the right to appointed counsel"). As here, the parties may not have preserved the issue, leaving the record undeveloped. See Tr. of Oral Arg. 49, 43 ("The record is insufficient" regarding alternative procedures because "[t]hey were raised for the very first time at the merits stage here; so, there's been no development"); Brief for Respondents 63. As here, the parties may not address the new issue in this Court, leaving its boundaries untested. See Brief for Petitioner 27, n. 15 (reiterating that "[t]he particular constitutional violation that Turner challenges in this case is the failure of the family court to *appoint* counsel"); Brief for Respondents 62 (declining to address the Government's argument because it is not "properly before this Court" (capitalization and boldface type deleted). Finally, as here, a party may even oppose the position taken by its allegedly supportive *amicus*. See Tr. of Oral Arg. 7–12, 14–15 (Turner's counsel rejecting the Government's argument that any procedures short of a categorical right to appointed counsel could satisfy due process); Reply Brief for Petitioner 14–15.

Accordingly, it is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an *amicus*. 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"); *Adarand Constructors, Inc.* v. *Mineta*, 534 U. S. 103, 110 (2001) *(per curiam)* ("[T]his is a court of final review and not first view" (internal quotation marks omitted)); *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981) (declining to consider an *amicus*' argument "since it was not raised by

either of the parties here or below" and was outside the grant of certiorari). This is doubly true when we review the decision of a state court and triply so when the new issue is a constitutional matter. See *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940) ("[I]t is only in exceptional cases, and then only in cases coming from the federal courts, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below"); *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969) ("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions").

The majority errs in moving beyond the question that was litigated below, decided by the state courts, petitioned to this Court, and argued by the parties here, to resolve a question raised exclusively in the Federal Government's *amicus* brief. In some cases, the Court properly affirms a lower court's judgment on an alternative ground or accepts the persuasive argument of an *amicus* on a question that the parties have raised. See, *e. g.*, *United States* v. *Tinklenberg*, 563 U. S. 647, 660 (2011). But it transforms a case entirely to vacate a state court's judgment based on an alternative constitutional ground advanced only by an *amicus* and outside the question on which the petitioner sought (and this Court granted) review.

It should come as no surprise that the majority confines its analysis of the Federal Government's new issue to acknowledging the Government's "considerable experience" in the field of child support enforcement and then adopting the Government's suggestions *in toto*. See *ante*, at 447–448. Perhaps if the issue had been preserved and briefed by the parties, the majority would have had alternative solutions or procedures to consider. See Tr. of Oral Arg. 43 ("[T]here's been no development. We don't know what other States are doing, the range of options out there"). The Federal Government's interest in States' child support enforcement

efforts may give the Government a valuable perspective,[4] but it does not overcome the strong reasons behind the Court's practice of not considering new issues, raised and addressed only by an *amicus*, for the first time in this Court.

III

For the reasons explained in the previous two sections, I would not engage in the majority's balancing analysis. But there is yet another reason not to undertake the *Mathews* v. *Eldridge* balancing test here. 424 U. S. 319 (1976). That test weighs an individual's interest against that of the Government. *Id.*, at 335 (identifying the opposing interest as "the Government's interest"); *Lassiter*, 452 U. S., at 27 (same). It does not account for the interests of the child and custodial parent, who is usually the child's mother. But their interests are the very reason for the child support obligation and the civil contempt proceedings that enforce it.

When fathers fail in their duty to pay child support, children suffer. See Cancian, Meyer, & Han, Child Support: Responsible Fatherhood and the Quid Pro Quo, 635 Annals Am. Acad. Pol. & Soc. Sci. 140, 153 (2011) (finding that child support plays an important role in reducing child poverty in single-parent homes); cf. Sorensen & Zibman, Getting To Know Poor Fathers Who Do Not Pay Child Support, 75 Soc. Serv. Rev. 420, 423 (2001) (finding that children whose fathers reside apart from them are 54 percent more likely to live in poverty than their fathers). Nonpayment or inadequate payment can press children and mothers into poverty. M. Garrison, The Goals and Limits of Child Support Policy, in Child Support: The Next Frontier 16 (J. Oldham & M. Melli eds. 2000); see also Dept. of Commerce, Census Bureau,

[4] See, *e. g.*, Deadbeat Parents Punishment Act of 1998, 112 Stat. 618; Child Support Recovery Act of 1992, 106 Stat. 3403; Child Support Enforcement Amendments of 1984, 98 Stat. 1305; Social Services Amendments of 1974, 88 Stat. 2337.

T. Grall, Custodial Mothers and Fathers and Their Child Support: 2007, pp. 4–5 (2009) (hereinafter Custodial Mothers and Fathers) (reporting that 27 percent of custodial mothers lived in poverty in 2007).

The interests of children and mothers who depend on child support are notoriously difficult to protect. See, *e. g.*, *Hicks* v. *Feiock*, 485 U. S. 624, 644 (1988) (O'Connor, J., dissenting) ("The failure of enforcement efforts in this area has become a national scandal" (internal quotation marks omitted)). Less than half of all custodial parents receive the full amount of child support ordered; 24 percent of those owed support receive nothing at all. Custodial Mothers and Fathers 7; see also Dept. of Health and Human Services, Office of Child Support Enforcement, FY 2008 Annual Report to Congress, App. III, Table 71 (showing national child support arrears of $105.5 billion in 2008). In South Carolina alone, more than 139,000 noncustodial parents defaulted on their child support obligations during 2008, and at year end parents owed $1.17 billion in total arrears. *Id.*, App. III, Tables 73 and 71.

That some fathers subject to a child support agreement report little or no income "does not mean they do not have the ability to pay any child support." Dept. of Health and Human Services, E. Sorensen, L. Sousa, & S. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 22 (2007) (prepared by The Urban Institute) (hereinafter Assessing Arrears). Rather, many "deadbeat dads"[5] "opt to work in the underground economy" to "shield their earnings from child support enforcement efforts." Mich. Sup. Ct., Task Force Report: The Underground Economy 10 (2010) (hereinafter Underground Economy). To avoid attempts to garnish their wages or otherwise enforce the support obligation, "deadbeats" quit their jobs, jump from job

[5] See Deadbeat Parents Punishment Act of 1998, 112 Stat. 618 (referring to parents who "willfully fai[l] to pay a support obligation" as "[d]eadbeat [p]arents").

to job, become self-employed, work under the table, or engage in illegal activity.[6] See Waller & Plotnick, Effective Child Support Policy for Low-Income Families: Evidence From Street Level Research, 20 J. Pol'y Analysis & Mgmt. 89, 104 (2001); Assessing Arrears 22–23.

Because of the difficulties in collecting payment through traditional enforcement mechanisms, many States also use civil contempt proceedings to coerce "deadbeats" into paying what they owe. The States that use civil contempt with the threat of detention find it a "highly effective" tool for collecting child support when nothing else works. Compendium of Responses Collected by the U. S. Dept. of Health and Human Services Office of Child Support Enforcement (Dec. 28, 2010), reprinted in App. to Brief for Sen. DeMint et al. as *Amici Curiae* 7a; see *id.*, at 3a, 9a. For example, Virginia, which uses civil contempt as "a last resort," reports that in 2010 "deadbeats" paid approximately $13 million "either before a court hearing to avoid a contempt finding or after a court hearing to purge the contempt finding." *Id.*, at 13a–14a. Other States confirm that the mere threat of imprisonment is often quite effective because most contemners "will pay . . . rather than go to jail." *Id.*, at 4a; see also Underground Economy C–2 ("Many judges . . . report that the prospect of [detention] often causes obligors to discover previously undisclosed resources that they can use to make child support payments").

This case illustrates the point. After the family court imposed Turner's weekly support obligation in June 2003, he made no payments until the court held him in contempt three months later, whereupon he paid over $1,000 to avoid confinement. App. 17a–18a, 131a. Three more times, Turner

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[6] In this case, Turner switched between eight different jobs in three years, which made wage withholding difficult. App. 12a, 18a, 24a, 47a, 53a, 136a–139a. Most recently, Turner sold drugs in 2009 and 2010 but paid not a penny in child support during those years. *Id.*, at 105a–111a; App. to Brief for Respondents 16a, 21a–24a, 29a–32a, 37a–54a.

refused to pay until the family court held him in contempt—then paid in short order. *Id.*, at 23a–25a, 31a–34a, 125a–126a, 129a–130a.

Although I think that the majority's analytical framework does not account for the interests that children and mothers have in effective and flexible methods to secure payment, I do not pass on the wisdom of the majority's preferred procedures. Nor do I address the wisdom of the State's decision to use certain methods of enforcement. Whether "deadbeat dads" should be threatened with incarceration is a policy judgment for state and federal lawmakers, as is the entire question of government involvement in the area of child support. See Elrod & Dale, Paradigm Shifts and Pendulum Swings in Child Custody, 42 Fam. L. Q. 381, 382 (2008) (observing the "federalization of many areas of family law" (internal quotation marks omitted)). This and other repercussions of the shift away from the nuclear family are ultimately the business of the policymaking branches. See, *e. g.*, D. Popenoe, Family in Decline in America, reprinted in War Over the Family 3, 4 (2005) (discussing "four major social trends" that emerged in the 1960's "to signal a widespread 'flight' " from the "nuclear family"); Krause, Child Support Reassessed, 24 Fam. L. Q. 1, 16 (1990) ("Easy-come, easy-go marriage and casual cohabitation and procreation are on a collision course with the economic and social needs of children"); M. Boumil & J. Friedman, Deadbeat Dads 23–24 (1996) ("Many [children of deadbeat dads] are born out of wedlock . . . . Others have lost a parent to divorce at such a young age that they have little conscious memory of it").

* * *

I would affirm the judgment of the South Carolina Supreme Court because the Due Process Clause does not provide a right to appointed counsel in civil contempt hearings that may lead to incarceration. As that is the only issue properly before the Court, I respectfully dissent.

Syllabus

STERN, EXECUTOR OF THE ESTATE OF MARSHALL *v.* MARSHALL, EXECUTRIX OF THE ESTATE OF MARSHALL

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

No. 10–179. Argued January 18, 2011—Decided June 23, 2011

Article III, § 1, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that the judges of those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services[ ] a Compensation[ ] [that] shall not be diminished" during their tenure. The questions presented in this case are whether a Bankruptcy Court Judge who did not enjoy such tenure and salary protections had the authority under 28 U. S. C. § 157 and Article III to enter final judgment on a counterclaim filed by Vickie Lynn Marshall (whose estate is the petitioner) against Pierce Marshall (whose estate is the respondent) in Vickie's bankruptcy proceedings.

Vickie married J. Howard Marshall II, Pierce's father, approximately a year before his death. Shortly before J. Howard died, Vickie filed a suit against Pierce in Texas state court, asserting that J. Howard meant to provide for Vickie through a trust, and Pierce tortiously interfered with that gift. After J. Howard died, Vickie filed for bankruptcy in federal court. Pierce filed a proof of claim in that proceeding, asserting that he should be able to recover damages from Vickie's bankruptcy estate because Vickie had defamed him by inducing her lawyers to tell the press that he had engaged in fraud in controlling his father's assets. Vickie responded by filing a counterclaim for tortious interference with the gift she expected from J. Howard.

The Bankruptcy Court granted Vickie summary judgment on the defamation claim and eventually awarded her hundreds of millions of dollars in damages on her counterclaim. Pierce objected that the Bankruptcy Court lacked jurisdiction to enter a final judgment on that counterclaim because it was not a "core proceeding" as defined by 28 U. S. C. § 157(b)(2)(C). As set forth in § 157(a), Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case under title 11." District courts may refer all such proceedings to the bankruptcy judges of their district, and bankruptcy

courts may enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." §§ 157(a), (b)(1). In non-core proceedings, by contrast, a bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court." § 157(c)(1). Section 157(b)(2) lists 16 categories of core proceedings, including "counterclaims by the estate against persons filing claims against the estate." § 157(b)(2)(C).

The Bankruptcy Court concluded that Vickie's counterclaim was a core proceeding. The District Court reversed, reading this Court's precedent in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, to "suggest[ ] that it would be unconstitutional to hold that any and all counterclaims are core." The court held that Vickie's counterclaim was not core because it was only somewhat related to Pierce's claim, and it accordingly treated the Bankruptcy Court's judgment as proposed, not final. Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court went on to decide the matter itself, in Vickie's favor. The Court of Appeals ultimately reversed. It held that the Bankruptcy Court lacked authority to enter final judgment on Vickie's counterclaim because the claim was not "so closely related to [Pierce's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." Because that holding made the Texas probate court's judgment the earliest final judgment on matters relevant to the case, the Court of Appeals held that the District Court should have given the state judgment preclusive effect.

Held: Although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so. Pp. 473–503.

1. Section 157(b) authorized the Bankruptcy Court to enter final judgment on Vickie's counterclaim. Pp. 475–482.

(a) The Bankruptcy Court had the statutory authority to enter final judgment on Vickie's counterclaim as a core proceeding under § 157(b)(2)(C). Pierce argues that § 157(b) authorizes bankruptcy courts to enter final judgments only in those proceedings that are both core and either arise in a Title 11 case or arise under Title 11 itself. But that reading necessarily assumes that there is a category of core proceedings that do not arise in a bankruptcy case or under bankruptcy law, and the structure of § 157 makes clear that no such category exists. Pp. 475–478.

(b) In the alternative, Pierce argues that the Bankruptcy Court lacked jurisdiction to resolve Vickie's counterclaim because his defama-

tion claim is a "personal injury tort" that the Bankruptcy Court lacked jurisdiction to hear under § 157(b)(5). The Court agrees with Vickie that § 157(b)(5) is not jurisdictional, and Pierce consented to the Bankruptcy Court's resolution of the defamation claim. The Court is not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such. See generally *Henderson* v. *Shinseki*, 562 U. S. 428; *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500. Section 157(b)(5) does not have the hallmarks of a jurisdictional decree, and the statutory context belies Pierce's claim that it is jurisdictional. Pierce consented to the Bankruptcy Court's resolution of the defamation claim by repeatedly advising that court that he was happy to litigate his claim there. Pp. 478–482.

2. Although § 157 allowed the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution did not. Pp. 482–503.

(a) Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline*, 458 U. S., at 58 (plurality opinion). Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges to protect the integrity of judicial decisionmaking.

This is not the first time the Court has faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline*, the Court considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—who also lacked the tenure and salary guarantees of Article III—could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. *Id.*, at 53, 87, n. 40 (plurality opinion). The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. A full majority of the Court, while not agreeing on the scope of that exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case, and rejected the debtor's argument that the Bankruptcy Court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals. *Id.*, at 69–72; see *id.*, at 90–91 (Rehnquist, J., concurring in judgment). After the decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. With respect to the "core" proceedings listed in § 157(b)(2), however, the bankruptcy courts under the Bankruptcy Amendments and Federal Judgeship Act of 1984 exercise the same pow-

ers they wielded under the 1978 Act. The authority exercised by the newly constituted courts over a counterclaim such as Vickie's exceeds the bounds of Article III. Pp. 482–488.

(b) Vickie's counterclaim does not fall within the public rights exception, however defined. The Court has long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284. The Court has also recognized that "[a]t the same time there are matters, involving public rights, . . . which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Ibid.* Several previous decisions have contrasted cases within the reach of the public rights exception—those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—and those that are instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S. 22, 50, 51.

Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular Federal Government action. See *United States* v. *Jicarilla Apache Nation*, *ante*, at 174; *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 584; *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 844, 856.

In *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, the most recent case considering the public rights exception, the Court rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the exception. Vickie's counterclaim is similar. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, *supra*, at 284; it does not flow from a federal statutory scheme, as in *Thomas*, *supra*, at 584–585; and it is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor*, *supra*, at 856. This case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common

law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers the Court has long recognized into mere wishful thinking. Pp. 488–495.

(c) The fact that Pierce filed a proof of claim in the bankruptcy proceedings did not give the Bankruptcy Court the authority to adjudicate Vickie's counterclaim. Initially, Pierce's defamation claim does not affect the nature of Vickie's tortious interference counterclaim as one at common law that simply attempts to augment the bankruptcy estate—the type of claim that, under *Northern Pipeline* and *Granfinanciera*, must be decided by an Article III court. The cases on which Vickie relies, *Katchen* v. *Landy*, 382 U. S. 323, and *Langenkamp* v. *Culp*, 498 U. S. 42 *(per curiam)*, are inapposite. *Katchen* permitted a bankruptcy referee to exercise jurisdiction over a trustee's voidable preference claim against a creditor only where there was no question that the referee was required to decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. The *Katchen* Court "intimate[d] no opinion concerning whether" the bankruptcy referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." 382 U. S., at 333, n. 9. The *per curiam* opinion in *Langenkamp* is to the same effect. In this case, by contrast, the Bankruptcy Court—in order to resolve Vickie's counterclaim—was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim. In both *Katchen* and *Langenkamp*, moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. Vickie's claim is instead a state tort action that exists without regard to any bankruptcy proceeding. Pp. 495–499.

(d) The bankruptcy courts under the 1984 Act are not "adjuncts" of the district courts. The new bankruptcy courts, like the courts considered in *Northern Pipeline*, do not "ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law" or engage in "statutorily channeled factfinding functions." 458 U. S., at 85 (plurality opinion). Whereas the adjunct agency in *Crowell* v. *Benson* "possessed only a limited power to issue compensation orders . . . [that] could be enforced only by order of the district court," 458 U. S.,

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at 85, a bankruptcy court resolving a counterclaim under § 157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§ 157(b)(1), 158(a)–(b). Such a court is an adjunct of no one. Pp. 500–501.

(e) Finally, Vickie and her *amici* predict that restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the bankruptcy process. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U. S. 919, 944. In addition, the Court is not convinced that the practical consequences of such limitations are as significant as Vickie suggests. The framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by state courts and district courts, see §§ 157(c), 1334(c), and the Court does not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the statute. Pp. 501–503.

600 F. 3d 1037, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 503. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 505.

Kent L. Richland argued the cause for petitioner. With him on the briefs were *Alan Diamond*, *Edward L. Xanders*, *Philip W. Boesch, Jr.*, and *Bruce S. Ross*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, *Eric J. Feigin*, and *Michael S. Raab*.

Roy T. Englert, Jr., argued the cause for respondent. With him on the brief were *G. Eric Brunstad, Jr.*, *Collin O'Connor Udell*, *Matthew J. Delude*, *Seth P. Waxman*, *Craig Goldblatt*, *Danielle Spinelli*, *Kenneth N. Klee*, *Daniel J.*

Bussel, *Don Jackson*, *Sanford Svetcov*, *Joseph A. Eisenberg*, and *Julia J. Rider*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This "suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."

Those words were not written about this case, see C. Dickens, Bleak House, in 1 Works of Charles Dickens 4–5 (1891), but they could have been. This is the second time we have had occasion to weigh in on this long-running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas. The Marshalls' litigation has worked its way through state and federal courts in Louisiana, Texas, and California, and two of those courts—a Texas state probate court and the Bankruptcy Court for the Central District of California—have reached contrary decisions on its merits. The Court of Appeals below held that the Texas state decision controlled, after concluding that the Bankruptcy Court lacked the authority to enter final judgment on a counterclaim that Vickie brought against

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Bankruptcy Trustees by *Lynne F. Riley;* and for Richard Aaron et al. by *Richard Lieb.*

Briefs of *amici curiae* urging affirmance were filed for the Center for the Rule of Law by *Ronald A. Cass;* for the National Black Chamber of Commerce et al. by *David B. Rivkin, Jr.*, and *Lanny J. Davis;* for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp;* and for S. Todd Brown et al. by *William C. Heuer.*

Pierce in her bankruptcy proceeding.[1] To determine whether the Court of Appeals was correct in that regard, we must resolve two issues: (1) whether the Bankruptcy Court had the statutory authority under 28 U. S. C. § 157(b) to issue a final judgment on Vickie's counterclaim; and (2) if so, whether conferring that authority on the Bankruptcy Court is constitutional.

Although the history of this litigation is complicated, its resolution ultimately turns on very basic principles. Article III, § 1, of the Constitution commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. *Ibid.* Those requirements of Article III were not honored here. The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection. We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so.

I

Because we have already recounted the facts and procedural history of this case in detail, see *Marshall* v. *Marshall*, 547 U. S. 293, 300–305 (2006), we do not repeat them in full here. Of current relevance are two claims Vickie filed in an attempt to secure half of J. Howard's fortune. Known to the public as Anna Nicole Smith, Vickie was J. Howard's third wife and married him about a year before his death. *Id.*, at

[1] Because both Vickie and Pierce passed away during this litigation, the parties in this case are Vickie's estate and Pierce's estate. We continue to refer to them as "Vickie" and "Pierce."

300; see *In re Marshall*, 392 F. 3d 1118, 1122 (CA9 2004). Although J. Howard bestowed on Vickie many monetary and other gifts during their courtship and marriage, he did not include her in his will. 547 U. S., at 300. Before J. Howard passed away, Vickie filed suit in Texas state probate court, asserting that Pierce—J. Howard's younger son—fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half his property. Pierce denied any fraudulent activity and defended the validity of J. Howard's trust and, eventually, his will. 392 F. 3d, at 1122–1123, 1125.

After J. Howard's death, Vickie filed a petition for bankruptcy in the Central District of California. Pierce filed a complaint in that bankruptcy proceeding, contending that Vickie had defamed him by inducing her lawyers to tell members of the press that he had engaged in fraud to gain control of his father's assets. 547 U. S., at 300–301; *In re Marshall*, 600 F. 3d 1037, 1043–1044 (CA9 2010). The complaint sought a declaration that Pierce's defamation claim was not dischargeable in the bankruptcy proceedings. *Ibid.*; see 11 U. S. C. § 523(a). Pierce subsequently filed a proof of claim for the defamation action, meaning that he sought to recover damages for it from Vickie's bankruptcy estate. See § 501(a). Vickie responded to Pierce's initial complaint by asserting truth as a defense to the alleged defamation and by filing a counterclaim for tortious interference with the gift she expected from J. Howard. As she had in state court, Vickie alleged that Pierce had wrongfully prevented J. Howard from taking the legal steps necessary to provide her with half his property. 547 U. S., at 301.

On November 5, 1999, the Bankruptcy Court issued an order granting Vickie summary judgment on Pierce's claim for defamation. On September 27, 2000, after a bench trial, the Bankruptcy Court issued a judgment on Vickie's counterclaim in her favor. The court later awarded Vickie over $400 million in compensatory damages and $25 million in pu-

nitive damages. 600 F. 3d, at 1045; see 253 B. R. 550, 561–562 (Bkrtcy. Ct. CD Cal. 2000); 257 B. R. 35, 39–40 (Bkrtcy. Ct. CD Cal. 2000).

In post-trial proceedings, Pierce argued that the Bankruptcy Court lacked jurisdiction over Vickie's counterclaim. In particular, Pierce renewed a claim he had made earlier in the litigation, asserting that the Bankruptcy Court's authority over the counterclaim was limited because Vickie's counterclaim was not a "core proceeding" under 28 U. S. C. § 157(b)(2)(C). See 257 B. R., at 39. As explained below, bankruptcy courts may hear and enter final judgments in "core proceedings" in a bankruptcy case. In noncore proceedings, the bankruptcy courts instead submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. The Bankruptcy Court in this case concluded that Vickie's counterclaim was "a core proceeding" under § 157(b)(2)(C), and the court therefore had the "power to enter judgment" on the counterclaim under § 157(b)(1). *Id.*, at 40.

The District Court disagreed. It recognized that "Vickie's counterclaim for tortious interference falls within the literal language" of the statute designating certain proceedings as "core," see § 157(b)(2)(C), but understood this Court's precedent to "suggest[ ] that it would be unconstitutional to hold that any and all counterclaims are core." 264 B. R. 609, 629–630 (CD Cal. 2001) (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 79, n. 31 (1982) (plurality opinion)). The District Court accordingly concluded that a "counterclaim should not be characterized as core" when it "is only somewhat related to the claim against which it is asserted, and when the unique characteristics and context of the counterclaim place it outside of the normal type of set-off or other counterclaims that customarily arise." 264 B. R., at 632.

Because the District Court concluded that Vickie's counterclaim was not core, the court determined that it was re-

quired to treat the Bankruptcy Court's judgment as "proposed[,] rather than final," and engage in an "independent review" of the record. *Id.*, at 633; see 28 U. S. C. § 157(c)(1). Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court declined to give that judgment preclusive effect and went on to decide the matter itself. 271 B. R. 858, 862–867 (CD Cal. 2001); see 275 B. R. 5, 56–58 (CD Cal. 2002). Like the Bankruptcy Court, the District Court found that Pierce had tortiously interfered with Vickie's expectancy of a gift from J. Howard. The District Court awarded Vickie compensatory and punitive damages, each in the amount of $44,292,767.33. *Id.*, at 58.

The Court of Appeals reversed the District Court on a different ground, 392 F. 3d, at 1137, and we—in the first visit of the case to this Court—reversed the Court of Appeals on that issue. 547 U. S., at 314–315. On remand from this Court, the Court of Appeals held that § 157 mandated "a two-step approach" under which a bankruptcy judge may issue a final judgment in a proceeding only if the matter both "meets Congress' definition of a core proceeding *and* arises under or arises in title 11," the Bankruptcy Code. 600 F. 3d, at 1055. The court also reasoned that allowing a bankruptcy judge to enter final judgments on all counterclaims raised in bankruptcy proceedings "would certainly run afoul" of this Court's decision in *Northern Pipeline*. 600 F. 3d, at 1057. With those concerns in mind, the court concluded that "a counterclaim under § 157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the [Bankruptcy] Code only if the counterclaim is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." *Id.*, at 1058 (internal quotation marks omitted; second brackets added). The court ruled that Vickie's counterclaim did not meet that test. *Id.*, at 1059. That holding made "the

Texas probate court's judgment . . . the earliest final judgment entered on matters relevant to this proceeding," and therefore the Court of Appeals concluded that the District Court should have "afford[ed] preclusive effect" to the Texas "court's determination of relevant legal and factual issues." *Id.*, at 1064–1065.[2]

We again granted certiorari. 561 U. S. 1058 (2010).

II

A

With certain exceptions not relevant here, the district courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U. S. C. § 1334(a). Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case under title 11." § 157(a). District courts may refer any or all such proceedings to the bankruptcy judges of their district, *ibid.*, which is how the Bankruptcy Court in this case came to preside over Vickie's bankruptcy proceedings. District courts also may withdraw a case or proceeding referred to the bankruptcy court "for cause shown." § 157(d). Since Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act), bankruptcy judges for each district have been appointed to 14-year terms by the courts of appeals for the circuits in which their district is located. § 152(a)(1).

The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved.

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[2] One judge wrote a separate concurring opinion. He concluded that "Vickie's counterclaim . . . [wa]s not a core proceeding, so the Texas probate court judgment preceded the district court judgment and controls." 600 F. 3d, at 1065 (Kleinfeld, J.). The concurring judge also "offer[ed] additional grounds" that he believed required judgment in Pierce's favor. *Ibid.* Pierce presses only one of those additional grounds here; it is discussed below, in Part II–C.

Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." § 157(b)(1). "Core proceedings include, but are not limited to," 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing claims against the estate." § 157(b)(2)(C).[3] Par-

[3] In full, §§ 157(b)(1)–(2) provides:

"(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

"(2) Core proceedings include, but are not limited to—

"(A) matters concerning the administration of the estate;

"(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

"(C) counterclaims by the estate against persons filing claims against the estate;

"(D) orders in respect to obtaining credit;

"(E) orders to turn over property of the estate;

"(F) proceedings to determine, avoid, or recover preferences;

"(G) motions to terminate, annul, or modify the automatic stay;

"(H) proceedings to determine, avoid, or recover fraudulent conveyances;

"(I) determinations as to the dischargeability of particular debts;

"(J) objections to discharges;

"(K) determinations of the validity, extent, or priority of liens;

"(L) confirmations of plans;

"(M) orders approving the use or lease of property, including the use of cash collateral;

"(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

"(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

"(P) recognition of foreign proceedings and other matters under chapter 15 of title 11."

ties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. See § 158(a); Fed. Rule Bkrtcy. Proc. 8013.

When a bankruptcy judge determines that a referred "proceeding . . . is not a core proceeding but . . . is otherwise related to a case under title 11," the judge may only "submit proposed findings of fact and conclusions of law to the district court." § 157(c)(1). It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects. *Ibid.*

B

Vickie's counterclaim against Pierce for tortious interference is a "core proceeding" under the plain text of § 157(b)(2)(C). That provision specifies that core proceedings include "counterclaims by the estate against persons filing claims against the estate." In past cases, we have suggested that a proceeding's "core" status alone authorizes a bankruptcy judge, as a statutory matter, to enter final judgment in the proceeding. See, *e. g.*, *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 50 (1989) (explaining that Congress had designated certain actions as " 'core proceedings,' which bankruptcy judges may adjudicate and in which they may issue final judgments, if a district court has referred the matter to them" (citations omitted)). We have not directly addressed the question, however, and Pierce argues that a bankruptcy judge may enter final judgment on a core proceeding only if that proceeding also "aris[es] in" a Title 11 case or "aris[es] under" Title 11 itself. Brief for Respondent 51 (internal quotation marks omitted).

Section 157(b)(1) authorizes bankruptcy courts to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." As written, § 157(b)(1) is ambiguous. The "arising under" and "arising in" phrases might, as Pierce suggests, be read as referring to a limited category of those core pro-

ceedings that are addressed in that section. On the other hand, the phrases might be read as simply describing what core proceedings are: matters arising under Title 11 or in a Title 11 case. In this case the structure and context of § 157 contradict Pierce's interpretation of § 157(b)(1).

As an initial matter, Pierce's reading of the statute necessarily assumes that there is a category of core proceedings that neither arise under Title 11 nor arise in a Title 11 case. The manner in which the statute delineates the bankruptcy courts' authority, however, makes plain that no such category exists. Section 157(b)(1) authorizes bankruptcy judges to enter final judgments in "core proceedings arising under title 11, or arising in a case under title 11." Section 157(c)(1) instructs bankruptcy judges to instead submit proposed findings in "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." Nowhere does § 157 specify what bankruptcy courts are to do with respect to the category of matters that Pierce posits—core proceedings that do *not* arise under Title 11 or in a Title 11 case. To the contrary, § 157(b)(3) only instructs a bankruptcy judge to "determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11." Two options. The statute does not suggest that any other distinctions need be made.

Under our reading of the statute, core proceedings are those that arise in a bankruptcy case or under Title 11. The detailed list of core proceedings in § 157(b)(2) provides courts with ready examples of such matters. Pierce's reading of § 157, in contrast, supposes that some core proceedings will arise in a Title 11 case or under Title 11 and some will not. Under that reading, the statute provides no guidance on how to tell which are which.

We think it significant that Congress failed to provide any framework for identifying or adjudicating the asserted category of core but not "arising" proceedings, given the other-

wise detailed provisions governing bankruptcy court authority. It is hard to believe that Congress would go to the trouble of cataloging 16 different types of proceedings that should receive "core" treatment, but then fail to specify how to determine whether those matters arise under Title 11 or in a bankruptcy case if—as Pierce asserts—the latter inquiry is determinative of the bankruptcy court's authority.

Pierce argues that we should treat core matters that arise neither under Title 11 nor in a Title 11 case as proceedings "related to" a Title 11 case. Brief for Respondent 60 (internal quotation marks omitted). We think that a contradiction in terms. It does not make sense to describe a "core" bankruptcy proceeding as merely "related to" the bankruptcy case; oxymoron is not a typical feature of congressional drafting. See *Northern Pipeline*, 458 U. S., at 71 (plurality opinion) (distinguishing "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, . . . from the adjudication of state-created private rights"); 1 Collier on Bankruptcy ¶ 3.02[2], p. 3–26, n. 5 (16th ed. 2010) ("The terms 'non-core' and 'related' are synonymous"); see also *id.*, at 3–26 ("The phraseology of section 157 leads to the conclusion that there is no such thing as a core matter that is 'related to' a case under title 11. Core proceedings are, at most, those that arise in title 11 cases or arise under title 11" (footnote omitted)). And, as already discussed, the statute simply does not provide for a proceeding that is simultaneously core and yet only related to the bankruptcy case. See § 157(c)(1) (providing only for "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11").

As we explain in Part III, we agree with Pierce that designating all counterclaims as "core" proceedings raises serious constitutional concerns. Pierce is also correct that we will, where possible, construe federal statutes so as "to avoid serious doubt of their constitutionality." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986) (internal

quotation marks omitted). But that "canon of construction does not give [us] the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Ibid.* In this case, we do not think the plain text of § 157(b)(2)(C) leaves any room for the canon of avoidance. We would have to "rewrit[e]" the statute, not interpret it, to bypass the constitutional issue § 157(b)(2)(C) presents. *Id.*, at 841 (internal quotation marks omitted). That we may not do. We agree with Vickie that § 157(b)(2)(C) permits the bankruptcy court to enter a final judgment on her tortious interference counterclaim.

C

Pierce argues, as another alternative to reaching the constitutional question, that the Bankruptcy Court lacked jurisdiction to enter final judgment on his defamation claim. Section 157(b)(5) provides that "[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose." Pierce asserts that his defamation claim is a "personal injury tort," that the Bankruptcy Court therefore had no jurisdiction over that claim, and that the court therefore necessarily lacked jurisdiction over Vickie's counterclaim as well. Brief for Respondent 65–66.

Vickie objects to Pierce's statutory analysis across the board. To begin, Vickie contends that § 157(b)(5) does not address subject matter jurisdiction at all, but simply specifies the venue in which "personal injury tort and wrongful death claims" should be tried. See Reply Brief for Petitioner 16–17, 19; see also Tr. of Oral Arg. 23 (Deputy Solicitor General) (Section "157(b)(5) is, in [the United States'] view, not jurisdictional"). Given the limited scope of that provision, Vickie argues, a party may waive or forfeit any objections under § 157(b)(5), in the same way that a party may waive or forfeit an objection to the bankruptcy court finally resolving a noncore claim. Reply Brief for Petitioner 17–20;

see § 157(c)(2) (authorizing the district court, "with the consent of all the parties to the proceeding," to refer a "related to" matter to the bankruptcy court for final judgment). Vickie asserts that in this case Pierce consented to the Bankruptcy Court's adjudication of his defamation claim, and forfeited any argument to the contrary, by failing to seek withdrawal of the claim until he had litigated it before the Bankruptcy Court for 27 months. *Id.*, at 20–23. On the merits, Vickie contends that the statutory phrase "personal injury tort and wrongful death claims" does not include nonphysical torts such as defamation. *Id.*, at 25–26.

We need not determine what constitutes a "personal injury tort" in this case because we agree with Vickie that § 157(b)(5) is not jurisdictional, and that Pierce consented to the Bankruptcy Court's resolution of his defamation claim.[4] Because "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adver-

[4] Although Pierce suggests that consideration of "the 157(b)(5) issue" would facilitate an "easy" resolution of the case, Tr. of Oral Arg. 47–48, he is mistaken. Had Pierce preserved his argument under that provision, we would have been confronted with several questions on which there is little consensus or precedent. Those issues include: (1) the scope of the phrase "personal injury tort"—a question over which there is at least a three-way divide, see *In re Arnold*, 407 B. R. 849, 851–853 (Bkrtcy. Ct. MDNC 2009); (2) whether, as Vickie argued in the Court of Appeals, the requirement that a personal injury tort claim be "tried" in the district court nonetheless permits the bankruptcy court to resolve the claim short of trial, see Appellee's/Cross-Appellant's Supplemental Brief in No. 02–56002 etc. (CA9), p. 24; see also *In re Dow Corning Corp.*, 215 B. R. 346, 349–351 (Bkrtcy. Ct. ED Mich. 1997) (noting divide over whether, and on what grounds, a bankruptcy court may resolve a claim pretrial); and (3) even if Pierce's defamation claim could be considered only by the District Court, whether the Bankruptcy Court might retain jurisdiction over the counterclaim, cf. *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006) ("when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U. S. C. § 1367, over pendent state-law claims"). We express no opinion on any of these issues and simply note that the § 157(b)(5) question is not as straightforward as Pierce would have it.

sarial system," *Henderson* v. *Shinseki*, 562 U. S. 428, 434 (2011), we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such. See generally *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 516 (2006) ("when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character").

Section 157(b)(5) does not have the hallmarks of a jurisdictional decree. To begin, the statutory text does not refer to either district court or bankruptcy court "jurisdiction," instead addressing only where personal injury tort claims "shall be tried."

The statutory context also belies Pierce's jurisdictional claim. Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. See §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See § 157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in noncore case). By the same token, § 157(b)(5) simply specifies where a particular category of cases should be tried. Pierce does not explain why that statutory limitation may not be similarly waived.

We agree with Vickie that Pierce not only could but did consent to the Bankruptcy Court's resolution of his defamation claim. Before the Bankruptcy Court, Vickie objected to Pierce's proof of claim for defamation, arguing that Pierce's claim was unenforceable and that Pierce should not receive any amount for it. See 29 Court of Appeals Supplemental Excerpts of Record 6031, 6035 (hereinafter Supplemental Record). Vickie also noted that the Bankruptcy Court could defer ruling on her objection, given the litigation posture of Pierce's claim before the Bankruptcy Court. See *id.*, at 6031. Vickie's filing prompted Pierce to advise the Bankruptcy Court that "[a]ll parties are in agreement that the amount of the contingent Proof of Claim filed by [Pierce] shall be determined by the adversary proceedings" that had

been commenced in the Bankruptcy Court. 31 *id.*, at 6801. Pierce asserted that Vickie's objection should be overruled or, alternatively, that any ruling on the objection "should be continued until the resolution of the pending adversary proceeding litigation." *Ibid.* Pierce identifies no point in the record where he argued to the Bankruptcy Court that it lacked the authority to adjudicate his proof of claim because the claim sought recompense for a personal injury tort.

Indeed, Pierce apparently did not object to any court that § 157(b)(5) prohibited the Bankruptcy Court from resolving his defamation claim until over two years—and several adverse discovery rulings—after he filed that claim in June 1996. The first filing Pierce cites as raising that objection is his September 22, 1998 motion to the District Court to withdraw the reference of the case to the Bankruptcy Court. See Brief for Respondent 26–27. The District Court did initially withdraw the reference as requested, but it then returned the proceeding to the Bankruptcy Court, observing that Pierce "implicated the jurisdiction of that bankruptcy court. He chose to be a party to that litigation." App. 129. Although Pierce had objected in July 1996 to the Bankruptcy Court's exercise of jurisdiction over Vickie's counterclaim, he advised the court at that time that he was "happy to litigate [his] claim" there. 29 Supplemental Record 6101. Counsel stated that even though Pierce thought it was "probably cheaper for th[e] estate if [Pierce's claim] were sent back or joined back with the State Court litigation," Pierce "did choose" the Bankruptcy Court forum and "would be more than pleased to do it [t]here." *Id.*, at 6101–6102; see also App. to Pet. for Cert. 266, n. 17 (District Court referring to these statements).

Given Pierce's course of conduct before the Bankruptcy Court, we conclude that he consented to that court's resolution of his defamation claim (and forfeited any argument to the contrary). We have recognized "the value of waiver and forfeiture rules" in "complex" cases, *Exxon Shipping Co.* v.

Baker, 554 U. S. 471, 487–488, n. 6 (2008), and this case is no exception. In such cases, as here, the consequences of "a litigant . . . 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor," *Puckett* v. *United States*, 556 U. S. 129, 134 (2009) (some internal quotation marks omitted)—can be particularly severe. If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly. See *United States* v. *Olano*, 507 U. S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it'" (quoting *Yakus* v. *United States*, 321 U. S. 414, 444 (1944))). Instead, Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.

III

Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.

A

Article III, § 1, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The same section provides that the judges of those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services[ ] a Compensation[ ] [that] shall not be diminished" during their tenure.

As its text and our precedent confirm, Article III is "an inseparable element of the constitutional system of checks

and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline*, 458 U. S., at 58 (plurality opinion). Under "the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government" adopted in the Constitution, "the 'judicial Power of the United States' . . . can no more be shared" with another branch than "the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States* v. *Nixon*, 418 U. S. 683, 704 (1974) (quoting U. S. Const., Art. III, § 1).

In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[ ] truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton put it, quoting Montesquieu, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Ibid.* (quoting 1 Montesquieu, Spirit of Laws 181).

We have recognized that the three branches are not hermetically sealed from one another, see *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977), but it remains true that Article III imposes some basic limitations that the other branches may not transgress. Those limitations serve two related purposes. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond* v. *United States*, *ante*, at 222.

Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand

of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence ¶ 11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges." 1 Works of James Wilson 363 (J. Andrews ed. 1896).

Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Northern Pipeline*, 458 U. S., at 90 (Rehnquist, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law"—to the Judiciary. *Id.*, at 86–87, n. 39 (plurality opinion).

B

This is not the first time we have faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline*, we considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III—could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. *Id.*, at 53, 87, n. 40 (plurality opinion); see *id.*, at 89–92 (Rehnquist, J., concurring in judgment). The Court concluded that assignment of such state law claims for resolution by those judges "violates Art. III of the Constitution." *Id.*, at 52, 87 (plurality opinion); *id.*, at 91 (Rehnquist, J., concurring in judgment).

The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. That opinion concluded that this "public rights" exception extended "only to matters arising between" individuals and the Government "in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those" branches. *Id.*, at 67–68 (internal quotation marks omitted). A full majority of the Court, while not agreeing on the scope of the exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case. *Id.*, at 69–72; see *id.*, at 90–91 (Rehnquist, J., concurring in judgment) ("None of the [previous cases addressing Article III power] has gone so far as to sanction the type of adjudication to which Marathon will be subjected . . . . To whatever extent different powers granted under [the 1978] Act might be sustained under the 'public rights' doctrine of *Murray's Lessee* . . .

and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained").[5]

A full majority of Justices in *Northern Pipeline* also rejected the debtor's argument that the bankruptcy court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals. *Id.*, at 71–72, 81–86 (plurality opinion); *id.*, at 91 (Rehnquist, J., concurring in judgment) ("the bankruptcy court is not an 'adjunct' of either the district court or the court of appeals").

After our decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. In the 1984 Act, Congress provided that the judges of the new bankruptcy courts would be appointed by the courts of appeals for the circuits in which their districts are located. 28 U. S. C. § 152(a). And, as we have explained, Congress permitted the newly constituted bankruptcy courts to enter final judgments only in "core" proceedings. See *supra*, at 473–475.

With respect to such "core" matters, however, the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978 (1978 Act), 92 Stat. 2549. As in *Northern Pipeline*, for example, the newly constituted bankruptcy courts are charged under § 157(b)(2)(C) with resolving "[a]ll matters of fact and law in whatever domains of the law to which" a counterclaim may lead. 458 U. S., at 91 (Rehnquist, J., concurring in judgment); see, *e. g.*, 275 B. R., at 50–51 (noting that Vickie's counterclaim required the bankruptcy court to determine whether Texas recognized a cause of action for tortious interference with an *inter vivos* gift—something the Supreme Court of Texas had yet to do). As in *Northern Pipeline*, the new courts in core proceedings "issue final judgments,

[5] The dissent is thus wrong in suggesting that less than a full Court agreed on the points pertinent to this case. *Post*, at 506 (opinion of BREYER, J.).

which are binding and enforceable even in the absence of an appeal." 458 U. S., at 85–86 (plurality opinion). And, as in *Northern Pipeline*, the district courts review the judgments of the bankruptcy courts in core proceedings only under the usual limited appellate standards. That requires marked deference to, among other things, the bankruptcy judges' findings of fact. See § 158(a); Fed. Rule Bkrtcy. Proc. 8013 (findings of fact "shall not be set aside unless clearly erroneous").

C

Vickie and the dissent argue that the Bankruptcy Court's entry of final judgment on her state common law counterclaim was constitutional, despite the similarities between the bankruptcy courts under the 1978 Act and those exercising core jurisdiction under the 1984 Act. We disagree. It is clear that the Bankruptcy Court in this case exercised the "judicial Power of the United States" in purporting to resolve and enter final judgment on a state common law claim, just as the court did in *Northern Pipeline*. No "public right" exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline*. Vickie argues that this case is different because the defendant is a creditor in the bankruptcy. But the debtors' claims in the cases on which she relies were themselves federal claims under bankruptcy law, which would be completely resolved in the bankruptcy process of allowing or disallowing claims. Here Vickie's claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy. *Northern Pipeline* and our subsequent decision in *Granfinanciera*, 492 U. S. 33, rejected the application of the "public rights" exception in such cases.

Nor can the bankruptcy courts under the 1984 Act be dismissed as mere adjuncts of Article III courts, any more than could the bankruptcy courts under the 1978 Act. The judicial powers the courts exercise in cases such as this remain

the same, and a court exercising such broad powers is no mere adjunct of anyone.

1

Vickie's counterclaim cannot be deemed a matter of "public right" that can be decided outside the Judicial Branch. As explained above, in *Northern Pipeline* we rejected the argument that the public rights doctrine permitted a bankruptcy court to adjudicate a state law suit brought by a debtor against a company that had not filed a claim against the estate. See 458 U. S., at 69–72 (plurality opinion); *id.*, at 90–91 (Rehnquist, J., concurring in judgment). Although our discussion of the public rights exception since that time has not been entirely consistent, and the exception has been the subject of some debate, this case does not fall within any of the various formulations of the concept that appear in this Court's opinions.

We first recognized the category of public rights in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856). That case involved the Treasury Department's sale of property belonging to a customs collector who had failed to transfer payments to the Federal Government that he had collected on its behalf. *Id.*, at 274, 275. The plaintiff, who claimed title to the same land through a different transfer, objected that the Treasury Department's calculation of the deficiency and sale of the property was void, because it was a judicial act that could not be assigned to the Executive under Article III. *Id.*, at 274–275, 282–283.

"To avoid misconstruction upon so grave a subject," the Court laid out the principles guiding its analysis. *Id.*, at 284. It confirmed that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Ibid.* The Court also recognized that "[a]t the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determi-

nation, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Ibid.*

As an example of such matters, the Court referred to "[e]quitable claims to land by the inhabitants of ceded territories" and cited cases in which land issues were conclusively resolved by Executive Branch officials. *Ibid.* (citing *Foley* v. *Harrison*, 15 How. 433 (1854); *Burgess* v. *Gray*, 16 How. 48 (1854)). In those cases "it depends upon the will of congress whether a remedy in the courts shall be allowed at all," so Congress could limit the extent to which a judicial forum was available. *Murray's Lessee*, 18 How., at 284. The challenge in *Murray's Lessee* to the Treasury Department's sale of the collector's land likewise fell within the "public rights" category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity. *Id.*, at 283–284. The point of *Murray's Lessee* was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.

Subsequent decisions from this Court contrasted cases within the reach of the public rights exception—those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—and those that were instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S. 22, 50, 51 (1932).[6] See *Atlas Roofing Co.* v. *Occupational Safety*

[6] Although the Court in *Crowell* went on to decide that the facts of the private dispute before it could be determined by a non-Article III tribunal in the first instance, subject to judicial review, the Court did so only after observing that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court. 285 U. S., at 38, 44–45, 54; see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 78 (1982) (plurality opinion). In other words, the agency in *Crowell* functioned as

and Health Review Comm'n, 430 U. S. 442, 458 (1977) (exception extends to cases "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights," while "[w]holly private tort, contract, and property cases, as well as a vast range of other cases . . . are not at all implicated"); *Ex parte Bakelite Corp.*, 279 U. S. 438, 451–452 (1929). See also *Northern Pipeline*, 458 U. S., at 68 (plurality opinion) (citing *Ex parte Bakelite Corp.* for the proposition that the doctrine extended "only to matters that historically could have been determined exclusively by" the Executive and Legislative Branches).

Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular Federal Government

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a true "adjunct" of the District Court. That is not the case here. See *infra*, at 500–501.

Although the dissent suggests that we understate the import of *Crowell* in this regard, the dissent itself recognizes—repeatedly—that *Crowell* by its terms addresses the determination of *facts* outside Article III. See *post*, at 508 (*Crowell* "upheld Congress' delegation of primary factfinding authority to the agency"); *post*, at 515 (quoting *Crowell*, 285 U. S., at 51, for the proposition that "'there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges'"). *Crowell* may well have additional significance in the context of expert administrative agencies that oversee particular substantive federal regimes, but we have no occasion to and do not address those issues today. See *infra*, at 493–494. The United States apparently agrees that any broader significance of *Crowell* is not pertinent in this case, citing to *Crowell* in its brief only once, in the last footnote, again for the limited proposition discussed above. Brief for United States as *Amicus Curiae* 32, n. 5.

action. See *United States* v. *Jicarilla Apache Nation*, *ante*, at 174 ("The distinction between 'public rights' against the Government and 'private rights' between private parties is well established" (citing *Murray's Lessee* and *Crowell*)).

Our decision in *Thomas* v. *Union Carbide Agricultural Products Co.*, for example, involved a data-sharing arrangement between companies under a federal statute providing that disputes about compensation between the companies would be decided by binding arbitration. 473 U. S. 568, 571–575 (1985). This Court held that the scheme did not violate Article III, explaining that "[a]ny right to compensation . . . results from [the statute] and does not depend on or replace a right to such compensation under state law." *Id.*, at 584.

Commodity Futures Trading Comm'n v. *Schor* concerned a statutory scheme that created a procedure for customers injured by a broker's violation of the federal commodities law to seek reparations from the broker before the Commodity Futures Trading Commission (CFTC). 478 U. S., at 836. A customer filed such a claim to recover a debit balance in his account, while the broker filed a lawsuit in Federal District Court to recover the same amount as lawfully due from the customer. The broker later submitted its claim to the CFTC, but after that agency ruled against the customer, the customer argued that agency jurisdiction over the broker's counterclaim violated Article III. *Id.*, at 837–838. This Court disagreed, but only after observing that (1) the claim and the counterclaim concerned a "single dispute"—the same account balance; (2) the CFTC's assertion of authority involved only "a narrow class of common law claims" in a " 'particularized area of law' "; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise"; (4) the parties had freely elected to resolve their differences before the CFTC; and (5) CFTC orders were "enforceable only by order of the district court." *Id.*, at 844, 852–856 (quoting *Northern Pipeline*, *supra*, at 85); see 478 U. S., at

843–844, 849–857. Most significantly, given that the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount, the Court repeatedly emphasized that it was "necessary" to allow the agency to exercise jurisdiction over the broker's claim, or else "the reparations procedure would have been confounded." *Id.*, at 856.

The most recent case in which we considered application of the public rights exception—and the only case in which we have considered that doctrine in the bankruptcy context since *Northern Pipeline*—is *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989). In *Granfinanciera* we rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the "public rights" exception. We explained that, "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Id.*, at 54–55. We reasoned that fraudulent conveyance suits were "quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.*, at 56. As a consequence, we concluded that fraudulent conveyance actions were "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.*, at 55.[7]

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[7] We noted that we did not mean to "suggest that the restructuring of debtor-creditor relations is in fact a public right." 492 U. S., at 56, n. 11. Our conclusion was that, "even if one accepts this thesis," Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court. *Ibid.* Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here.

Vickie's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, 18 How., at 284, or one that "historically could have been determined exclusively by" those branches, *Northern Pipeline*, 458 U. S., at 68 (citing *Ex parte Bakelite Corp.*, 279 U. S., at 458). The claim is instead one under state common law between two private parties. It does not "depend[ ] upon the will of congress," *Murray's Lessee*, *supra*, at 284; Congress has nothing to do with it.

In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme, as in *Thomas*, *supra*, at 584–585, or *Atlas Roofing*, 430 U. S., at 458. It is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor*, 478 U. S., at 856. And in contrast to the objecting party in *Schor*, *id.*, at 855–856, Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate. See *Granfinanciera*, *supra*, at 59, n. 14 (noting that "[p]arallel reasoning [to *Schor*] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims").[8]

Furthermore, the asserted authority to decide Vickie's claim is not limited to a "particularized area of the law," as in *Crowell*, *Thomas*, and *Schor*. *Northern Pipeline*, 458 U. S., at 85 (plurality opinion). We deal here not with an

[8] Contrary to the claims of the dissent, see *post*, at 516, Pierce did not have another forum in which to pursue his claim to recover from Vickie's prebankruptcy assets, rather than take his chances with whatever funds might remain after the Title 11 proceedings. Creditors who possess claims that do not satisfy the requirements for nondischargeability under 11 U. S. C. § 523 have no choice but to file their claims in bankruptcy proceedings if they want to pursue the claims at all. That is why, as we recognized in *Granfinanciera*, the notion of "consent" does not apply in bankruptcy proceedings as it might in other contexts.

agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*. See *ibid.*; *id.*, at 91 (Rehnquist, J., concurring in judgment). This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell*, 285 U. S., at 46; see *Schor*, *supra*, at 855–856. The "experts" in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay.

The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as "'establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.'" *Post*, at 510 (quoting *Thomas*, 473 U. S., at 584). Just so: Substitute "tort" for "contract," and that statement directly covers this case.

We recognize that there may be instances in which the distinction between public and private rights—at least as framed by some of our recent cases—fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme. Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.

What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory re-

gime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

2

Vickie and the dissent next attempt to distinguish *Northern Pipeline* and *Granfinanciera* on the ground that Pierce, unlike the defendants in those cases, had filed a proof of claim in the bankruptcy proceedings. Given Pierce's participation in those proceedings, Vickie argues, the Bankruptcy Court had the authority to adjudicate her counterclaim under our decisions in *Katchen* v. *Landy*, 382 U. S. 323 (1966), and *Langenkamp* v. *Culp*, 498 U. S. 42 (1990) (*per curiam*).

We do not agree. As an initial matter, it is hard to see why Pierce's decision to file a claim should make any difference with respect to the characterization of Vickie's counterclaim. "'[P]roperty interests are created and defined by state law,' and '[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 451 (2007) (quoting *Butner* v. *United States*, 440 U. S. 48, 55 (1979)). Pierce's claim for defamation in no way affects the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court.

Contrary to Vickie's contention, moreover, our decisions in *Katchen* and *Langenkamp* do not suggest a different result. *Katchen* permitted a bankruptcy referee acting under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as "summary juris-

diction" over a voidable preference claim brought by the bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding. See 382 U. S., at 325, 327–328. A voidable preference claim asserts that a debtor made a payment to a particular creditor in anticipation of bankruptcy, to in effect increase that creditor's proportionate share of the estate. The preferred creditor's claim in bankruptcy can be disallowed as a result of the preference, and the amounts paid to that creditor can be recovered by the trustee. See *id.*, at 330; see also 11 U. S. C. §§ 502(d), 547(b).

Although the creditor in *Katchen* objected that the preference issue should be resolved through a "plenary suit" in an Article III court, this Court concluded that summary adjudication in bankruptcy was appropriate, because it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue. 382 U. S., at 329–330, 332–333, and n. 9, 334. There was no question that the bankruptcy referee could decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. Once the referee did that, "nothing remains for adjudication in a plenary suit"; such a suit "would be a meaningless gesture." *Id.*, at 334. The plenary proceeding the creditor sought could be brought into the bankruptcy court because "the same issue [arose] as part of the process of allowance and disallowance of claims." *Id.*, at 336.

It was in that sense that the Court stated that "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure." *Id.*, at 333, n. 9. In *Katchen*, one of those consequences was resolution of the preference issue as part of the process of allowing or disallowing claims, and accordingly there was no basis for the creditor to insist that the issue be resolved in an Article III court. See *id.*, at 334. Indeed, the *Katchen* Court expressly noted that it "intimate[d] no opinion concerning whether" the bankruptcy

referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." *Id.*, at 333, n. 9.

Our *per curiam* opinion in *Langenkamp* is to the same effect. We explained there that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because *then* "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship." 498 U. S., at 44. If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does *not* "become[ ] part of the claims-allowance process" subject to resolution by the bankruptcy court. *Ibid.*; see *id.*, at 45.

In ruling on Vickie's counterclaim, the Bankruptcy Court was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim for defamation, which the court had denied almost a year earlier. *Katchen*, *supra*, at 332, n. 9. There was some overlap between Vickie's counterclaim and Pierce's defamation claim that led the courts below to conclude that the counterclaim was compulsory, 600 F. 3d, at 1057, or at least in an "attenuated" sense related to Pierce's claim, 264 B. R., at 631. But there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim. See *id.*, at 631, 632 (explaining that "the primary facts at issue on Pierce's claim were the relationship between Vickie and her attorneys and her knowledge or approval of their statements," and "the counterclaim raises issues of law entirely different from those raise[d] on the defamation claim"). The United States acknowledges the point. See Brief for United States as *Amicus Curiae*, p. (I) (question presented concerns authority of a bankruptcy court to enter final judgment on a compulsory counterclaim "when adjudi-

cation of the counterclaim requires resolution of issues that are not implicated by the claim against the estate"); *id.*, at 26.

The only overlap between the two claims in this case was the question whether Pierce had in fact tortiously taken control of his father's estate in the manner alleged by Vickie in her counterclaim and described in the allegedly defamatory statements. From the outset, it was clear that, even assuming the Bankruptcy Court would (as it did) rule in Vickie's favor on that question, the court could not enter judgment for Vickie unless the court additionally ruled on the questions whether Texas recognized tortious interference with an expected gift as a valid cause of action, what the elements of that action were, and whether those elements were met in this case. 275 B. R., at 50–53. Assuming Texas accepted the elements adopted by other jurisdictions, that meant Vickie would need to prove, above and beyond Pierce's tortious interference, (1) the existence of an expectancy of a gift; (2) a reasonable certainty that the expectancy would have been realized but for the interference; and (3) damages. *Id.*, at 51; see 253 B. R., at 558–561. Also, because Vickie sought punitive damages in connection with her counterclaim, the Bankruptcy Court could not finally dispose of the case in Vickie's favor without determining whether to subject Pierce to the sort of "retribution," "punishment[,] and deterrence," *Exxon Shipping Co.*, 554 U. S., at 492, 504 (internal quotation marks omitted), those damages are designed to impose. There thus was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim.

In both *Katchen* and *Langenkamp*, moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. In *Langenkamp*, we noted that "the trustee instituted adversary proceedings under 11 U. S. C. § 547(b) to recover, as avoidable preferences," payments respondents received from the debtor before the bankruptcy filings. 498 U. S., at 43; see,

e. g., § 547(b)(1) ("the trustee may avoid any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor"). In *Katchen*, "[t]he Trustee . . . [asserted] that the payments made [to the creditor] were preferences inhibited by Section 60a of the Bankruptcy Act." Memorandum Opinion (Feb. 8, 1963), Tr. of Record in O. T. 1965, No. 28, p. 3; see 382 U. S., at 334 (considering impact of the claims allowance process on "action by the trustee under § 60 to recover the preference"); 11 U. S. C. § 96(b) (1964 ed.) (§ 60(b) of the then-applicable Bankruptcy Act) ("preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby . . . has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent"). Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.

In light of all the foregoing, we disagree with the dissent that there are no "relevant distinction[s]" between Pierce's claim in this case and the claim at issue in *Langenkamp*. *Post*, at 517. We see no reason to treat Vickie's counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*. 492 U. S., at 56. *Granfinanciera*'s distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res," *ibid.*, reaffirms that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. Vickie has failed to demonstrate that her counterclaim falls within one of the "limited circumstances" covered by the public rights exception, particularly given our conclusion that, "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." *Northern Pipeline*, 458 U. S., at 69, n. 23, 77, n. 29 (plurality opinion).

3

Vickie additionally argues that the Bankruptcy Court's final judgment was constitutional because bankruptcy courts under the 1984 Act are properly deemed "adjuncts" of the district courts. Brief for Petitioner 61–64. We rejected a similar argument in *Northern Pipeline*, see 458 U. S., at 84–86 (plurality opinion); *id.*, at 91 (Rehnquist, J., concurring in judgment), and our reasoning there holds true today.

To begin, as explained above, it is still the bankruptcy court itself that exercises the essential attributes of judicial power over a matter such as Vickie's counterclaim. See *supra*, at 487–488. The new bankruptcy courts, like the old, do not "ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law" or engage in "statutorily channeled factfinding functions." *Northern Pipeline*, 458 U. S., at 85 (plurality opinion). Instead, bankruptcy courts under the 1984 Act resolve "[a]ll matters of fact and law in whatever domains of the law to which" the parties' counterclaims might lead. *Id.*, at 91 (Rehnquist, J., concurring in judgment).

In addition, whereas the adjunct agency in *Crowell* v. *Benson* "possessed only a limited power to issue compensation orders . . . [that] could be enforced only by order of the district court," *Northern Pipeline*, *supra*, at 85, a bankruptcy court resolving a counterclaim under 28 U. S. C. § 157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§ 157(b)(1), 158(a)–(b). It is thus no less the case here than it was in *Northern Pipeline* that "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with" the bankruptcy judge, not the district court. 458 U. S., at 81 (plurality opinion) (internal quotation marks omitted). Given that authority, a bankruptcy court can no more be deemed a mere "adjunct" of the district court than a district court can be deemed such an "adjunct" of the court of appeals. We cer-

tainly cannot accept the dissent's notion that judges who have the power to enter final, binding orders are the "functional[ ]" equivalent of "law clerks[ ] and the Judiciary's administrative officials." *Post*, at 515. And even were we wrong in this regard, that would only confirm that such judges should not be in the business of entering final judgments in the first place.

It does not affect our analysis that, as Vickie notes, bankruptcy judges under the current Act are appointed by the Article III courts, rather than the President. See Brief for Petitioner 59. If—as we have concluded—the bankruptcy court itself exercises "the essential attributes of judicial power [that] are reserved to Article III courts," *Schor*, 478 U. S., at 851 (internal quotation marks omitted), it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains. See The Federalist No. 78, at 471 ("Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [a judge's] necessary independence").

D

Finally, Vickie and her *amici* predict as a practical matter that restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the bankruptcy process. See, *e. g.*, Brief for Petitioner 34–36, 57–58; Brief for United States as *Amicus Curiae* 29–30. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U. S. 919, 944 (1983).

In addition, we are not convinced that the practical consequences of such limitations on the authority of bankruptcy courts to enter final judgments are as significant as Vickie and the dissent suggest. See *post*, at 519–520. The dissent

asserts that it is important that counterclaims such as Vickie's be resolved "in a bankruptcy court," and that, "to be effective, a single tribunal must have broad authority to restructure [debtor-creditor] relations." *Post*, at 518, 519 (emphasis deleted). But the framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts. Section 1334(c)(2), for example, requires that bankruptcy courts abstain from hearing specified noncore, state law claims that "can be timely adjudicated[ ] in a State forum of appropriate jurisdiction." Section 1334(c)(1) similarly provides that bankruptcy courts may abstain from hearing any proceeding, including core matters, "in the interest of comity with State courts or respect for State law."

As described above, the current bankruptcy system also requires the district court to review *de novo* and enter final judgment on any matters that are "related to" the bankruptcy proceedings, § 157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, § 157(d). Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide[s]" them. Brief for Respondent 61. We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a "narrow" one. Brief for United States as *Amicus Curiae* 23.

If our decision today does not change all that much, then why the fuss? Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy? The short but emphatic answer is yes. A statute

may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. "Slight encroachments create new boundaries from which legions of power can seek new territory to capture." *Reid* v. *Covert*, 354 U. S. 1, 39 (1957) (plurality opinion). Although "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form," we cannot overlook the intrusion: "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886). We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.

* * *

Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I agree with the Court's interpretation of our Article III precedents, and I accordingly join its opinion. I adhere to my view, however, that—our contrary precedents notwithstanding—"a matter of public rights . . . must at a minimum arise between the government and others," *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 65 (1989) (SCALIA, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area. I count at least seven different reasons given in the Court's opinion for concluding that an Article III judge was required to adjudicate this lawsuit: that it was one "under state common law" which was "not a matter that can be pursued only by grace of the other branches," *ante,* at 493; that it was "not 'completely dependent upon' adjudication of a claim created by federal law," *ibid.;* that "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings," *ibid.*; that "the asserted authority to decide Vickie's claim is not limited to a 'particularized area of the law,'" *ibid.*; that "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim," *ante,* at 497; that the trustee was not "asserting a right of recovery created by federal bankruptcy law," *ante,* at 498; and that the Bankruptcy Judge "ha[d] the power to enter 'appropriate orders and judgments'—including final judgments—subject to review only if a party chooses to appeal," *ante,* at 500.

Apart from their sheer numerosity, the more fundamental flaw in the many tests suggested by our jurisprudence is that they have nothing to do with the text or tradition of Article III. For example, Article III gives no indication that state-law claims have preferential entitlement to an Article III judge; nor does it make pertinent the extent to which the area of the law is "particularized." The multifactors relied upon today seem to have entered our jurisprudence almost randomly.

Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell* v. *Benson*, 285 U. S. 22 (1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established his-

torical practice to the contrary. For that reason—and not because of some intuitive balancing of benefits and harms—I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true "public rights" cases. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 71 (1982) (plurality opinion). Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate, see, *e. g.*, Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr. L. J. 567, 607–609 (1998); the subject has not been briefed, and so I state no position on the matter. But Vickie points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.

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

Pierce Marshall filed a claim in Federal Bankruptcy Court against the estate of Vickie Marshall. His claim asserted that Vickie Marshall had, through her lawyers, accused him of trying to prevent her from obtaining money that his father had wanted her to have; that her accusations violated state defamation law; and that she consequently owed Pierce Marshall damages. Vickie Marshall filed a compulsory counterclaim in which she asserted that Pierce Marshall had unlawfully interfered with her husband's efforts to grant her an *inter vivos* gift and that he consequently owed her damages.

The Bankruptcy Court adjudicated the claim and the counterclaim. In doing so, the court followed statutory procedures applicable to "core" bankruptcy proceedings. See 28 U. S. C. § 157(b). And ultimately the Bankruptcy Court entered judgment in favor of Vickie Marshall. The question before us is whether the Bankruptcy Court possessed jurisdiction to adjudicate Vickie Marshall's counterclaim. I agree with the Court that the bankruptcy statute,

§ 157(b)(2)(C), authorizes a bankruptcy court to adjudicate the counterclaim. But I do not agree with the majority about the statute's constitutionality. I believe the statute is consistent with the Constitution's delegation of the "judicial Power of the United States" to the Judicial Branch of Government. Art. III, § 1. Consequently, it is constitutional.

I

My disagreement with the majority's conclusion stems in part from my disagreement about the way in which it interprets, or at least emphasizes, certain precedents. In my view, the majority overstates the current relevance of statements this Court made in an 1856 case, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, and it overstates the importance of an analysis that did not command a Court majority in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), and that was subsequently disavowed. At the same time, I fear the Court understates the importance of a watershed opinion widely thought to demonstrate the constitutional basis for the current authority of administrative agencies to adjudicate private disputes, namely, *Crowell* v. *Benson*, 285 U. S. 22 (1932). And it fails to follow the analysis that this Court more recently has held applicable to the evaluation of claims of a kind before us here, namely, claims that a congressional delegation of adjudicatory authority violates separation-of-powers principles derived from Article III. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568 (1985); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986).

I shall describe these cases in some detail in order to explain why I believe we should put less weight than does the majority upon the statement in *Murray's Lessee* and the analysis followed by the *Northern Pipeline* plurality and instead should apply the approach this Court has applied in *Crowell*, *Thomas*, and *Schor*.

A

In *Murray's Lessee*, the Court held that the Constitution permitted an executive official, through summary, nonjudicial proceedings, to attach the assets of a customs collector whose account was deficient. The Court found evidence in common law of "summary method[s] for the recovery of debts due to the crown, and especially those due from receivers of the revenues," 18 How., at 277, and it analogized the Government's summary attachment process to the kind of self-help remedies available to private parties, *id.*, at 283. In the course of its opinion, the Court wrote:

> "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*, at 284.

The majority reads the first part of the statement's first sentence as authoritatively defining the boundaries of Article III. *Ante*, at 484. I would read the statement in a less absolute way. For one thing, the statement is in effect dictum. For another, it is the remainder of the statement, announcing a distinction between "public rights" and "private rights," that has had the more lasting impact. Later Courts have seized on that distinction when *upholding* non-Article III adjudication, not when striking it down. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 451–452 (1929) (Court of Customs Appeals); *Williams* v. *United States*, 289 U. S. 553, 579–580 (1933) (Court of Claims). The one exception is *Northern*

Pipeline, where the Court struck down the Bankruptcy Act of 1978. But in that case there was no majority. And a plurality, not a majority, read the statement roughly in the way the Court does today. See 458 U. S., at 67–70.

B

At the same time, I believe the majority places insufficient weight on *Crowell*, a seminal case that clarified the scope of the dictum in *Murray's Lessee*. In that case, the Court considered whether Congress could grant to an Article I administrative agency the power to adjudicate an employee's workers' compensation claim against his employer. The Court assumed that an Article III court would review the agency's decision *de novo* in respect to questions of law but it would conduct a less searching review (looking to see only if the agency's award was "supported by evidence in the record") in respect to questions of fact. *Crowell*, 285 U. S., at 48–50. The Court pointed out that the case involved a dispute between private persons (a matter of "private rights") and (with one exception not relevant here) it upheld Congress' delegation of primary factfinding authority to the agency.

Justice Brandeis, dissenting (from a here-irrelevant portion of the Court's holding), wrote that the adjudicatory scheme raised only a due process question: When does due process require decision by an Article III judge? He answered that question by finding constitutional the statute's delegation of adjudicatory authority to an agency. *Id.*, at 87.

Crowell has been hailed as "the greatest of the cases validating administrative adjudication." Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 251 (1990). Yet, in a footnote, the majority distinguishes *Crowell* as a case in which the Court upheld the delegation of adjudicatory authority to an administrative agency simply because the agency's power to make the "specialized, narrowly confined

factual determinations" at issue arising in a "particularized area of law" made the agency a "true 'adjunct' of the District Court." *Ante,* at 489–490, n. 6. Were *Crowell*'s holding as narrow as the majority suggests, one could question the validity of Congress' delegation of authority to adjudicate disputes among private parties to other agencies such as the National Labor Relations Board, the Commodity Futures Trading Commission, the Surface Transportation Board, and the Department of Housing and Urban Development, thereby resurrecting important legal questions previously thought to have been decided. See 29 U. S. C. § 160; 7 U. S. C. § 18; 49 U. S. C. § 10704; 42 U. S. C. § 3612(b).

C

The majority, in my view, overemphasizes the precedential effect of the plurality opinion in *Northern Pipeline.* *Ante,* at 485–487. There, the Court held unconstitutional the jurisdictional provisions of the Bankruptcy Act of 1978 granting adjudicatory authority to bankruptcy judges who lack the protections of tenure and compensation that Article III provides. Four Members of the Court wrote that Congress could grant adjudicatory authority to a non-Article III judge only where (1) the judge sits on a "territorial cour[t]," (2) the judge conducts a "courts-martial," or (3) the case involves a "public right," namely, a "matter" that "at a minimum arise[s] 'between the government and others.'" 458 U. S., at 64–70 (plurality opinion) (quoting *Ex parte Bakelite Corp.*, *supra,* at 451). Two other Members of the Court, without accepting these limitations, agreed with the result because the case involved a breach-of-contract claim brought by the bankruptcy trustee on behalf of the bankruptcy estate against a third party who was not part of the bankruptcy proceeding, and none of the Court's preceding cases (which, the two Members wrote, "do not admit of easy synthesis") had "gone so far as to sanction th[is] type of adjudication." 458 U. S., at 90–91 (Rehnquist, J. concurring in judgment).

Three years later, the Court held that *Northern Pipeline* "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas*, 473 U. S., at 584.

D

Rather than leaning so heavily on the approach taken by the plurality in *Northern Pipeline*, I would look to this Court's more recent Article III cases *Thomas* and *Schor*—cases that commanded a clear majority. In both cases the Court took a more pragmatic approach to the constitutional question. It sought to determine whether, in the particular instance, the challenged delegation of adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch.

1

In *Thomas*, the Court focused directly upon the nature of the Article III problem, illustrating how the Court should determine whether a delegation of adjudicatory authority to a non-Article III judge violates the Constitution. The statute in question required pesticide manufacturers to submit to binding arbitration claims for compensation owed for the use by one manufacturer of the data of another to support its federal pesticide registration. After describing *Northern Pipeline*'s holding in the language I have set forth above, *supra* this page, the Court stated that "*practical attention to substance* rather than doctrinaire reliance on formal categories should inform application of Article III." *Thomas*, 473 U. S., at 587 (emphasis added). It indicated that Article III's requirements could not be "determined" by "the identity of the parties alone," *ibid.*, or by the "private rights"/"public

rights" distinction, *id.*, at 585–586. And it upheld the arbitration provision of the statute.

The Court pointed out that the right in question was created by a federal statute, it "represent[s] a pragmatic solution to the difficult problem of spreading [certain] costs," and the statute "does not preclude review of the arbitration proceeding by an Article III court." *Id.*, at 589–592. The Court concluded:

> "Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme." *Id.*, at 590.

2

Most recently, in *Schor*, the Court described in greater detail how this Court should analyze this kind of Article III question. The question at issue in *Schor* involved a delegation of authority to an agency to adjudicate a counterclaim. A customer brought before the Commodity Futures Trading Commission (CFTC) a claim for reparations against his commodity futures broker. The customer noted that his brokerage account showed that he owed the broker money, but he said that the broker's unlawful actions had produced that debit balance, and he sought damages. The broker brought a counterclaim seeking the money that the account showed the customer owed. This Court had to decide whether agency adjudication of such a counterclaim is consistent with Article III.

In doing so, the Court expressly "declined to adopt formalistic and unbending rules." *Schor*, 478 U. S., at 851. Rather, it "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Ibid.* Those relevant factors include (1) "the origins and importance of the right to be adjudicated"; (2) "the extent to which

the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; (3) the extent to which the delegation nonetheless reserves judicial power for exercise by Article III courts; (4) the presence or "absence of consent to an initial adjudication before a non-Article III tribunal"; and (5) "the concerns that drove Congress to depart from" adjudication in an Article III court. *Id.*, at 849, 851.

The Court added that where "private rights," rather than "public rights," are involved, the "danger of encroaching on the judicial powers" is greater. *Id.*, at 853–854 (internal quotation marks omitted). Thus, while non-Article III adjudication of "private rights" is not necessarily unconstitutional, the Court's constitutional "examination" of such a scheme must be more "searching." *Ibid.*

Applying this analysis, the Court upheld the agency's authority to adjudicate the counterclaim. The Court conceded that the adjudication might be of a kind traditionally decided by a court and that the rights at issue were "private," not "public." *Id.*, at 853. But, the Court said, the CFTC deals only with a "'particularized area of law'"; the decision to invoke the CFTC forum is "left entirely to the parties"; Article III courts can review the agency's findings of fact under "the same 'weight of the evidence' standard sustained in *Crowell*" and review its "legal determinations . . . *de novo*"; and the agency's "counterclaim jurisdiction" was necessary to make "workable" a "reparations procedure," which constitutes an important part of a congressionally enacted "regulatory scheme." *Id.*, at 852–856. The Court concluded that for these and other reasons "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." *Id.*, at 856.

II

A

This case law, as applied in *Thomas* and *Schor*, requires us to determine pragmatically whether a congressional dele-

gation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III. That is to say, we must determine through an examination of certain relevant factors whether that delegation constitutes a significant encroachment by the Legislative or Executive Branches of Government upon the realm of authority that Article III reserves for exercise by the Judicial Branch of Government. Those factors include (1) the nature of the claim to be adjudicated; (2) the nature of the non-Article III tribunal; (3) the extent to which Article III courts exercise control over the proceeding; (4) the presence or absence of the parties' consent; and (5) the nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections. The presence of "private rights" does not automatically determine the outcome of the question but requires a more "searching" examination of the relevant factors. *Schor*, *supra*, at 854.

Insofar as the majority would apply more formal standards, it simply disregards recent, controlling precedent. *Thomas*, 473 U. S., at 587 ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"); *Schor*, *supra*, at 851 ("[T]he Court has declined to adopt formalistic and unbending rules" for deciding Article III cases).

B

Applying *Schor*'s approach here, I conclude that the delegation of adjudicatory authority before us is constitutional. A grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III.

First, I concede that *the nature of the claim to be adjudicated* argues against my conclusion. Vickie Marshall's counterclaim—a kind of tort suit—resembles "a suit at the common law." *Murray's Lessee*, 18 How., at 284. Although not

determinative of the question, see *Schor*, 478 U. S., at 853, a delegation of authority to a non-Article III judge to adjudicate a claim of that kind poses a heightened risk of encroachment on the Federal Judiciary, *id.*, at 854.

At the same time the significance of this factor is mitigated here by the fact that bankruptcy courts often decide claims that similarly resemble various common-law actions. Suppose, for example, that ownership of 40 acres of land in the bankruptcy debtor's possession is disputed by a creditor. If that creditor brings a claim in the bankruptcy court, resolution of that dispute requires the bankruptcy court to apply the same state property law that would govern in a state-court proceeding. This kind of dispute arises with regularity in bankruptcy proceedings.

Of course, in this instance the state-law question is embedded in a debtor's counterclaim, not a creditor's claim. But the counterclaim is "compulsory." It "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. Rule Civ. Proc. 13(a); Fed. Rule Bkrtcy. Proc. 7013. Thus, resolution of the counterclaim will often turn on facts identical to, or at least related to, those at issue in a creditor's claim that is undisputedly proper for the bankruptcy court to decide.

Second, *the nature of the non-Article III tribunal* argues in favor of constitutionality. That is because the tribunal is made up of judges who enjoy considerable protection from improper political influence. Unlike the 1978 Act which provided for the appointment of bankruptcy judges by the President with the advice and consent of the Senate, 28 U. S. C. § 152 (1976 ed., Supp. IV), current law provides that the federal courts of appeals appoint federal bankruptcy judges, § 152(a)(1) (2006 ed.). Bankruptcy judges are removable by the circuit judicial council (made up of federal court of appeals and district court judges) and only for cause. § 152(e). Their salaries are pegged to those of federal district court judges, § 153(a), and the cost of their courthouses and other

work-related expenses are paid by the Judiciary, § 156. Thus, although Congress technically exercised its Article I power when it created bankruptcy courts, functionally, bankruptcy judges can be compared to magistrate judges, law clerks, and the Judiciary's administrative officials, whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch.

Third, *the control exercised by Article III judges over bankruptcy proceedings* argues in favor of constitutionality. Article III judges control and supervise the bankruptcy court's determinations—at least to the same degree that Article III judges supervised the agency's determinations in *Crowell*, if not more so. Any party may appeal those determinations to the federal district court, where the federal judge will review all determinations of fact for clear error and will review all determinations of law *de novo*. Fed. Rule Bkrtcy. Proc. 8013; 10 Collier on Bankruptcy ¶ 8013.04 (16th ed. 2011). But for the here-irrelevant matter of what *Crowell* considered to be special "constitutional" facts, the standard of review for factual findings here ("clearly erroneous") is more stringent than the standard at issue in *Crowell* (whether the agency's factfinding was "supported by evidence in the record"). 285 U. S., at 48; see *Dickinson* v. *Zurko*, 527 U. S. 150, 152, 153 (1999) ("unsupported by substantial evidence" more deferential than "clearly erroneous" (internal quotation marks omitted)). And, as *Crowell* noted, "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." 285 U. S., at 51.

Moreover, in one important respect Article III judges maintain greater control over the bankruptcy court proceedings at issue here than they did over the relevant proceedings in any of the previous cases in which this Court has upheld a delegation of adjudicatory power. The District Court here may "withdraw, in whole or in part, any case or

proceeding referred [to the Bankruptcy Court] . . . on its own motion or on timely motion of any party, for cause shown." 28 U. S. C. § 157(d); cf. *Northern Pipeline*, 458 U. S., at 80, n. 31 (plurality opinion) (contrasting pre-1978 law where "power to withdraw the case from the [bankruptcy] referee" gave district courts "control" over case with the unconstitutional 1978 statute, which provided no such district court authority).

Fourth, the fact that *the parties have consented* to Bankruptcy Court jurisdiction argues in favor of constitutionality, and strongly so. Pierce Marshall, the counterclaim defendant, is not a stranger to the litigation, forced to appear in Bankruptcy Court against his will. Cf. *id.*, at 91 (Rehnquist, J., concurring in judgment) (suit was litigated in Bankruptcy Court "over [the defendant's] objection"). Rather, he appeared voluntarily in Bankruptcy Court as one of Vickie Marshall's creditors, seeking a favorable resolution of his claim against Vickie Marshall to the detriment of her other creditors. He need not have filed a claim, perhaps not even at the cost of bringing it in the future, for he says his claim is "nondischargeable," in which case he could have litigated it in a state or federal court after distribution. See 11 U. S. C. § 523(a)(6). Thus, Pierce Marshall likely had "an alternative forum to the bankruptcy court in which to pursue [his] clai[m]." *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 59, n. 14 (1989).

The Court has held, in a highly analogous context, that this type of consent argues strongly in favor of using ordinary bankruptcy court proceedings. In *Granfinanciera*, the Court held that when a bankruptcy trustee seeks to void a transfer of assets from the debtor to an individual on the ground that the transfer to that individual constitutes an unlawful "preference," the question whether the individual has a right to a jury trial "depends upon whether the creditor has submitted a claim against the estate." *Id.*, at 58. The following year, in *Langenkamp* v. *Culp*, 498

U. S. 42 (1990) *(per curiam)*, the Court emphasized that when the individual files a claim against the estate, that individual has

> "trigger[ed] the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*." *Id.*, at 44 (quoting *Granfinanciera*, 492 U. S., at 58; citations omitted).

As we have recognized, the jury trial question and the Article III question are highly analogous. See *id.*, at 52–53. And to that extent, *Granfinanciera*'s and *Langenkamp*'s basic reasoning and conclusion apply here: Even when private rights are at issue, non-Article III adjudication may be appropriate when both parties consent. Cf. *Northern Pipeline*, *supra*, at 80, n. 31 (plurality opinion) (noting the importance of consent to bankruptcy jurisdiction). See also *Schor*, 478 U. S., at 849 ("[A]bsence of consent to an initial adjudication before a non-Article III tribunal was relied on [in *Northern Pipeline*] as a significant factor in determining that Article III forbade such adjudication"). The majority argues that Pierce Marshall "did not truly consent" to bankruptcy jurisdiction, *ante*, at 493, but filing a proof of claim was sufficient in *Langenkamp* and *Granfinanciera*, and there is no relevant distinction between the claims filed in those cases and the claim filed here.

Fifth, *the nature and importance of the legislative purpose served* by the grant of adjudicatory authority to bankruptcy tribunals argues strongly in favor of constitutionality. Congress' delegation of adjudicatory powers over counter-

claims asserted against bankruptcy claimants constitutes an important means of securing a constitutionally authorized end. Article I, § 8, of the Constitution explicitly grants Congress the "Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." James Madison wrote in the Federalist Papers that the

> "power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, p. 271 (C. Rossiter ed. 1961).

Congress established the first Bankruptcy Act in 1800. 2 Stat. 19. From the beginning, the "core" of federal bankruptcy proceedings has been "the restructuring of debtor-creditor relations." *Northern Pipeline*, *supra*, at 71 (plurality opinion). And, to be effective, a single tribunal must have broad authority to restructure those relations, "having jurisdiction of the parties to controversies brought before them," "decid[ing] all matters in dispute," and "decree[ing] complete relief." *Katchen* v. *Landy*, 382 U. S. 323, 335 (1966) (internal quotation marks omitted).

The restructuring process requires a creditor to file a proof of claim in the bankruptcy court. 11 U. S. C. § 501; Fed. Rule Bkrtcy. Proc. 3002(a). In doing so, the creditor "triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp*, *supra*, at 44 (quoting *Granfinanciera*, *supra*, at 58). By filing a proof of claim, the creditor agrees to the bankruptcy court's resolution of that claim, and if the creditor wins, the creditor will receive a share of the distribution of the bankruptcy estate. When the bankruptcy estate has a related claim against that creditor, that counterclaim may offset the creditor's claim, or even

yield additional damages that augment the estate and may be distributed to the other creditors.

The consequent importance to the total bankruptcy scheme of permitting the trustee in bankruptcy to assert counterclaims against claimants, *and resolving those counterclaims in a bankruptcy court*, is reflected in the fact that Congress included "counterclaims by the estate against persons filing claims against the estate" on its list of "[c]ore proceedings." 28 U. S. C. § 157(b)(2)(C). And it explains the difference, reflected in this Court's opinions, between a claimant's and a nonclaimant's constitutional right to a jury trial. Compare *Granfinanciera*, 492 U. S., at 58–59 ("Because petitioners . . . have not filed claims against the estate" they retain "their Seventh Amendment right to a trial by jury"), with *Langenkamp*, 498 U. S., at 45 ("Respondents filed claims against the bankruptcy estate" and "[c]onsequently, they were not entitled to a jury trial").

Consequently a bankruptcy court's determination of such matters has more than "some bearing on a bankruptcy case." *Ante*, at 499 (emphasis deleted). It plays a critical role in Congress' constitutionally based effort to create an efficient, effective federal bankruptcy system. At the least, that is what Congress concluded. We owe deference to that determination, which shows the absence of any legislative or executive motive, intent, purpose, or desire to encroach upon areas that Article III reserves to judges to whom it grants tenure and compensation protections.

Considering these factors together, I conclude that, as in *Schor*, "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." 478 U. S., at 856. I would similarly find the statute before us constitutional.

III

The majority predicts that as a "practical matter" today's decision "does not change all that much." *Ante*, at 501–502. But I doubt that is so. Consider a typical case: A tenant

files for bankruptcy. The landlord files a claim for unpaid rent. The tenant asserts a counterclaim for damages suffered by the landlord's (1) failing to fulfill his obligations as lessor, and (2) improperly recovering possession of the premises by misrepresenting the facts in housing court. (These are close to the facts presented in *In re Beugen*, 81 B. R. 994 (Bkrtcy. Ct. ND Cal. 1988).) This state-law counterclaim does not "ste[m] from the bankruptcy itself," *ante*, at 499, it would not "necessarily be resolved in the claims allowance process," *ibid.*, and it would require the debtor to prove damages suffered by the lessor's failures, the extent to which the landlord's representations to the housing court were untrue, and damages suffered by improper recovery of possession of the premises, cf. *ante*, at 497–498. Thus, under the majority's holding, the federal district judge, not the bankruptcy judge, would have to hear and resolve the counterclaim.

Why is that a problem? Because these types of disputes arise in bankruptcy court with some frequency. See, *e. g.*, *In re CBI Holding Co.*, 529 F. 3d 432 (CA2 2008) (state-law claims and counterclaims); *In re Winstar Communications, Inc.*, 348 B. R. 234 (Bkrtcy. Ct. Del. 2005) (same); *In re Ascher*, 128 B. R. 639 (Bkrtcy. Ct. ND Ill. 1991) (same); *In re Sun West Distributors, Inc.*, 69 B. R. 861 (Bkrtcy. Ct. SD Cal. 1987) (same). Because the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases. Administrative Office of the United States Courts, J. Duff, Judicial Business of the United States Courts: Annual Report of the Director 14 (2010). Because unlike the "related" noncore state-law claims that bankruptcy courts must abstain from hearing, see *ante*, at 502, compulsory counterclaims involve the same factual disputes as the claims that may be finally adjudicated by the bankruptcy courts. Because under these circumstances, a constitutionally required game of jurisdictional

ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.

For these reasons, with respect, I dissent.

Syllabus

FREEMAN *v.* UNITED STATES

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

No. 09–10245. Argued February 23, 2011—Decided June 23, 2011

In order to reduce unwarranted federal sentencing disparities, the Sentencing Reform Act of 1984 authorizes the United States Sentencing Commission to create, and to retroactively amend, Sentencing Guidelines to inform judicial discretion. Title 18 U. S. C. § 3582(c)(2) permits a defendant who was sentenced to a term of imprisonment "based on" a Guidelines sentencing range that has subsequently been lowered by retroactive amendment to move for a sentence reduction. This case concerns § 3582(c)(2)'s application to cases in which the defendant and the Government have entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), which permits the parties to "agree that a specific sentence or sentencing range is the appropriate disposition of the case," and "binds the court [to the agreed-upon sentence] once [it] accepts the plea agreement."

Petitioner Freeman was indicted for various crimes, including possessing with intent to distribute cocaine base. 21 U. S. C. § 841(a)(1). He entered into an 11(c)(1)(C) agreement to plead guilty to all charges; in return the Government agreed to a 106-month sentence. The agreement states that the parties independently reviewed the applicable Guidelines, noted that Freeman agreed to have his sentence determined under the Guidelines, and reflected the parties' understanding that the agreed-to sentence corresponded with the minimum sentence suggested by the applicable Guidelines range of 46 to 57 months, along with a consecutive mandatory minimum of 60 months for possessing a firearm in furtherance of a drug-trafficking crime under 18 U. S. C. § 924(c)(1)(A). Three years after the District Court accepted the plea agreement, the Commission issued a retroactive Guidelines amendment to remedy the significant disparity between the penalties for cocaine base and powder cocaine offenses. Because the amendment's effect was to reduce Freeman's applicable sentencing range to 37 to 46 months plus the consecutive 60-month mandatory minimum, he moved for a sentence reduction under § 3582(c)(2). However, the District Court denied the motion, and the Sixth Circuit affirmed because its precedent rendered defendants sentenced pursuant to 11(c)(1)(C) agreements ineligible for § 3582(c)(2) relief, barring a miscarriage of justice or mutual mistake.

Held: The judgment is reversed, and the case is remanded.

355 Fed. Appx. 1, reversed and remanded.

Syllabus

JUSTICE KENNEDY, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN, concluded that defendants who enter into 11(c)(1)(C) agreements that specify a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2). Pp. 529–534.

(a) The text and purpose of the statute, Rule 11(c)(1)(C), and the governing Guidelines policy statements compel the conclusion that the district court has authority to entertain § 3582(c)(2) motions when sentences are imposed in light of the Guidelines, even if the defendant enters into an 11(c)(1)(C) agreement. The district judge must, in every case, impose "a sentence sufficient, but not greater than necessary, to comply with" the purposes of federal sentencing, in light of the Guidelines and other relevant factors. § 3553(a). The Guidelines provide a framework or starting point—a basis, in the term's commonsense meaning—for the judge's exercise of discretion. Rule 11(c)(1)(C) permits the defendant and the prosecutor to agree on a specific sentence, but that agreement does not discharge the district court's independent obligation to exercise its discretion. In the usual sentencing, whether following trial or plea, the judge's reliance on the Guidelines will be apparent when the judge uses the Guidelines range as the starting point in the analysis and imposes a sentence within the range. *Gall* v. *United States*, 552 U. S. 38, 49. Even where the judge varies from the recommended range, *id.*, at 50, if the judge uses the sentencing range as the beginning point to explain the deviation, then the Guidelines are in a real sense a basis for the sentence. The parties' recommended sentence binds the court "once the court accepts the plea agreement," Rule 11(c)(1)(C), but the relevant policy statement forbids the judge to accept an agreement without first giving due consideration to the applicable Guidelines sentencing range, even if the parties recommend a specific sentence as a condition of the guilty plea, see U. S. Sentencing Commission, Guidelines Manual § 6B1.2. This approach finds further support in the policy statement applicable to § 3582(c)(2) motions, which instructs the district court in modifying a sentence to substitute the retroactive amendment, but to leave all original Guidelines determinations in place, § 1B1.10(b)(1). Pp. 529–530.

(b) Petitioner's sentencing hearing transcript reveals that the District Court expressed its independent judgment that the sentence was appropriate in light of the applicable Guidelines range. Its decision was therefore "based on" that range within § 3582(c)(2)'s meaning. Pp. 530–531.

(c) The Government's argument that sentences that follow an 11(c)(1)(C) agreement are based only on the agreement itself and not the Guidelines, and are therefore ineligible for § 3582(c)(2) reduction, must be rejected. Even when a defendant enters into an 11(c)(1)(C) agree-

ment, the judge's decision to accept the plea and impose the recommended sentence is likely to be based on the Guidelines; and when it is, the defendant should be eligible to seek § 3582(c)(2) relief. Pp. 531–534.

JUSTICE SOTOMAYOR concluded that if an agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) ((C) agreement) expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the Sentencing Commission, the prison term is "based on" the range employed and the defendant is eligible for sentence reduction under 18 U. S. C. § 3582(c)(2). Pp. 534–544.

(a) The term of imprisonment imposed by a district court pursuant to a (C) agreement is "based on" the agreement itself, not on the judge's calculation of the Guidelines sentencing range. To hold otherwise would be to contravene the very purpose of (C) agreements—to bind the district court and allow the Government and the defendant to determine what sentence he will receive. Pp. 535–538.

(b) This does not mean, however, that a term of imprisonment imposed under a (C) agreement can *never* be reduced under § 3582(c)(2). Because the very purpose of a (C) agreement is to allow the parties to determine the defendant's sentence, when the agreement itself employs a particular Guidelines sentencing range applicable to the charged offenses in establishing the term of imprisonment imposed by the district court, the defendant is eligible to have his sentence reduced under § 3582(c)(2). Pp. 538–542.

(c) Freeman is eligible. The offense level and criminal history category set forth in his (C) agreement produce a sentencing range of 46 to 57 months; it is evident that the parties combined the 46-month figure at the low end of the range with the 60-month mandatory minimum sentence under § 924(c)(1)(A) to establish the 106-month sentence called for in the agreement. Under the amended Guidelines, however, the applicable sentencing range is now 37 to 46 months. Therefore, Freeman's prison term is "based on" a sentencing range that "has subsequently been lowered by the Sentencing Commission," rendering him eligible for sentence reduction. Pp. 542–544.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment, *post*, p. 534. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post*, p. 544.

Frank W. Heft, Jr., argued the cause for petitioner. With him on the briefs was *Scott T. Wendelsdorf.*

Curtis E. Gannon argued the cause for the United States. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *John-Alex Romano*.

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join.

The Sentencing Reform Act of 1984, 18 U. S. C. § 3551 *et seq.*, calls for the creation of Sentencing Guidelines to inform judicial discretion in order to reduce unwarranted disparities in federal sentencing. The Act allows retroactive amendments to the Guidelines for cases where the Guidelines become a cause of inequality, not a bulwark against it. When a retroactive Guidelines amendment is adopted, § 3582(c)(2) permits defendants sentenced based on a sentencing range that has been modified to move for a reduced sentence.

The question here is whether defendants who enter into plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2). See Fed. Rule Crim. Proc. 11(c)(1)(C) (authorizing such plea agreements). The Court of Appeals for the Sixth Circuit held that, barring a miscarriage of justice or mutual mistake, defendants who enter into 11(c)(1)(C) agreements cannot benefit from retroactive Guidelines amendments.

Five Members of the Court agree that this judgment must be reversed. The Justices who join this plurality opinion conclude that the categorical bar enacted by the Court of Appeals finds no support in § 3582(c)(2), Rule 11(c)(1)(C), or the relevant Guidelines policy statements. In every case the judge must exercise discretion to impose an appropriate sentence. This discretion, in turn, is framed by the Guidelines. And the Guidelines must be consulted, in the regular course, whether the case is one in which the conviction was

after a trial or after a plea, including a plea pursuant to an agreement that recommends a particular sentence. The district judge's decision to impose a sentence may therefore be based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C). Where the decision to impose a sentence is based on a range later subject to retroactive amendment, § 3582(c)(2) permits a sentence reduction.

Section 3582(c)(2) empowers district judges to correct sentences that depend on frameworks that later prove unjustified. There is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range.

JUSTICE SOTOMAYOR would reverse the judgment on a different ground set out in the opinion concurring in the judgment. That opinion, like the dissent, would hold that sentences following 11(c)(1)(C) agreement are based on the agreement rather than the Guidelines, and therefore that § 3582(c)(2) relief is not available in the typical case. But unlike the dissent she would permit the petitioner here to seek a sentence reduction because his plea agreement in express terms ties the recommended sentence to the Guidelines sentencing range.

The reasons that lead those Members of the Court who join this plurality opinion may be set forth as follows.

I

A

Federal courts are forbidden, as a general matter, to "modify a term of imprisonment once it has been imposed," 18 U. S. C. § 3582(c); but the rule of finality is subject to a few narrow exceptions. Here, the exception is contained in a statutory provision enacted to permit defendants whose Guidelines sentencing range has been lowered by retroactive amendment to move for a sentence reduction if the terms of the statute are met. The statute provides:

> "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U. S. C. 994(*o*) . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(2).

This case concerns the application of the statute to cases in which defendants enter into plea agreements under Rule 11(c)(1)(C). That Rule permits the parties to "agree that a specific sentence or sentencing range is the appropriate disposition of the case, . . . [a request which] binds the court once the court accepts the plea agreement." The question is whether defendants who enter into 11(c)(1)(C) agreements that specify a particular sentence may be said to have been sentenced "based on" a Guidelines sentencing range, making them eligible for relief under § 3582(c)(2).

B

Petitioner William Freeman was indicted in 2005 for various crimes, including possessing with intent to distribute cocaine base. 21 U. S. C. §§ 841(a)(1), (b)(1)(C). He entered into an agreement under Rule 11(c)(1)(C) in which he agreed to plead guilty to all charges. In return the Government "agree[d] that a sentence of 106 months' incarceration is the appropriate disposition of this case." App. 26a. The agreement states that "[b]oth parties have independently reviewed the Sentencing Guidelines applicable in this case," and that "[Freeman] agrees to have his sentence determined pursuant to the Sentencing Guidelines." *Id.*, at 27a–28a. The agreement reflects the parties' expectation that Freeman would face a Guidelines range of 46 to 57 months, *ibid.* (Offense Level 19, Criminal History Category IV), along with a consecutive mandatory minimum of 60 months for pos-

sessing a firearm in furtherance of a drug-trafficking crime under 18 U. S. C. § 924(c)(1)(A). The recommended sentence of 106 months thus corresponded with the minimum sentence suggested by the Guidelines, in addition to the 60-month § 924(c)(1)(A) sentence.

The District Court accepted the plea agreement. At the sentencing hearing, the court "adopt[ed] the findings of the probation officer disclosed in the probation report and application of the guidelines as set out therein." App. 47a. "[H]aving considered the advisory guidelines and 18 USC 3553(a)," the court imposed the recommended 106-month sentence, which was "within the guideline ranges"—the 46- to 57-month range the parties had anticipated plus the mandatory 60 months under § 924(c)(1)(A)—and "sufficient to meet the objectives of the law." *Id.*, at 48a–49a.

Three years later, the Commission issued a retroactive amendment to the Guidelines to remedy the significant disparity between the penalties for cocaine base and powder cocaine offenses. See United States Sentencing Commission, Guidelines Manual Supp. App. C, Amdt. 706 (Nov. 2010) (USSG) (effective Nov. 1, 2007) (adjusting Guidelines); *id.*, Amdt. 713 (effective Mar. 3, 2008) (making Amendment 706 retroactive). Its effect was to reduce Freeman's applicable sentencing range to 37 to 46 months, again with the consecutive 60-month mandatory minimum. App. 142a–144a (Sealed).

Freeman moved for a sentence reduction under § 3582(c)(2). The District Court, however, denied the motion, and the Court of Appeals for the Sixth Circuit affirmed. *United States* v. *Goins*, 355 Fed. Appx. 1 (2009). Adhering to its decision in *United States* v. *Peveler*, 359 F. 3d 369 (2004), the Court of Appeals held that defendants sentenced following 11(c)(1)(C) agreements that specify a particular sentence are ineligible for § 3582(c)(2) relief, barring a miscarriage of justice or mutual mistake.

This Court granted certiorari. 561 U. S. 1058 (2010).

II

Federal sentencing law requires the district judge in every case to impose "a sentence sufficient, but not greater than necessary, to comply with" the purposes of federal sentencing, in light of the Guidelines and other § 3553(a) factors. 18 U. S. C. § 3553(a). The Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion. *E. g.*, 1 Oxford English Dictionary 977 (2d ed. 1989). Rule 11(c)(1)(C) permits the defendant and the prosecutor to agree that a specific sentence is appropriate, but that agreement does not discharge the district court's independent obligation to exercise its discretion. In the usual sentencing, whether following trial or plea, the judge's reliance on the Guidelines will be apparent, for the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range. *Gall* v. *United States*, 552 U. S. 38, 49 (2007). Even where the judge varies from the recommended range, *id.*, at 50, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence.

Rule 11(c)(1)(C) makes the parties' recommended sentence binding on the court "once the court accepts the plea agreement," but the governing policy statement confirms that the court's acceptance is itself based on the Guidelines. See USSG § 6B1.2. That policy statement forbids the district judge to accept an 11(c)(1)(C) agreement without first evaluating the recommended sentence in light of the defendant's applicable sentencing range. The commentary to § 6B1.2 advises that a court may accept an 11(c)(1)(C) agreement "only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons." Cf. *Stinson* v. *United States*, 508 U. S. 36 (1993) (Guidelines commentary is authoritative). Any bargain between the parties is contingent until the

court accepts the agreement. The Guidelines require the district judge to give due consideration to the relevant sentencing range, even if the defendant and prosecutor recommend a specific sentence as a condition of the guilty plea.

This approach finds further support in the policy statement that applies to § 3582(c)(2) motions. See USSG § 1B1.10. It instructs the district court in modifying a sentence to substitute only the retroactive amendment and then leave all original Guidelines determinations in place. § 1B1.10(b)(1). In other words, the policy statement seeks to isolate whatever marginal effect the since-rejected Guideline had on the defendant's sentence. Working backwards from this purpose, § 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement. This is the only rule consistent with the governing policy statement, a statement that rests on the premise that a Guideline range may be one of many factors that determine the sentence imposed.

Thus, the text and purpose of the three relevant sources—the statute, the Rule, and the governing policy statements—require the conclusion that the district court has authority to entertain § 3582(c)(2) motions when sentences are imposed in light of the Guidelines, even if the defendant enters into an 11(c)(1)(C) agreement.

III

The transcript of petitioner's sentencing hearing reveals that his original sentence was based on the Guidelines. The District Court first calculated the sentencing range, as both § 3553(a)(4) and § 6B1.2(c) require. App. 47a, 49a. It explained that it "considered the advisory guidelines and 18 USC 3553(a)," and that "the sentence imposed . . . fall[s] within the guideline rang[e] and [is] sufficient to meet the objectives of the law." *Id.*, at 48a–49a. Apart from the de-

fense attorney's initial statement that the case involved a "(C) plea," *id.*, at 47a, the hearing proceeded as if the agreement did not exist. The court expressed its independent judgment that the sentence was appropriate in light of the applicable Guidelines range, and its decision was therefore "based on" that range.

IV

The Government asks this Court to hold that sentences like petitioner's, which follow an 11(c)(1)(C) agreement, are based only on the agreement and not the Guidelines, and therefore that defendants so sentenced are ineligible for § 3582(c)(2) relief. The Government's position rests in part on the concern that the conclusion reached here will upset the bargain struck between prosecutor and defendant. See Brief for United States 42–43. That, however, has nothing to do with whether a sentence is "based on" the Guidelines under § 3582(c)(2). And in any event, the concern is overstated. Retroactive reductions to sentencing ranges are infrequent, so the problem will not arise often. Klein & Thompson, DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing, 44 Tulsa L. Rev. 519, 535 (2009). More important, the district court's authority under § 3582(c)(2) is subject to significant constraints, constraints that can be enforced by appellate review.

The binding policy statement governing § 3582(c)(2) motions places considerable limits on district court discretion. All Guidelines decisions from the original sentencing remain in place, save the sentencing range that was altered by retroactive amendment. USSG § 1B1.10(b)(1). In an initial sentencing hearing, a district court can vary below the Guidelines; but, by contrast, below-Guidelines modifications in § 3582(c)(2) proceedings are forbidden, USSG § 1B1.10(b)(2)(A), except where the original sentence was itself a downward departure, § 1B1.10(b)(2)(B). And the court must always "consider the nature and seriousness of the danger to

any person or the community that may be posed by a reduction in the defendant's term of imprisonment." §1B1.10, comment., n. 1(B)(ii). The district court's authority is limited; and the courts of appeals, and ultimately this Court, can ensure that district courts do not overhaul plea agreements, thereby abusing their authority under §3582(c)(2). See *Dillon* v. *United States*, 560 U. S. 817 (2010) (reviewing and affirming a §3582(c)(2) sentence reduction); *Gall*, 552 U. S., at 49 (all sentences are reviewable for abuse of discretion).

The Government would enact a categorical bar on §3582(c)(2) relief. But such a bar would prevent district courts from making an inquiry that is within their own special knowledge and expertise. What is at stake in this case is a defendant's eligibility for relief, not the extent of that relief. Indeed, even where a defendant is permitted to seek a reduction, the district judge may conclude that a reduction would be inappropriate. District judges have a continuing professional commitment, based on scholarship and accumulated experience, to a consistent sentencing policy. They can rely on the frameworks they have devised to determine whether and to what extent a sentence reduction is warranted in any particular case. They may, when considering a §3582(c)(2) motion, take into account a defendant's decision to enter into an 11(c)(1)(C) agreement. If the district court, based on its experience and informed judgment, concludes the agreement led to a more lenient sentence than would otherwise have been imposed, it can deny the motion, for the statute permits but does not require the court to reduce a sentence. This discretion ensures that §3582(c)(2) does not produce a windfall.

As noted, the opinion concurring in the judgment suggests an intermediate position. That opinion argues that in general defendants sentenced following 11(c)(1)(C) agreements are ineligible for §3582(c)(2) relief, but relief may be sought where the plea agreement itself contemplates sentence re-

duction. The statute, however, calls for an inquiry into the reasons for a judge's sentence, not the reasons that motivated or informed the parties. If, as the Government suggests, the judge's decision to impose a sentence is based on the agreement, then § 3582(c)(2) does not apply. The parties cannot by contract upset an otherwise-final sentence. And the consequences of this erroneous rule would be significant. By allowing modification only when the terms of the agreement contemplate it, the proposed rule would permit the very disparities the Sentencing Reform Act seeks to eliminate.

The Act aims to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences. See 18 U. S. C. § 3553(a)(6); K. Stith & J. Cabranes, Fear of Judging 104–105 (1998). Section 3582(c)(2) contributes to that goal by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes are too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes.

The crack-cocaine range here is a prime example of an unwarranted disparity that § 3582(c)(2) is designed to cure. The Commission amended the crack-cocaine Guidelines to effect a "partial remedy" for the "urgent and compelling" problem of crack-cocaine sentences, which, the Commission concluded, "significantly undermines the various congressional objectives set forth in the Sentencing Reform Act." United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8–10 (May 2007); see also USSG Supp. App. C, Amdt. 706; *Kimbrough* v. *United States*, 552 U. S. 85, 99–100 (2007). The Commission determined that those Guidelines were flawed, and therefore that sentences that relied on them ought to be reexamined. There is no good reason to extend the benefit of the Commission's judgment only to an arbitrary subset of defendants

whose agreed sentences were accepted in light of a since-rejected Guidelines range based on whether their plea agreements refer to the Guidelines. Congress enacted § 3582(c)(2) to remedy systemic injustice, and the approach outlined in the opinion concurring in the judgment would undercut a systemic solution.

Even when a defendant enters into an 11(c)(1)(C) agreement, the judge's decision to accept the plea and impose the recommended sentence is likely to be based on the Guidelines; and when it is, the defendant should be eligible to seek § 3582(c)(2) relief. This straightforward analysis would avoid making arbitrary distinctions between similar defendants based on the terms of their plea agreements. And it would also reduce unwarranted disparities in federal sentencing, consistent with the purposes of the Sentencing Reform Act.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with the plurality that petitioner William Freeman is eligible for sentence reduction under 18 U. S. C. § 3582(c)(2), but I differ as to the reason why. In my view, the term of imprisonment imposed by a district court pursuant to an agreement authorized by Federal Rule of Criminal Procedure 11(c)(1)(C) ((C) agreement) is "based on" the agreement itself, not on the judge's calculation of the Sentencing Guidelines. However, I believe that if a (C) agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is "based on" the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2).

I

To ask whether a particular term of imprisonment is "based on" a Guidelines sentencing range is to ask whether that range serves as the basis or foundation for the term of imprisonment. No term of imprisonment—whether derived from a (C) agreement or otherwise—has legal effect until the court enters judgment imposing it. As a result, in applying § 3582(c)(2) a court must discern the foundation for the term of imprisonment imposed by the sentencing judge. As the plurality explains, in the normal course the district judge's calculation of the Guidelines range applicable to the charged offenses will serve as the basis for the term of imprisonment imposed. See *ante*, at 529; see also *Gall* v. *United States*, 552 U. S. 38, 49 (2007).

Sentencing under (C) agreements, however, is different. At the time of sentencing, the term of imprisonment imposed pursuant to a (C) agreement does not involve the court's independent calculation of the Guidelines or consideration of the other 18 U. S. C. § 3553(a) factors. The court may only accept or reject the agreement, and if it chooses to accept it, at sentencing the court may only impose the term of imprisonment the agreement calls for; the court may not change its terms. See Fed. Rule Crim. Proc. 11(c)(3)(A) ("To the extent the plea agreement is of the type specified in [Rule 11(c)(1)(C)], the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report"); Advisory Committee's Notes on 1979 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., pp. 583–584 (1982 ed.) ("[C]ritical to a . . . (C) agreement is that the defendant receive the . . . agreed-to sentence"); accord, *United States* v. *Rivera-Martínez*, 607 F. 3d 283, 286 (CA1 2010); *United States* v. *Green*, 595 F. 3d 432, 438 (CA2 2010).

In the (C) agreement context, therefore, it is the binding plea agreement that is the foundation for the term of imprisonment to which the defendant is sentenced. At the moment of sentencing, the court simply implements the terms

of the agreement it has already accepted. Contrary to the plurality's view, see *ante*, at 529–530, the fact that United States Sentencing Commission, Guidelines Manual § 6B1.2(c) (Nov. 2010) (USSG), instructs a district court to use the Guidelines as a yardstick in deciding whether to accept a (C) agreement does not mean that the term of imprisonment imposed by the court is "based on" a particular Guidelines sentencing range. The term of imprisonment imposed by the sentencing judge is dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation. In short, the term of imprisonment imposed pursuant to a (C) agreement is, for purposes of § 3582(c)(2), "based on" the agreement itself.

To hold otherwise would be to contravene the very purpose of (C) agreements—to bind the district court and allow the Government and the defendant to determine what sentence he will receive. Although district courts ordinarily have significant discretion in determining the appropriate sentence to be imposed on a particular defendant, see *Gall*, 552 U. S., at 46, under Rule 11(c)(1)(C) it is the parties' agreement that determines the sentence to be imposed, see Advisory Committee's Notes on 1999 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1570 (2000 ed.) (noting that, under a (C) agreement, "the government and defense have actually agreed on what amounts to an appropriate sentence . . . . [T]his agreement is binding on the court once the court accepts it"). To be sure, the court "retains absolute discretion whether to accept a plea agreement," *ibid.*, but once it does it is bound at sentencing to give effect to the parties' agreement as to the appropriate term of imprisonment.

Allowing district courts later to reduce a term of imprisonment simply because the court itself considered the Guidelines in deciding whether to accept the agreement would transform § 3582(c)(2) into a mechanism by which courts could rewrite the terms of (C) agreements in ways not con-

templated by the parties. At the time that § 3582(c)(2) was enacted in 1984, it was already well understood that, under Rule 11, the term of imprisonment stipulated in a (C) agreement bound the district court once it accepted the agreement. See Fed. Rule Crim. Proc. 11(e)(1)(C) (1982) (specifying that the parties to a (C) agreement may "agree that a specific sentence is the appropriate disposition of the case"); *United States* v. *French*, 719 F. 2d 387, 389, n. 2 (CA11 1983) *(per curiam)* (noting that a Rule 11(e)(1)(C) plea agreement was a "'binding' plea bargain").[1]

In the absence of any indication from the statutory text or legislative history that § 3582(c)(2) was meant to fundamentally alter the way in which Rule 11(c)(1)(C) operates, I cannot endorse the plurality's suggestion that § 3582(c)(2) should be understood "to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Ante*, at 530; cf. *Dillon* v. *United States*, 560 U. S. 817, 826 (2010) ("Congress intended [§ 3582(c)(2)] to authorize only a limited adjustment to an otherwise final sentence").

By the same token, the mere fact that the parties to a (C) agreement may have considered the Guidelines in the course of their negotiations does not empower the court under § 3582(c)(2) to reduce the term of imprisonment they ultimately agreed upon, as Freeman argues. Undoubtedly, he is correct that in most cases the Government and the defendant will negotiate the term of imprisonment in a (C) agreement by reference to the applicable Guidelines provisions. See Brief for Petitioner 30–31 ("[T]he Guidelines are . . . the starting point and initial benchmark for plea

[1] Prior to 2002, Rule 11's provisions governing binding plea agreements were located in Rule 11(e)(1)(C). In substance they were largely identical to the current rules in 11(c)(1)(C). See Fed. Rule Crim. Proc. 11(e)(1)(C) (2000).

negotiations"); Brief for United States 33 (noting the "concededly strong likelihood that the parties will . . . calculat[e] and conside[r] potential Guidelines ranges in the course of negotiating a plea agreement and selecting a specific sentence"). This only makes sense; plea bargaining necessarily occurs in the shadow of the sentencing scheme to which the defendant would otherwise be subject. See *United States* v. *Booker*, 543 U. S. 220, 255 (2005) ("[P]lea bargaining takes place in the shadow of . . . a potential trial" (emphasis deleted)).

The term of imprisonment imposed by the district court, however, is not "based on" those background negotiations; instead, as explained above, it is based on the binding agreement produced by those negotiations. I therefore cannot agree with Freeman that § 3582(c)(2) calls upon district courts to engage in a free-ranging search through the parties' negotiating history in search of a Guidelines sentencing range that might have been relevant to the agreement or the court's acceptance of it. Nor can I agree with the plurality that the district judge's calculation of the Guidelines provides the basis for the term of imprisonment imposed pursuant to a (C) agreement.

II

These conclusions, however, do not mean that a term of imprisonment imposed pursuant to a (C) agreement can *never* be reduced under § 3582(c)(2), as the Government contends. For example, Rule 11(c)(1)(C) allows the parties to "agree that a specific . . . sentencing range is the appropriate disposition of the case." In delineating the agreed-upon term of imprisonment, some (C) agreements may call for the defendant to be sentenced within a particular Guidelines sentencing range. In such cases, the district court's acceptance of the agreement obligates the court to sentence the defendant accordingly, and there can be no doubt that the term of imprisonment the court imposes is "based on" the agreed-upon sentencing range within the meaning of § 3582(c)(2). If

that Guidelines range is subsequently lowered by the Sentencing Commission, the defendant is eligible for sentence reduction.

Similarly, a plea agreement might provide for a specific term of imprisonment—such as a number of months—but also make clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty. As long as that sentencing range is evident from the agreement itself, for purposes of § 3582(c)(2) the term of imprisonment imposed by the court in accordance with that agreement is "based on" that range. Therefore, when a (C) agreement expressly uses a Guidelines sentencing range to establish the term of imprisonment, and that range is subsequently lowered by the Commission, the defendant is eligible for sentence reduction under § 3582(c)(2).[2]

In so holding, I necessarily reject the categorical rule advanced by the Government and endorsed by the dissent, which artificially divorces a (C) agreement from its express terms.[3] Because the very purpose of a (C) agreement is to

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[2] The dissent suggests that this rule results from a "mistaken shift in analysis" in this opinion from the actions of the judge to the intent of the parties. See *post*, at 547 (opinion of ROBERTS, C. J.). The purpose of a (C) agreement, however, is to bind the sentencing court to the terms agreed upon by the parties. See *supra*, at 536–537. Therefore, to determine whether a sentence imposed pursuant to a (C) agreement was "based on" a Guidelines sentencing range, the reviewing court must necessarily look to the agreement itself.

[3] The majority of the Courts of Appeals to have addressed this question have taken approaches consistent with the one I take today. See *United States* v. *Rivera-Martínez*, 607 F. 3d 283, 286–287 (CA1 2010); *United States* v. *Ray*, 598 F. 3d 407, 409–410 (CA7 2010); *United States* v. *Main*, 579 F. 3d 200, 203 (CA2 2009); *United States* v. *Scurlark*, 560 F. 3d 839, 842–843 (CA8 2009). It appears that only the Third Circuit has applied the absolute rule advanced by the Government. See *United States* v. *Sanchez*, 562 F. 3d 275, 282, and n. 8 (2009). As noted by the plurality, see *ante*, at 525, even the Sixth Circuit allows for sentence reduction "to avoid a miscarriage of justice or to correct a mutual mistake," *United*

allow the parties to determine the defendant's sentence, when the agreement itself employs the particular Guidelines sentencing range applicable to the charged offenses in establishing the term of imprisonment, the defendant is eligible to have his sentence reduced under § 3582(c)(2).[4] In such cases, the district court's reduction of the sentence does not rewrite the plea agreement; instead, it enforces the agreement's terms.

Like the plurality, I am not persuaded by the Government's argument that allowing a term of imprisonment imposed pursuant to a (C) agreement to be reduced under § 3582(c)(2) deprives the Government of the benefit of the bargain it struck with the defendant. When a (C) agreement explicitly employs a particular Guidelines sentencing range to establish the term of imprisonment, the agreement itself demonstrates the parties' intent that the imposed term of imprisonment will be based on that range, as required for sentence reduction under the statute.[5] The Government's

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States v. *Peveler*, 359 F. 3d 369, 378, n. 4 (2004) (internal quotation marks omitted). And only two Courts of Appeals have adopted a wide-ranging approach similar to the one suggested by Freeman. See *United States* v. *Garcia*, 606 F. 3d 209, 214 (CA5 2010) *(per curiam); United States* v. *Cobb*, 584 F. 3d 979, 985 (CA10 2009).

[4] The dissent contends that, even when a (C) agreement expressly uses a Guidelines sentencing range to establish the term of imprisonment, the district court imposing a sentence pursuant to that agreement does not "'appl[y]'" that range within the meaning of the applicable Guidelines policy statement. See *post*, at 548 (citing USSG § 1B1.10(b)(1)). But in so arguing, the dissent—like the Government—would have courts ignore the agreement's express terms, which the court "applie[s]" when imposing the term of imprisonment.

[5] The plurality asserts that "[t]here is no good reason to extend the benefit [of sentence reduction] only to an arbitrary subset of defendants . . . based on whether their plea agreements refer to the Guidelines." *Ante*, at 533–534. But the "good reason" is evident: Rule 11(c)(1)(C)'s entire purpose is to allow the parties' intent to determine sentencing outcomes. See *supra*, at 536–537. If a (C) agreement does not indicate the parties' intent to base the term of imprisonment on a particular Guidelines range subse-

concern that application of § 3582(c)(2) to (C) agreements will result in certain defendants receiving an "unjustified windfall" is therefore misplaced. See Brief for United States 40, 43.

Furthermore, in cases where the Government believes that even the limited sentence reduction authorized by § 3582(c)(2) and USSG § 1B1.10 improperly benefits the defendant, it can argue to the district court that the court should not exercise its discretion under the statute to reduce the sentence.[6] See *Dillon*, 560 U. S., at 826 (noting that, in applying § 3582(c)(2), the court must "consider whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in [18 U. S. C.] § 3553(a)").

Finally, if the Government wants to ensure *ex ante* that a particular defendant's term of imprisonment will not be reduced later, the solution is simple enough: Nothing prevents the Government from negotiating with a defendant to secure a waiver of his statutory right to seek sentence reduction under § 3582(c)(2), just as it often does with respect to a defendant's rights to appeal and collaterally attack the conviction and sentence.[7] See 18 U. S. C. § 3742; 28 U. S. C. § 2255 (2006 ed., Supp. III); see also App. 28a–29a (provision in Freeman's agreement expressly waiving both rights). In

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quently lowered by the Commission, then § 3582(c)(2) simply does not apply.

[6] For example, the district court might decline to reduce the term of imprisonment of an eligible defendant in light of the Government's argument that it made significant concessions in the agreement—such as dropping a charge or forgoing a future charge—and therefore it would not have agreed to a lower sentence at the time the agreement was made.

[7] The opposite would not necessarily be true, however, under the reading of § 3582(c)(2) proposed by the Government and the dissent. If a district court has no statutory authority to reduce a term of imprisonment imposed pursuant to a (C) agreement—because such a term is never "based on" a Guidelines sentencing range within the meaning of § 3582(c)(2)—it is not clear how the parties could effectively confer that authority upon the court by the terms of their agreement.

short, application of § 3582(c)(2) to an eligible defendant does not—and will not—deprive the Government of the benefit of its bargain.

III

In order to conclude that Freeman is eligible for sentence reduction under § 3582(c)(2), the plea agreement between Freeman and the Government must use a Guidelines sentencing range that has subsequently been lowered by the Sentencing Commission to establish the term of imprisonment imposed by the District Court. Freeman's agreement does.

The agreement states that Freeman "agrees to have his sentence determined pursuant to the Sentencing Guidelines," *id.*, at 28a, and that 106 months is the total term of imprisonment to be imposed, *id.*, at 26a. The agreement also makes clear that the § 924(c)(1)(A) count to which Freeman agrees to plead guilty carries a minimum sentence of 60 months, "which must be served consecutively to" any other sentence imposed. *Id.*, at 27a. This leaves 46 months unaccounted for. The agreement sets Freeman's offense level at 19, as determined by the quantity of drugs and his acceptance of responsibility, and states that the parties anticipate a criminal history category of IV. *Id.*, at 27a–28a. Looking to the Sentencing Guidelines, an offense level of 19 and a criminal history category of IV produce a sentencing range of 46 to 57 months.[8] See USSG ch. 5, pt. A (sentencing table). Therefore, contrary to the dissent's curious suggestion that "there is no way of knowing what th[e] sentence was 'based on,'" *post,* at 549, it is evident that Freeman's agreement employed the 46-month figure at the bottom end

[8] Because it is the parties' agreement that controls in the (C) agreement context, see *supra,* at 536–537, even if the District Court had calculated the range differently than the parties, see *post,* at 550–551 (ROBERTS, C. J., dissenting), Freeman would still be eligible for resentencing, as long as the parties' chosen range was one that was "subsequently . . . lowered by the Sentencing Commission," § 3582(c)(2).

of this sentencing range, in combination with the 60-month mandatory minimum sentence under § 924(c)(1)(A), to establish his 106-month sentence.[9] Thus the first of § 3582(c)(2)'s conditions is satisfied—Freeman's term of imprisonment is "based on" a Guidelines sentencing range.

In 2007 the Commission amended the Guidelines provisions applicable to cocaine base offenses, such that the offense level applicable to the quantity of drugs for which Freeman was charged was lowered from 22 to 20. See App. 142a–143a (Sealed); USSG Supp. App. C, Amdt. 706. Taking into account the three-level reduction for acceptance of responsibility, Freeman's recalculated offense level is 17, resulting in an amended sentencing range of 37 to 46 months. Thus there can be no doubt that the Guidelines sentencing range originally used to establish Freeman's term of imprisonment "has subsequently been lowered by the Sentencing Commission," § 3582(c)(2), such that the amendment "ha[s]

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[9] The dissent asks whether Freeman would be eligible for sentence reduction if the agreement had called for a 53-month term of imprisonment. See *post*, at 550. Though that question is not presented by the facts of this case, the answer is evident from the foregoing discussion: If the agreement itself made clear that the parties arrived at the 53-month term of imprisonment by determining the sentencing range applicable to Freeman's offenses and then halving the 106-month figure at its low end, he would have been eligible under § 3582(c)(2). See *United States* v. *Franklin*, 600 F. 3d 893, 897 (CA7 2010) (noting that a (C) agreement would not foreclose relief under § 3582(c)(2) if it provided that the term of imprisonment was to be 40 percent below the low end of the applicable sentencing range).

Of course, if a (C) agreement "does not contain any references to the Guidelines," *post*, at 550 (ROBERTS, C. J., dissenting), there is no way of knowing whether the agreement "use[d] a Guidelines sentencing range to establish the term of imprisonment," *supra*, at 539, and a prisoner sentenced under such an agreement would not be eligible. It is therefore unclear why the dissent believes that the straightforward inquiry called for by the rule I apply today will "foster confusion" among the lower courts. *Post*, at 550. This approach is consistent with the one already taken by most Courts of Appeals, see n. 3, *supra*, and there is no indication that they have found it unpalatable, cf. *post*, at 551.

the effect of lowering [Freeman's] applicable guideline range," § 1B1.10(a)(2)(B). As a result, Freeman's term of imprisonment satisfies the second of § 3582(c)(2)'s conditions. I therefore concur in the plurality's judgment that he is eligible for sentence reduction.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

The plurality and the opinion concurring in the judgment agree on very little except the judgment. I on the other hand agree with much of each opinion, but disagree on the judgment. I agree with the concurrence that the sentence imposed under a Rule 11(c)(1)(C) plea agreement is based on the agreement, not the Sentencing Guidelines. I would, however, adhere to that logic regardless whether the agreement could be said to "use" or "employ" a Guidelines range in arriving at the particular sentence specified in the agreement. *Ante*, at 534 (opinion of SOTOMAYOR, J.). In that respect I agree with the plurality that the approach of the concurrence to determining when a Rule 11(c)(1)(C) sentence may be reduced is arbitrary and unworkable. *Ante*, at 532–534.

Section 3582(c)(2) provides that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," a district court "may reduce the term of imprisonment . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The lone issue here is whether petitioner William Freeman meets the initial prerequisite of having been sentenced to a term of imprisonment "based on" a subsequently reduced sentencing range.

I agree with JUSTICE SOTOMAYOR that "the term of imprisonment imposed pursuant to a (C) agreement is, for purposes of § 3582(c)(2), 'based on' the agreement itself." *Ante*, at 536. In this case, Freeman executed a written plea agreement in which the parties "agree[d] that a sentence of 106

months' incarceration [was] the appropriate disposition." App. 26a. Because the plea agreement was entered pursuant to Rule 11(c)(1)(C), that proposed sentence became binding on the District Court once it accepted the agreement. See Fed. Rule Crim. Proc. 11(c)(1)(C) (the parties' "request" for "a specific sentence" "binds the court once the court accepts the plea agreement"). As a result, when determining the sentence to impose on Freeman, the District Court needed to consult one thing and one thing only—the plea agreement. See *ante*, at 535–536 (opinion of SOTOMAYOR, J.) ("At the moment of sentencing, the court simply implements the terms of the agreement it has already accepted").

I also agree with JUSTICE SOTOMAYOR that the "term of imprisonment imposed by the sentencing judge is dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation," and that "[a]llowing district courts later to reduce a term of imprisonment simply because the court itself considered the Guidelines in deciding whether to accept the agreement would transform § 3582(c)(2) into a mechanism by which courts could rewrite the terms of (C) agreements in ways not contemplated by the parties." *Ante*, at 536–537.

But then comes the O. Henry twist: After cogently explaining why a Rule 11(c)(1)(C) sentence is based on the plea agreement, JUSTICE SOTOMAYOR diverges from that straightforward conclusion and holds that Freeman nevertheless satisfies the threshold requirement in § 3582(c)(2). According to her opinion, if a Rule 11(c)(1)(C) "agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment"—or if such use is "evident from the agreement"—then the defendant's "term of imprisonment is 'based on' the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2)." *Ante*, at 534, 539. This exception is in my view as mistaken as the position of the plurality—and basically for the same reasons.

JUSTICE SOTOMAYOR begins the departure from her own rule innocently enough. As she explains, "some (C) agreements may call for the defendant to be sentenced within a particular Guidelines sentencing range." *Ante*, at 538. In such a case, according to JUSTICE SOTOMAYOR, there can be "no doubt" that the prison term the court imposes is "based on" the agreed-upon sentencing range, and therefore the defendant is eligible for sentence reduction. *Ibid.*

Whether or not that is true, it provides no support for the next step:

> "Similarly, a plea agreement might provide for a specific term of imprisonment—such as a number of months—but also make clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty. As long as that sentencing range is evident from the agreement itself . . . the term of imprisonment imposed by the court in accordance with that agreement is 'based on' that range." *Ante*, at 539.

This category of cases is not "similar" to the first at all. It is one thing to say that a sentence imposed pursuant to an agreement expressly providing that the court will sentence the defendant within an applicable Guidelines range is "based on" that range. It is quite another to conclude that an agreement providing for a specific term is "similarly" based on a Guidelines range, simply because the specified term can be said to reflect that range.

According to the concurrence, if the parties simply "consider[ ] the Guidelines" or "negotiate . . . by reference" to them, the defendant is not eligible for a sentence reduction. *Ante*, at 537. If, however, the agreement sets forth a specific term but it is somehow "clear that the basis for the specified term is a Guidelines sentencing range," then the defendant is eligible for a sentence reduction. *Ante*, at 539. This head-scratching distinction between negotiating by refer-

ence to the Guidelines and using them as a basis for the specified term makes for an unworkable test that can yield only arbitrary results.

The confusion is compounded by the varying standards in the concurrence. Sometimes the test is whether an agreement "expressly uses" a Guidelines sentencing range, *ante*, at 534, 539; see *ante*, at 540 ("explicitly employs"). Other times the test is whether such use is "evident," *ante*, at 539, 542; see *ante*, at 543, n. 9 ("clear"). A third option is whether the agreement "*indicate[s]* the parties' intent to base the term of imprisonment on a particular Guidelines range." *Ante*, at 540, n. 5 (emphasis added).

The error in the concurring opinion is largely attributable to a mistaken shift in analysis. In the first half of the opinion, the inquiry properly looks to what the *judge* does: He is, after all, the one who imposes the sentence. After approving the agreement, the judge considers only the fixed term in the agreement, so the sentence he actually imposes is not "based on" the Guidelines.

In the second half of the opinion, however, the analysis suddenly shifts, and focuses on the parties: Did *they* "use" or "employ" the Guidelines in arriving at the term in their agreement? But § 3582(c)(2) is concerned only with whether a defendant "has been *sentenced* to a term of imprisonment based on a sentencing range." (Emphasis added.) Only a court can sentence a defendant, so there is no basis for examining why the parties settled on a particular prison term.

This conclusion dovetails with United States Sentencing Commission, Guidelines Manual § 1B1.10(b)(1) (Nov. 2010) (USSG)—the Sentencing Commission's policy statement governing whether a defendant is eligible for a reduction under § 3582(c)(2). As we explained last Term, § 3582(c)(2) requires a district court "to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification." *Dillon* v. *United States*, 560 U. S. 817, 827 (2010). According to § 1B1.10(b)(1), the court must

first determine "the amended guideline range that would have been applicable to the defendant" if the retroactively amended provision had been in effect at the time of his sentencing. "In making such determination, the court shall substitute only the amendments . . . for the corresponding guideline provisions that were *applied when the defendant was sentenced.*" USSG §1B1.10(b)(1), p. s. (emphasis added).

As noted, the District Court sentenced Freeman pursuant to the term specified by his plea agreement; it never "applied" a Guidelines provision in imposing his term of imprisonment. The fact that the court may have "use[d] the Guidelines as a yardstick in deciding whether to accept a (C) agreement does not mean that the term of imprisonment imposed by the court is 'based on' a particular Guidelines sentencing range." *Ante,* at 536 (opinion of SOTOMAYOR, J.). Even if the Guidelines were "used" or "employed" *by the parties* in arriving at the Rule 11(c)(1)(C) sentencing term, they were not "applied when the defendant was sentenced." Once the District Court accepted the agreement, all that was later "applied" was the sentence set forth in that agreement.

JUSTICE SOTOMAYOR is wrong to assert that her standard "does not rewrite the plea agreement" but rather "enforces the agreement's terms." *Ante,* at 540. According to the concurrence, "[w]hen a (C) agreement explicitly employs a particular Guidelines sentencing range to establish the term of imprisonment, the agreement itself demonstrates the parties' intent that the imposed term of imprisonment will be based on that range," and therefore subject to reduction if the Commission subsequently lowers that range. *Ibid.* In this case, JUSTICE SOTOMAYOR concludes that Freeman's agreement contemplated such a reduction, even though the parties had "agree[d] that a sentence of 106 months' incarceration is the appropriate disposition of this case." App. 26a.

There is, however, no indication whatever that the parties to the agreement contemplated the prospect of lowered sen-

tencing ranges. And it is fanciful to suppose that the parties would have said "106 months" if what they really meant was "a sentence at the lowest end of the applicable Guidelines range." Cf. *id.*, at 25a (parties in this case recommending "a fine at the lowest end of the applicable Guideline Range"). In concluding otherwise, the concurrence "ignore[s] the agreement's express terms." *Ante*, at 540, n. 4.

The reality is that whenever the parties choose a fixed term, there is no way of knowing what that sentence was "based on." The prosecutor and the defendant could well have had quite different reasons for concluding that 106 months was a good deal. Perhaps the prosecutor wanted to devote the limited resources of his office to a different area of criminal activity, rather than try this case. Perhaps the defendant had reason to question the credibility of one of his key witnesses, and feared a longer sentence if the case went to trial.

Indeed, the fact that there may be uncertainty about how to calculate the appropriate Guidelines range could be the basis for agreement on a fixed term in a plea under Rule 11(c)(1)(C). Here the agreement made clear that there was some doubt about the Guidelines calculations. See App. 28a ("Both parties reserve the right to object to the USSG § 4A1.1 calculation of defendant's criminal history"); *ibid.* (the parties acknowledge that their Guidelines calculations "are not binding upon the Court" and that the "defendant understands the Court will independently calculate the Guidelines at sentencing and defendant may not withdraw the plea of guilty solely because the Court does not agree with . . . [the] Sentencing Guideline application").

In addition, parties frequently enter plea agreements that reflect prosecutorial decisions not to pursue particular counts. If a defendant faces three counts, and agrees to plead to one if the prosecutor does not pursue the other two, is the sentence reflected in the Rule 11(c)(1)(C) agreement in any sense "based on" the Guidelines sentencing range for the

one count to which the defendant pleaded? Surely not. The concurrence tacitly concedes as much when it suggests that an agreement to "drop[ ] a charge or forgo[ ] a future charge" could ultimately be grounds for not reducing the defendant's sentence. *Ante*, at 541, n. 6. But what this really shows is a basic flaw in the "based on" test adopted by that opinion.

Finally, JUSTICE SOTOMAYOR's approach will foster confusion in an area in need of clarity. As noted, courts will be hard pressed to apply the distinction between referring to and relying on a Guidelines range. Other questions abound:

What if the agreement contains a particular Guidelines calculation but the agreement's stipulated sentence is outside the parties' predicted Guidelines range? The test in the concurring opinion is whether the agreement "uses" or "employs" a Guidelines sentencing range to establish the term of imprisonment, *ante*, at 534, not whether that term falls within the range. In this case, what if the term was 53 months—exactly half the low end of the sentencing range anticipated by the parties? Is it "evident" in that case that the Guidelines were used or employed to establish the agreed-upon sentence?*

What if the plea agreement does not contain any references to the Guidelines—not even the partial and tentative Guidelines calculations in Freeman's agreement—but the binding sentence selected by the parties corresponds exactly to the low end of the applicable Guidelines range? Is it "evident" in that case that the agreement is based on a sentencing range?

What if the District Court calculates the applicable Guidelines range differently than the parties? This is no academic

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*JUSTICE SOTOMAYOR responds that "[i]f the agreement itself made clear" that the parties arrived at the 53-month figure by determining the sentencing range and then halving the range's low end—106 months—then the sentence could be reduced. *Ante*, at 543, n. 9. Does the 53-month figure itself make that clear? What if the figure is 26½ months?

hypothetical. See, *e. g.*, *United States* v. *Franklin*, 600 F. 3d 893, 896–897 (CA7 2010) (noting that "the district court settled on a higher guidelines range than that contemplated in the [Rule 11(c)(1)(C)] plea agreement"). Is a Rule 11(c)(1)(C) sentence still subject to reduction if the parties relied on the wrong sentencing range? JUSTICE SOTOMAYOR's surprising answer is "yes," see *ante*, at 542, n. 8, even though the governing Guidelines provision specifies that a defendant is only eligible for sentence reduction if the amended Guideline has "the effect of lowering the defendant's applicable guideline range"—presumably the *correct* applicable guideline range. See USSG §1B1.10(a)(2)(B), p. s. Relying on error is just one unforeseen consequence of looking not to the specified term in a Rule 11(c)(1)(C) agreement, but instead trying to reconstruct what led the parties to agree to that term in the first place.

This confusion will invite the very thing JUSTICE SOTOMAYOR claims to disavow: a "free-ranging search" by district courts "through the parties' negotiating history in search of a Guidelines sentencing range that might have been relevant to the agreement." *Ante*, at 538. This is particularly unfortunate given that the whole point of Rule 11(c)(1)(C) agreements is to provide the parties with certainty about sentencing.

* * *

As with any negotiation, parties entering a Rule 11(c)(1)(C) plea agreement must take the bitter with the sweet. Because of today's decision, however, Freeman gets more sweet and the Government more bitter than either side bargained for. But those who will really be left with a sour taste after today's decision are the lower courts charged with making sense of it going forward.

I respectfully dissent.

Syllabus

SORRELL, ATTORNEY GENERAL OF VERMONT, ET AL. *v.* IMS HEALTH INC. ET AL.

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

No. 10–779. Argued April 26, 2011—Decided June 23, 2011

Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing." Pharmacies receive "prescriber-identifying information" when processing prescriptions and sell the information to "data miners," who produce reports on prescriber behavior and lease their reports to pharmaceutical manufacturers. "Detailers" employed by pharmaceutical manufacturers then use the reports to refine their marketing tactics and increase sales to doctors. Vermont's Prescription Confidentiality Law provides that, absent the prescriber's consent, prescriber-identifying information may not be sold by pharmacies and similar entities, disclosed by those entities for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vt. Stat. Ann., Tit. 18, § 4631(d). The prohibitions are subject to exceptions that permit the prescriber-identifying information to be disseminated and used for a number of purposes, *e. g.*, "health care research." § 4631(e).

Respondents, Vermont data miners and an association of brand-name drug manufacturers, sought declaratory and injunctive relief against state officials (hereinafter Vermont), contending that § 4631(d) violates their rights under the Free Speech Clause of the First Amendment. The District Court denied relief, but the Second Circuit reversed, holding that § 4631(d) unconstitutionally burdens the speech of pharmaceutical marketers and data miners without adequate justification.

Held:

1. Vermont's statute, which imposes content- and speaker-based burdens on protected expression, is subject to heightened judicial scrutiny. Pp. 562–571.

(a) On its face, the law enacts a content- and speaker-based restriction on the sale, disclosure, and use of prescriber-identifying information. The law first forbids sale subject to exceptions based in large part on the content of a purchaser's speech. It then bars pharmacies from disclosing the information when recipient speakers will use that information for marketing. Finally, it prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, *i. e.*, speech with a particular content, as well as particular speakers, *i. e.*, detailers engaged in marketing on behalf of

pharmaceutical manufacturers. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 426; *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658. Yet the law allows prescriber-identifying information to be purchased, acquired, and used for other types of speech and by other speakers. The record and formal legislative findings of purpose confirm that § 4631(d) imposes an aimed, content-based burden on detailers, in particular detailers who promote brand-name drugs. In practical operation, Vermont's law "goes even beyond mere content discrimination, to actual viewpoint discrimination." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 391. Heightened judicial scrutiny is warranted. Pp. 563–566.

(b) Vermont errs in arguing that heightened scrutiny is unwarranted. The State contends that its law is a mere commercial regulation. Far from having only an incidental effect on speech, however, § 4631(d) imposes a burden based on the content of speech and the identity of the speaker. The State next argues that, because prescriber-identifying information was generated in compliance with a legal mandate, § 4631(d) is akin to a restriction on access to government-held information. That argument finds some support in *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, but that case is distinguishable. Vermont has imposed a restriction on access to information in private hands. *United Reporting* reserved that situation—*i. e.*, "a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id.*, at 40. In addition, the *United Reporting* plaintiff was presumed to have suffered no personal First Amendment injury, while respondents claim that § 4631(d) burdens their own speech. That circumstance warrants heightened scrutiny. Vermont also argues that heightened judicial scrutiny is unwarranted because sales, transfer, and use of prescriber-identifying information are conduct, not speech. However, the creation and dissemination of information are speech for First Amendment purposes. See, *e. g.*, *Bartnicki* v. *Vopper*, 532 U. S. 514, 527. There is no need to consider Vermont's request for an exception to that rule. Section 4631(d) imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify applying heightened scrutiny, even assuming that prescriber-identifying information is a mere commodity. Pp. 566–571.

2. Vermont's justifications for § 4631(d) do not withstand heightened scrutiny. Pp. 571–580.

(a) The outcome here is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied, see, *e. g.*, *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 184. To sustain § 4631(d)'s targeted, content-based burden on protected expression, Vermont must show at least that the statute di-

rectly advances a substantial governmental interest and that the measure is drawn to achieve that interest. See *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480–481. Vermont contends that its law (1) is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship, and (2) is integral to the achievement of the policy objectives of improving public health and reducing healthcare costs. Pp. 571–572.

(b) Assuming that physicians have an interest in keeping their prescription decisions confidential, § 4631(d) is not drawn to serve that interest. Pharmacies may share prescriber-identifying information with anyone for any reason except for marketing. Vermont might have addressed physician confidentiality through "a more coherent policy," *Greater New Orleans Broadcasting*, *supra*, at 195, such as allowing the information's sale or disclosure in only a few narrow and well-justified circumstances. But it did not. Given the information's widespread availability and many permissible uses, Vermont's asserted interest in physician confidentiality cannot justify the burdens that § 4631(d) imposes on protected expression. It is true that doctors can forgo the law's advantages by consenting to the sale, disclosure, and use of their prescriber-identifying information. But the State has offered only a contrived choice: Either consent, which will allow the doctor's prescriber-identifying information to be disseminated and used without constraint; or, withhold consent, which will allow the information to be used by those speakers whose message the State supports. Cf. *Rowan* v. *Post Office Dept.*, 397 U. S. 728. Respondents suggest a further defect lies in § 4631(d)'s presumption of applicability absent an individual election to the contrary. Reliance on a prior election, however, would not save a privacy measure that imposed an unjustified burden on protected expression. Vermont also asserts that its broad content-based rule is necessary to avoid harassment, but doctors can simply decline to meet with detailers. Cf. *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 168. Vermont further argues that detailers' use of prescriber-identifying information undermines the doctor-patient relationship by allowing detailers to influence treatment decisions. But if pharmaceutical marketing affects treatment decisions, it can do so only because it is persuasive. Fear that speech might persuade provides no lawful basis for quieting it. Pp. 572–576.

(c) While Vermont's goals of lowering the costs of medical services and promoting public health may be proper, § 4631(d) does not advance them in a permissible way. Vermont seeks to achieve those objectives

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through the indirect means of restraining certain speech by certain speakers—*i. e.*, by diminishing detailers' ability to influence prescription decisions. But the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. *Thompson* v. *Western States Medical Center*, 535 U. S. 357, 374. That precept applies with full force when the audience—here, prescribing physicians—consists of "sophisticated and experienced" consumers. lx*Edenfield* v. *Fane*, 507 U. S. 761, 775. The instant law's defect is made clear by the fact that many listeners find detailing instructive. Vermont may be displeased that detailers with prescriber-indentifying information are effective in promoting brand-name drugs, but the State may not burden protected expression in order to tilt public debate in a preferred direction. Vermont nowhere contends that its law will prevent false or misleading speech within the meaning of this Court's First Amendment precedents. The State's interest in burdening detailers' speech thus turns on nothing more than a difference of opinion. Pp. 576–579.

630 F. 3d 263, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, ALITO, and SOTOMAYOR, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 580.

Bridget C. Asay, Assistant Attorney General of Vermont, argued the cause for petitioners. With her on the briefs were *William H. Sorrell*, Attorney General, *pro se*, *Sarah E. B. London* and *David R. Cassetty*, Assistant Attorneys General, *David C. Frederick*, and *Scott H. Angstreich*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, *Jeffrey B. Wall*, *Scott R. McIntosh*, and *Irene M. Solet*.

Thomas C. Goldstein argued the cause for respondents IMS Health Inc. et al. With him on the brief were *Kevin K. Russell*, *Amy Howe*, *Thomas R. Julin*, *Jamie Z. Isani*, *Patricia Acosta*, *Robert B. Hemley*, and *Matthew B. Byrne*. *Lisa S. Blatt*, *Jeffrey L. Handwerker*, *Robert J. Katerberg*,

Counsel

Sarah Brackney Arni, *Karen McAndrew*, and *Linda J. Cohen* filed a brief for respondent Pharmaceutical Research and Manufacturers of America.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, and *Jane Elinor Notz*, Deputy Solicitor General, by *Irvin B. Nathan*, Acting Attorney General of the District of Columbia, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Kamala D. Harris* of California, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Douglas F. Gansler* of Maryland, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Steve Bullock* of Montana, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *John R. Kroger* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *Robert M. McKenna* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia; for AARP et al. by *Stacy Canan*, *Bruce Vignery*, *Michael Schuster*, and *Sean Fiil-Flynn;* for AFSCME District Council 37 et al. by *Georgia John Maheras;* for the Association of American Physicians & Surgeons by *Andrew L. Schlafly;* for the Electronic Frontier Foundation by *Cindy Cohn* and *Lee Tien;* for the Electronic Privacy Information Center et al. by *Marc Rotenberg;* for the New England Journal of Medicine et al. by *Michael Kevin Outterson* and *Myles V. Lynk;* for Public Citizen et al. by *Gregory A. Beck*, *Allison M. Zieve*, and *Scott L. Nelson;* for the Vermont Medical Society et al. by *Eileen I. Elliott* and *Jessica A. Oski;* and for the Yale Rudd Center for Food Policy & Obesity et al. by *Edward Steinman* and *Seth E. Mermin.*

Briefs of *amici curiae* urging affirmance were filed for Academic Research Scientists by *David R. Marriott* and *James J. Varellas III;* for American Business Media et al. by *Christopher A. Mohr* and *Michael R. Klipper;* for the Association of Clinical Research Organizations by *Michael R. Lazerwitz* and *Steven J. Kaiser;* for the Association of National Advertisers, Inc., et al. by *Robert Corn-Revere*, *Ronald G. London*, *Bruce Johnson*, and *Terri Keville;* for Bloomberg L. P. et al. by *Henry R. Kaufman*,

JUSTICE KENNEDY delivered the opinion of the Court.

Vermont law restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Vt. Stat. Ann., Tit. 18, § 4631 (Supp. 2010). Subject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vermont argues that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State. It can be assumed that these interests are significant. Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont's statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.

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Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing." This often in-

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Kenneth M. Vittor, *William P. Farley*, *Jonathan R. Donnellan*, *Richard J. Tofel*, *Lucy A. Dalglish*, *Gregg P. Leslie*, and *Derek D. Green;* for the Chamber of Commerce of the United States of America by *Paul M. Smith*, *Matthew S. Hellman*, and *Robin S. Conrad;* for the Council of American Survey Research Organizations, Inc., by *Duane L. Berlin* and *Russell F. Anderson;* for the Genetic Alliance et al. by *Bert W. Rein*, *James N. Czaban*, and *Ann B. Waldo;* for the Massachusetts Biotechnology Council et al. by *William H. Roberts* and *Jeremy A. Rist;* for the National Association of Chain Drug Stores et al. by *Roger N. Morris*, *Melody A. Emmert*, *Jennifer L. Rathburn*, and *Lisa E. Davis;* for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse;* for the Pacific Legal Foundation et al. by *Deborah J. La Fetra* and *Ilya Shapiro;* for TechFreedom by *Richard J. Ovelmen;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* and for Dr. Khaled El Emam et al. by *Michael A. Pollard.*

James C. Martin and *David J. Bird* filed a brief for Louis W. Sullivan et al. as *amici curiae.*

volves a scheduled visit to a doctor's office to persuade the doctor to prescribe a particular pharmaceutical. Detailers bring drug samples as well as medical studies that explain the "details" and potential advantages of various prescription drugs. Interested physicians listen, ask questions, and receive followup data. Salespersons can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception. Knowledge of a physician's prescription practices—called "prescriber-identifying information"—enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message. Detailing is an expensive undertaking, so pharmaceutical companies most often use it to promote high-profit brand-name drugs protected by patent. Once a brand-name drug's patent expires, less expensive bioequivalent generic alternatives are manufactured and sold.

Pharmacies, as a matter of business routine and federal law, receive prescriber-identifying information when processing prescriptions. See 21 U. S. C. § 353(b); see also Vt. Bd. of Pharmacy Admin. Rule 9.1 (2009); Rule 9.2. Many pharmacies sell this information to "data miners," firms that analyze prescriber-identifying information and produce reports on prescriber behavior. Data miners lease these reports to pharmaceutical manufacturers subject to nondisclosure agreements. Detailers, who represent the manufacturers, then use the reports to refine their marketing tactics and increase sales.

In 2007, Vermont enacted the Prescription Confidentiality Law. The measure is also referred to as Act 80. It has several components. The central provision of the present case is § 4631(d).

> "A health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy, or other similar entity shall not sell, license, or exchange for value regu-

> lated records containing prescriber-identifiable information, nor permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents . . . . Pharmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents . . . ."

The quoted provision has three component parts. The provision begins by prohibiting pharmacies, health insurers, and similar entities from selling prescriber-identifying information, absent the prescriber's consent. The parties here dispute whether this clause applies to all sales or only to sales for marketing. The provision then goes on to prohibit pharmacies, health insurers, and similar entities from allowing prescriber-identifying information to be used for marketing, unless the prescriber consents. This prohibition in effect bars pharmacies from disclosing the information for marketing purposes. Finally, the provision's second sentence bars pharmaceutical manufacturers and pharmaceutical marketers from using prescriber-identifying information for marketing, again absent the prescriber's consent. The Vermont attorney general may pursue civil remedies against violators. § 4631(f).

Separate statutory provisions elaborate the scope of the prohibitions set out in § 4631(d). "Marketing" is defined to include "advertising, promotion, or any activity" that is "used to influence sales or the market share of a prescription drug." § 4631(b)(5). Section 4631(c)(1) further provides that Vermont's Department of Health must allow "a prescriber to give consent for his or her identifying information to be used for the purposes" identified in § 4631(d). Finally, the Act's prohibitions on sale, disclosure, and use are subject to a list of exceptions. For example, prescriber-identifying information may be disseminated or used for "health care research"; to enforce "compliance" with health insurance formularies

or preferred drug lists; for "care management educational communications provided to" patients on such matters as "treatment options"; for law enforcement operations; and for purposes "otherwise provided by law." § 4631(e).

Act 80 also authorized funds for an "evidence-based prescription drug education program" designed to provide doctors and others with "information and education on the therapeutic and cost-effective utilization of prescription drugs." § 4622(a)(1). An express aim of the program is to advise prescribers "about commonly used brand-name drugs for which the patent has expired" or will soon expire. § 4622(a)(2). Similar efforts to promote the use of generic pharmaceuticals are sometimes referred to as "counter-detailing." App. 211; see also *IMS Health Inc.* v. *Ayotte*, 550 F. 3d 42, 91 (CA1 2008) (Lipez, J., concurring and dissenting). The counterdetailer's recommended substitute may be an older, less expensive drug and not a bioequivalent of the brand-name drug the physician might otherwise prescribe. Like the pharmaceutical manufacturers whose efforts they hope to resist, counterdetailers in some States use prescriber-identifying information to increase their effectiveness. States themselves may supply the prescriber-identifying information used in these programs. See App. 313; *id.*, at 375 ("[W]e use the data given to us by the State of Pennsylvania . . . to figure out which physicians to talk to"); see also *id.*, at 427–429 (Director of the Office of Vermont Health Access explaining that the office collects prescriber-identifying information but "does not at this point in time have a counterdetailing or detailing effort"). As first enacted, Act 80 also required detailers to provide information about alternative treatment options. The Vermont Legislature, however, later repealed that provision. 2008 Vt. Laws No. 89, § 3.

Act 80 was accompanied by legislative findings. 2007 Vt. Laws No. 80, § 1. Vermont found, for example, that the "goals of marketing programs are often in conflict with the

goals of the state" and that the "marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors." §§ 1(3), (4). Detailing, in the legislature's view, caused doctors to make decisions based on "incomplete and biased information." § 1(4). Because they "are unable to take the time to research the quickly changing pharmaceutical market," Vermont doctors "rely on information provided by pharmaceutical representatives." § 1(13). The legislature further found that detailing increases the cost of health care and health insurance, § 1(15); encourages hasty and excessive reliance on brand-name drugs, before the profession has observed their effectiveness as compared with older and less expensive generic alternatives, § 1(7); and fosters disruptive and repeated marketing visits tantamount to harassment, §§ 1(27)–(28). The legislative findings further noted that use of prescriber-identifying information "increase[s] the effect of detailing programs" by allowing detailers to target their visits to particular doctors. §§ 1(23)–(26). Use of prescriber-identifying data also helps detailers shape their messages by "tailoring" their "presentations to individual prescriber styles, preferences, and attitudes." § 1(25).

B

The present case involves two consolidated suits. One was brought by three Vermont data miners, the other by an association of pharmaceutical manufacturers that produce brand-name drugs. These entities are the respondents here. Contending that § 4631(d) violates their First Amendment rights as incorporated by the Fourteenth Amendment, respondents sought declaratory and injunctive relief against petitioners, the Attorney General and other officials of the State of Vermont.

After a bench trial, the United States District Court for the District of Vermont denied relief. 631 F. Supp. 2d 434

(2009). The District Court found that "[p]harmaceutical manufacturers are essentially the only paying customers of the data vendor industry" and that, because detailing unpatented generic drugs is not "cost-effective," pharmaceutical sales representatives "detail only branded drugs." *Id.*, at 451, 442. As the District Court further concluded, "the Legislature's determination that [prescriber-identifying] data is an effective marketing tool that enables detailers to increase sales of new drugs is supported in the record." *Id.*, at 451. The United States Court of Appeals for the Second Circuit reversed and remanded. It held that § 4631(d) violates the First Amendment by burdening the speech of pharmaceutical marketers and data miners without an adequate justification. 630 F. 3d 263 (2010). Judge Livingston dissented.

The decision of the Second Circuit is in conflict with decisions of the United States Court of Appeals for the First Circuit concerning similar legislation enacted by Maine and New Hampshire. See *IMS Health Inc.* v. *Mills*, 616 F. 3d 7 (CA1 2010) (Maine); *Ayotte*, *supra* (New Hampshire). Recognizing a division of authority regarding the constitutionality of state statutes, this Court granted certiorari. 562 U. S. 1127 (2011).

II

The beginning point is the text of § 4631(d). In the proceedings below, Vermont stated that the first sentence of § 4631(d) prohibits pharmacies and other regulated entities from selling or disseminating prescriber-identifying information for marketing. The information, in other words, could be sold or given away for purposes other than marketing. The District Court and the Court of Appeals accepted the State's reading. See 630 F. 3d, at 276. At oral argument in this Court, however, the State for the first time advanced an alternative reading of § 4631(d)—namely, that pharmacies, health insurers, and similar entities may not sell prescriber-identifying information for any purpose, subject to the statu-

tory exceptions set out at § 4631(e). See Tr. of Oral Arg. 19–20. It might be argued that the State's newfound interpretation comes too late in the day. See *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002) (waiver); *New Hampshire* v. *Maine*, 532 U. S. 742, 749 (2001) (judicial estoppel). Respondents, the District Court, and the Court of Appeals were entitled to rely on the State's plausible interpretation of the law it is charged with enforcing. For the State to change its position is particularly troubling in a First Amendment case, where plaintiffs have a special interest in obtaining a prompt adjudication of their rights, despite potential ambiguities of state law. See *Houston* v. *Hill*, 482 U. S. 451, 467–468, and n. 17 (1987); *Zwickler* v. *Koota*, 389 U. S. 241, 252 (1967).

In any event, § 4631(d) cannot be sustained even under the interpretation the State now adopts. As a consequence this Court can assume that the opening clause of § 4631(d) prohibits pharmacies, health insurers, and similar entities from selling prescriber-identifying information, subject to the statutory exceptions set out at § 4631(e). Under that reading, pharmacies may sell the information to private or academic researchers, see § 4631(e)(1), but not, for example, to pharmaceutical marketers. There is no dispute as to the remainder of § 4631(d). It prohibits pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing. And it bars pharmaceutical manufacturers and detailers from using the information for marketing. The questions now are whether § 4631(d) must be tested by heightened judicial scrutiny and, if so, whether the State can justify the law.

A

1

On its face, Vermont's law enacts content- and speaker-based restrictions on the sale, disclosure, and use of

prescriber-identifying information. The provision first forbids sale subject to exceptions based in large part on the content of a purchaser's speech. For example, those who wish to engage in certain "educational communications," § 4631(e)(4), may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing. Finally, the provision's second sentence prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers. As a result of these content- and speaker-based rules, detailers cannot obtain prescriber-identifying information, even though the information may be purchased or acquired by other speakers with diverse purposes and viewpoints. Detailers are likewise barred from using the information for marketing, even though the information may be used by a wide range of other speakers. For example, it appears that Vermont could supply academic organizations with prescriber-identifying information to use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs. But § 4631(d) leaves detailers no means of purchasing, acquiring, or using prescriber-identifying information. The law on its face burdens disfavored speech by disfavored speakers.

Any doubt that § 4631(d) imposes an aimed, content-based burden on detailers is dispelled by the record and by formal legislative findings. As the District Court noted, "[p]harmaceutical manufacturers are essentially the only paying customers of the data vendor industry"; and the almost invariable rule is that detailing by pharmaceutical manufacturers is in support of brand-name drugs. 631 F. Supp. 2d, at 451. Vermont's law thus has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner. Cf. *Edenfield*

v. *Fane*, 507 U. S. 761, 766 (1993) (explaining the "considerable value" of in-person solicitation). Formal legislative findings accompanying § 4631(d) confirm that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs. Just as the "inevitable effect of a statute on its face may render it unconstitutional," a statute's stated purposes may also be considered. *United States* v. *O'Brien*, 391 U. S. 367, 384 (1968). Here, the Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that "are often in conflict with the goals of the state." 2007 Vt. Laws No. 80, § 1(3). The legislature designed § 4631(d) to target those speakers and their messages for disfavored treatment. "In its practical operation," Vermont's law "goes even beyond mere content discrimination, to actual viewpoint discrimination." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 391 (1992). Given the legislature's expressed statement of purpose, it is apparent that § 4631(d) imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.

Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted. See *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 418 (1993) (applying heightened scrutiny to "a categorical prohibition on the use of newsracks to disseminate commercial messages"); *id.*, at 429 ("[T]he very basis for the regulation is the difference in content between ordinary newspapers and commercial speech" in the form of "commercial handbills . . . . Thus, by any commonsense understanding of the term, the ban in this case is 'content based'" (some internal quotation marks omitted)); see also *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658 (1994) (explaining that strict scrutiny applies to regulations reflecting "aversion" to what "disfavored speakers" have to say). The Court has recognized that the "distinction between laws burdening and laws banning speech is but a

matter of degree" and that the "Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 812 (2000). Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115 (1991) (content-based financial burden); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983) (speaker-based financial burden).

The First Amendment requires heightened scrutiny whenever the government creates "a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989); see also *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (explaining that "'content-neutral' speech regulations" are "those that are *justified* without reference to the content of the regulated speech" (internal quotation marks omitted)). A government bent on frustrating an impending demonstration might pass a law demanding two years' notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. *Ibid.* Commercial speech is no exception. See *Discovery Network*, *supra*, at 429–430 (commercial speech restriction lacking a "neutral justification" was not content neutral). A "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 364 (1977). That reality has great relevance in the fields of medicine and public health, where information can save lives.

2

The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation.

It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove "'White Applicants Only'" signs, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 62 (2006); why "an ordinance against outdoor fires" might forbid "burning a flag," *R. A. V.*, *supra*, at 385; and why antitrust laws can prohibit "agreements in restraint of trade," *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949).

But § 4631(d) imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker. See *supra*, at 563–565. While the burdened speech results from an economic motive, so too does a great deal of vital expression. See *Bigelow* v. *Virginia*, 421 U. S. 809, 818 (1975); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 266 (1964); see also *United States* v. *United Foods, Inc.*, 533 U. S. 405, 410–411 (2001) (applying "First Amendment scrutiny" where speech effects were not incidental and noting that "those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups"). Vermont's law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers. The Constitution "does not enact Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting). It does enact the First Amendment.

Vermont further argues that § 4631(d) regulates not speech but simply access to information. Prescriber-identifying information was generated in compliance with a

legal mandate, the State argues, and so could be considered a kind of governmental information. This argument finds some support in *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32 (1999), where the Court held that a plaintiff could not raise a facial challenge to a content-based restriction on access to government-held information. Because no private party faced a threat of legal punishment, the Court characterized the law at issue as "nothing more than a governmental denial of access to information in its possession." *Id.*, at 40. Under those circumstances the special reasons for permitting First Amendment plaintiffs to invoke the rights of others did not apply. *Id.*, at 38–39. Having found that the plaintiff could not raise a facial challenge, the Court remanded for consideration of an as-applied challenge. *Id.*, at 41. *United Reporting* is thus a case about the availability of facial challenges. The Court did not rule on the merits of any First Amendment claim.

United Reporting is distinguishable in at least two respects. First, Vermont has imposed a restriction on access to information in private hands. This confronts the Court with a point reserved, and a situation not addressed, in *United Reporting.* Here, unlike in *United Reporting,* we do have "a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id.*, at 40. The difference is significant. An individual's right to speak is implicated when information he or she possesses is subjected to "restraints on the way in which the information might be used" or disseminated. *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20, 32 (1984); see also *Bartnicki* v. *Vopper*, 532 U. S. 514, 527 (2001); *Florida Star* v. *B. J. F.*, 491 U. S. 524 (1989); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971) *(per curiam).* In *Seattle Times,* this Court applied heightened judicial scrutiny before sustaining a trial court order prohibiting a newspaper's disclosure of information it learned through coercive discovery. It is true that respondents here, unlike the newspaper in

Seattle Times, do not themselves possess information whose disclosure has been curtailed. That information, however, is in the hands of pharmacies and other private entities. There is no question that the "threat of prosecution . . . hangs over their heads." *United Reporting*, 528 U. S., at 41. For that reason *United Reporting* does not bar respondents' facial challenge.

United Reporting is distinguishable for a second and even more important reason. The plaintiff in *United Reporting* had neither "attempt[ed] to qualify" for access to the government's information nor presented an as-applied claim in this Court. *Id.*, at 40. As a result, the Court assumed that the plaintiff had not suffered a personal First Amendment injury and could prevail only by invoking the rights of others through a facial challenge. Here, by contrast, respondents claim—with good reason—that § 4631(d) burdens their own speech. That argument finds support in the separate writings in *United Reporting*, which were joined by eight Justices. All of those writings recognized that restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment. See *id.*, at 42 (SCALIA, J., concurring) (suggesting that "a restriction upon access that *allows* access to the press . . . , but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech"); *id.*, at 43 (GINSBURG, J., concurring) (noting that "the provision of [government] information is a kind of subsidy to people who wish to speak" about certain subjects, "and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed"); *id.*, at 46 (Stevens, J., dissenting) (concluding that, "because the State's discrimination is based on its desire to prevent the information from being used for constitutionally protected purposes, [i]t must assume the burden of justifying its conduct"). Vermont's law imposes

a content- and speaker-based burden on respondents' own speech. That consideration provides a separate basis for distinguishing *United Reporting* and requires heightened judicial scrutiny.

The State also contends that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech. Consistent with that submission, the United States Court of Appeals for the First Circuit has characterized prescriber-identifying information as a mere "commodity" with no greater entitlement to First Amendment protection than "beef jerky." *Ayotte*, 550 F. 3d, at 52–53. In contrast the courts below concluded that a prohibition on the sale of prescriber-identifying information is a content-based rule akin to a ban on the sale of cookbooks, laboratory results, or train schedules. See 630 F. 3d, at 271–272 ("The First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression" (internal quotation marks and brackets omitted)); 631 F. Supp. 2d, at 445 ("A restriction on disclosure is a regulation of speech, and the 'sale' of [information] is simply disclosure for profit").

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. See, *e. g.*, *Bartnicki*, *supra*, at 527 ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct" (some internal quotation marks omitted)); *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 481 (1995) ("information on beer labels" is speech); *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 759 (1985) (plurality opinion) (credit report is "speech"). Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.

The State asks for an exception to the rule that information is speech, but there is no need to consider that request in this case. The State has imposed content- and speaker-based restrictions on the availability and use of prescriber-identifying information. So long as they do not engage in marketing, many speakers can obtain and use the information. But detailers cannot. Vermont's statute could be compared with a law prohibiting trade magazines from purchasing or using ink. Cf. *Minneapolis Star*, 460 U. S. 575. Like that hypothetical law, § 4631(d) imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny. As a consequence, this case can be resolved even assuming, as the State argues, that prescriber-identifying information is a mere commodity.

B

In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory. See *R. A. V.*, 505 U. S., at 382 ("Content-based regulations are presumptively invalid"); *id.*, at 391–392. The State argues that a different analysis applies here because, assuming § 4631(d) burdens speech at all, it at most burdens only commercial speech. As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. See, *e. g.*, *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 184 (1999). For the same reason there is no need to determine whether all speech hampered by § 4631(d) is commercial, as our cases have used that term. Cf. *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 474 (1989) (discussing whether "pure speech and commercial speech" were inextricably intertwined, so that "the entirety must . . . be classified as noncommercial").

Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First

Amendment. *Thompson* v. *Western States Medical Center*, 535 U. S. 357, 373 (2002). To sustain the targeted, content-based burden § 4631(d) imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. See *Fox*, *supra*, at 480–481; *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566 (1980). There must be a "fit between the legislature's ends and the means chosen to accomplish those ends." *Fox*, *supra*, at 480 (internal quotation marks omitted). As in other contexts, these standards ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message. See *Turner Broadcasting*, 512 U. S., at 662–663.

The State's asserted justifications for § 4631(d) come under two general headings. First, the State contends that its law is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship. Second, the State argues that § 4631(d) is integral to the achievement of policy objectives—namely, improved public health and reduced health-care costs. Neither justification withstands scrutiny.

1

Vermont argues that its physicians have a "reasonable expectation" that their prescriber-identifying information "will not be used for purposes other than . . . filling and processing" prescriptions. See 2007 Vt. Laws No. 80, § 1(29). It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential. But § 4631(d) is not drawn to serve that interest. Under Vermont's law, pharmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing. Exceptions further allow pharmacies to sell prescriber-identifying

information for certain purposes, including "health care research." § 4631(e). And the measure permits insurers, researchers, journalists, the State itself, and others to use the information. See § 4631(d); cf. App. 370–372; *id.*, at 211. All but conceding that § 4631(d) does not in itself advance confidentiality interests, the State suggests that other laws might impose separate bars on the disclosure of prescriber-identifying information. See Vt. Bd. of Pharmacy Admin. Rule 20.1. But the potential effectiveness of other measures cannot justify the distinctive set of prohibitions and sanctions imposed by § 4631(d).

Perhaps the State could have addressed physician confidentiality through "a more coherent policy." *Greater New Orleans Broadcasting, supra,* at 195; see also *Discovery Network,* 507 U. S., at 428. For instance, the State might have advanced its asserted privacy interest by allowing the information's sale or disclosure in only a few narrow and well-justified circumstances. See, *e. g.,* Health Insurance Portability and Accountability Act of 1996, 42 U. S. C. § 1320d–2; 45 CFR pts. 160 and 164 (2010). A statute of that type would present quite a different case from the one presented here. But the State did not enact a statute with that purpose or design. Instead, Vermont made prescriber-identifying information available to an almost limitless audience. The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers. Given the information's widespread availability and many permissible uses, the State's asserted interest in physician confidentiality does not justify the burden that § 4631(d) places on protected expression.

The State points out that it allows doctors to forgo the advantages of § 4631(d) by consenting to the sale, disclosure, and use of their prescriber-identifying information. See § 4631(c)(1). It is true that private decisionmaking can avoid governmental partiality and thus insulate privacy measures from First Amendment challenge. See *Rowan* v. *Post Office*

Dept., 397 U. S. 728 (1970); cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 72 (1983). But that principle is inapposite here. Vermont has given its doctors a contrived choice: Either consent, which will allow your prescriber-identifying information to be disseminated and used without constraint; or, withhold consent, which will allow your information to be used by those speakers whose message the State supports. Section 4631(d) may offer a limited degree of privacy, but only on terms favorable to the speech the State prefers. Cf. *Rowan*, *supra*, at 734, 737, 739, n. 6 (sustaining a law that allowed private parties to make "unfettered," "unlimited," and "unreviewable" choices regarding their own privacy). This is not to say that all privacy measures must avoid content-based rules. Here, however, the State has conditioned privacy on acceptance of a content-based rule that is not drawn to serve the State's asserted interest. To obtain the limited privacy allowed by § 4631(d), Vermont physicians are forced to acquiesce in the State's goal of burdening disfavored speech by disfavored speakers.

Respondents suggest that a further defect of § 4631(d) lies in its presumption of applicability absent a physician's election to the contrary. Vermont's law might burden less speech if it came into operation only after an individual choice, but a revision to that effect would not necessarily save § 4631(d). Even reliance on a prior election would not suffice, for instance, if available categories of coverage by design favored speakers of one political persuasion over another. Rules that burden protected expression may not be sustained when the options provided by the State are too narrow to advance legitimate interests or too broad to protect speech. As already explained, § 4631(d) permits extensive use of prescriber-identifying information and so does not advance the State's asserted interest in physician confidentiality. The limited range of available privacy options instead reflects the State's impermissible purpose to burden

disfavored speech. Vermont's argument accordingly fails, even if the availability and scope of private election might be relevant in other contexts, as when the statute's design is unrelated to any purpose to advance a preferred message.

The State also contends that § 4631(d) protects doctors from "harassing sales behaviors." 2007 Vt. Laws No. 80, § 1(28). "Some doctors in Vermont are experiencing an undesired increase in the aggressiveness of pharmaceutical sales representatives," the Vermont Legislature found, "and a few have reported that they felt coerced and harassed." § 1(20). It is doubtful that concern for "a few" physicians who may have "felt coerced and harassed" by pharmaceutical marketers can sustain a broad content-based rule like § 4631(d). Many are those who must endure speech they do not like, but that is a necessary cost of freedom. See *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 210–211 (1975); *Cohen* v. *California*, 403 U. S. 15, 21 (1971). In any event the State offers no explanation why remedies other than content-based rules would be inadequate. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 503 (1996) (opinion of Stevens, J.). Physicians can, and often do, simply decline to meet with detailers, including detailers who use prescriber-identifying information. See, *e. g.*, App. 180, 333–334. Doctors who wish to forgo detailing altogether are free to give "No Solicitation" or "No Detailing" instructions to their office managers or to receptionists at their places of work. Personal privacy even in one's own home receives "ample protection" from the "resident's unquestioned right to refuse to engage in conversation with unwelcome visitors." *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 168 (2002); see also *Bolger*, *supra*, at 72. A physician's office is no more private and is entitled to no greater protection.

Vermont argues that detailers' use of prescriber-identifying information undermines the doctor-patient relationship by allowing detailers to influence treatment deci-

sions. According to the State, "unwanted pressure occurs" when doctors learn that their prescription decisions are being "monitored" by detailers. 2007 Vt. Laws No. 80, § 1(27). Some physicians accuse detailers of "spying" or of engaging in "underhanded" conduct in order to "subvert" prescription decisions. App. 336, 380, 407–408; see also *id.*, at 326–328. And Vermont claims that detailing makes people "anxious" about whether doctors have their patients' best interests at heart. *Id.*, at 327. But the State does not explain why detailers' use of prescriber-identifying information is more likely to prompt these objections than many other uses permitted by § 4631(d). In any event, this asserted interest is contrary to basic First Amendment principles. Speech remains protected even when it may "stir people to action," "move them to tears," or "inflict great pain." *Snyder* v. *Phelps*, 562 U. S. 443, 460–461 (2011). The more benign and, many would say, beneficial speech of pharmaceutical marketing is also entitled to the protection of the First Amendment. If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it. *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)*.

2

The State contends that § 4631(d) advances important public policy goals by lowering the costs of medical services and promoting public health. If prescriber-identifying information were available for use by detailers, the State contends, then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives. This logic is set out at length in the legislative findings accompanying § 4631(d). Yet at oral argument here, the State declined to acknowledge that § 4631(d)'s objective purpose and practical effect were to inhibit detailing and alter doctors' prescription decisions. See Tr. of Oral Arg.

5–6. The State's reluctance to embrace its own legislature's rationale reflects the vulnerability of its position.

While Vermont's stated policy goals may be proper, § 4631(d) does not advance them in a permissible way. As the Court of Appeals noted, the "state's own explanation of how" § 4631(d) "advances its interests cannot be said to be direct." 630 F. 3d, at 277. The State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. *Thompson*, 535 U. S., at 374; see also *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 769–770 (1976). "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, supra*, at 503 (opinion of Stevens, J.); see also *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 97 (1977). These precepts apply with full force when the audience, in this case prescribing physicians, consists of "sophisticated and experienced" consumers. *Edenfield*, 507 U. S., at 775.

As Vermont's legislative findings acknowledge, the premise of § 4631(d) is that the force of speech can justify the government's attempts to stifle it. Indeed the State defends the law by insisting that "pharmaceutical marketing has a strong influence on doctors' prescribing practices." Brief for Petitioners 49–50. This reasoning is incompatible with the First Amendment. In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the market-

place by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.

The defect in Vermont's law is made clear by the fact that many listeners find detailing instructive. Indeed the record demonstrates that some Vermont doctors view targeted detailing based on prescriber-identifying information as "very helpful" because it allows detailers to shape their messages to each doctor's practice. App. 274; see also *id.*, at 181, 218, 271–272. Even the United States, which appeared here in support of Vermont, took care to dispute the State's "unwarranted view that the dangers of [n]ew drugs outweigh their benefits to patients." Brief for United States as *Amicus Curiae* 24, n. 4. There are divergent views regarding detailing and the prescription of brand-name drugs. Under the Constitution, resolution of that debate must result from free and uninhibited speech. As one Vermont physician put it: "We have a saying in medicine, information is power. And the more you know, or anyone knows, the better decisions can be made." App. 279. There are similar sayings in law, including that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Bd.*, 425 U. S., at 770. The choice, "between the dangers of suppressing information, and the dangers of its misuse if it is freely available," is one that "the First Amendment makes for us." *Ibid.*

Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs. The State can express that view through its own speech. See *Linmark*, *supra*, at 97; cf. § 4622(a)(1) (establishing a prescription drug educational program). But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a pre-

ferred direction. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield*, *supra*, at 767.

It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech. Indeed the government's legitimate interest in protecting consumers from "commercial harms" explains "why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Discovery Network*, 507 U. S., at 426; see also *44 Liquormart*, 517 U. S., at 502 (opinion of Stevens, J.). The Court has noted, for example, that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *R. A. V.*, 505 U. S., at 388–389 (citing *Virginia Bd.*, *supra*, at 771–772). Here, however, Vermont has not shown that its law has a neutral justification.

The State nowhere contends that detailing is false or misleading within the meaning of this Court's First Amendment precedents. See *Thompson*, *supra*, at 373. Nor does the State argue that the provision challenged here will prevent false or misleading speech. Cf. *post*, at 589–590 (BREYER, J., dissenting) (collecting regulations that the government might defend on this ground). The State's interest in burdening the speech of detailers instead turns on nothing more than a difference of opinion. See *Bolger*, 463 U. S., at 69; *Thompson*, *supra*, at 376.

* * *

The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In con-

sidering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate.

If Vermont's statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position. Here, however, the State gives possessors of the information broad discretion and wide latitude in disclosing the information, while at the same time restricting the information's use by some speakers and for some purposes, even while the State itself can use the information to counter the speech it seeks to suppress. Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers.

When it enacted § 4631(d), the Vermont Legislature found that the "marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors." 2007 Vt. Laws No. 80, § 1(4). "The goals of marketing programs," the legislature said, "are often in conflict with the goals of the state." § 1(3). The text of § 4631(d), associated legislative findings, and the record developed in the District Court establish that Vermont enacted its law for this end. The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

The Vermont statute before us adversely affects expression in one, and only one, way. It deprives pharmaceutical

and data-mining companies of data, collected pursuant to the government's regulatory mandate, that could help pharmaceutical companies create better sales messages. In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special "heightened" standard of review when reviewing such an effort. And, in any event, the statute meets the First Amendment standard this Court has previously applied when the government seeks to regulate commercial speech. For any or all of these reasons, the Court should uphold the statute as constitutional.

I

The Vermont statute before us says pharmacies and certain other entities

> "shall not [(1)] sell . . . regulated records containing prescriber-identifiable information, nor [(2)] permit the use of [such] records . . . for marketing or promoting a prescription drug, unless the prescriber consents." Vt. Stat. Ann., Tit. 18, § 4631(d) (Supp. 2010).

It also says that

> "[(3)] [p]harmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents." *Ibid.*

For the most part, I shall focus upon the first and second of these prohibitions. In Part IV, I shall explain why the third prohibition makes no difference to the result.

II

In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457 (1997), this Court considered the First Amendment's application to federal agricultural commodity mar-

keting regulations that required growers of fruit to make compulsory contributions to pay for collective advertising. The Court reviewed the lawfulness of the regulation's negative impact on the growers' freedom voluntarily to choose their own commercial messages "under the standard appropriate for the review of economic regulation." *Id.*, at 469.

In this case I would ask whether Vermont's regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives. And in doing so, I would give significant weight to legitimate commercial regulatory objectives—as this Court did in *Glickman*. The far stricter, specially "heightened" First Amendment standards that the majority would apply to this instance of commercial regulation are out of place here. *Ante*, at 557, 563, 565, 566, 568, 570, 571.

A

Because many, perhaps most, activities of human beings living together in communities take place through speech, and because speech-related risks and offsetting justifications differ depending upon context, this Court has distinguished for First Amendment purposes among different contexts in which speech takes place. See, *e. g.*, *Snyder* v. *Phelps*, 562 U. S. 443, 451–452 (2011). Thus, the First Amendment imposes tight constraints upon government efforts to restrict, *e. g.*, "core" political speech, while imposing looser constraints when the government seeks to restrict, *e. g.*, commercial speech, the speech of its own employees, or the regulation-related speech of a firm subject to a traditional regulatory program. Compare *Boos* v. *Barry*, 485 U. S. 312, 321 (1988) (political speech), with *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980) (commercial speech), *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968) (government employees), and *Glickman*, *supra* (economic regulation).

These test-related distinctions reflect the constitutional importance of maintaining a free marketplace of ideas, a marketplace that provides access to "social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); see *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). Without such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people's informed will.

At the same time, our cases make clear that the First Amendment offers considerably less protection to the maintenance of a free marketplace for goods and services. See *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 623 (1995) ("We have always been careful to distinguish commercial speech from speech at the First Amendment's core"). And they also reflect the democratic importance of permitting an elected government to implement through effective programs policy choices for which the people's elected representatives have voted.

Thus this Court has recognized that commercial speech including advertising has an "informational function" and is not "valueless in the marketplace of ideas." *Central Hudson*, *supra*, at 563; *Bigelow* v. *Virginia*, 421 U. S. 809, 826 (1975). But at the same time it has applied a less than strict, "intermediate" First Amendment test when the government directly restricts commercial speech. Under that test, government laws and regulations may significantly restrict speech, as long as they also "directly advance" a "substantial" government interest that could not "be served as well by a more limited restriction." *Central Hudson*, *supra*, at 564. Moreover, the Court has found that "sales practices" that are "misleading, deceptive, or aggressive" lack the protection of even this "intermediate" standard. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 501 (1996) (opinion of Stevens, J.); see also *Central Hudson*, *supra*, at 563; *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer*

Council, Inc., 425 U. S. 748, 772 (1976). And the Court has emphasized the need, in applying an "intermediate" test, to maintain the

> "'commonsense' distinction between speech proposing a commercial transaction, *which occurs in an area traditionally subject to government regulation*, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978) (quoting *Virginia Bd. of Pharmacy, supra,* at 771, n. 24; emphasis added).

The Court has also normally applied a yet more lenient approach to ordinary commercial or regulatory legislation that affects speech in less direct ways. In doing so, the Court has taken account of the need in this area of law to defer significantly to legislative judgment—as the Court has done in cases involving the Commerce Clause or the Due Process Clause. See *Glickman*, 521 U. S., at 475–476. "Our function" in such cases, Justice Brandeis said, "is only to determine the reasonableness of the legislature's belief in the existence of evils and in the effectiveness of the remedy provided." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 286–287 (1932) (dissenting opinion); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional" if it rests "upon some rational basis within the knowledge and experience of the legislators").

To apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs (even if that program has a modest impact upon a firm's ability to shape a commercial message) would work at cross-purposes with this more basic constitutional approach. Since ordinary regulatory programs can

affect speech, particularly commercial speech, in myriad ways, to apply a "heightened" First Amendment standard of review whenever such a program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives. See *Glickman*, *supra*, at 476 ("Doubts concerning the policy judgments that underlie" a program requiring fruitgrowers to pay for advertising they disagree with does not "justify reliance on the First Amendment as a basis for reviewing economic regulations"). Cf. *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550, 560–562 (2005) (applying less scrutiny when the compelled speech is made by the Government); *United States* v. *United Foods, Inc.*, 533 U. S. 405, 411 (2001) (applying greater scrutiny where compelled speech was not "ancillary to a more comprehensive program restricting marketing autonomy"). To apply a "heightened" standard of review in such cases as a matter of course would risk what then-Justice Rehnquist, dissenting in *Central Hudson*, described as a

> "retur[n] to the bygone era of *Lochner* v. *New York*, 198 U. S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." 447 U. S., at 589.

B

There are several reasons why the Court should review Vermont's law "under the standard appropriate for the review of economic regulation," not "under a heightened standard appropriate for the review of First Amendment issues." *Glickman*, 521 U. S., at 469. For one thing, Vermont's statute neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale

of a product. Cf. *id.*, at 469–470. (And I here assume that *Central Hudson* might otherwise apply. See Part III, *infra.*)

For another thing, the same First Amendment standards that apply to Vermont here would apply to similar regulatory actions taken by other States or by the Federal Government acting, for example, through Food and Drug Administration (FDA) regulation. (And the Federal Government's ability to pre-empt state laws that interfere with existing or contemplated federal forms of regulation is here irrelevant.)

Further, the statute's requirements form part of a traditional, comprehensive regulatory regime. Cf. *United Foods, supra,* at 411. The pharmaceutical drug industry has been heavily regulated at least since 1906. See Pure Food and Drugs Act, 34 Stat. 768. Longstanding statutes and regulations require pharmaceutical companies to engage in complex drug testing to ensure that their drugs are both "safe" and "effective." 21 U. S. C. §§ 355(b)(1), (d). Only then can the drugs be marketed, at which point drug companies are subject to the FDA's exhaustive regulation of the content of drug labels and the manner in which drugs can be advertised and sold. § 352(f)(2); 21 CFR pts. 201–203 (2010).

Finally, Vermont's statute is directed toward information that exists only by virtue of government regulation. Under federal law, certain drugs can be dispensed only by a pharmacist operating under the orders of a medical practitioner. 21 U. S. C. § 353(b). Vermont regulates the qualifications, the fitness, and the practices of pharmacists themselves, and requires pharmacies to maintain a "patient record system" that, among other things, tracks who prescribed which drugs. Vt. Stat. Ann., Tit. 26, §§ 2041(a), 2022(14) (Supp. 2010); Vt. Bd. of Pharmacy Admin. Rules (Pharmacy Rules) 9.1, 9.24(e) (2009). But for these regulations, pharmacies would have no way to know who had told customers to buy which drugs (as is the case when a doctor tells a patient to take a daily dose of aspirin).

Regulators will often find it necessary to create tailored restrictions on the use of information subject to their regulatory jurisdiction. A car dealership that obtains credit scores for customers who want car loans can be prohibited from using credit data to search for new customers. See 15 U. S. C. § 1681b (2006 ed. and Supp. III); cf. *Trans Union Corp.* v. *FTC*, 245 F. 3d 809, reh'g denied, 267 F. 3d 1138 (CADC 2001). Medical specialists who obtain medical records for their existing patients cannot purchase those records in order to identify new patients. See 45 CFR § 164.508(a)(3) (2010). Or, speaking hypothetically, a public utilities commission that directs local gas distributors to gather usage information for individual customers might permit the distributors to share the data with researchers (trying to lower energy costs) but forbid sales of the data to appliance manufacturers seeking to sell gas stoves.

Such regulatory actions are subject to judicial review, *e. g.*, for compliance with applicable statutes. And they would normally be subject to review under the Administrative Procedure Act to make certain they are not "arbitrary, capricious, [or] an abuse of discretion." 5 U. S. C. § 706(2)(A) (2006 ed.). In an appropriate case, such review might be informed by First Amendment considerations. But regulatory actions of the kind present here have not previously been thought to raise serious additional constitutional concerns under the First Amendment. But cf. *Trans Union LLC* v. *FTC*, 536 U. S. 915 (2002) (KENNEDY, J., dissenting from denial of certiorari) (questioning ban on use of consumer credit reports for target marketing). The ease with which one can point to actual or hypothetical examples with potentially adverse speech-related effects at least roughly comparable to those at issue here indicates the danger of applying a "heightened" or "intermediate" standard of First Amendment review where typical regulatory actions affect commercial speech (say, by withholding information that a

commercial speaker might use to shape the content of a message).

Thus, it is not surprising that, until today, this Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate—whether the information rests in government files or has remained in the hands of the private firms that gathered it. But cf. *ante*, at 566–570. Nor has this Court *ever* previously applied any form of "heightened" scrutiny in any even roughly similar case. See *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32 (1999) (no heightened scrutiny); compare *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 426 (1993) ("[C]ommercial speech can be subject to greater governmental regulation than noncommercial speech" because of the government's "interest in preventing commercial harms"), with *ante*, at 565, 566, 573, 579 (suggesting that *Discovery Network* supports heightened scrutiny when regulations target commercial speech).

C

The Court (suggesting a standard yet stricter than *Central Hudson*) says that we must give *content-based* restrictions that burden speech "heightened" scrutiny. It adds that "[c]ommercial speech is no exception." *Ante*, at 566. And the Court then emphasizes that this is a case involving both "content-based" and "speaker-based" restrictions. See *ante*, at 563, 564, 565, 566, 568, 570, 571, 572, 574, 575, 577, 579, 580.

But neither of these categories—"content-based" nor "speaker-based"—has ever before justified greater scrutiny when regulatory activity affects commercial speech. See, *e. g.*, *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (DC 1971) (three-judge court), summarily aff'd *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U. S. 1000 (1972) (upholding ban on radio and television marketing of tobacco). And the absence of any such precedent is understandable.

Regulatory programs necessarily draw distinctions on the basis of content. *Virginia Bd. of Pharmacy*, 425 U. S., at 761, 762 ("If there is a kind of commercial speech that lacks all First Amendment protection, . . . it must be distinguished by its content"). Electricity regulators, for example, oversee company statements, pronouncements, and proposals, but only about electricity. See, *e. g.*, Vt. Pub. Serv. Bd. Rules 3.100 (1983), 4.200 (1986), 5.200 (2004). The Federal Reserve Board regulates the content of statements, advertising, loan proposals, and interest rate disclosures, but only when made by financial institutions. See 12 CFR pts. 226, 230 (2011). And the FDA oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture. See 21 CFR pts. 201–203. Given the ubiquity of content-based regulatory categories, why should the "content-based" nature of typical regulation require courts (other things being equal) to grant legislators and regulators *less* deference? Cf. *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 481 (1989) (courts, in First Amendment area, should "provide the Legislative and Executive Branches needed leeway" when regulated industries are at issue).

Nor, in the context of a regulatory program, is it unusual for particular rules to be "speaker-based," affecting only a class of entities, namely, the regulated firms. An energy regulator, for example, might require the manufacturers of home appliances to publicize ways to reduce energy consumption, while exempting producers of industrial equipment. See, *e. g.*, 16 CFR pt. 305 (2011) (prescribing labeling requirements for certain home appliances); Nev. Admin. Code §§ 704.804, 704.808 (2010) (requiring utilities to provide consumers with information on conservation). Or a trade regulator might forbid a particular firm to make the true claim that its cosmetic product contains "cleansing grains that scrub away dirt and excess oil" unless it substantiates that claim with detailed backup testing, even though oppo-

nents of cosmetics use need not substantiate their claims. Morris, F. T. C. Orders Data To Back Ad Claims, N. Y. Times, Nov. 3, 1973, p. 32; Boys' Life, Oct. 1973, p. 64; see 36 Fed. Reg. 12058 (1971). Or the FDA might control in detail just what a pharmaceutical firm can, and cannot, tell potential purchasers about its products. Such a firm, for example, could not suggest to a potential purchaser (say, a doctor) that he or she might put a pharmaceutical drug to an "off label" use, even if the manufacturer, in good faith and with considerable evidence, believes the drug will help. All the while, a third party (say, a researcher) is free to tell the doctor not to use the drug for that purpose. See 21 CFR pt. 99; cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 350–351 (2001) (discussing effect of similar regulations in respect to medical devices); see also Proposed Rule, Revised Effectiveness Determination; Sunscreen Drug Products for Over-the-Counter Human Use, 76 Fed. Reg. 35672 (2011) (proposing to prohibit marketing of sunscreens with sun protection factor of greater than 50 due to insufficient data "to indicate that there is additional clinical benefit").

If the Court means to create constitutional barriers to regulatory rules that might affect the *content* of a commercial message, it has embarked upon an unprecedented task—a task that threatens significant judicial interference with widely accepted regulatory activity. Cf., *e. g.*, 21 CFR pts. 201–203. Nor would it ease the task to limit its "heightened" scrutiny to regulations that only affect certain speakers. As the examples that I have set forth illustrate, many regulations affect only messages sent by a small class of regulated speakers, for example, electricity generators or natural gas pipelines.

The Court also uses the words "aimed" and "targeted" when describing the relation of the statute to drug manufacturers. *Ante*, at 564, 565, 567, 572, 578. But, for the reasons just set forth, to require "heightened" scrutiny on this

basis is to require its application early and often when the State seeks to regulate industry. Any statutory initiative stems from a legislative agenda. See, *e. g.*, Message to Congress, May 24, 1937, H. R. Doc. No. 255, 75th Cong., 1st Sess., 4 (request from President Franklin Roosevelt for legislation to ease the plight of factory workers). Any administrative initiative stems from a regulatory agenda. See, *e. g.*, Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993) (specifying how to identify regulatory priorities and requiring agencies to prepare agendas). The related statutes, regulations, programs, and initiatives almost always reflect a point of view, for example, of the Congress and the administration that enacted them and ultimately the voters. And they often aim at, and target, particular firms that engage in practices about the merits of which the Government and the firms may disagree. Section 2 of the Sherman Act, 15 U. S. C. § 2, for example, which limits the truthful, nonmisleading speech of firms that, due to their market power, can affect the competitive landscape, is directly aimed at, and targeted at, monopolists.

In short, the case law in this area reflects the need to ensure that the First Amendment protects the "marketplace of ideas," thereby facilitating the democratic creation of sound government policies without improperly hampering the ability of government to introduce an agenda, to implement its policies, and to favor them to the exclusion of contrary policies. To apply "heightened" scrutiny when the regulation of commercial activities (which often involve speech) is at issue is unnecessarily to undercut the latter constitutional goal. The majority's view of this case presents that risk.

Moreover, given the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutional-

ization of economic theories preferred by individual jurists. See *Lochner* v. *New York*, 198 U. S. 45, 75–76 (1905) (Holmes, J., dissenting). By inviting courts to scrutinize whether a State's legitimate regulatory interests can be achieved in less restrictive ways whenever they touch (even indirectly) upon commercial speech, today's majority risks repeating the mistakes of the past in a manner not anticipated by our precedents. See *Central Hudson*, 447 U. S., at 589 (Rehnquist, J., dissenting); cf. *Railroad Comm'n of Tex.* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 580–581 (1940) ("A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted").

Nothing in Vermont's statute undermines the ability of persons opposing the State's policies to speak their mind or to pursue a different set of policy objectives through the democratic process. Whether Vermont's regulatory statute "targets" drug companies (as opposed to affecting them unintentionally) must be beside the First Amendment point.

This does not mean that economic regulation having some effect on speech is always lawful. Courts typically review the lawfulness of statutes for rationality and of regulations (if federal) to make certain they are not "arbitrary, capricious, [or] an abuse of discretion." 5 U. S. C. § 706(2)(A). And our valuable free-speech tradition may play an important role in such review. But courts do not normally view these matters as requiring "heightened" First Amendment scrutiny—and particularly not the unforgiving brand of "intermediate" scrutiny employed by the majority. Because the imposition of "heightened" scrutiny in such instances would significantly change the legislative/judicial balance, in a way that would significantly weaken the legislature's authority to regulate commerce and industry, I would not apply a "heightened" First Amendment standard of review in this case.

III

Turning to the constitutional merits, I believe Vermont's statute survives application of *Central Hudson*'s "intermediate" commercial speech standard as well as any more limited "economic regulation" test.

A

The statute threatens only modest harm to commercial speech. I agree that it withholds from pharmaceutical companies information that would help those entities create a more effective selling message. But I cannot agree with the majority that the harm also involves unjustified discrimination in that it permits "pharmacies" to "share prescriber-identifying information with anyone for any reason" (but marketing). *Ante*, at 572. Whatever the First Amendment relevance of such discrimination, there is no evidence that it exists in Vermont. The record contains no evidence that prescriber-identifying data is widely disseminated. See App. 248, 255. Cf. *Burson* v. *Freeman*, 504 U. S. 191, 207 (1992) (plurality opinion) ("States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist"); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 380 (1977) ("[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context").

The absence of any such evidence likely reflects the presence of other legal rules that forbid widespread release of prescriber-identifying information. Vermont's Pharmacy Rules, for example, define "unprofessional conduct" to include "[d]ivulging or revealing to unauthorized persons patient *or practitioner* information or the nature of professional pharmacy services rendered." Rule 20.1(i) (emphasis added); see also Reply Brief for Petitioners 21. The statute reinforces this prohibition where pharmaceutical marketing is at issue. And the exceptions that it creates are narrow and concern common and often essential uses of prescription

data. See Vt. Stat. Ann., Tit. 18, § 4631(e)(1) (pharmacy reimbursement, patient care management, health care research); § 4631(e)(2) (drug dispensing); § 4631(e)(3) (communications between prescriber and pharmacy); § 4631(e)(4) (information to patients); §§ 4631(e)(5)–(6) (as otherwise provided by state or federal law). Cf. *Trans Union Corp.*, 245 F. 3d, at 819 (rejecting an underinclusiveness challenge because an exception to the Fair Credit Reporting Act concerned " 'exactly the sort of thing the Act seeks to promote' " (quoting *Trans Union Corp.* v. *FTC*, 81 F. 3d 228, 234 (CADC 1996))).

Nor can the majority find record support for its claim that the statute helps "favored" speech and imposes a "burde[n]" upon "disfavored speech by disfavored speakers." *Ante*, at 574. The Court apparently means that the statute (1) prevents pharmaceutical companies from creating individualized messages that would help them sell their drugs more effectively, but (2) permits "counterdetailing" programs, which often promote generic drugs, to create such messages using prescriber-identifying data. I am willing to assume, for argument's sake, that this consequence would significantly increase the statute's negative impact upon commercial speech. But cf. 21 CFR §§ 202.1(e)(1), (e)(5)(ii) (FDA's "fair balance" requirement); App. 193 (no similar FDA requirement for nondrug manufacturers). The record before us, however, contains no evidentiary basis for the conclusion that any such individualized counterdetailing is widespread, or exists at all, in Vermont.

The majority points out, *ante*, at 560, that Act 80, of which § 4631 was a part, also created an "evidence-based prescription drug education program," in which the Vermont Department of Health, the Department of Vermont Health Access, and the University of Vermont, among others, work together "to provide information and education on the therapeutic and cost-effective utilization of prescription drugs" to health professionals responsible for prescribing and dispensing

prescription drugs, Vt. Stat. Ann., Tit. 18, § 4622(a)(1). See generally §§ 4621–4622. But that program does *not* make use of prescriber-identifying data. Reply Brief for Petitioners 11.

The majority cites testimony by two witnesses in support of its statement that "States themselves may supply the prescriber-identifying information used in [counterdetailing] programs." *Ante*, at 560. One witness explained that academic detailers *in Pennsylvania* work with state health officials to identify physicians serving patients whose health care is likewise state provided. App. 375. The other, an IMS Health officer, observed that Vermont has its own multipayer database containing prescriber-identifying data, which *could* be used to talk to doctors about their prescription patterns and the lower costs associated with generics. *Id.*, at 313. But nothing in the record indicates that any "counterdetailing" of this kind *has ever taken place in fact in Vermont.* State-sponsored health care professionals sometimes meet with small groups of doctors to discuss best practices and generic drugs generally. See University of Vermont, College of Medicine, Office of Primary Care, Vermont Academic Detailing Program (July 2010), http://www.med.uvm.edu/ahec/downloads/VTAD_overview_2010.07.08.pdf (all Internet materials as visited June 21, 2011, and available in Clerk of Court's case file). Nothing in Vermont's statute prohibits brand-name manufacturers from undertaking a similar effort.

The upshot is that the only commercial-speech-related harm that the record shows this statute to have brought about is the one I have previously described: the withholding of information collected through a regulatory program, thereby preventing companies from shaping a commercial message they believe maximally effective. The absence of precedent suggesting that this kind of harm is serious reinforces the conclusion that the harm here is modest at most.

B

The legitimate state interests that the statute serves are "substantial." *Central Hudson*, 447 U. S., at 564. Vermont enacted its statute

> "to advance the state's interest in protecting the public health of Vermonters, protecting the privacy of prescribers and prescribing information, and to ensure costs are contained in the private health care sector, as well as for state purchasers of prescription drugs, through the promotion of less costly drugs and ensuring prescribers receive unbiased information." § 4631(a).

These objectives are important. And the interests they embody all are "neutral" in respect to speech. Cf. *ante*, at 579.

The protection of public health falls within the traditional scope of a State's police powers. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 719 (1985). The fact that the Court normally exempts the regulation of "misleading" and "deceptive" information even from the rigors of its "intermediate" commercial speech scrutiny testifies to the importance of securing "unbiased information," see *44 Liquormart*, 517 U. S., at 501 (opinion of Stevens, J.); *Central Hudson*, *supra*, at 563, as does the fact that the FDA sets forth as a federal regulatory goal the need to ensure a "fair balance" of information about marketed drugs, 21 CFR §§ 202.1(e)(1), (e)(5)(ii). As major payers in the health care system, health care spending is also of crucial state interest. And this Court has affirmed the importance of maintaining "privacy" as an important public policy goal—even in respect to information already disclosed to the public for particular purposes (but not others). See *Department of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U. S. 749, 762–771 (1989); see also Solove, A Taxonomy of Privacy, 154 U. Pa. L. Rev. 477, 520–522 (2006); cf. *NASA* v. *Nelson*, 562 U. S. 134, 144–146 (2011) (discussing privacy interests in nondisclosure).

At the same time, the record evidence is sufficient to permit a legislature to conclude that the statute "directly advances" each of these objectives. The statute helps to focus sales discussions on an individual drug's safety, effectiveness, and cost, perhaps compared to other drugs (including generics). These drug-related facts have everything to do with general information that drug manufacturers likely possess. They have little, if anything, to do with the name or prior prescription practices of the particular doctor to whom a detailer is speaking. Shaping a detailing message based on an individual doctor's prior prescription habits may help sell more of a particular manufacturer's particular drugs. But it does so by diverting attention from scientific research about a drug's safety and effectiveness, as well as its cost. This diversion comes at the expense of public health and the State's fiscal interests.

Vermont compiled a substantial legislative record to corroborate this line of reasoning. See Testimony of Sean Flynn (Apr. 11, 2007), App. in No. 09–1913–cv(L) etc. (CA2), p. A–1156 (hereinafter CA2 App.) (use of data mining helps drug companies "to cover up information that is not in the best light of their drug and to highlight information that makes them look good"); Volker & Outterson, New Legislative Trends Threaten the Way Health Information Companies Operate, Pharmaceutical Pricing & Reimbursement 2007, *id.*, at A–4235 (one former detailer considered prescriber-identifying data the "'greatest tool in planning our approach to manipulating doctors'" (quoting Whitney, Big (Brother) Pharma: How Drug Reps Know Which Doctors To Target, New Republic, Aug. 29, 2006, http://www.tnr.com/article/84056/health-care-eli-lilly-pfizer-ama); Testimony of Paul Harrington (May 3, 2007), CA2 App. A–1437 (describing data-mining practices as "secret and manipulative activities by the marketers"); Testimony of Julie Brill (May 3, 2007), *id.*, at A–1445 (restrictions on data mining "ensur[e] that the FDA's requirement of doctors receiving fair and balanced in-

formation actually occurs"); Written Statement of Jerry Avorn & Aaron Kesselheim, *id.*, at A–4310 (citing studies that "indicate that more physician-specific detailing will lead to more prescriptions of brand-name agents, often with no additional patient benefit but at much higher cost to patients and to state-based insurance programs, which will continue to drive up the cost of health care"); *id.*, at A–4311 ("Making it more difficult for manufacturers to tailor their marketing strategies to the prescribing histories of individual physicians would actually encourage detailers to present physicians with a more neutral description of the product"); see also Record in No. 1:07–cv–00188–jgm (D Vt.), Doc. 414, pp. 53–57, 64 (hereinafter Doc. 414) (summarizing record evidence).

These conclusions required the legislature to make judgments about whether and how to ameliorate these problems. And it is the job of regulatory agencies and legislatures to make just these kinds of judgments. Vermont's attempts to ensure a "fair balance" of information is no different from the FDA's similar requirement, see 21 CFR §§ 202.1(e)(1), (e)(5)(ii). No one has yet suggested that substantial portions of federal drug regulation are unconstitutional. Why then should we treat Vermont's law differently?

The record also adequately supports the State's privacy objective. Regulatory rules in Vermont make clear that the confidentiality of an individual doctor's prescribing practices remains the norm. See, *e. g.*, Pharmacy Rule 8.7(c) ("Prescription and other patient health care information shall be secure from access by the public, and the information shall be kept confidential"); Pharmacy Rule 20.1(i) (forbidding disclosure of patient or prescriber information to "unauthorized persons" without consent). Exceptions to this norm are comparatively few. See, *e. g.*, *ibid.* (identifying "authorized persons"); Vt. Stat. Ann., Tit. 18, § 4631(e); App. 248, 255 (indicating that prescriber-identifying data is not widely disseminated). There is no indication that the State of Ver-

mont, or others in the State, makes use of this information for counterdetailing efforts. See *supra*, at 594–595.

Pharmaceutical manufacturers and the data miners who sell information to those manufacturers would like to create (and did create) an additional exception, which means additional circulation of otherwise largely confidential information. Vermont's statute closes that door. At the same time, the statute permits doctors who wish to permit use of their prescribing practices to do so. §§ 4631(c)–(d). For purposes of *Central Hudson*, this would seem sufficiently to show that the statute serves a meaningful interest in increasing the protection given to prescriber privacy. See *Fox*, 492 U. S., at 480 (in commercial speech area, First Amendment requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served" (internal quotation marks omitted)); see also *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 434 (1993) (The First Amendment does not "require that the Government make progress on every front before it can make progress on any front"); *Burson*, 504 U. S., at 207 (plurality opinion).

C

The majority cannot point to any adequately supported, similarly effective "more limited restriction." *Central Hudson*, 447 U. S., at 564. It says that doctors "can, and often do, simply decline to meet with detailers." *Ante*, at 575. This fact, while true, is beside the point. Closing the office door entirely has no similar tendency to lower costs (by focusing greater attention upon the comparative advantages and disadvantages of generic drug alternatives). And it would not protect the confidentiality of information already released to, say, data miners. In any event, physicians are unlikely to turn detailers away at the door, for those detailers, whether delivering a balanced or imbalanced message, are nonetheless providers of much useful information. See

Manchanda & Honka, The Effects and Role of Direct-to-Physician Marketing in the Pharmaceutical Industry: An Integrative Review, 5 Yale J. Health Pol'y L. & Ethics 785, 793–797, 815–816 (2005); Ziegler, Lew, & Singer, The Accuracy of Drug Information From Pharmaceutical Sales Representatives, 273 JAMA 1296 (1995). Forcing doctors to choose between targeted detailing and no detailing at all could therefore jeopardize the State's interest in promoting public health.

The majority also suggests that if the "statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position." *Ante*, at 580; see also *ante*, at 572–573. But the disclosure-permitting exceptions here *are* quite narrow, and they serve useful, indeed essential purposes. See *supra*, at 593–594. Compare Vt. Stat. Ann., Tit. 18, § 4631(e), with note following 42 U. S. C. § 1320d–2, p. 1190, and 45 CFR § 164.512 (uses and disclosures not requiring consent under the Health Insurance Portability and Accountability Act of 1996). Regardless, this alternative is not "a *more limited* restriction," *Central Hudson*, *supra*, at 564 (emphasis added), for it would impose a *greater*, not a *lesser*, burden upon the dissemination of information.

Respondents' alternatives are no more helpful. Respondents suggest that "Vermont can simply inform physicians that pharmaceutical companies . . . use prescription history information to communicate with doctors." Brief for Respondent Pharmaceutical Research and Manufacturers of America 48. But how would that help serve the State's basic purposes? It would not create the "fair balance" of information in pharmaceutical marketing that the State, like the FDA, seeks. Cf. *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 874 (1997) (alternative must be "at least as effective in achieving the legitimate purpose that the statute was enacted to serve"). Respondents also suggest policies requiring use of generic drugs or educating doctors

about their benefits. Brief for Respondent Pharmaceutical Research and Manufacturers of America 54–55. Such programs have been in effect for some time in Vermont or other States, without indication that they have prevented the imbalanced sales tactics at which Vermont's statute takes aim. See, *e. g.*, Written Statement of Jerry Avorn & Aaron Kesselheim, CA2 App. A–4310; Doc. 414, at 60–61. And in any event, such laws do not help protect prescriber privacy.

Vermont has thus developed a record that sufficiently shows that its statute meaningfully furthers substantial state interests. Neither the majority nor respondents suggests any equally effective "more limited" restriction. And the First Amendment harm that Vermont's statute works is, at most, modest. I consequently conclude that, even if we apply an "intermediate" test such as that in *Central Hudson*, this statute is constitutional.

IV

What about the statute's third restriction, providing that "[p]harmaceutical manufacturers and pharmaceutical marketers" may not "*use* prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents"? Vt. Stat. Ann., Tit. 18, § 4631(d) (emphasis added). In principle, I should not reach this question. That is because respondent pharmaceutical manufacturers, marketers, and data miners seek a declaratory judgment and injunction prohibiting the enforcement of this statute. See 28 U. S. C. § 2201; App. 49–128. And they have neither shown nor claimed that they could obtain significant amounts of "prescriber-identifiable information" if the first two prohibitions are valid. If, as I believe, the first two statutory prohibitions (related to selling and disclosing the information) are valid, then the dispute about the validity of the third provision is not "'real and substantial'" or "'definite and concrete.'" *MedImmune, Inc.* v. *Genentech, Inc.*, 549

U. S. 118, 127 (2007) (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937)) (Article III does not permit courts to entertain such disputes).

The Court, however, strikes down all three provisions, and so I add that I disagree with the majority as to the constitutionality of the third restriction as well—basically for the reasons I have already set out. The prohibition against pharmaceutical firms using this prescriber-identifying information works no more than modest First Amendment harm; the prohibition is justified by the need to ensure unbiased sales presentations, prevent unnecessarily high drug costs, and protect the privacy of prescribing physicians. There is no obvious equally effective, more limited alternative.

V

In sum, I believe that the statute before us satisfies the "intermediate" standards this Court has applied to restrictions on commercial speech. *A fortiori* it satisfies less demanding standards that are more appropriately applied in this kind of commercial regulatory case—a case where the government seeks typical regulatory ends (lower drug prices, more balanced sales messages) through the use of ordinary regulatory means (limiting the commercial use of data gathered pursuant to a regulatory mandate). The speech-related consequences here are indirect, incidental, and entirely commercial. See *supra*, at 585–588.

The Court reaches its conclusion through the use of important First Amendment categories—"content-based," "speaker-based," and "neutral"—but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent. See *supra*, at 581–585, 589–592, 597. At best the Court opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. See, *e. g.*, *supra*, at 587–588, 589–590. At worst, it

reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue. See *Central Hudson*, 447 U. S., at 589 (Rehnquist, J., dissenting).

Regardless, whether we apply an ordinary commercial speech standard or a less demanding standard, I believe Vermont's law is consistent with the First Amendment. And with respect, I dissent.

Syllabus

PLIVA, INC., ET AL. *v.* MENSING

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

No. 09–993. Argued March 30, 2011—Decided June 23, 2011*

Five years after the Food and Drug Administration (FDA) first approved metoclopramide, a drug commonly used to treat digestive tract problems, under the brand name Reglan, generic manufacturers such as petitioners also began producing the drug. Because of accumulating evidence that long-term metoclopramide use can cause tardive dyskinesia, a severe neurological disorder, warning labels for the drug have been strengthened and clarified several times, most recently in 2009.

Respondents were prescribed Reglan in 2001 and 2002, but both received the generic drug from their pharmacists. After taking the drug as prescribed for several years, both developed tardive dyskinesia. In separate state-court tort actions, they sued petitioners, the generic drug manufacturers that produced the metoclopramide they took (Manufacturers). Each respondent alleged, *inter alia*, that long-term metoclopramide use caused her disorder and that the Manufacturers were liable under state tort law for failing to provide adequate warning labels. In both suits, the Manufacturers urged that federal statutes and FDA regulations pre-empted the state tort claims by requiring the same safety and efficacy labeling for generic metoclopramide as was mandated at the time for Reglan. The Fifth and Eighth Circuits rejected these arguments, holding that respondents' claims were not pre-empted.

Held: The judgments are reversed, and the cases are remanded.

588 F. 3d 603 and 593 F. 3d 428, reversed and remanded.

JUSTICE THOMAS delivered the opinion of the Court with respect to all but Part III–B–2, concluding that federal drug regulations applicable to generic drug manufacturers directly conflict with, and thus pre-empt, these state claims. Pp. 611–621, 623–626.

(a) Because pre-emption analysis requires a comparison between federal and state law, the Court begins by identifying the state tort duties and federal labeling requirements applicable to the Manufacturers. Pp. 611–617.

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*Together with No. 09–1039, *Actavis Elizabeth, LLC* v. *Mensing*, also on certiorari to the same court, and No. 09–1501, *Actavis, Inc.* v. *Demahy*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

Syllabus

(1) State tort law requires a manufacturer that is, or should be, aware of its drug's danger to label it in a way that renders it reasonably safe. Respondents pleaded that the Manufacturers knew, or should have known, both that the long-term use of their products carried a high risk of tardive dyskinesia and that their labels did not adequately warn of that risk. Taking these allegations as true, the state-law duty required the Manufacturers to use a different, stronger label than the one they actually used. Pp. 611–612.

(2) On the other hand, federal drug regulations, as interpreted by the FDA, prevented the Manufacturers from independently changing their generic drugs' safety labels. A manufacturer seeking federal approval to market a new drug must prove that it is safe and effective and that the proposed label is accurate and adequate. Although the same rules originally applied to all drugs, the 1984 law commonly called the Hatch-Waxman Amendments allows a generic drug manufacturer to gain FDA approval simply by showing that its drug is equivalent to an already-approved brand-name drug, and that the safety and efficacy labeling proposed for its drug is the same as that approved for the brand-name drug. Respondents contend that federal law nevertheless provides avenues through which the Manufacturers could have altered their metoclopramide labels in time to prevent the injuries here. These include: (1) the FDA's "changes-being-effected" (CBE) process, which permits drug manufacturers, without preapproval, to add or strengthen a warning label; and (2) sending "Dear Doctor" letters providing additional warnings to prescribing physicians and other healthcare professionals. However, the FDA denies that the Manufacturers could have used either of these processes to unilaterally strengthen their warning labels. The Court defers to the FDA's views because they are not plainly erroneous or inconsistent with the regulations, and there is no other reason to doubt that they reflect the FDA's fair and considered judgment. *Auer* v. *Robbins*, 519 U. S. 452, 461, 462. Assuming, without deciding, that the FDA is correct that federal law nevertheless required the Manufacturers to ask for the agency's assistance in convincing the brand-name manufacturer to adopt a stronger label, the Court turns to the pre-emption question. Pp. 612–617.

(b) Where state and federal law directly conflict, state law must give way. See, *e. g.*, *Wyeth* v. *Levine*, 555 U. S. 555, 583. Such a conflict exists where it is "impossible for a private party to comply with both state and federal requirements." *Freightliner Corp.* v. *Myrick*, 514 U. S. 280, 287. Pp. 617–621, 623–626.

(1) The Court finds impossibility here. If the Manufacturers had independently changed their labels to satisfy their state-law duty to attach a safer label to their generic metoclopramide, they would have

violated the federal requirement that generic drug labels be the same as the corresponding brand-name drug labels. Thus, it was impossible for them to comply with both state and federal law. And even if they had fulfilled their federal duty to ask for FDA help in strengthening the corresponding brand-name label, assuming such a duty exists, they would not have satisfied their state tort-law duty. State law demanded a safer label; it did not require communication with the FDA about the possibility of a safer label. Pp. 618–619.

(2) The Court rejects the argument that the Manufacturers' pre-emption defense fails because they failed to ask the FDA for help in changing the corresponding brand-name label. The proper question for "impossibility" analysis is whether the private party could independently do under federal law what state law requires of it. See *Wyeth*, *supra*, at 573. Accepting respondents' argument would render conflict pre-emption largely meaningless by making most conflicts between state and federal law illusory. In these cases, it is possible that, had the Manufacturers asked the FDA for help, they might have eventually been able to strengthen their warning label. But it is also *possible* that they could have convinced the FDA to reinterpret its regulations in a manner that would have opened the CBE process to them, persuaded the FDA to rewrite its generic drug regulations entirely, or talked Congress into amending the Hatch-Waxman Amendments. If these conjectures sufficed to prevent federal and state law from conflicting, it is unclear when, outside of express pre-emption, the Supremacy Clause would have any force. That Clause—which makes federal law "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U. S. Const., Art. VI, cl. 2—cannot be read to permit an approach to pre-emption that renders conflict pre-emption all but meaningless. Here, it is enough to hold that when a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes. Pp. 619–621, 623–624.

(3) *Wyeth* is not to the contrary. The Court there held that a state tort action against a brand-name drug manufacturer for failure to provide an adequate warning label was not pre-empted because it was possible for the manufacturer to comply with both state and federal law under the FDA's CBE regulation. 555 U. S., at 572–573. The federal statutes and regulations that apply to brand-name drug manufacturers differ, by Congress' design, from those applicable to generic drug manufacturers. And different federal statutes and regulations may, as here, lead to different pre-emption results. This Court will not distort the

Syllabus

Supremacy Clause in order to create similar pre-emption across a dissimilar statutory scheme. Congress and the FDA retain authority to change the law and regulations if they so desire. Pp. 624–626.

THOMAS, J., delivered the opinion of the Court, except as to Part III–B–2. ROBERTS, C. J., and SCALIA and ALITO, JJ., joined that opinion in full, and KENNEDY, J., joined as to all but Part III–B–2. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 626.

Jay P. Lefkowitz argued the cause for petitioners in all cases. With him on the briefs for petitioners in No. 09–993 were *Michael D. Shumsky*, *Philippa Scarlett*, *Joseph P. Thomas*, *Linda E. Maichl*, *Richard A. Oetheimer*, *Jonathan I. Price*, and *William F. Sheehan*. *William B. Schultz*, *Irene C. Keyse-Walker*, and *Richard A. Dean* filed briefs for petitioners in Nos. 09–1039 and 09–1501.

Louis M. Bograd argued the cause for respondents in all cases. With him on the brief were *Lucia J. W. McLaren*, *Daniel J. McGlynn*, *Claire Prestel*, *Richard A. Tonry II*, *Brian L. Glorioso*, and *Kristine K. Sims*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, *Benjamin J. Horwich*, *Douglas N. Letter*, *Sharon Swingle*, *Ralph S. Tyler*, and *Eric M. Blumberg*.†

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†Briefs of *amici curiae* urging reversal in all cases were filed for Apotex, Inc., by *Roy T. Englert, Jr.*, *Alan Untereiner*, *Charles A. Fitzpatrick III*, *Arthur B. Keppel*, and *Shashank Upadhye;* for the Generic Pharmaceutical Association by *Earl B. Austin*, *Melissa Armstrong*, and *Evan A. Young;* and for Morton Grove Pharmaceuticals, Inc., et al. by *Steffen N. Johnson*, *James F. Hurst*, and *William P. Ferranti*.

Briefs of *amici curiae* urging affirmance in all cases were filed for the State of Minnesota et al. by *Lori Swanson*, Attorney General of Minnesota, *Alan I. Gilbert*, Solicitor General, and *John S. Garry*, Assistant Attorney General, by *Irvin B. Nathan*, Acting Attorney General of the District of Columbia, and *William H. Ryan, Jr.*, Acting Attorney General of Pennsylvania, and by the Attorneys General for their respective States as

JUSTICE THOMAS delivered the opinion of the Court, except as to Part III–B–2.*

These consolidated lawsuits involve state tort-law claims based on certain drug manufacturers' alleged failure to pro-

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follows: *Luther Strange* of Alabama, *John J. Burns* of Alaska, *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Kamala D. Harris* of California, *John W. Suthers* of Colorado, *George Jepsen* of Connecticut, *Joseph R. Biden III* of Delaware, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for Administrative Law and Civil Procedure Scholars by *Alexander A. Reinert*, *Joseph F. Rice*, and *Fred Thompson III;* for the American Association for Justice by *Mindy Michaels Roth;* for the Constitutional Accountability Center by *Douglas T. Kendall* and *Elizabeth B. Wydra;* for the National Conference of State Legislators by *Sean H. Donahue*, *David T. Goldberg*, *Andy Birchfield*, *Edward Blizzard*, and *J. Scott Nabers;* for Public Citizen et al. by *Adina H. Rosenbaum*, *Allison M. Zieve*, and *Bruce Vignery;* for Mary J. Davis et al. by *Michael F. Sturley;* for Christy Graves by *Erik S. Jaffe*, *John Eddie Williams, Jr.*, and *John T. Boundas;* for Jerome P. Kassirer et al. by *Collyn A. Peddie*, *Ellen Relkin*, *Mark P. Robinson, Jr.*, and *Karen Barth Menzies;* for Marc T. Law et al. by *Thomas M. Sobol* and *Lauren G. Barnes;* and for Rep. Henry A. Waxman by *Jonathan S. Massey* and *Willard J. Moody, Jr.*

Briefs of *amici curiae* were filed in all cases for the American Medical Association et al. by *Jay Henderson*, *R. Brent Cooper*, *Diana L. Faust*, and *Donald P. Wilcox;* and for the National Coalition Against Censorship by *Erwin Chemerinsky*, *Bijan Esfandiari*, *Sharon J. Arkin*, and *Joan E. Bertin.*

*JUSTICE KENNEDY joins all but Part III–B–2 of this opinion.

vide adequate warning labels for generic metoclopramide. The question presented is whether federal drug regulations applicable to generic drug manufacturers directly conflict with, and thus pre-empt, these state-law claims. We hold that they do.

I

Metoclopramide is a drug designed to speed the movement of food through the digestive system. The Food and Drug Administration (FDA) first approved metoclopramide tablets, under the brand name Reglan, in 1980. Five years later, generic manufacturers also began producing metoclopramide. The drug is commonly used to treat digestive tract problems such as diabetic gastroparesis and gastroesophageal reflux disorder.

Evidence has accumulated that long-term metoclopramide use can cause tardive dyskinesia, a severe neurological disorder. Studies have shown that up to 29% of patients who take metoclopramide for several years develop this condition. *McNeil* v. *Wyeth*, 462 F. 3d 364, 370, n. 5 (CA5 2006); see also Shaffer, Butterfield, Pamer, & Mackey, Tardive Dyskinesia Risks and Metoclopramide Use Before and After U. S. Market Withdrawal of Cisapride, 44 J. Am. Pharmacists Assn. 661, 663 (2004) (noting 87 cases of metoclopramide-related tardive dyskinesia reported to the FDA's adverse event reporting system by mid-2003).

Accordingly, warning labels for the drug have been strengthened and clarified several times. In 1985, the label was modified to warn that "[t]ardive dyskinesia . . . may develop in patients treated with metoclopramide," and the drug's package insert added that "[t]herapy longer than 12 weeks has not been evaluated and cannot be recommended." Physician's Desk Reference 1635–1636 (41st ed. 1987); see also Brief for Petitioner PLIVA et al. 21–22 (hereinafter PLIVA Brief). In 2004, the brand-name Reglan manufacturer requested, and the FDA approved, a label change to add that "[t]herapy should not exceed 12 weeks in duration."

Brief for United States as *Amicus Curiae* 8 (hereinafter U. S. Brief). And in 2009, the FDA ordered a black box warning—its strongest—which states: "Treatment with metoclopramide can cause tardive dyskinesia, a serious movement disorder that is often irreversible. . . . Treatment with metoclopramide for longer than 12 weeks should be avoided in all but rare cases." See Physician's Desk Reference 2902 (65th ed. 2011) (Warning Box).

Gladys Mensing and Julie Demahy, the plaintiffs in these consolidated cases, were prescribed Reglan in 2001 and 2002, respectively. Both received generic metoclopramide from their pharmacists. After taking the drug as prescribed for several years, both women developed tardive dyskinesia.

In separate suits, Mensing and Demahy sued the generic drug manufacturers that produced the metoclopramide they took (Manufacturers). Each alleged, as relevant here, that long-term metoclopramide use caused her tardive dyskinesia and that the Manufacturers were liable under state tort law (specifically, that of Minnesota and Louisiana) for failing to provide adequate warning labels. They claimed that "despite mounting evidence that long term metoclopramide use carries a risk of tardive dyskinesia far greater than that indicated on the label," none of the Manufacturers had changed their labels to adequately warn of that danger. *Mensing* v. *Wyeth, Inc.*, 588 F. 3d 603, 605 (CA8 2009); see also *Demahy* v. *Actavis, Inc.*, 593 F. 3d 428, 430 (CA5 2010).

In both suits, the Manufacturers urged that federal law pre-empted the state tort claims. According to the Manufacturers, federal statutes and FDA regulations required them to use the same safety and efficacy labeling as their brand-name counterparts. This means, they argued, that it was impossible to simultaneously comply with both federal law and any state tort-law duty that required them to use a different label.

The Courts of Appeals for the Fifth and Eighth Circuits rejected the Manufacturers' arguments and held that Men-

sing and Demahy's claims were not pre-empted. See 588 F. 3d, at 614; 593 F. 3d, at 449. We granted certiorari, 562 U. S. 1104 (2010), consolidated the cases, and now reverse each.

II

Pre-emption analysis requires us to compare federal and state law. We therefore begin by identifying the state tort duties and federal labeling requirements applicable to the Manufacturers.

A

It is undisputed that Minnesota and Louisiana tort law require a drug manufacturer that is or should be aware of its product's danger to label that product in a way that renders it reasonably safe. Under Minnesota law, which applies to Mensing's lawsuit, "where the manufacturer . . . of a product has actual or constructive knowledge of danger to users, the . . . manufacturer has a duty to give warning of such dangers." *Frey* v. *Montgomery Ward & Co.*, 258 N. W. 2d 782, 788 (Minn. 1977). Similarly, under Louisiana law applicable to Demahy's lawsuit, "a manufacturer's duty to warn includes a duty to provide adequate instructions for safe use of a product." *Stahl* v. *Novartis Pharmaceuticals Corp.*, 283 F. 3d 254, 269–270 (CA5 2002); see also La. Rev. Stat. Ann. § 9:2800.57 (West 2009). In both States, a duty to warn falls specifically on the manufacturer. See *Marks* v. *OHMEDA, Inc.*, 2003–1446, pp. 8–9 (La. App. 3 Cir. 3/31/04), 871 So. 2d 1148, 1155; *Gray* v. *Badger Min. Corp.*, 676 N. W. 2d 268, 274 (Minn. 2004).

Mensing and Demahy have pleaded that the Manufacturers knew or should have known of the high risk of tardive dyskinesia inherent in the long-term use of their product. They have also pleaded that the Manufacturers knew or should have known that their labels did not adequately warn of that risk. App. 437–438, 67–69, 94–96. The parties do

not dispute that, if these allegations are true, state law required the Manufacturers to use a different, safer label.

B

Federal law imposes far more complex drug labeling requirements. We begin with what is not in dispute. Under the 1962 Drug Amendments to the Federal Food, Drug, and Cosmetic Act, 76 Stat. 780, 21 U. S. C. § 301 *et seq.*, a manufacturer seeking federal approval to market a new drug must prove that it is safe and effective and that the proposed label is accurate and adequate.[1] See, *e. g.*, 21 U. S. C. §§ 355(b)(1), (d); *Wyeth* v. *Levine*, 555 U. S. 555, 567 (2009). Meeting those requirements involves costly and lengthy clinical testing. §§ 355(b)(1)(A), (d); see also D. Beers, Generic and Innovator Drugs: A Guide to FDA Approval Requirements § 2.02[A] (7th ed. 2008).

Originally, the same rules applied to all drugs. In 1984, however, Congress passed the Drug Price Competition and Patent Term Restoration Act, 98 Stat. 1585, commonly called the Hatch-Waxman Amendments. Under this law, "generic drugs" can gain FDA approval simply by showing equivalence to a reference listed drug that has already been approved by the FDA.[2] 21 U. S. C. § 355(j)(2)(A). This allows manufacturers to develop generic drugs inexpensively, without duplicating the clinical trials already performed on the equivalent brand-name drug. A generic drug application must also "show that the [safety and efficacy] labeling proposed . . . is the same as the labeling approved

[1] All relevant events in these cases predate the Food and Drug Administration Amendments Act of 2007, 121 Stat. 823. We therefore refer exclusively to the pre-2007 statutes and regulations and express no view on the impact of the 2007 Act.

[2] As we use it here, "generic drug" refers to a drug designed to be a copy of a reference listed drug (typically a brand-name drug), and thus identical in active ingredients, safety, and efficacy. See, *e. g.*, *United States* v. *Generix Drug Corp.*, 460 U. S. 453, 454–455 (1983); 21 CFR § 314.3(b) (2006) (defining "reference listed drug").

for the [brand-name] drug." § 355(j)(2)(A)(v); see also § 355(j)(4)(G); Beers, *supra*, §§ 3.01, 3.03[A].

As a result, brand-name and generic drug manufacturers have different federal drug labeling duties. A brand-name manufacturer seeking new drug approval is responsible for the accuracy and adequacy of its label. See, *e. g.*, 21 U. S. C. §§ 355(b)(1), (d); *Wyeth*, *supra*, at 570–571. A manufacturer seeking generic drug approval, on the other hand, is responsible for ensuring that its warning label is the same as the brand name's. See, *e. g.*, § 355(j)(2)(A)(v); § 355(j)(4)(G); 21 CFR §§ 314.94(a)(8), 314.127(a)(7).

The parties do not disagree. What is in dispute is whether, and to what extent, generic manufacturers may change their labels *after* initial FDA approval. Mensing and Demahy contend that federal law provided several avenues through which the Manufacturers could have altered their metoclopramide labels in time to prevent the injuries here. The FDA, however, tells us that it interprets its regulations to require that the warning labels of a brand-name drug and its generic copy must always be the same—thus, generic drug manufacturers have an ongoing federal duty of "sameness." U. S. Brief 16; see also 57 Fed. Reg. 17961 (1992) ("[T]he [generic drug's] labeling must be the same as the listed drug product's labeling because the listed drug product is the basis for [generic drug] approval"). The FDA's views are "controlling unless plainly erroneous or inconsistent with the regulation[s]" or there is any other reason to doubt that they reflect the FDA's fair and considered judgment. *Auer* v. *Robbins*, 519 U. S. 452, 461, 462 (1997) (internal quotation marks omitted).[3]

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[3] The brief filed by the United States represents the views of the FDA. Cf. *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, *ante*, at 53, n. 1. Although we defer to the agency's interpretation of its regulations, we do not defer to an agency's ultimate conclusion about whether state law should be pre-empted. *Wyeth* v. *Levine*, 555 U. S. 555, 576 (2009).

1

First, Mensing and Demahy urge that the FDA's "changes-being-effected" (CBE) process allowed the Manufacturers to change their labels when necessary. See Brief for Respondents 33–35; see also 593 F. 3d, at 439–444; *Gaeta* v. *Perrigo Pharmaceuticals Co.*, 630 F. 3d 1225, 1231 (CA9 2011); *Foster* v. *American Home Prods. Corp.*, 29 F. 3d 165, 170 (CA4 1994). The CBE process permits drug manufacturers to "add or strengthen a contraindication, warning, [or] precaution," 21 CFR §314.70(c)(6)(iii)(A) (2006), or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product," §314.70(c)(6)(iii)(C). When making labeling changes using the CBE process, drug manufacturers need not wait for preapproval by the FDA, which ordinarily is necessary to change a label. *Wyeth*, *supra*, at 568. They need only simultaneously file a supplemental application with the FDA. 21 CFR §314.70(c)(6).

The FDA denies that the Manufacturers could have used the CBE process to unilaterally strengthen their warning labels. The agency interprets the CBE regulation to allow changes to generic drug labels only when a generic drug manufacturer changes its label to match an updated brand-name label or to follow the FDA's instructions. U. S. Brief 15, 16, n. 7 (interpreting 21 CFR §314.94(a)(8)(iv)); U. S. Brief 16, n. 8. The FDA argues that CBE changes unilaterally made to strengthen a generic drug's warning label would violate the statutes and regulations requiring a generic drug's label to match its brand-name counterpart's. *Id.*, at 15–16; see also 21 U. S. C. §355(j)(4)(G); 21 CFR §§314.94(a)(8)(iii), 314.150(b)(10) (approval may be withdrawn if the generic drug's label "is no longer consistent with that for [the brand-name]").

We defer to the FDA's interpretation of its CBE and generic labeling regulations. Although Mensing and Demahy

offer other ways to interpret the regulations, see Brief for Respondents 33–35, we do not find the agency's interpretation "plainly erroneous or inconsistent with the regulation," *Auer*, *supra*, at 461 (internal quotation marks omitted). Nor do Mensing and Demahy suggest there is any other reason to doubt the agency's reading. We therefore conclude that the CBE process was not open to the Manufacturers for the sort of change required by state law.

2

Next, Mensing and Demahy contend that the Manufacturers could have used "Dear Doctor" letters to send additional warnings to prescribing physicians and other healthcare professionals. See Brief for Respondents 36; 21 CFR §200.5. Again, the FDA disagrees, and we defer to the agency's views.

The FDA argues that Dear Doctor letters qualify as "labeling." U. S. Brief 18; see also 21 U. S. C. §321(m); 21 CFR §202.1(*l*)(2). Thus, any such letters must be "consistent with and not contrary to [the drug's] approved . . . labeling." 21 CFR §201.100(d)(1). A Dear Doctor letter that contained substantial new warning information would not be consistent with the drug's approved labeling. Moreover, if generic drug manufacturers, but not the brand-name manufacturer, sent such letters, that would inaccurately imply a therapeutic difference between the brand and generic drugs and thus could be impermissibly "misleading." U. S. Brief 19; see 21 CFR §314.150(b)(3) (FDA may withdraw approval of a generic drug if "the labeling of the drug . . . is false or misleading in any particular").

As with the CBE regulation, we defer to the FDA. Mensing and Demahy offer no argument that the FDA's interpretation is plainly erroneous. See *Auer*, *supra*, at 461. Accordingly, we conclude that federal law did not permit the Manufacturers to issue additional warnings through Dear Doctor letters.

3

Though the FDA denies that the Manufacturers could have used the CBE process or Dear Doctor letters to strengthen their warning labels, the agency asserts that a different avenue existed for changing generic drug labels. According to the FDA, the Manufacturers could have proposed—indeed, were required to propose—stronger warning labels to the agency if they believed such warnings were needed. U. S. Brief 20; 57 Fed. Reg. 17961. If the FDA had agreed that a label change was necessary, it would have worked with the brand-name manufacturer to create a new label for both the brand-name and generic drug. *Ibid.*

The agency traces this duty to 21 U. S. C. § 352(f)(2), which provides that a drug is "misbranded . . . [u]nless its labeling bears . . . adequate warnings against . . . unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users." See U. S. Brief 12. By regulation, the FDA has interpreted that statute to require that "labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug." 21 CFR § 201.57(e).

According to the FDA, these requirements apply to generic drugs. As it explains, a "'central premise of federal drug regulation [is] that the manufacturer bears responsibility for the content of its label at all times.'" U. S. Brief 12–13 (quoting *Wyeth*, 555 U. S., at 570–571). The FDA reconciles this duty to have adequate and accurate labeling with the duty of sameness in the following way: Generic drug manufacturers that become aware of safety problems must ask the agency to work toward strengthening the label that applies to both the generic and brand-name equivalent drug. U. S. Brief 20.

The Manufacturers and the FDA disagree over whether this alleged duty to request a strengthened label actually existed. The FDA argues that it explained this duty in the

preamble to its 1992 regulations implementing the Hatch-Waxman Amendments. *Ibid.;* see 57 Fed. Reg. 17961 ("If a [generic drug manufacturer] believes new safety information should be added to a product's labeling, it should contact FDA, and FDA will determine whether the labeling for the generic and listed drugs should be revised"). The Manufacturers claim that the FDA's 19-year-old statement did not create a duty, and that there is no evidence of any generic drug manufacturer ever acting pursuant to any such duty. See Tr. of Oral Arg. 19–24; Reply Brief for Petitioner PLIVA et al. 18–22. Because we ultimately find pre-emption even assuming such a duty existed, we do not resolve the matter.

C

To summarize, the relevant state and federal requirements are these: State tort law places a duty directly on all drug manufacturers to adequately and safely label their products. Taking Mensing and Demahy's allegations as true, this duty required the Manufacturers to use a different, stronger label than the label they actually used. Federal drug regulations, as interpreted by the FDA, prevented the Manufacturers from independently changing their generic drugs' safety labels. But, we assume, federal law also required the Manufacturers to ask for FDA assistance in convincing the brand-name manufacturer to adopt a stronger label, so that all corresponding generic drug manufacturers could do so as well. We turn now to the question of pre-emption.

III

The Supremacy Clause establishes that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2. Where state and federal law "directly conflict," state law must give way. *Wyeth, supra,* at 583 (THOMAS, J., concurring in judgment); see also *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363,

372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute"). We have held that state and federal law conflict where it is "impossible for a private party to comply with both state and federal requirements."[4] *Freightliner Corp.* v. *Myrick*, 514 U. S. 280, 287 (1995) (internal quotation marks omitted).[5]

A

We find impossibility here. It was not lawful under federal law for the Manufacturers to do what state law required of them. And even if they had fulfilled their federal duty to ask for FDA assistance, they would not have satisfied the requirements of state law.

If the Manufacturers had independently changed their labels to satisfy their state-law duty, they would have violated federal law. Taking Mensing and Demahy's allegations as true, state law imposed on the Manufacturers a duty to attach a safer label to their generic metoclopramide. Federal law, however, demanded that generic drug labels be the same at all times as the corresponding brand-name drug labels. See, *e. g.*, 21 CFR § 314.150(b)(10). Thus, it was impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal-law duty to keep the label the same.

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[4] We do not address whether state and federal law "directly conflict" in circumstances beyond "impossibility." See *Wyeth*, 555 U. S., at 583, 590–591 (THOMAS, J., concurring in judgment) (suggesting that they might).

[5] The Hatch-Waxman Amendments contain no provision expressly preempting state tort claims. See *post*, at 633–634 (SOTOMAYOR, J., dissenting). Nor do they contain any saving clause to expressly preserve state tort claims. Cf. *Williamson* v. *Mazda Motor of America, Inc.*, 562 U. S. 323, 339 (2011) (THOMAS, J., concurring in judgment) (discussing the saving clause in the National Traffic and Motor Vehicle Safety Act of 1966, 49 U. S. C. § 30103(e)). Although an express statement on pre-emption is always preferable, the lack of such a statement does not end our inquiry. Contrary to the dissent's suggestion, the absence of express pre-emption is not a reason to find no *conflict* pre-emption. See *post*, at 643.

The federal duty to ask the FDA for help in strengthening the corresponding brand-name label, assuming such a duty exists, does not change this analysis. Although requesting FDA assistance would have satisfied the Manufacturers' federal duty, it would not have satisfied their state tort-law duty to provide adequate labeling. State law demanded a safer label; it did not instruct the Manufacturers to communicate with the FDA about the possibility of a safer label. Indeed, Mensing and Demahy deny that their state tort claims are based on the Manufacturers' alleged failure to ask the FDA for assistance in changing the labels. Brief for Respondents 53–54; cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341 (2001) (holding that federal drug and medical device laws pre-empted a state tort-law claim based on failure to properly communicate with the FDA).

B

1

Mensing and Demahy contend that, while their state-law claims do not turn on whether the Manufacturers asked the FDA for assistance in changing their labels, the Manufacturers' federal affirmative defense of pre-emption does. Mensing and Demahy argue that if the Manufacturers had asked the FDA for help in changing the corresponding brand-name label, they might eventually have been able to accomplish under federal law what state law requires. That is true enough. The Manufacturers "freely concede" that they could have asked the FDA for help. PLIVA Brief 48. If they had done so, and if the FDA decided there was sufficient supporting information, and if the FDA undertook negotiations with the brand-name manufacturer, and if adequate label changes were decided on and implemented, then the Manufacturers would have started a Mouse Trap game that eventually led to a better label on generic metoclopramide.

This raises the novel question whether conflict pre-emption should take into account these possible actions by the FDA and the brand-name manufacturer. Here, what federal law permitted the Manufacturers to do could have changed, even absent a change in the law itself, depending on the actions of the FDA and the brand-name manufacturer. Federal law does not dictate the text of each generic drug's label, but rather ties those labels to their brand-name counterparts. Thus, federal law would permit the Manufacturers to comply with the state labeling requirements if, and only if, the FDA and the brand-name manufacturer changed the brand-name label to do so.

Mensing and Demahy assert that when a private party's ability to comply with state law depends on approval and assistance from the FDA, proving pre-emption requires that party to demonstrate that the FDA would not have allowed compliance with state law. Here, they argue, the Manufacturers cannot bear their burden of proving impossibility because they did not even *try* to start the process that might ultimately have allowed them to use a safer label. Brief for Respondents 47. This is a fair argument, but we reject it.

The question for "impossibility" is whether the private party could independently do under federal law what state law requires of it. See *Wyeth*, 555 U. S., at 573 (finding no pre-emption where the defendant could "unilaterally" do what state law required). Accepting Mensing and Demahy's argument would render conflict pre-emption largely meaningless because it would make most conflicts between state and federal law illusory. We can often imagine that a third party or the Federal Government *might* do something that makes it lawful for a private party to accomplish under federal law what state law requires of it. In these cases, it is certainly possible that, had the Manufacturers asked the FDA for help, they might have eventually been able to strengthen their warning label. Of course, it is also *possible* that the Manufacturers could have convinced the FDA to

reinterpret its regulations in a manner that would have opened the CBE process to them. Following Mensing and Demahy's argument to its logical conclusion, it is also *possible* that, by asking, the Manufacturers could have persuaded the FDA to rewrite its generic drug regulations entirely or talked Congress into amending the Hatch-Waxman Amendments.

If these conjectures suffice to prevent federal and state law from conflicting for Supremacy Clause purposes, it is unclear when, outside of express pre-emption, the Supremacy Clause would have any force.[6] We do not read the Supremacy Clause to permit an approach to pre-emption that renders conflict pre-emption all but meaningless. The Supremacy Clause, on its face, makes federal law "the supreme Law of the Land" even absent an express statement by Congress. U. S. Const., Art. VI, cl. 2.

2

Moreover, the text of the Clause—that federal law shall be supreme, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"—plainly contemplates conflict pre-emption by describing federal law as effectively repealing contrary state law. *Ibid.;* see Nelson, Preemption, 86 Va. L. Rev. 225, 234 (2000); *id.*, at 252–253 (describing discussion of the Supremacy Clause in state ratification debates as concerning whether federal law could repeal state law, or vice versa). The phrase "any [state law] to the Contrary notwithstanding" is a *non obstante* provision. *Id.*, at 238–240, nn. 43–45. Eighteenth-century legislatures used *non obstante* provisions to specify the degree to which a

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[6] The dissent asserts that we are forgetting "purposes-and-objectives" pre-emption. *Post,* at 640. But as the dissent acknowledges, purposes-and-objectives pre-emption is a form of conflict pre-emption. *Post,* at 634, 640. If conflict pre-emption analysis must take into account hypothetical federal action, including possible changes in Acts of Congress, then there is little reason to think that pre-emption based on the purposes and objectives of Congress would survive either.

new statute was meant to repeal older, potentially conflicting statutes in the same field. *Id.*, at 238–240 (citing dozens of statutes from the 1770's and 1780's with similar provisions). A *non obstante* provision "in [a] new statute acknowledged that the statute might contradict prior law and instructed courts not to apply the general presumption against implied repeals." *Id.*, at 241–242; 4 M. Bacon, A New Abridgment of the Law ¶19, p. 639 (4th ed. 1778) ("Although two Acts of Parliament are *seemingly* repugnant, yet if there be no Clause of *non Obstante* in the latter, they shall if possible have such Construction, that the latter may not be a Repeal of the former by Implication"). The *non obstante* provision in the Supremacy Clause therefore suggests that federal law should be understood to impliedly repeal conflicting state law.

Further, the provision suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law. Traditionally, courts went to great lengths attempting to harmonize conflicting statutes, in order to avoid implied repeals. *Warder* v. *Arell*, 2 Va. 282, 296 (1796) (opinion of Roane, J.) ("[W]e ought to seek for such a construction as will reconcile [the statutes] together"); *Ludlow's Heirs* v. *Johnson*, 3 Ohio 553, 564 (1828) ("[I]f by any fair course of reasoning the two [statutes] can be reconciled, both shall stand"); *Doolittle* v. *Bryan*, 14 How. 563, 566 (1853) (requiring "the repugnance be quite plain" before finding implied repeal). A *non obstante* provision thus was a useful way for legislatures to specify that they did not want courts distorting the new law to accommodate the old. Nelson, *supra*, at 240–242; see also J. Sutherland, Statutes and Statutory Construction § 147, p. 199 (1891) ("[W]hen there is inserted in a statute a provision [of *non obstante*] . . . [i]t is to be supposed that courts will be less inclined against recognizing repugnancy in applying such statutes"); *Weston's Case*, 3 Dyer 347a, 347b, 73 Eng. Rep. 780, 781 (K. B. 1575) ("[W]hen there are two statutes, the one in appearance crossing the other, and no clause of *non obstante* is contained

in the second statute . . . the exposition ought to be that both should stand in force"); G. Jacob, A New Law Dictionary (J. Morgan ed., 10th ed. 1782) (definition of "statute," ¶ 6: "[W]hen there is a seeming variance between two *statutes*, and no clause of *non obstante* in the latter, such construction shall be made that both may stand"). The *non obstante* provision of the Supremacy Clause indicates that a court need look no further than "the ordinary meanin[g]" of federal law, and should not distort federal law to accommodate conflicting state law. *Wyeth*, 555 U. S., at 588 (THOMAS, J., concurring in judgment) (internal quotation marks omitted).

To consider in our pre-emption analysis the contingencies inherent in these cases—in which the Manufacturers' ability to comply with state law depended on uncertain federal agency and third-party decisions—would be inconsistent with the *non obstante* provision of the Supremacy Clause. The Manufacturers would be required continually to prove the counterfactual conduct of the FDA and brand-name manufacturer in order to establish the supremacy of federal law. We do not think the Supremacy Clause contemplates that sort of contingent supremacy. The *non obstante* provision suggests that pre-emption analysis should not involve speculation about ways in which federal agency and third-party actions could potentially reconcile federal duties with conflicting state duties. When the "ordinary meaning" of federal law blocks a private party from independently accomplishing what state law requires, that party has established pre-emption.

3

To be sure, whether a private party can act sufficiently independently under federal law to do what state law requires may sometimes be difficult to determine. But this is not such a case. Before the Manufacturers could satisfy state law, the FDA—a federal agency—had to undertake special effort permitting them to do so. To decide these cases, it is enough to hold that when a party cannot satisfy its state duties without the Federal Government's special per-

mission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes.

Here, state law imposed a duty on the Manufacturers to take a certain action, and federal law barred them from taking that action. The only action the Manufacturers could independently take—asking for the FDA's help—is not a matter of state-law concern. Mensing and Demahy's tort claims are pre-empted.

C

Wyeth is not to the contrary. In that case, as here, the plaintiff contended that a drug manufacturer had breached a state tort-law duty to provide an adequate warning label. *Id.*, at 559–560. The Court held that the lawsuit was not pre-empted because it was possible for Wyeth, a brand-name drug manufacturer, to comply with both state and federal law. *Id.*, at 572–573.[7] Specifically, the CBE regulation, 21 CFR § 314.70(c)(6)(iii), permitted a brand-name drug manufacturer like Wyeth "to unilaterally strengthen its warning" without prior FDA approval. 555 U. S., at 573; cf. *supra*, at 614–615. Thus, the federal regulations applicable to Wyeth allowed the company, of its own volition, to strengthen its label in compliance with its state tort duty.[8]

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[7] Wyeth also urged that state tort law "creat[ed] an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 555 U. S., at 563–564 (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)). The Court rejected that argument, and that type of pre-emption is not argued here. Cf. *post*, at 640, n. 13 (opinion of SOTOMAYOR, J.).

[8] The FDA, however, retained the authority to eventually rescind Wyeth's unilateral CBE changes. Accordingly, the Court noted that Wyeth could have attempted to show, by "clear evidence," that the FDA would have rescinded any change in the label and thereby demonstrate that it would in fact have been impossible to do under federal law what state law required. *Wyeth*, *supra*, at 571. Wyeth offered no such evidence.

That analysis is consistent with our holding today. The Court in *Wyeth* asked what the drug manufacturer could independently do under federal

We recognize that from the perspective of Mensing and Demahy, finding pre-emption here but not in *Wyeth* makes little sense. Had Mensing and Demahy taken Reglan, the brand-name drug prescribed by their doctors, *Wyeth* would control and their lawsuits would not be pre-empted. But because pharmacists, acting in full accord with state law, substituted generic metoclopramide instead, federal law pre-empts these lawsuits. See, *e. g.*, Minn. Stat. § 151.21 (2010) (describing when pharmacists may substitute generic drugs); La. Rev. Stat. Ann. § 37:1241(A)(17) (West 2007) (same). We acknowledge the unfortunate hand that federal drug regulation has dealt Mensing, Demahy, and others similarly situated.[9]

But "it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre." *Cuomo* v. *Clearing House Assn., L. L. C.*, 557 U. S.

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law, and in the absence of clear evidence that Wyeth could not have accomplished what state law required of it, found no pre-emption. The *Wyeth* Court held that, because federal law accommodated state-law duties, "the mere possibility of impossibility" was "not enough." *Post,* at 635; see also *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982) (rejecting "hypothetical" impossibility). But here, "existing" federal law directly conflicts with state law. *Post,* at 639 ("Conflict analysis necessarily turns on existing law"). The question in these cases is not whether the possibility of *impossibility* establishes pre-emption, but rather whether the possibility of *possibility* defeats pre-emption. *Post,* at 634–635.

[9] That said, the dissent overstates what it characterizes as the "many absurd consequences" of our holding. *Post,* at 643. First, the FDA informs us that "[a]s a practical matter, genuinely new information about drugs in long use (as generic drugs typically are) appears infrequently." U. S. Brief 34–35. That is because patent protections ordinarily prevent generic drugs from arriving on the market for a number of years after the brand-name drug appears. Indeed, situations like the one alleged here are apparently so rare that the FDA has no "formal regulation" establishing generic drug manufacturers' duty to initiate a label change, nor does it have any regulation setting out that label-change process. *Id.*, at 20–21. Second, the dissent admits that, even under its approach, generic drug manufacturers could establish pre-emption in a number of scenarios. *Post,* at 637.

519, 556 (2009) (THOMAS, J., concurring in part and dissenting in part) (internal quotation marks and brackets omitted). It is beyond dispute that the federal statutes and regulations that apply to brand-name drug manufacturers are meaningfully different than those that apply to generic drug manufacturers. Indeed, it is the special, and different, regulation of generic drugs that allowed the generic drug market to expand, bringing more drugs more quickly and cheaply to the public. But different federal statutes and regulations may, as here, lead to different pre-emption results. We will not distort the Supremacy Clause in order to create similar pre-emption across a dissimilar statutory scheme. As always, Congress and the FDA retain the authority to change the law and regulations if they so desire.

* * *

The judgments of the Fifth and Eighth Circuits are reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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

The Court today invokes the doctrine of impossibility pre-emption to hold that federal law immunizes generic-drug manufacturers from all state-law failure-to-warn claims because they cannot unilaterally change their labels. I cannot agree. We have traditionally held defendants claiming impossibility to a demanding standard: Until today, the mere possibility of impossibility had not been enough to establish pre-emption.

The Food and Drug Administration (FDA) permits—and, the Court assumes, requires—generic-drug manufacturers to propose a label change to the FDA when they believe that their labels are inadequate. If it agrees that the labels are inadequate, the FDA can initiate a change to the brand-name

label, triggering a corresponding change to the generic labels. Once that occurs, a generic manufacturer is in full compliance with both federal law and a state-law duty to warn. Although generic manufacturers may be able to show impossibility in some cases, petitioners, generic manufacturers of metoclopramide (Manufacturers), have shown only that they *might* have been unable to comply with both federal law and their state-law duties to warn respondents Gladys Mensing and Julie Demahy. This, I would hold, is insufficient to sustain their burden.

The Court strains to reach the opposite conclusion. It invents new principles of pre-emption law out of thin air to justify its dilution of the impossibility standard. It effectively rewrites our decision in *Wyeth* v. *Levine*, 555 U. S. 555 (2009), which holds that federal law does not pre-empt failure-to-warn claims against brand-name drug manufacturers. And a plurality of the Court tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws governing health and safety. As a result of today's decision, whether a consumer harmed by inadequate warnings can obtain relief turns solely on the happenstance of whether her pharmacist filled her prescription with a brand-name or generic drug. The Court gets one thing right: This outcome "makes little sense." *Ante*, at 625.

I

A

Today's decision affects 75 percent of all prescription drugs dispensed in this country. The dominant position of generic drugs in the prescription drug market is the result of a series of legislative measures, both federal and state.

In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act, 98 Stat. 1585—commonly known as the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetic Act (FDCA)—to "make available

more low cost generic drugs by establishing a generic drug approval procedure," H. R. Rep. No. 98–857, pt. 1, p. 14 (1984). As the majority explains, to accomplish this goal the amendments establish an abbreviated application process for generic drugs. *Ante*, at 612–613; see also 21 U. S. C. § 355(j)(2)(A). The abbreviated approval process implements the amendments' core principle that generic and brand-name drugs must be the "same" in nearly all respects: To obtain FDA approval, a generic manufacturer must ordinarily show, among other things, that its product has the same active ingredients as an approved brand-name drug; that "the route of administration, the dosage form, and the strength of the new drug are the same" as the brand-name drug; and that its product is "bioequivalent" to the brand-name drug. §§ 355(j)(2)(A)(ii), (iii), (iv). By eliminating the need for generic manufacturers to prove their drugs' safety and efficacy independently, the Hatch-Waxman Amendments allow generic manufacturers to bring drugs to market much less expensively.

The States have also acted to expand consumption of low-cost generic drugs. In the years leading up to passage of the Hatch-Waxman Amendments, States enacted legislation authorizing pharmacists to substitute generic drugs when filling prescriptions for brand-name drugs. Christensen, Kirking, Ascione, Welage, & Gaither, Drug Product Selection: Legal Issues, 41 J. Am. Pharmaceutical Assn. 868, 869 (2001). Currently, all States have some form of generic substitution law. See *ibid.* Some States require generic substitution in certain circumstances. Dept. of Health and Human Servs., ASPE Issue Brief: Expanding the Use of Generic Drugs 7 (2010) (hereinafter Expanding the Use of Generic Drugs);[1] see, *e. g.*, N. Y. Educ. Law Ann. § 6816–a (West 2010). Others permit, but do not require, substitu-

[1] Online at http://aspe.hhs.gov/sp/reports/2010/GenericDrugs/ib.pdf (all Internet materials as visited June 17, 2011, and available in Clerk of Court's case file).

tion. Expanding the Use of Generic Drugs 7; see, *e. g.*, Cal. Bus. & Prof. Code Ann. § 4073 (West Supp. 2011). Some States require patient consent to substitution, and all States "allow the physician to specify that the brand name must be prescribed, although with different levels of effort from the physician." Expanding the Use of Generic Drugs 7.[2]

These legislative efforts to expand production and consumption of generic drugs have proved wildly successful. It is estimated that in 1984, when the Hatch-Waxman Amendments were enacted, generic drugs constituted 19 percent of drugs sold in this country. Congressional Budget Office, How Increased Competition From Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry 27 (1998).[3] Today, they dominate the market. See Expanding the Use of Generic Drugs 2 (generic drugs constituted 75 percent of all dispensed prescription drugs in 2009). Ninety percent of drugs for which a generic version is available are now filled with generics. *Id.*, at 3–4. In many cases, once generic versions of a drug enter the market, the brand-name manufacturer stops selling the brand-name drug altogether. See Brief for Marc T. Law et al. as *Amici Curiae* 18 (citing studies showing that anywhere from one-third to one-half of generic drugs no longer have a marketed brand-name equivalent). Reflecting the success of their products, many generic manufacturers, including the Manufacturers and their *amici*, are huge, multinational companies.

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[2] In addition, many insurance plans are structured to promote generic use. See Congressional Budget Office, Effects of Using Generic Drugs on Medicare's Prescription Drug Spending 9 (2010), online at http://www.cbo.gov/ftpdocs/118xx/doc11838/09-15-PrescriptionDrugs.pdf. State Medicaid programs similarly promote generic use. See Kaiser Comm'n on Medicaid and the Uninsured, State Medicaid Outpatient Prescription Drug Policies: Findings from a National Survey, 2005 Update 10 (2005), online at www.kff.org/medicaid/upload/state-medicaid-outpatient-prescription-drug-policies-findings-from-a-national-survey-2005-update-report.pdf.

[3] Online at http://www.cbo.gov/ftpdocs/6xx/doc655/pharm.pdf.

In total, generic-drug manufacturers sold an estimated $66 billion of drugs in this country in 2009. See *id.*, at 15.

B

As noted, to obtain FDA approval a generic manufacturer must generally show that its drug is the same as an approved brand-name drug. It need not conduct clinical trials to prove the safety and efficacy of the drug. This does not mean, however, that a generic manufacturer has no duty under federal law to ensure the safety of its products. The FDA has limited resources to conduct postapproval monitoring of drug safety. See *Wyeth*, 555 U. S., at 578. Manufacturers, we have recognized, "have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge." *Id.*, at 578–579. Federal law thus obliges drug manufacturers—both brand-name and generic—to monitor the safety of their products.

Under federal law, generic manufacturers must "develop written procedures for the surveillance, receipt, evaluation, and reporting of postmarketing adverse drug experiences" to the FDA.[4] 21 CFR §314.80(b);[5] see also §314.98 (making §314.80 applicable to generic manufacturers); Brief for United States as *Amicus Curiae* 6, and n. 2 (hereinafter U. S. Brief). They must review all reports of adverse drug experiences received from "any source." §314.80(b). If a manufacturer receives a report of a serious and unexpected adverse drug experience, it must report the event to the FDA within 15 days and must "promptly investigate." §§314.80(c)(1)(i)–(ii); see also Tr. of Oral Arg. 8. Most other adverse drug experiences must be reported on a quarterly

[4] An adverse drug experience is defined as "[a]ny adverse event associated with the use of a drug in humans, whether or not considered drug related." 21 CFR §314.80(a) (2006).

[5] Like the majority, I refer to the pre-2007 statutes and regulations. See *ante*, at 612, n. 1.

or yearly basis.[6] § 314.80(c)(2). Generic manufacturers must also submit to the FDA an annual report summarizing "significant new information from the previous year that might affect the safety, effectiveness, or labeling of the drug product," including a "description of actions the [manufacturer] has taken or intends to take as a result of this new information." § 314.81(b)(2)(i); see also § 314.98(c).

Generic manufacturers, the majority assumes, also bear responsibility under federal law for monitoring the adequacy of their warnings. I agree with the majority's conclusion that generic manufacturers are not permitted unilaterally to change their labels through the "changes-being-effected" (CBE) process or to issue additional warnings through "Dear Doctor" letters. See *ante,* at 613–615. According to the FDA, however, that generic manufacturers cannot disseminate additional warnings on their own does not mean that federal law permits them to remain idle when they conclude that their labeling is inadequate. FDA regulations require that labeling "be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug." 21 CFR § 201.57(e) (2006), currently

[6] At congressional hearings on the Hatch-Waxman Amendments, representatives of the generic-drug manufacturers confirmed both their obligation and their ability to conduct postapproval investigation of adverse drug experiences. See Drug Legislation: Hearings on H. R. 1554 et al. before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, 98th Cong., 1st Sess., 45 (1983) (statement of Kenneth N. Larsen, chairman of the Generic Pharmaceutical Industry Association (GPhA)) (generic manufacturers "are sensitive to the importance of looking at adverse reactions"); *id.*, at 47–48 ("[W]e will do and provide whatever is required to be performed to meet the regulatory requirement to provide for the safety and well-being of those that are using the drug, this is our role and responsibility. This is an obligation to be in this business"); *id.*, at 50–51 (statement of Bill Haddad, executive officer and president of GPhA) ("Every single generic drug company that I know has a large research staff. It not only researches the drug that they are copying, or bringing into the market but it researches new drugs, researches adverse reaction[s]").

codified at 21 CFR §201.80(e) (2010); see also *Wyeth*, 555 U. S., at 570–571. The FDA construes this regulation to oblige generic manufacturers "to seek to revise their labeling and provide FDA with supporting information about risks" when they believe that additional warnings are necessary.[7] U. S. Brief 20.

The Manufacturers disagree. They read the FDA regulation to require them only to ensure that their labels match the brand-name labels. See Brief for Petitioner PLIVA et al. 38–41. I need not decide whether the regulation in fact obliges generic manufacturers to approach the FDA to propose a label change. The majority assumes that it does. And even if generic manufacturers do not have a duty to propose label changes, two points remain undisputed. First, they do have a duty under federal law to monitor the safety of their products. And, second, they may approach the FDA to propose a label change when they believe a change is required.

II

This brings me to the Manufacturers' pre-emption defense. State law obliged the Manufacturers to warn of dangers to users. See *Hines* v. *Remington Arms Co.*, 94–0455, p. 10

[7] The FDA's construction of this regulation mirrors the guidance it provided to generic manufacturers nearly 20 years ago in announcing the final rule implementing the abbreviated application process for generic drugs: "If an ANDA [*i. e.*, application for approval of a generic drug] applicant believes new safety information should be added to a product's labeling, it should contact FDA, and FDA will determine whether the labeling for the generic and listed drugs should be revised. After approval of an ANDA, if an ANDA holder believes that new safety information should be added, it should provide adequate supporting information to FDA, and FDA will determine whether the labeling for the generic and listed drugs should be revised." 57 Fed. Reg. 17961 (1992).

The FDA's internal procedures recognize that the Office of Generic Drugs will have to consult with other FDA components on "some labeling reviews." Manual of Policies and Procedures 5200.6, p. 1 (May 9, 2001). Consultations involving "possible serious safety concerns" receive the highest priority. *Id.*, at 3.

(La. 12/8/94), 648 So. 2d 331, 337; *Frey* v. *Montgomery Ward & Co.*, 258 N. W. 2d 782, 788 (Minn. 1977). The Manufacturers contend, and the majority agrees, that federal law pre-empts respondents' failure-to-warn claims because, under federal law, the Manufacturers could not have provided additional warnings to respondents without the exercise of judgment by the FDA. I cannot endorse this novel conception of impossibility pre-emption.

A

Two principles guide all pre-emption analysis. First, "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth*, 555 U. S., at 565 (quoting *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996)). Second, "'[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth*, 555 U. S., at 565 (quoting *Lohr*, 518 U. S., at 485; some internal quotation marks omitted; alterations in original).

These principles find particular resonance in these cases. The States have traditionally regulated health and safety matters. See *id.*, at 485. Notwithstanding Congress' "certain awareness of the prevalence of state tort litigation" against drug manufacturers, *Wyeth*, 555 U. S., at 575, Congress has not expressly pre-empted state-law tort actions against prescription drug manufacturers, whether brand-name or generic. To the contrary, when Congress amended the FDCA in 1962 to "enlarg[e] the FDA's powers to 'protect the public health' and 'assure the safety, effectiveness, and reliability of drugs,' [it] took care to preserve state law." *Id.*, at 567 (quoting 76 Stat. 780); see § 202, 76 Stat. 793 ("Nothing in the amendments made by this Act to the [FDCA] shall be construed as invalidating any provision of

State law which would be valid in the absence of such amendments unless there is a direct and positive conflict between such amendments and such provision of State law"). Notably, although Congress enacted an express pre-emption provision for medical devices in 1976, see § 521, 90 Stat. 574, 21 U. S. C. § 360k(a), it included no such provision in the Hatch-Waxman Amendments eight years later. Cf. *Wyeth*, 555 U. S., at 567, 574–575. Congress' "silence on the issue . . . is powerful evidence that [it] did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.*, at 575.

B

Federal law impliedly pre-empts state law when state and federal law "conflict"—*i. e.*, when "it is impossible for a private party to comply with both state and federal law" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372–373 (2000) (internal quotation marks omitted). The Manufacturers rely solely on the former ground of pre-emption.

Impossibility pre-emption, we have emphasized, "is a demanding defense." *Wyeth*, 555 U. S., at 573. Because pre-emption is an affirmative defense, a defendant seeking to set aside state law bears the burden to prove impossibility. See *ibid.*; *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 255 (1984). To prevail on this defense, a defendant must demonstrate that "compliance with both federal and state [law] is a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963); see also *Wyeth*, 555 U. S., at 573. In other words, there must be an "inevitable collision" between federal and state law. *Florida Lime*, 373 U. S., at 143. "The existence of a hypothetical or potential conflict is insufficient to warrant" pre-emption of state law. *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659

(1982); see also *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 110 (1992) (KENNEDY, J., concurring in part and concurring in judgment). In other words, the mere possibility of impossibility is not enough.

The Manufacturers contend that it was impossible for them to provide additional warnings to respondents Mensing and Demahy because federal law prohibited them from changing their labels unilaterally.[8] They concede, however, that they could have asked the FDA to initiate a label change. If the FDA agreed that a label change was required, it could have asked, and indeed pressured, the brand-name manufacturer to change its label, triggering a corresponding change to the Manufacturers' generic labels.[9] Thus, had the Manufacturers invoked the available mechanism for initiating label changes, they may well have been able to change their labels in sufficient time to warn respondents. Having failed to do so, the Manufacturers cannot sustain their burden (at least not without further factual development) to demonstrate that it was impossible for them to comply with both federal and state law. At most, they have

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[8] In its decision below, the Eighth Circuit suggested that the Manufacturers could not show impossibility because federal law merely permitted them to sell generic drugs; it did not require them to do so. See *Mensing* v. *Wyeth, Inc.*, 588 F. 3d 603, 611 (2009) ("The generic defendants were not compelled to market metoclopramide. If they realized their label was insufficient but did not believe they could even propose a label change, they could have simply stopped selling the product"); see also *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 873 (2000) (describing "a case of impossibility" as one "in which state law penalizes what federal law *requires*" (emphasis added)). Respondents have not advanced this argument, and I find it unnecessary to consider.

[9] At the time respondents' cause of action arose, the FDA did not have authority to require a brand-name manufacturer to change its label. (It received that authority in 2007. See § 901, 121 Stat. 924–926, 21 U. S. C. § 355(*o*)(4) (2006 ed., Supp. III).) It did, however, have the equally significant authority to withdraw the brand-name manufacturer's permission to market its drug if the manufacturer refused to make a requested labeling change. See 21 U. S. C. § 355(e) (2006 ed.); 21 CFR § 314.150(b)(3).

demonstrated only "a hypothetical or potential conflict." *Rice*, 458 U. S., at 659.

Like the majority, the Manufacturers focus on the fact that they cannot change their labels unilaterally—which distinguishes them from the brand-name-manufacturer defendant in *Wyeth*. They correctly point out that in *Wyeth* we concluded that the FDA's CBE regulation authorized the defendant to strengthen its warnings before receiving agency approval of its supplemental application describing the label change. 555 U. S., at 568–571; see also 21 CFR § 314.70(c)(6). But the defendant's label change was contingent on FDA acceptance, as the FDA retained "authority to reject labeling changes made pursuant to the CBE regulation." *Wyeth*, 555 U. S., at 571. Thus, in the long run, a brand-name manufacturer's compliance with a state-law duty to warn required action by two actors: The brand-name manufacturer had to change the label and the FDA, upon reviewing the supplemental application, had to agree with the change.[10] The need for FDA approval of the label change did not make compliance with federal and state law impossible in every case. Instead, because the defendant bore the burden to show impossibility, we required it to produce "clear evidence that the FDA would not have approved a change to [the] label." *Ibid.*

I would apply the same approach in these cases. State law, respondents allege, required the Manufacturers to provide a strengthened warning about the dangers of long-term metoclopramide use.[11] Just like the brand-name manufac-

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[10] A brand-name manufacturer's ability to comply with a state-law duty to warn would depend on its own unilateral actions only during the period after it should have changed its label but before the FDA would have approved or disapproved the label change. The claim in *Wyeth* does not appear to have arisen during that period.

[11] Respondents' state-law claim is not that the Manufacturers were required to ask the FDA for assistance in changing the labels; the role of the FDA arises only as a result of the Manufacturers' pre-emption defense.

turer in *Wyeth*, the Manufacturers had available to them a mechanism for attempting to comply with their state-law duty to warn. Federal law thus "accommodated" the Manufacturers' state-law duties. See *ante*, at 625, n. 8. It was not necessarily impossible for the Manufacturers to comply with both federal and state law because, had they approached the FDA, the FDA may well have agreed that a label change was necessary. Accordingly, as in *Wyeth*, I would require the Manufacturers to show that the FDA would not have approved a proposed label change. They have not made such a showing: They do "not argue that [they] attempted to give the kind of warning required by [state law] but [were] prohibited from doing so by the FDA." *Wyeth*, 555 U. S., at 572.

This is not to say that generic manufacturers could never show impossibility. If a generic-manufacturer defendant proposed a label change to the FDA but the FDA rejected the proposal, it would be impossible for that defendant to comply with a state-law duty to warn. Likewise, impossibility would be established if the FDA had not yet responded to a generic manufacturer's request for a label change at the time a plaintiff's injuries arose. A generic manufacturer might also show that the FDA had itself considered whether to request enhanced warnings in light of the evidence on which a plaintiff's claim rests but had decided to leave the warnings as is. (The Manufacturers make just such an argument in these cases. See, *e. g.*, Brief for Petitioner Actavis et al. 11.) But these are questions of fact to be established through discovery. Because the burden of proving impossibility falls on the defendant, I would hold that federal law does not render it impossible for generic manufacturers to comply with a state-law duty to warn as a categorical matter.

This conclusion flows naturally from the overarching principles governing our pre-emption doctrine. See *supra*, at 633. Our "respect for the States as 'independent sovereigns

in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Wyeth*, 555 U. S., at 565–566, n. 3 (quoting *Lohr*, 518 U. S., at 485). It is for this reason that we hold defendants asserting impossibility to a "demanding" standard. *Wyeth*, 555 U. S., at 573. This presumption against pre-emption has particular force when the Federal Government has afforded defendants a mechanism for complying with state law, even when that mechanism requires federal agency action. (The presumption has even greater force when federal law requires defendants to invoke that mechanism, as the majority assumes in these cases.) In such circumstances, I would hold, defendants will usually be unable to sustain their burden of showing impossibility if they have not even attempted to employ that mechanism. Any other approach threatens to infringe the States' authority over traditional matters of state interest—such as the failure-to-warn claims here—when Congress expressed no intent to pre-empt state law.

C

The majority concedes that the Manufacturers might have been able to accomplish under federal law what state law requires. *Ante*, at 619. To reach the conclusion that the Manufacturers have nonetheless satisfied their burden to show impossibility, the majority invents a new pre-emption rule: "The question for 'impossibility' is whether the private party could *independently* do under federal law what state law requires of it." *Ante*, at 620 (emphasis added). Because the Manufacturers could not have changed their labels without the exercise of judgment by the FDA, the majority holds, compliance with both state and federal law was impossible in these cases.[12]

[12] These cases do not involve a situation where a brand-name manufacturer itself produces generic drugs. See Okie, Multinational Medicines—Ensuring Drug Quality in an Era of Global Manufacturing, 361 New Eng. J. Med. 737, 738 (2009); see also GPhA, Frequently Asked Questions

The majority's new test has no basis in our precedents. The majority cites only *Wyeth* in support of its test. As discussed above, however, *Wyeth* does not stand for the proposition that it is impossible to comply with both federal and state law whenever federal agency approval is required. To the contrary, label changes by brand-name manufacturers such as Wyeth are subject to FDA review and acceptance. See *supra*, at 636–637. And, even if *Wyeth* could be characterized as turning on the fact that the brand-name manufacturer could change its label unilaterally, the possibility of unilateral action was, at most, a sufficient condition for rejecting the impossibility defense in that case. *Wyeth* did not hold that unilateral action is a necessary condition in every case.

With so little support in our case law, the majority understandably turns to other rationales. None of the rationales that it offers, however, makes any sense. First, it offers a *reductio ad absurdum:* If the possibility of FDA approval of a label change is sufficient to avoid conflict in these cases, it warns, as a "logical conclusion" so too would be the possibility that the FDA might rewrite its regulations or that Congress might amend the Hatch-Waxman Amendments. *Ante*, at 621. The logic of this conclusion escapes me. Conflict analysis necessarily turns on existing law. It thus would be ridiculous to conclude that federal and state law do not conflict on the ground that the defendant could have asked a federal agency or Congress to change the law. Here, by contrast, the Manufacturers' compliance with their state-law duty to warn did not require them to ask for a change in federal law, as the majority itself recognizes. See *ante*, at 620 ("[F]ederal law would permit the Manufacturers to comply with the state labeling requirements if, and only

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About Generics, http://www.gphaonline.org/about-gpha/about-generics/faq ("Brand-name companies make about half of generic drugs"). In that case, the manufacturer could independently change the brand-name label under the CBE regulation, triggering a corresponding change to its own generic label.

if, the FDA and the brand-name manufacturer changed the brand-name label to do so"). The FDA already afforded them a mechanism for attempting to comply with their state-law duties. Indeed, the majority assumes that FDA regulations *required* the Manufacturers to request a label change when they had "reasonable evidence of an association of a serious hazard with a drug." 21 CFR § 201.57(e).

Second, the majority suggests that any other approach would render conflict pre-emption "illusory" and "meaningless." *Ante*, at 620. It expresses concern that, without a robust view of what constitutes conflict, the Supremacy Clause would not have "any force" except in cases of express pre-emption. *Ante*, at 621. To the extent the majority's purported concern is driven by its *reductio ad absurdum*, see *ibid.*, n. 6, that concern is itself illusory, for the reasons just stated. To the extent the majority is concerned that our traditionally narrow view of what constitutes impossibility somehow renders conflict pre-emption as a whole meaningless, that concern simply makes no sense: We have repeatedly recognized that conflict pre-emption may be found, even absent impossibility, where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U. S., at 373 (internal quotation marks omitted); see, *e. g.*, *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 886 (2000); *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 31 (1996); *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). The majority's expansive view of impossibility is thus unnecessary to prevent conflict pre-emption from losing all meaning.[13]

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[13] JUSTICE THOMAS, the author of today's opinion, has previously expressed the view that obstacle pre-emption is inconsistent with the Constitution. See *Williamson* v. *Mazda Motor of America, Inc.*, 562 U. S. 323, 339 (2011) (opinion concurring in judgment); *Wyeth* v. *Levine*, 555 U. S. 555, 604 (2009) (opinion concurring in judgment). That position, however, has not been accepted by this Court, and it thus should not justify the majority's novel expansion of impossibility pre-emption.

Third, a plurality of the Court adopts the novel theory that the Framers intended for the Supremacy Clause to operate as a so-called *non obstante* provision. See *ante*, at 621–623 (citing Nelson, Preemption, 86 Va. L. Rev. 225 (2000)). According to the plurality, *non obstante* provisions in statutes "instruc[t] courts not to apply the general presumption against implied repeals." *Ante*, at 622 (internal quotation marks omitted); see also *ibid.* (stating that when a statute contains a *non obstante* provision, "'courts will be less inclined against recognizing repugnancy in applying such statutes'" (quoting J. Sutherland, Statutes and Statutory Construction § 147, p. 199 (1891))). From this understanding of the Supremacy Clause, the plurality extrapolates the principle that "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *Ante*, at 622.

This principle would have been news to the Congress that enacted the Hatch-Waxman Amendments in 1984: Our precedents hold just the opposite. For more than half a century, we have directed courts to presume that congressional action does *not* supersede "the historic police powers of the States . . . unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); see also *Gade*, 505 U. S., at 111–112 (KENNEDY, J., concurring in part and concurring in judgment). We apply this presumption against pre-emption both where Congress has spoken to the pre-emption question and where it has not. See *Wyeth*, 555 U. S., at 566, n. 3. In the context of express pre-emption, we read federal statutes whenever possible not to pre-empt state law. See *Altria Group, Inc.* v. *Good*, 555 U. S. 70, 77 (2008) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption'" (quoting *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 449 (2005))); see also *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518 (1992). And, when the claim is that federal law im-

pliedly pre-empts state law, we require a "strong" showing of a conflict "to overcome the presumption that state and local regulation . . . can constitutionally coexist with federal regulation." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 716 (1985).

The plurality's new theory of the Supremacy Clause is a direct assault on these precedents.[14] Whereas we have long presumed that federal law does not pre-empt, or repeal, state law, the plurality today reads the Supremacy Clause to operate as a provision instructing courts "*not* to apply the general presumption against implied repeals." *Ante*, at 622 (internal quotation marks omitted; emphasis added). And whereas we have long required evidence of a "clear and manifest" purpose to pre-empt, *Rice*, 331 U. S., at 230, the plurality now instructs courts to "look no further than the ordinary meaning of federal law" before concluding that Congress must have intended to cast aside state law, *ante*, at 623 (internal quotation marks and alteration omitted).

That the plurality finds it necessary to resort to this novel theory of the Supremacy Clause—a theory advocated by no party or *amici* in these cases—is telling. Proper application of the longstanding presumption *against* pre-emption compels the conclusion that federal law does not render compliance with state law impossible merely because it requires an actor to seek federal agency approval. When federal law provides actors with a mechanism for attempting to comply with their state-law duties, "respect for the States as 'independent sovereigns in our federal system' " should require those actors to attempt to comply with state law before

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[14] The author of the law review article proposing this theory of the Supremacy Clause acknowledges as much. See Nelson, Preemption, 86 Va. L. Rev. 225, 304 (2000) ("The *non obstante* provision rejects an artificial presumption that Congress did not intend to contradict any state laws and that federal statutes must therefore be harmonized with state law"). The plurality, on the other hand, carefully avoids discussing the ramifications of its new theory for the longstanding presumption against pre-emption.

being heard to complain that compliance with both laws was impossible. *Wyeth*, 555 U. S., at 565–566, n. 3 (quoting *Lohr*, 518 U. S., at 485).

III

Today's decision leads to so many absurd consequences that I cannot fathom that Congress would have intended to pre-empt state law in these cases.

First, the majority's pre-emption analysis strips generic-drug consumers of compensation when they are injured by inadequate warnings. "If Congress had intended to deprive injured parties of [this] long available form of compensation, it surely would have expressed that intent more clearly." *Bates*, 544 U. S., at 449. Given the longstanding existence of product liability actions, including for failure to warn, "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U. S., at 251; see also *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 240 (2011) (noting our previously expressed "doubt that Congress would quietly preempt product-liability claims without providing a federal substitute"). In concluding that Congress silently immunized generic manufacturers from all failure-to-warn claims, the majority disregards our previous hesitance to infer congressional intent to effect such a sweeping change in traditional state-law remedies.

As the majority itself admits, a drug consumer's right to compensation for inadequate warnings now turns on the happenstance of whether her pharmacist filled her prescription with a brand-name drug or a generic. If a consumer takes a brand-name drug, she can sue the manufacturer for inadequate warnings under our opinion in *Wyeth*. If, however, she takes a generic drug, as occurs 75 percent of the time, she now has no right to sue. The majority offers no reason to think—apart from its new articulation of the impossibility standard—that Congress would have intended such an arbitrary distinction. In some States, pharmacists must dis-

pense generic drugs absent instruction to the contrary from a consumer's physician. Even when consumers can request brand-name drugs, the price of the brand-name drug or the consumers' insurance plans may make it impossible to do so. As a result, in many cases, consumers will have no ability to preserve their state-law right to recover for injuries caused by inadequate warnings.

Second, the majority's decision creates a gap in the parallel federal-state regulatory scheme in a way that could have troubling consequences for drug safety. As we explained in *Wyeth*, "[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly." 555 U. S., at 579. Thus, we recognized, "state law offers an additional, and important, layer of consumer protection that complements FDA regulation." *Ibid.* Today's decision eliminates the traditional state-law incentives for generic manufacturers to monitor and disclose safety risks. When a generic drug has a brand-name equivalent on the market, the brand-name manufacturer will remain incentivized to uncover safety risks. But brand-name manufacturers often leave the market once generic versions are available, see *supra*, at 629–630, meaning that there will be no manufacturer subject to failure-to-warn liability. As to those generic drugs, there will be no "additional . . . layer of consumer protection." *Wyeth*, 555 U. S., at 579.

Finally, today's decision undoes the core principle of the Hatch-Waxman Amendments that generic and brand-name drugs are the "same" in nearly all respects.[15] See Brief for Rep. Henry A. Waxman as *Amicus Curiae* 9. The majority pins the expansion of the generic-drug market on "the special, and different, regulation of generic drugs," which allows

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[15] According to the GPhA, both the FDA and the generic-drug industry "spend millions of dollars each year . . . seeking to reassure consumers that affordable generic drugs really are—as federal law compels them to be—*the same as* their pricier brand-name counterparts." Brief for GPhA as *Amicus Curiae* on Pet. for Cert. in Nos. 09–993, 09–1039, pp. 2–3.

generic manufacturers to produce their drugs more cheaply. *Ante*, at 626. This tells only half the story. The expansion of the market for generic drugs has also flowed from the increased acceptance of, and trust in, generic drugs by consumers, physicians, and state legislators alike.

Today's decision introduces a critical distinction between brand-name and generic drugs. Consumers of brand-name drugs can sue manufacturers for inadequate warnings; consumers of generic drugs cannot. These divergent liability rules threaten to reduce consumer demand for generics, at least among consumers who can afford brand-name drugs. They may pose "an ethical dilemma" for prescribing physicians. Brief for American Medical Association et al. as *Amici Curiae* 29. And they may well cause the States to rethink their longstanding efforts to promote generic use through generic substitution laws. See Brief for National Conference of State Legislators as *Amicus Curiae* 15 (state generic substitution laws "have proceeded on the premise that . . . generic drugs are not, from citizens' perspective, materially different from brand ones, except for the lower price"). These consequences are directly at odds with the Hatch-Waxman Amendments' goal of increasing consumption of generic drugs.

Nothing in the Court's opinion convinces me that, in enacting the requirement that generic labels match their corresponding brand-name labels, Congress intended these absurd results. The Court certainly has not shown that such was the "*clear and manifest* purpose of Congress." *Wyeth*, 555 U. S., at 565 (internal quotation marks omitted; emphasis added). To the contrary, because federal law affords generic manufacturers a mechanism for attempting to comply with their state-law duties to warn, I would hold that federal law does not categorically pre-empt state-law failure-to-warn claims against generic manufacturers. Especially in light of the presumption against pre-emption, the burden should fall on generic manufacturers to show that compliance was im-

possible on the particular facts of their case. By holding that the "possibility of *possibility*" is insufficient to "defea[t]" pre-emption in these cases, *ante*, at 625, n. 8, the Court contorts our pre-emption doctrine and exempts defendants from their burden to establish impossibility. With respect, I dissent.

Syllabus

BULLCOMING *v.* NEW MEXICO

CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

No. 09–10876. Argued March 2, 2011—Decided June 23, 2011

The Sixth Amendment's Confrontation Clause gives the accused, "[i]n all criminal prosecutions, . . . the right . . . to be confronted with the witnesses against him." In *Crawford* v. *Washington*, 541 U. S. 36, 59, this Court held that the Clause permits admission of "[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Later, in *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, the Court declined to create a "forensic evidence" exception to *Crawford*, holding that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, ranked as "testimonial" for Confrontation Clause purposes. Absent stipulation, the Court ruled, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the report's statements. 557 U. S., at 324.

Petitioner Bullcoming's jury trial on charges of driving while intoxicated (DWI) occurred after *Crawford*, but before *Melendez-Diaz*. Principal evidence against him was a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold for aggravated DWI. Bullcoming's blood sample had been tested at the New Mexico Department of Health, Scientific Laboratory Division (SLD), by a forensic analyst named Caylor, who completed, signed, and certified the report. However, the prosecution neither called Caylor to testify nor asserted he was unavailable; the record showed only that Caylor was placed on unpaid leave for an undisclosed reason. In lieu of Caylor, the State called another analyst, Razatos, to validate the report. Razatos was familiar with the testing device used to analyze Bullcoming's blood and with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample. Bullcoming's counsel objected, asserting that introduction of Caylor's report without his testimony would violate the Confrontation Clause, but the trial court overruled the objection, admitted the SLD report as a business record, and permitted Razatos to testify. Bullcoming was convicted, and, while his appeal was pending before the New Mexico Supreme Court, this Court decided *Melendez-Diaz*. The state high court acknowledged that the SLD report qualified as testimonial evidence under *Melendez-Diaz*, but held that the report's admission did not

violate the Confrontation Clause because: (1) certifying analyst Caylor was a mere scrivener who simply transcribed machine-generated test results, and (2) SLD analyst Razatos, although he did not participate in testing Bullcoming's blood, qualified as an expert witness with respect to the testing machine and SLD procedures. The court affirmed Bullcoming's conviction.

Held: The judgment is reversed, and the case is remanded.

2010–NMSC–007, 147 N. M. 487, 226 P. 3d 1, reversed and remanded.

JUSTICE GINSBURG delivered the opinion of the Court with respect to all but Part IV and footnote 6. The Confrontation Clause, the opinion concludes, does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. Pp. 658–665.

(a) If an out-of-court statement is testimonial, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Pp. 658–663.

(1) Caylor's certification reported more than a machine-generated number: It represented that he received Bullcoming's blood sample intact with the seal unbroken; that he checked to make sure that the forensic report number and the sample number corresponded; that he performed a particular test on Bullcoming's sample, adhering to a precise protocol; and that he left the report's remarks section blank, indicating that no circumstance or condition affected the sample's integrity or the analysis' validity. These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination. The potential ramifications of the state court's reasoning, therefore, raise red flags. Most witnesses testify to their observations of factual conditions or events. Where, for example, a police officer's report recorded an objective fact such as the readout of a radar gun, the state court's reasoning would permit another officer to introduce the information, so long as he or she was equipped to testify about the technology the observing officer deployed and the police department's standard operating procedures. As, *e. g.*, *Davis* v. *Washington*, 547 U. S. 813, 826, makes plain, however, such testimony would violate the Confrontation Clause. The comparative reliability of an an-

alyst's testimonial report does not dispense with the Clause. *Crawford*, 541 U. S., at 62. The analysts who write reports introduced as evidence must be made available for confrontation even if they have "the scientific acumen of Mme. Curie and the veracity of Mother Teresa." *Melendez-Diaz*, 557 U. S., at 319–320, n. 6. Pp. 659–661.

(2) Nor was Razatos an adequate substitute witness simply because he qualified as an expert with respect to the testing machine and SLD's laboratory procedures. Surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events he certified, nor expose any lapses or lies on Caylor's part. Significantly, Razatos did not know why Caylor had been placed on unpaid leave. With Caylor on the stand, Bullcoming's counsel could have asked Caylor questions designed to reveal whether Caylor's incompetence, evasiveness, or dishonesty accounted for his removal from work. And the State did not assert that Razatos had any independent opinion concerning Bullcoming's blood-alcohol content. More fundamentally, the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. Although the purpose of Sixth Amendment rights is to ensure a fair trial, it does not follow that such rights can be disregarded because, on the whole, the trial is fair. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 145. If a "particular guarantee" is violated, no substitute procedure can cure the violation. *Id.*, at 146. Pp. 661–663.

(b) *Melendez-Diaz* precluded the State's argument that introduction of the SLD report did not implicate the Confrontation Clause because the report is nontestimonial. Like the certificates in *Melendez-Diaz*, the SLD report is undoubtedly an "affirmation made for the purpose of establishing or proving some fact" in a criminal proceeding. 557 U. S., at 310. Created solely for an "evidentiary purpose," *id.*, at 311, the report ranks as testimonial. In all material respects, the SLD report resembles the certificates in *Melendez-Diaz*. Here, as there, an officer provided seized evidence to a state laboratory required by law to assist in police investigations. Like the *Melendez-Diaz* analysts, Caylor tested the evidence and prepared a certificate concerning the result of his analysis. And like the *Melendez-Diaz* certificates, Caylor's report here is "formalized" in a signed document, *Davis*, 547 U. S., at 837, n. 2. Also noteworthy, the SLD report form contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses. Thus, although the SLD report was not notarized, the formalities attending the report were more than adequate to qualify Caylor's assertions as testimonial. Pp. 663–665.

Syllabus

GINSBURG, J., delivered the opinion of the Court, except as to Part IV and footnote 6. SCALIA, J., joined that opinion in full, SOTOMAYOR and KAGAN, JJ., joined as to all but Part IV, and THOMAS, J., joined as to all but Part IV and footnote 6. SOTOMAYOR, J., filed an opinion concurring in part, *post*, p. 668. KENNEDY, J., filed a dissenting opinion, in which ROBERTS, C. J., and BREYER and ALITO, JJ., joined, *post*, p. 674.

Jeffrey L. Fisher, by appointment of the Court, 562 U. S. 1028, argued the cause for petitioner. With him on the briefs were *Pamela S. Karlan*, *Susan Roth*, *Amy Howe*, and *Kevin K. Russell*.

Gary K. King, Attorney General of New Mexico, argued the cause for respondent. With him on the brief were *Ann Marie Harvey*, *James W. Grayson*, and *M. Victoria Wilson*, Assistant Attorneys General.*

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*Briefs of *amici curiae* urging reversal were filed for the Innocence Network by *Keith A. Findley*, *Peter J. Neufeld*, and *Barry C. Scheck;* for Law Professors et al. by *Stephen A. Miller*, *Erin E. Murphy*, *pro se*, *Robert P. Mosteller*, *pro se*, and *Paul C. Giannelli*, *pro se;* for the National Association of Criminal Defense Lawyers et al. by *Barbara E. Bergman*, *Alexandra Freedman Smith*, *Leonard R. Stamm*, *Ronald L. Moore*, and *Justin J. McShane;* for the Public Defender Service for the District of Columbia et al. by *Sandra K. Levick*, *Catherine F. Easterly*, *Didi H. Sallings*, *Claudia S. Saari*, *Carey Haughwout*, *Hon. Abishi C. Cunningham, Jr. (Ret.)*, *Jim Neuhard*, and *John Stuart;* and for Richard D. Friedman by *Mr. Friedman*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *John Michael Chamberlain* and *Lynne G. McGinnis*, Deputy Attorneys General, *Dane R. Gillette*, Chief Assistant Attorney General, *Donald E. de Nicola*, Deputy State Solicitor General, *Gerald A. Engler*, Senior Assistant Attorney General, and *Laurence K. Sullivan*, Supervising Deputy Attorney General, by *Irvin B. Nathan*, Acting Attorney General of the District of Columbia, and *Russell A. Suzuki*, Acting Attorney General of Hawaii, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John J. Burns* of Alaska, *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Bill Schuette*

JUSTICE GINSBURG delivered the opinion of the Court, except as to Part IV and footnote 6.†

In *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009), this Court held that a forensic laboratory report stating that a suspect substance was cocaine ranked as testimonial for purposes of the Sixth Amendment's Confrontation Clause. The report had been created specifically to serve as evidence in a criminal proceeding. Absent stipulation, the Court ruled, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the statements made in the report.

In the case before us, petitioner Donald Bullcoming was arrested on charges of driving while intoxicated (DWI). Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was "testimonial," the Confrontation Clause did not require the certifying analyst's in-court testimony. Instead,

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of Michigan, *Lori Swanson* of Minnesota, *Steve Bullock* of Montana, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Paula T. Dow* of New Jersey, *Michael DeWine* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Peter F. Kilmartin* of Rhode Island, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for the National District Attorneys Association et al. by *Albert C. Locher* and *W. Scott Thorpe;* and for the State of New Mexico Department of Health, Scientific Laboratory Division, by *Elizabeth Anne Trickey.*

†JUSTICE SOTOMAYOR and JUSTICE KAGAN join all but Part IV of this opinion. JUSTICE THOMAS joins all but Part IV and footnote 6.

New Mexico's high court held, live testimony of another analyst satisfied the constitutional requirements.

The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

I

A

In August 2005, a vehicle driven by petitioner Donald Bullcoming rear ended a pickup truck at an intersection in Farmington, New Mexico. When the truckdriver exited his vehicle and approached Bullcoming to exchange insurance information, he noticed that Bullcoming's eyes were bloodshot. Smelling alcohol on Bullcoming's breath, the truckdriver told his wife to call the police. Bullcoming left the scene before the police arrived, but was soon apprehended by an officer who observed his performance of field sobriety tests. Upon failing the tests, Bullcoming was arrested for driving a vehicle while "under the influence of intoxicating liquor" (DWI), in violation of N. M. Stat. Ann. § 66–8–102 (2004).

Because Bullcoming refused to take a breath test, the police obtained a warrant authorizing a blood-alcohol analysis. Pursuant to the warrant, a sample of Bullcoming's blood was drawn at a local hospital. To determine Bullcoming's blood-alcohol concentration (BAC), the police sent the sample to the New Mexico Department of Health, Scientific Labora-

tory Division (SLD). In a standard SLD form titled "Report of Blood Alcohol Analysis," participants in the testing were identified, and the forensic analyst certified his finding. App. 62.

SLD's report contained in the top block "information . . . filled in by [the] arresting officer." *Ibid.* (capitalization omitted). This information included the "reason [the] suspect [was] stopped" (the officer checked "Accident"), and the date ("8.14.05") and time ("18:25 PM") the blood sample was drawn. *Ibid.* (capitalization omitted). The arresting officer also affirmed that he had arrested Bullcoming and witnessed the blood draw. *Ibid.* The next two blocks contained certifications by the nurse who drew Bullcoming's blood and the SLD intake employee who received the blood sample sent to the laboratory. *Ibid.*

Following these segments, the report presented the "certificate of analyst," *ibid.* (capitalization omitted), completed and signed by Curtis Caylor, the SLD forensic analyst assigned to test Bullcoming's blood sample. *Id.*, at 62, 64–65. Caylor recorded that the BAC in Bullcoming's sample was 0.21 grams per hundred milliliters, an inordinately high level. *Id.*, at 62. Caylor also affirmed that "[t]he seal of th[e] sample was received intact and broken in the laboratory," that "the statements in [the analyst's block of the report] are correct," and that he had "followed the procedures set out on the reverse of th[e] report." *Ibid.* Those "procedures" instructed analysts, *inter alia*, to "retai[n] the sample container and the raw data from the analysis," and to "not[e] any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis." *Id.*, at 65. Finally, in a block headed "certificate of reviewer," the SLD examiner who reviewed Caylor's analysis certified that Caylor was qualified to conduct the BAC test, and that the "established procedure" for handling and analyzing Bullcoming's sample "ha[d] been followed." *Id.*, at 62 (capitalization omitted).

SLD analysts use gas chromatograph machines to determine BAC levels. Operation of the machines requires specialized knowledge and training. Several steps are involved in the gas chromatograph process, and human error can occur at each step.[1]

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[1] Gas chromatography is a widely used scientific method of quantitatively analyzing the constituents of a mixture. See generally H. McNair & J. Miller, Basic Gas Chromatography (2d ed. 2009) (hereinafter McNair). Under SLD's standard testing protocol, the analyst extracts two blood samples and inserts them into vials containing an "internal standard"—a chemical additive. App. 53. See McNair 141–142. The analyst then "cap[s] the [two] sample[s]," "crimp[s] them with an aluminum top," and places the vials into the gas chromatograph machine. App. 53–54. Within a few hours, this device produces a printed graph—a chromatogram—along with calculations representing a software-generated interpretation of the data. See Brief for New Mexico Department of Health, SLD, as *Amicus Curiae* 16–17.

Although the State presented testimony that obtaining an accurate BAC measurement merely entails "look[ing] at the [gas chromatograph] machine and record[ing] the results," App. 54, authoritative sources reveal that the matter is not so simple or certain. "In order to perform quantitative analyses satisfactorily and . . . support the results under rigorous examination in court, the analyst must be aware of, and adhere to, good analytical practices and understand what is being done and why." Stafford, Chromatography, in Principles of Forensic Toxicology 91, 114 (B. Levine 2d ed. 2006). See also McNair 137 ("Errors that occur in any step can invalidate the best chromatographic analysis, so attention must be paid to all steps."); D. Bartell, M. McMurray, & A. ImObersteg, Attacking and Defending Drunk Driving Tests § 16:80 (2d revision 2010) (stating that 93% of errors in laboratory tests for BAC levels are human errors that occur either before or after machines analyze samples). Even after the machine has produced its printed result, a review of the chromatogram may indicate that the test was not valid. See McNair 207–214.

Nor is the risk of human error so remote as to be negligible. *Amici* inform us, for example, that in neighboring Colorado, a single forensic laboratory produced at least 206 flawed blood-alcohol readings over a three-year span, prompting the dismissal of several criminal prosecutions. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 32–33. An analyst had used improper amounts of the internal standard, causing the chromatograph machine systematically to in-

Caylor's report that Bullcoming's BAC was 0.21 supported a prosecution for aggravated DWI, the threshold for which is a BAC of 0.16 grams per hundred milliliters, § 66–8–102(D)(1). The State accordingly charged Bullcoming with this more serious crime.

B

The case was tried to a jury in November 2005, after our decision in *Crawford* v. *Washington*, 541 U. S. 36 (2004), but before *Melendez-Diaz*. On the day of trial, the State announced that it would not be calling SLD analyst Curtis Caylor as a witness because he had "very recently [been] put on unpaid leave" for a reason not revealed. 2010–NMSC–007, ¶ 8, 147 N. M. 487, 492, 226 P. 3d 1, 6 (internal quotation marks omitted); App. 58. A startled defense counsel objected. The prosecution, she complained, had never disclosed, until trial commenced, that the witness "out there . . . [was] not the analyst [of Bullcoming's sample]." *Id.*, at 46. Counsel stated that, "had [she] known that the analyst [who tested Bullcoming's blood] was not available," her opening, indeed, her entire defense "may very well have been dramatically different." *Id.*, at 47. The State, however, proposed to introduce Caylor's finding as a "business record" during the testimony of Gerasimos Razatos, an SLD scientist who had neither observed nor reviewed Caylor's analysis. *Id.*, at 44.

Bullcoming's counsel opposed the State's proposal. *Id.*, at 44–45. Without Caylor's testimony, defense counsel maintained, introduction of the analyst's finding would violate Bullcoming's Sixth Amendment right "to be confronted with

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flate BAC measurements. The analyst's error, a supervisor said, was "fairly complex." Ensslin, Final Tally on Flawed DUI: 206 Errors, 9 Tossed or Reduced, Colorado Springs Gazette, Apr. 19, 2010, pp. 1, 2 (internal quotation marks omitted), available at http://www.gazette.com/articles/report-97354-police-discuss.html. (All Internet materials as visited June 21, 2011, and included in Clerk of Court's case file.)

the witnesses against him." *Ibid.*[2] The trial court overruled the objection, *id.*, at 46–47, and admitted the SLD report as a business record, *id.*, at 44–46, 57.[3] The jury convicted Bullcoming of aggravated DWI, and the New Mexico Court of Appeals upheld the conviction, concluding that "the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness." 2008–NMCA–097, ¶ 17, 144 N. M. 546, 552, 189 P. 3d 679, 685.

C

While Bullcoming's appeal was pending before the New Mexico Supreme Court, this Court decided *Melendez-Diaz.* In that case, "[t]he Massachusetts courts [had] admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine." 557 U. S., at 307. Those affidavits, the Court held, were "'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." *Ibid.*

In light of *Melendez-Diaz,* the New Mexico Supreme Court acknowledged that the blood-alcohol report introduced at Bullcoming's trial qualified as testimonial evidence. Like the affidavits in *Melendez-Diaz,* the court observed, the report was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." 147 N. M., at 494, 226 P. 3d, at 8 (quoting *Melendez-Diaz,* 557

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[2] The State called as witnesses the arresting officer and the nurse who drew Bullcoming's blood. Bullcoming did not object to the State's failure to call the SLD intake employee or the reviewing analyst. "It is up to the prosecution," the Court observed in *Melendez-Diaz* v. *Massachusetts,* 557 U. S. 305, 311, n. 1 (2009), "to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."

[3] The trial judge noted that, when he started out in law practice, "there were no breath tests or blood tests. They just brought in the cop, and the cop said, 'Yeah, he was drunk.'" App. 47.

U. S., at 310–311).[4] Nevertheless, for two reasons, the court held that admission of the report did not violate the Confrontation Clause.

First, the court said certifying analyst Caylor "was a mere scrivener," who "simply transcribed the results generated by the gas chromatograph machine." 147 N. M., at 494–495, 226 P. 3d, at 8–9. Second, SLD analyst Razatos, although he did not participate in testing Bullcoming's blood, "qualified as an expert witness with respect to the gas chromatograph machine." *Id.*, at 495, 226 P. 3d, at 9. "Razatos provided live, in-court testimony," the court stated, "and, thus, was available for cross-examination regarding the operation of the . . . machine, the results of [Bullcoming's] BAC test, and the SLD's established laboratory procedures." *Ibid.* Razatos' testimony was crucial, the court explained, because Bullcoming could not cross-examine the machine or the written report. *Id.*, at 496, 226 P. 3d, at 10. But "[Bullcoming's] right of confrontation was preserved," the court concluded, because Razatos was a qualified analyst, able to serve as a surrogate for Caylor. *Ibid.*

We granted certiorari to address this question: Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. 561 U. S. 1058 (2010). Our answer is in line with controlling precedent: As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.

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[4] In so ruling, the New Mexico Supreme Court explicitly overruled *State* v. *Dedman*, 2004–NMSC–037, 136 N. M. 561, 102 P. 3d 628 (2004), which had classified blood-alcohol reports as public records neither "investigative nor prosecutorial" in nature. 147 N. M., at 494, 226 P. 3d, at 7–8.

Because the New Mexico Supreme Court permitted the testimonial statement of one witness, *i. e.*, Caylor, to enter into evidence through the in-court testimony of a second person, *i. e.*, Razatos, we reverse that court's judgment.

II

The Sixth Amendment's Confrontation Clause confers upon the accused, "[i]n all criminal prosecutions, . . . the right . . . to be confronted with the witnesses against him." In a pathmarking 2004 decision, *Crawford* v. *Washington*, we overruled *Ohio* v. *Roberts*, 448 U. S. 56 (1980), which had interpreted the Confrontation Clause to allow admission of absent witnesses' testimonial statements based on a judicial determination of reliability. See *id.*, at 66. Rejecting *Roberts*' "amorphous notions of 'reliability,'" *Crawford*, 541 U. S., at 61, *Crawford* held that fidelity to the Confrontation Clause permitted admission of "[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine," *id.*, at 59. See *Michigan* v. *Bryant*, 562 U. S. 344, 354 (2011) ("[F]or testimonial evidence to be admissible, the Sixth Amendment 'demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination.'" (quoting *Crawford*, 541 U. S., at 68)). *Melendez-Diaz*, relying on *Crawford*'s rationale, refused to create a "forensic evidence" exception to this rule. 557 U. S., at 317–321.[5] An analyst's certification prepared in connection with a criminal investigation or prosecution, the Court held, is "testimonial," and

[5] The dissent makes plain that its objection is less to the application of the Court's decisions in *Crawford* and *Melendez-Diaz* to this case than to those pathmarking decisions themselves. See *post*, at 678 (criticizing the *Crawford* "line of cases" for rejecting "reliable evidence"); *post*, at 681, 684 (deploring "*Crawford*'s rejection of the [reliability-centered] regime of *Ohio* v. *Roberts*").

therefore within the compass of the Confrontation Clause. *Id.*, at 321–324.[6]

The State in the instant case never asserted that the analyst who signed the certification, Curtis Caylor, was unavailable. The record showed only that Caylor was placed on unpaid leave for an undisclosed reason. See *supra*, at 655. Nor did Bullcoming have an opportunity to cross-examine Caylor. *Crawford* and *Melendez-Diaz*, therefore, weigh heavily in Bullcoming's favor. The New Mexico Supreme Court, however, although recognizing that the SLD report was testimonial for purposes of the Confrontation Clause, considered SLD analyst Razatos an adequate substitute for Caylor. We explain first why Razatos' appearance did not meet the Confrontation Clause requirement. We next address the State's argument that the SLD report ranks as "nontestimonial," and therefore "[was] not subject to the Confrontation Clause" in the first place. Brief for Respondent 7 (capitalization omitted).

A

The New Mexico Supreme Court held surrogate testimony adequate to satisfy the Confrontation Clause in this case because analyst Caylor "simply transcribed the resul[t] generated by the gas chromatograph machine," presenting no interpretation and exercising no independent judgment. 226 P. 3d, at 8. Bullcoming's "'true 'accuser,'" the court said, was the machine, while testing analyst Caylor's role was that of "mere scrivener." *Id.*, at 9. Caylor's certification, how-

[6] To rank as "testimonial," a statement must have a "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *Davis* v. *Washington*, 547 U. S. 813, 822 (2006). See also *Bryant*, 562 U. S., at 358. Elaborating on the purpose for which a "testimonial report" is created, we observed in *Melendez-Diaz* that business and public records "are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." 557 U. S., at 324.

ever, reported more than a machine-generated number. See *supra,* at 653.

Caylor certified that he received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number "correspond[ed]," and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol. App. 62–65. He further represented, by leaving the "[r]emarks" section of the report blank, that no "circumstance or condition . . . affect[ed] the integrity of the sample or . . . the validity of the analysis." *Id.*, at 62, 65. These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.

The potential ramifications of the New Mexico Supreme Court's reasoning, furthermore, raise red flags. Most witnesses, after all, testify to their observations of factual conditions or events, *e. g.*, "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact—Bullcoming's counsel posited the address above the front door of a house or the readout of a radar gun. See Brief for Petitioner 35. Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No." See *Davis* v. *Washington,* 547 U. S. 813, 826 (2006) (Confrontation Clause may not be "evaded by having a note-taking police [officer] recite the . . . testimony of the declarant" (emphasis deleted)); *Melendez-Diaz,* 557 U. S., at 334 (KENNEDY, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.").

The New Mexico Supreme Court stated that the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment on Caylor's part. 147 N. M., at 494–495, 226 P. 3d, at 8–9. We have already explained that Caylor certified to more than a machine-generated number. See *supra*, at 653. In any event, the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that the "obviou[s] reliab[ility]" of a testimonial statement does not dispense with the Confrontation Clause. 541 U. S., at 62; see *id.*, at 61 (Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination"). Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa." *Melendez-Diaz*, 557 U. S., at 319–320, n. 6.

B

Recognizing that admission of the blood-alcohol analysis depended on "live, in-court testimony [by] a qualified analyst," 147 N. M., at 496, 226 P. 3d, at 10, the New Mexico Supreme Court believed that Razatos could substitute for Caylor because Razatos "qualified as an expert witness with respect to the gas chromatograph machine and the SLD's laboratory procedures," *id.*, at 495, 226 P. 3d, at 9. But surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, *i. e.*, the particular test and testing process he employed.[7] Nor could such surrogate

[7] We do not question that analyst Caylor, in common with other analysts employed by SLD, likely would not recall a particular test, given the number of tests each analyst conducts and the standard procedure followed in

testimony expose any lapses or lies on the certifying analyst's part.[8] Significant here, Razatos had no knowledge of the reason why Caylor had been placed on unpaid leave. With Caylor on the stand, Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor's removal from his workstation. Notable in this regard, the State never asserted that Caylor was "unavailable"; the prosecution conveyed only that Caylor was on uncompensated leave. Nor did the State assert that Razatos had any "independent opinion" concerning Bullcoming's BAC. See Brief for Respondent 58, n. 15. In this light, Caylor's live testimony could hardly be typed "a hollow formality," *post*, at 677.

More fundamentally, as this Court stressed in *Crawford*, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." 541 U. S., at 54. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Giles* v. *California*, 554 U. S. 353, 375 (2008) (plurality). Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

A recent decision involving another Sixth Amendment right—the right to counsel—is instructive. In *United States* v. *Gonzalez-Lopez*, 548 U. S. 140 (2006), the Govern-

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testing. Even so, Caylor's testimony under oath would have enabled Bullcoming's counsel to raise before a jury questions concerning Caylor's proficiency, the care he took in performing his work, and his veracity. In particular, Bullcoming's counsel likely would have inquired on cross-examination why Caylor had been placed on unpaid leave.

[8] At Bullcoming's trial, Razatos acknowledged that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance." App. 59.

ment argued that illegitimately denying a defendant his counsel of choice did not violate the Sixth Amendment where "substitute counsel's performance" did not demonstrably prejudice the defendant. *Id.*, at 144–145. This Court rejected the Government's argument. "[T]rue enough," the Court explained, "the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Id.*, at 145. If a "particular guarantee" of the Sixth Amendment is violated, no substitute procedure can cure the violation, and "[n]o additional showing of prejudice is required to make the violation 'complete.' " *Id.*, at 146. If representation by substitute counsel does not satisfy the Sixth Amendment, neither does the opportunity to confront a substitute witness.

In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way. See *Melendez-Diaz*, 557 U. S., at 334 (KENNEDY, J., dissenting) (Court's holding means "the . . . analyst who must testify is the person who signed the certificate").

III

We turn, finally, to the State's contention that SLD's blood-alcohol analysis reports are nontestimonial in character, therefore no Confrontation Clause question even arises in this case. *Melendez-Diaz* left no room for that argument, the New Mexico Supreme Court concluded, see 147 N. M., at 494, 226 P. 3d, at 7–8; *supra*, at 656–657, a conclusion we find inescapable.

In *Melendez-Diaz*, a state forensic laboratory, on police request, analyzed seized evidence (plastic bags) and reported the laboratory's analysis to the police (the substance found in the bags contained cocaine). 557 U. S., at 308. The "certificates of analysis" prepared by the analysts who tested the evidence in *Melendez-Diaz*, this Court held, were

"incontrovertibly . . . affirmation[s] made for the purpose of establishing or proving some fact" in a criminal proceeding. *Id.*, at 310 (internal quotation marks omitted). The same purpose was served by the certificate in question here.

The State maintains that the affirmations made by analyst Caylor were not "adversarial" or "inquisitorial," Brief for Respondent 27–33; instead, they were simply observations of an "independent scientis[t]" made "according to a non-adversarial public duty," *id.*, at 32–33. That argument fares no better here than it did in *Melendez-Diaz*. A document created solely for an "evidentiary purpose," *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial. 557 U. S., at 311 (forensic reports available for use at trial are "testimonial statements" and certifying analyst is a "'witnes[s]' for purposes of the Sixth Amendment").

Distinguishing Bullcoming's case from *Melendez-Diaz*, where the analysts' findings were contained in certificates "sworn to before a notary public," *id.*, at 308, the State emphasizes that the SLD report of Bullcoming's BAC was "unsworn." Brief for Respondent 13; *post*, at 676 ("only sworn statement" here was that of Razatos, "who was present and [did] testif[y]"). As the New Mexico Supreme Court recognized, "'the absence of [an] oath [i]s not dispositive' in determining if a statement is testimonial." 147 N. M., at 494, 226 P. 3d, at 8 (quoting *Crawford*, 541 U. S., at 52). Indeed, in *Crawford*, this Court rejected as untenable any construction of the Confrontation Clause that would render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements "perfectly OK." *Id.*, at 52–53, n. 3. Reading the Clause in this "implausible" manner, *ibid.*, the Court noted, would make the right to confrontation easily erasable. See *Davis*, 547 U. S., at 830–831, n. 5; *id.*, at 838 (THOMAS, J., concurring in judgment in part and dissenting in part).

In all material respects, the laboratory report in this case resembles those in *Melendez-Diaz*. Here, as in *Melendez-*

Diaz, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations, N. M. Stat. Ann. § 29–3–4 (2004). Like the analysts in *Melendez-Diaz*, analyst Caylor tested the evidence and prepared a certificate concerning the result of his analysis. App. 62. Like the *Melendez-Diaz* certificates, Caylor's certificate is "formalized" in a signed document, *Davis*, 547 U. S., at 837, n. 2 (opinion of THOMAS, J.), headed a "report," App. 62. Noteworthy as well, the SLD report form contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses.

In sum, the formalities attending the "report of blood alcohol analysis" are more than adequate to qualify Caylor's assertions as testimonial. The absence of notarization does not remove his certification from Confrontation Clause governance. The New Mexico Supreme Court, guided by *Melendez-Diaz*, correctly recognized that Caylor's report "fell within the core class of testimonial statements," 147 N. M., at 493, 226 P. 3d, at 7, described in this Court's leading Confrontation Clause decisions: *Melendez-Diaz*, 557 U. S., at 310; *Davis*, 547 U. S., at 830; *Crawford*, 541 U. S., at 51–52.

IV

The State and its *amici* urge that unbending application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution. This argument, also advanced in the dissent, *post*, at 683, largely repeats a refrain rehearsed and rejected in *Melendez-Diaz*. See 557 U. S., at 325–328. The constitutional requirement, we reiterate, "may not [be] disregard[ed] . . . at our convenience," *id.*, at 325, and the predictions of dire consequences, we again observe, are dubious, see *ibid.*

New Mexico law, it bears emphasis, requires the laboratory to preserve samples, which can be retested by other analysts, see N. M. Admin. Code § 7.33.2.15(A)(4)–(6) (2010),

available at http://www.nmcpr.state.nm.us/nmac/_title07/T07C033.htm, and neither party questions SLD's compliance with that requirement. Retesting "is almost always an option . . . in [DWI] cases," Brief for Public Defender Service for District of Columbia et al. as *Amici Curiae* 25 (hereinafter PDS Brief), and the State had that option here: New Mexico could have avoided any Confrontation Clause problem by asking Razatos to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe.

Notably, New Mexico advocates retesting as an effective means to preserve a defendant's confrontation right "when the [out-of-court] statement is raw data or a mere transcription of raw data onto a public record." Brief for Respondent 53–54. But the State would require the defendant to initiate retesting. *Id.*, at 55; *post*, at 677 (defense "remains free to . . . call and examine the technician who performed a test"); *post*, at 681 ("free retesting" is available to defendants). The prosecution, however, bears the burden of proof. *Melendez-Diaz*, 557 U. S., at 324 ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."). Hence the obligation to propel retesting when the original analyst is unavailable is the State's, not the defendant's. See *Taylor* v. *Illinois*, 484 U. S. 400, 410, n. 14 (1988) (Confrontation Clause's requirements apply "in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own").

Furthermore, notice-and-demand procedures, long in effect in many jurisdictions, can reduce burdens on forensic laboratories. Statutes governing these procedures typically "render . . . otherwise hearsay forensic reports admissible[,] while specifically preserving a defendant's right to demand that the prosecution call the author/analyst of [the] report." PDS Brief 9; see *Melendez-Diaz*, 557 U. S., at 326 (observing that notice-and-demand statutes "permit the defendant to assert (or forfeit by silence) his Confrontation Clause right

after receiving notice of the prosecution's intent to use a forensic analyst's report").

Even before this Court's decision in *Crawford*, moreover, it was common prosecutorial practice to call the forensic analyst to testify. Prosecutors did so "to bolster the persuasive power of [the State's] case[,] . . . [even] when the defense would have preferred that the analyst did *not* testify." PDS Brief 8.

We note also the "small fraction of . . . cases" that "actually proceed to trial." *Melendez-Diaz*, 557 U. S., at 325 (citing estimate that "nearly 95% of convictions in state and federal courts are obtained via guilty plea"). And, "when cases in which forensic analysis has been conducted [do] go to trial," defendants "regularly . . . [stipulate] to the admission of [the] analysis." PDS Brief 20. "[A]s a result, analysts testify in only a very small percentage of cases," *id.*, at 21, for "[i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Melendez-Diaz*, 557 U. S., at 328.[9]

Tellingly, in jurisdictions in which "it is the [acknowledged] job of . . . analysts to testify in court . . . about their test results," the sky has not fallen. PDS Brief 23. State

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[9] The dissent argues otherwise, reporting a 71% increase, from 2008 to 2010, in the number of subpoenas for New Mexico analysts' testimony in impaired-driving cases. *Post*, at 683. The dissent is silent, however, on the number of instances in which subpoenaed analysts in fact testify, *i. e.*, the figure that would reveal the actual burden of courtroom testimony. Moreover, New Mexico's Department of Health, Scientific Laboratory Division, has attributed the "chaotic" conditions noted by the dissent, *post*, at 684, to several factors, among them, staff attrition, a state hiring freeze, a 15% increase in the number of blood samples received for testing, and "wildly" divergent responses by New Mexico District Attorneys to *Melendez-Diaz*. Brief for New Mexico Department of Health, SLD, as *Amicus Curiae* 2–5. Some New Mexico District Attorneys' offices, we are informed, "subpoen[a] every analyst with any connection to a blood sample," *id.*, at 5, an exorbitant practice that undoubtedly inflates the number of subpoenas issued.

and municipal laboratories "make operational and staffing decisions" to facilitate analysts' appearance at trial. *Ibid.* Prosecutors schedule trial dates to accommodate analysts' availability, and trial courts liberally grant continuances when unexpected conflicts arise. *Id.*, at 24–25. In rare cases in which the analyst is no longer employed by the laboratory at the time of trial, "the prosecution makes the effort to bring that analyst . . . to court." *Id.*, at 25. And, as is the practice in New Mexico, see *supra*, at 665–666, laboratories ordinarily retain additional samples, enabling them to run tests again when necessary.[10]

* * *

For the reasons stated, the judgment of the New Mexico Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.[11]

It is so ordered.

JUSTICE SOTOMAYOR, concurring in part.

I agree with the Court that the trial court erred by admitting the blood alcohol concentration (BAC) report. I write separately first to highlight why I view the report at issue to be testimonial—specifically because its "primary purpose" is evidentiary—and second to emphasize the limited reach of the Court's opinion.

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[10] The dissent refers, selectively, to experience in Los Angeles, *post*, at 683, but overlooks experience documented in Michigan. In that State, post-*Melendez-Diaz*, the increase in in-court analyst testimony has been slight. Compare PDS Brief 21 (in 2006, analysts provided testimony for only 0.7% of all tests) with Michigan State Police, Forensic Science Division, available at http://www.michigan.gov/msp/0,1607,7-123-1593_3800-15901--,00.html (in 2010, analysts provided testimony for approximately 1% of all tests).

[11] As in *Melendez-Diaz*, 557 U. S., at 329, and n. 14, we express no view on whether the Confrontation Clause error in this case was harmless. The New Mexico Supreme Court did not reach that question, see Brief for Respondent 59–60, and nothing in this opinion impedes a harmless-error inquiry on remand.

I

A

Under our precedents, the New Mexico Supreme Court was correct to hold that the certified BAC report in this case is testimonial. 2010–NMSC–007, ¶ 18, 147 N. M. 487, 494, 226 P. 3d 1, 8.

To determine if a statement is testimonial, we must decide whether it has "a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan* v. *Bryant*, 562 U. S. 344, 358 (2011). When the "primary purpose" of a statement is "not to create a record for trial," *ibid.*, "the admissibility of [the] statement is the concern of state and federal rules of evidence, not the Confrontation Clause," *id.*, at 359.

This is not the first time the Court has faced the question whether a scientific report is testimonial. As the Court explains, *ante*, at 663–664, in *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009), we held that "certificates of analysis," completed by employees of the State Laboratory Institute of the Massachusetts Department of Public Health, *id.*, at 308, were testimonial because they were "incontrovertibly . . . ' "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact," ' " *id.*, at 310 (quoting *Crawford* v. *Washington*, 541 U. S. 36, 51 (2004), in turn quoting 2 N. Webster, An American Dictionary of the English Language (1828)).

As we explained earlier this Term in *Michigan* v. *Bryant*, "[i]n making the primary purpose determination, standard rules of hearsay . . . will be relevant." 562 U. S., at 358–359.[1] As applied to a scientific report, *Melendez-Diaz* explained

[1] Contrary to the dissent's characterization, *Bryant* deemed reliability, as reflected in the hearsay rules, to be "relevant," 562 U. S., at 359, not "essential," *post*, at 678 (opinion of KENNEDY, J.). The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation.

that pursuant to Federal Rule of Evidence 803, "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status," except "if the regularly conducted business activity is the production of evidence for use at trial." 557 U. S., at 321 (citing Fed. Rule Evid. 803(6)). In that circumstance, the hearsay rules bar admission of even business records. Relatedly, in the Confrontation Clause context, business and public records "are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Melendez-Diaz*, 557 U. S., at 324. We concluded, therefore, that because the purpose of the certificates of analysis was use at trial, they were not properly admissible as business or public records under the hearsay rules, *id.*, at 321–322, nor were they admissible under the Confrontation Clause, *id.*, at 324. The hearsay rule's recognition of the certificates' evidentiary purpose thus confirmed our decision that the certificates were testimonial under the primary purpose analysis required by the Confrontation Clause. See *id.*, at 311 (explaining that under Massachusetts law not just the purpose but the "*sole purpose* of the affidavits was to provide" evidence).

Similarly, in this case, for the reasons the Court sets forth the BAC report and Caylor's certification on it clearly have a "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U. S., at 358. The Court also explains why the BAC report is not materially distinguishable from the certificates we held testimonial in *Melendez-Diaz*. See 557 U. S., at 308, 310–311.[2]

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[2] This is not to say, however, that every person noted on the BAC report must testify. As we explained in *Melendez-Diaz*, it is not the case "that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case . . . . It is up to the

The formality inherent in the certification further suggests its evidentiary purpose. Although "[f]ormality is not the sole touchstone of our primary purpose inquiry," a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial. *Bryant*, 562 U. S., at 366.[3] I agree with the Court's assessment that the certificate at issue here is a formal statement, despite the absence of notarization. *Ante*, at 664; *Crawford*, 541 U. S., at 52 ("[T]he absence of [an] oath [is] not dispositive"). The formality derives from the fact that the analyst is asked to sign his name and "certify" to both the result and the statements on the form. A "certification" requires one "[t]o attest" that the accompanying statements are true. Black's Law Dictionary 258 (9th ed. 2009) (definition of "certify"); see also *id.*, at 147 (defining "attest" as "[t]o bear witness; testify," or "[t]o affirm to be true or genuine; to authenticate by signing as a witness").

In sum, I am compelled to conclude that the report has a "primary purpose of creating an out-of-court substitute for

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prosecution to decide what steps in the chain of custody are so crucial as to require evidence . . . ." 557 U. S., at 311, n. 1.

[3] By looking to the formality of a statement, we do not "trea[t] the reliability of evidence as a reason to exclude it." *Post*, at 678 (KENNEDY, J., dissenting). Although in some instances formality could signal reliability, the dissent's argument fails to appreciate that, under our Confrontation Clause precedents, formality is primarily an indicator of testimonial purpose. Formality is not the sole indicator of the testimonial nature of a statement because it is too easily evaded. See *Davis* v. *Washington*, 547 U. S. 813, 838 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part). Nonetheless formality has long been a hallmark of testimonial statements because formality suggests that the statement is intended for use at trial. As we explained in *Bryant*, informality, on the other hand, "does not necessarily indicate . . . lack of testimonial intent." 562 U. S., at 366. The dissent itself recognizes the relevance of formality to the testimonial inquiry when it notes the formality of the problematic unconfronted statements in Sir Walter Raleigh's trial. *Post*, at 680.

trial testimony," *Bryant*, 562 U. S., at 358, which renders it testimonial.

B

After holding that the report was testimonial, the New Mexico Supreme Court nevertheless held that its admission was permissible under the Confrontation Clause for two reasons: because Caylor was a "mere scrivener," and because Razatos could be cross-examined on the workings of the gas chromatograph and laboratory procedures. 147 N. M., at 494–496, 226 P. 3d, at 8–10. The Court convincingly explains why those rationales are incorrect. *Ante*, at 659–663. Therefore, the New Mexico court contravened our precedents in holding that the report was admissible via Razatos' testimony.

II

Although this case is materially indistinguishable from the facts we considered in *Melendez-Diaz*, I highlight some of the factual circumstances that this case does *not* present.

First, this is not a case in which the State suggested an alternative purpose, much less an alternative *primary* purpose, for the BAC report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment. See *Bryant*, 562 U. S., at 362, n. 9 (listing "Statements for Purposes of Medical Diagnosis or Treatment" under Federal Rule of Evidence 803(4) as an example of statements that are "by their nature, made for a purpose other than use in a prosecution"); *Melendez-Diaz*, 557 U. S., at 312, n. 2 ("[M]edical reports created for treatment purposes . . . would not be testimonial under our decision today"); *Giles* v. *California*, 554 U. S. 353, 376 (2008) ("[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules").

Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. Razatos

conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. App. 58. The court below also recognized Razatos' total lack of connection to the test at issue. 147 N. M., at 492, 226 P. 3d, at 6. It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.

Third, this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. See Fed. Rule Evid. 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted). As the Court notes, *ante*, at 662, the State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration. Rather, the State explains, "[a]side from reading a report that was introduced as an exhibit, Mr. Razatos offered no opinion about Petitioner's blood alcohol content . . . ." Brief for Respondent 58, n. 15 (citation omitted). Here the State offered the BAC report, including Caylor's testimonial statements, into evidence. We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph. The State here introduced Caylor's statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the

procedures used in handling the blood sample. See *ante*, at 659–660; App. 62 ("I certify that I followed the procedures set out on the reverse of this report, and the statements in this block are correct"). Thus, we do not decide whether, as the New Mexico Supreme Court suggests, 147 N. M., at 496, 226 P. 3d, at 10, a State could introduce (assuming an adequate chain of custody foundation) raw data generated by a machine in conjunction with the testimony of an expert witness. See Reply Brief for Petitioner 16, n. 5.

This case does not present, and thus the Court's opinion does not address, any of these factual scenarios.

* * *

As in *Melendez-Diaz*, the primary purpose of the BAC report is clearly to serve as evidence. It is therefore testimonial, and the trial court erred in allowing the State to introduce it into evidence via Razatos' testimony. I respectfully concur.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE ALITO join, dissenting.

The Sixth Amendment Confrontation Clause binds the States and the National Government. *Pointer* v. *Texas*, 380 U. S. 400, 403 (1965). Two Terms ago, in a case arising from a state criminal prosecution, the Court interpreted the Clause to mandate exclusion of a laboratory report sought to be introduced based on the authority of that report's own sworn statement that a test had been performed yielding the results as shown. *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009). The Court's opinion in that case held the report inadmissible because no one was present at trial to testify to its contents.

Whether or not one agrees with the reasoning and the result in *Melendez-Diaz*, the Court today takes the new and serious misstep of extending that holding to instances like this one. Here a knowledgeable representative of the labo-

ratory was present to testify and to explain the lab's processes and the details of the report; but because he was not the analyst who filled out part of the form and transcribed onto it the test result from a machine printout, the Court finds a confrontation violation. Some of the principal objections to the Court's underlying theory have been set out earlier and need not be repeated here. See *id.*, at 330–332 (KENNEDY, J., dissenting). Additional reasons, applicable to the extension of that doctrine and to the new ruling in this case, are now explained in support of this respectful dissent.

I

Before today, the Court had not held that the Confrontation Clause bars admission of scientific findings when an employee of the testing laboratory authenticates the findings, testifies to the laboratory's methods and practices, and is cross-examined at trial. Far from replacing live testimony with "systematic" and "extrajudicial" examinations, *Davis* v. *Washington*, 547 U. S. 813, 835, 836 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part) (emphasis deleted; internal quotation marks omitted), these procedures are fully consistent with the Confrontation Clause and with well-established principles for ensuring that criminal trials are conducted in full accord with requirements of fairness and reliability and with the confrontation guarantee. They do not "resemble Marian proceedings." *Id.*, at 837.

The procedures followed here, but now invalidated by the Court, make live testimony rather than the "solemnity" of a document the primary reason to credit the laboratory's scientific results. *Id.*, at 838. Unlike *Melendez-Diaz*, where the jury was asked to credit a laboratory's findings based solely on documents that were "quite plainly affidavits," 557 U. S., at 330 (THOMAS, J., concurring) (internal quotation marks omitted), here the signature, heading, or legend on the document were routine authentication elements for a report that would be assessed and explained by in-court testimony sub-

ject to full cross-examination. The only sworn statement at issue was that of the witness who was present and who testified.

The record reveals that the certifying analyst's role here was no greater than that of anyone else in the chain of custody. App. 56 (laboratory employee's testimony agreeing that "once the material is prepared and placed in the machine, you don't need any particular expertise to record the results"). The information contained in the report was the result of a scientific process comprising multiple participants' acts, each with its own evidentiary significance. These acts included receipt of the sample at the laboratory; recording its receipt; storing it; placing the sample into the testing device; transposing the printout of the results of the test onto the report; and review of the results. See *id.*, at 48–56; see also Brief for New Mexico Department of Health, Scientific Laboratory Division, as *Amicus Curiae* 4 (hereinafter New Mexico Scientific Laboratory Brief) ("Each blood sample has original testing work by . . . as many as seve[n] analysts . . . "); App. 62 (indicating that this case involved three laboratory analysts who, respectively, received, analyzed, and reviewed analysis of the sample); cf. Brief for State of Indiana et al. as *Amici Curiae* in *Briscoe* v. *Virginia*, O. T. 2009, No. 07–11191, p. 10 (explaining that DNA analysis can involve the combined efforts of up to 40 analysts).

In the New Mexico scientific laboratory where the blood sample was processed, analyses are run in batches involving 40–60 samples. Each sample is identified by a computer-generated number that is not linked back to the file containing the name of the person from whom the sample came until after all testing is completed. See New Mexico Scientific Laboratory Brief 26. The analysis is mechanically performed by the gas chromatograph, which may operate—as in this case—after all the laboratory employees leave for the day. See *id.*, at 17. And whatever the result, it is reported to both law enforcement and the defense. See *id.*, at 36.

The representative of the testing laboratory whom the prosecution called was a scientific analyst named Mr. Razatos. He testified that he "help[ed] in overseeing the administration of these programs throughout the State," and he was qualified to answer questions concerning each of these steps. App. 49. The Court has held that the government need not produce at trial "everyone who laid hands on the evidence," *Melendez-Diaz, supra*, at 311, n. 1. Here, the defense used the opportunity in cross-examination to highlight the absence at trial of certain laboratory employees. Under questioning by Bullcoming's attorney, Razatos acknowledged that his name did not appear on the report; that he did not receive the sample, perform the analysis, or complete the review; and that he did not know the reason for some personnel decisions. App. 58. After weighing arguments from defense counsel concerning these admissions, and after considering the testimony of Razatos, who knew the laboratory's protocols and processes, the jury found no reasonable doubt as to the defendant's guilt.

In these circumstances, requiring the State to call the technician who filled out a form and recorded the results of a test is a hollow formality. The defense remains free to challenge any and all forensic evidence. It may call and examine the technician who performed a test. And it may call other expert witnesses to explain that tests are not always reliable or that the technician might have made a mistake. The jury can then decide whether to credit the test, as it did here. The States, furthermore, can assess the progress of scientific testing and enact or adopt statutes and rules to ensure that only reliable evidence is admitted. Rejecting these commonsense arguments and the concept that reliability is a legitimate concern, the Court today takes a different course. It once more assumes for itself a central role in mandating detailed evidentiary rules, thereby extending and confirming *Melendez-Diaz*'s "vast potential to disrupt criminal procedures." 557 U. S., at 331 (KENNEDY, J., dissenting).

II

The protections in the Confrontation Clause, and indeed the Sixth Amendment in general, are designed to ensure a fair trial with reliable evidence. But the *Crawford* v. *Washington*, 541 U. S. 36 (2004), line of cases has treated the reliability of evidence as a reason to exclude it. *Id.*, at 61–62. Today, for example, the Court bars admission of a lab report because it "is formalized in a signed document." *Ante*, at 665 (internal quotation marks omitted). The Court's unconventional and unstated premise is that the State—by acting to ensure a statement's reliability—makes the statement more formal and therefore less likely to be admitted. Park, Is Confrontation the Bottom Line? 19 Regent U. L. Rev. 459, 461 (2007). That is so, the Court insists, because reliability does not animate the Confrontation Clause. *Ante*, at 661; *Melendez-Diaz*, *supra*, at 317–318; *Crawford*, *supra*, at 61–62. Yet just this Term the Court ruled that, in another confrontation context, reliability was an essential part of the constitutional inquiry. See *Michigan* v. *Bryant*, 562 U. S. 344, 358–359, 361–362 (2011).

Like reliability, other principles have weaved in and out of the *Crawford* jurisprudence. Solemnity has sometimes been dispositive, see *Melendez-Diaz*, 557 U. S., at 310–311; *id.*, at 329–330 (THOMAS, J., concurring), and sometimes not, see *Davis*, 547 U. S., at 834–837, 841 (THOMAS, J., concurring in judgment in part and dissenting in part). So, too, with the elusive distinction between utterances aimed at proving past events, and those calculated to help police keep the peace. Compare *Davis*, *supra*, and *Bryant*, 562 U. S., at 371–376, with *id.*, at 384–387 (SCALIA, J., dissenting).

It is not even clear which witnesses' testimony could render a scientific report admissible under the Court's approach. *Melendez-Diaz* stated an inflexible rule: Where "analysts' affidavits" included "testimonial statements," defendants were "entitled to be confronted with the analysts" themselves.

557 U. S., at 311 (internal quotation marks omitted). Now, the Court reveals, this rule is either less clear than it first appeared or too strict to be followed. A report is admissible, today's opinion states, if a "live witness competent to testify to the truth of the statements made in the report" appears. *Ante,* at 651. Such witnesses include not just the certifying analyst, but also any "scientist who . . . perform[ed] or observe[d] the test reported in the certification." *Ante,* at 652.

Today's majority is not committed in equal shares to a common set of principles in applying the holding of *Crawford.* Compare *Davis*, *supra* (opinion for the Court by SCALIA, J.), with *id.*, at 834 (THOMAS, J., concurring in judgment in part and dissenting in part); and *Bryant*, *supra* (opinion for the Court by SOTOMAYOR, J.), with *id.*, at 378 (THOMAS, J., concurring in judgment), *id.*, at 379 (SCALIA, J., dissenting), and *id.*, at 395 (GINSBURG, J., dissenting); and *ante,* p. 647 (opinion of the Court), with *ante,* p. 668 (SOTOMAYOR, J., concurring). That the Court in the wake of *Crawford* has had such trouble fashioning a clear vision of that case's meaning is unsettling; for *Crawford* binds every judge in every criminal trial in every local, state, and federal court in the Nation. This Court's prior decisions leave trial judges to "guess what future rules this Court will distill from the sparse constitutional text," *Melendez-Diaz*, *supra*, at 331 (KENNEDY, J., dissenting), or to struggle to apply an "amorphous, if not entirely subjective," "highly context-dependent inquiry" involving "open-ended balancing," *Bryant*, *supra,* at 393 (SCALIA, J., dissenting) (internal quotation marks omitted) (listing 11 factors relevant under the majority's approach).

The persistent ambiguities in the Court's approach are symptomatic of a rule not amenable to sensible applications. Procedures involving multiple participants illustrate the problem. In *Melendez-Diaz* the Court insisted that its opin-

ion did not require everyone in the chain of custody to testify but then qualified that "what testimony *is* introduced must . . . be introduced live." 557 U. S., at 311, n. 1; *ante*, at 656, n. 2. This could mean that a statement that evidence remained in law-enforcement custody is admissible if the statement's maker appears in court. If so, an intern at police headquarters could review the evidence log, declare that chain of custody was retained, and so testify. The rule could also be that the intern's statement—which draws on statements in the evidence log—is inadmissible unless every officer who signed the log appears at trial. That rule, if applied to this case, would have conditioned admissibility of the report on the testimony of three or more identified witnesses. See App. 62. In other instances, 7 or even 40 witnesses could be required. See *supra*, at 676. The court has thus—in its fidelity to *Melendez-Diaz*—boxed itself into a choice of evils: render the Confrontation Clause *pro forma* or construe it so that its dictates are unworkable.

III

Crawford itself does not compel today's conclusion. It is true, as *Crawford* confirmed, that the Confrontation Clause seeks in part to bar the government from replicating trial procedures outside of public view. See 541 U. S., at 50; *Bryant*, *supra*, at 358–359. *Crawford* explained that the basic purpose of the Clause was to address the sort of abuses exemplified at the notorious treason trial of Sir Walter Raleigh. 541 U. S., at 51. On this view the Clause operates to bar admission of out-of-court statements obtained through formal interrogation in preparation for trial. The danger is that innocent defendants may be convicted on the basis of unreliable, untested statements by those who observed—or claimed to have observed—preparation for or commission of the crime. And, of course, those statements might not have been uttered at all or—even if spoken—might not have been true.

A rule that bars testimony of that sort, however, provides neither cause nor necessity to impose a constitutional bar on the admission of impartial lab reports like the instant one, reports prepared by experienced technicians in laboratories that follow professional norms and scientific protocols. In addition to the constitutional right to call witnesses in his own defense, the defendant in this case was already protected by checks on potential prosecutorial abuse such as free retesting for defendants; result-blind issuance of reports; testing by an independent agency; routine processes performed en masse, which reduce opportunities for targeted bias; and labs operating pursuant to scientific and professional norms and oversight. See Brief for Respondent 5, 14–15, 41, 54; New Mexico Scientific Laboratory Brief 2, 26.

In addition to preventing the State from conducting *ex parte* trials, *Crawford*'s rejection of the regime of *Ohio* v. *Roberts,* 448 U. S. 56 (1980), seemed to have two underlying jurisprudential objectives. One was to delink the intricacies of hearsay law from a constitutional mandate; and the other was to allow the States, in their own courts and legislatures and without this Court's supervision, to explore and develop sensible, specific evidentiary rules pertaining to the admissibility of certain statements. These results were to be welcomed, for this Court lacks the experience and day-to-day familiarity with the trial process to suit it well to assume the role of national tribunal for rules of evidence. Yet far from pursuing these objectives, the Court rejects them in favor of their opposites.

Instead of freeing the Clause from reliance on hearsay doctrines, the Court has now linked the Clause with hearsay rules in their earliest, most rigid, and least refined formulations. See, *e. g.,* Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 739–740, 742, 744–746; Gallanis, The Rise of Modern Evidence Law, 84 Iowa L. Rev. 499, 502–503, 514–515, 533–537 (1999). In

cases like *Melendez-Diaz* and this one, the Court has tied the Confrontation Clause to 18th-century hearsay rules unleavened by principles tending to make those rules more sensible. Sklansky, Hearsay's Last Hurrah, 2009 S. Ct. Rev. 1, 5–6, 36. As a result, the Court has taken the Clause far beyond its most important application, which is to forbid sworn, *ex parte*, out-of-court statements by unconfronted and available witnesses who observed the crime and do not appear at trial.

Second, the States are not just at risk of having some of their hearsay rules reviewed by this Court. They often are foreclosed now from contributing to the formulation and enactment of rules that make trials fairer and more reliable. For instance, recent state laws allowing admission of well-documented and supported reports of abuse by women whose abusers later murdered them must give way, unless that abuser murdered with the specific purpose of foreclosing the testimony. *Giles* v. *California*, 554 U. S. 353 (2008); Sklansky, *supra*, at 14–15. Whether those statutes could provide sufficient indicia of reliability and other safeguards to comply with the Confrontation Clause as it should be understood is, to be sure, an open question. The point is that the States cannot now participate in the development of this difficult part of the law.

In short, there is an ongoing, continued, and systemic displacement of the States and dislocation of the federal structure. Cf. *Melendez-Diaz*, 557 U. S., at 307–309, 327–329. If this Court persists in applying wooden formalism in order to bar reliable testimony offered by the prosecution—testimony thought proper for many decades in state and federal courts committed to devising fair trial processes—then the States might find it necessary and appropriate to enact statutes to accommodate this new, intrusive federal regime. If they do, those rules could remain on state statute books for decades, even if subsequent decisions of this Court were to better implement the objectives of *Crawford*. This underscores

the disruptive, long-term structural consequences of decisions like the one the Court announces today.

States also may decide it is proper and appropriate to enact statutes that require defense counsel to give advance notice if they are going to object to introduction of a report without the presence in court of the technician who prepared it. Indeed, today's opinion relies upon laws of that sort as a palliative to the disruption it is causing. *Ante*, at 666–667 (plurality opinion). It is quite unrealistic, however, to think that this will take away from the defense the incentives to insist on having the certifying analyst present. There is in the ordinary case that proceeds to trial no good reason for defense counsel to waive the right of confrontation as the Court now interprets it.

Today's opinion repeats an assertion from *Melendez-Diaz* that its decision will not "impose an undue burden on the prosecution." *Ante*, at 665 (plurality opinion). But evidence to the contrary already has begun to mount. See, *e. g.*, Brief for State of California et al. as *Amici Curiae* 7 (explaining that the 10 toxicologists for the Los Angeles Police Department spent 782 hours at 261 court appearances during a 1-year period); Brief for National District Attorneys Association et al. as *Amici Curiae* 23 (observing that each blood-alcohol analyst in California processes 3,220 cases per year on average). New and more rigorous empirical studies further detailing the unfortunate effects of *Melendez-Diaz* are sure to be forthcoming.

In the meantime, New Mexico's experience exemplifies the problems ahead. From 2008 to 2010, subpoenas requiring New Mexico analysts to testify in impaired-driving cases rose 71%, to 1,600—or 8 or 9 every workday. New Mexico Scientific Laboratory Brief 2. In a State that is the Nation's fifth largest by area and that employs just 10 total analysts, *id.*, at 3, each analyst in blood-alcohol cases recently received 200 subpoenas per year, *id.*, at 33. The analysts now must travel great distances on most working days. The result

has been, in the laboratory's words, "chaotic." *Id.*, at 5. And if the defense raises an objection and the analyst is tied up in another court proceeding; or on leave; or absent; or delayed in transit; or no longer employed; or ill; or no longer living, the defense gets a windfall. As a result, good defense attorneys will object in ever-greater numbers to a prosecution failure or inability to produce laboratory analysts at trial. The concomitant increases in subpoenas will further impede the state laboratory's ability to keep pace with its obligations. Scarce state resources could be committed to other urgent needs in the criminal justice system.

* * *

Seven years after its initiation, it bears remembering that the *Crawford* approach was not preordained. This Court's missteps have produced an interpretation of the word "witness" at odds with its meaning elsewhere in the Constitution, including elsewhere in the Sixth Amendment, see Amar, Sixth Amendment First Principles, 84 Geo. L. J. 641, 647, 691–696 (1996), and at odds with the sound administration of justice. It is time to return to solid ground. A proper place to begin that return is to decline to extend *Melendez-Diaz* to bar the reliable, commonsense evidentiary framework the State sought to follow in this case.

Syllabus

CSX TRANSPORTATION, INC. *v.* McBRIDE

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

No. 10–235. Argued March 28, 2011—Decided June 23, 2011

Respondent McBride, a locomotive engineer with petitioner CSX Transportation, Inc., an interstate railroad, sustained a debilitating hand injury while switching railroad cars. He filed suit under the Federal Employers' Liability Act (FELA), which holds railroads liable for employees' injuries "resulting in whole or in part from [carrier] negligence." 45 U. S. C. § 51. McBride alleged that CSX negligently (1) required him to use unsafe switching equipment and (2) failed to train him to operate that equipment. A verdict for McBride would be in order, the District Court instructed, if the jury found that CSX's negligence "caused or contributed to" his injury. The court declined CSX's request for additional charges requiring McBride to "show that . . . [CSX's] negligence was a proximate cause of the injury" and defining "proximate cause" as "any cause which, in natural or probable sequence, produced the injury complained of." Instead, relying on *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, the court gave the Seventh Circuit's pattern FELA instruction: "Defendant 'caused or contributed to' Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury." The jury returned a verdict for McBride.

On appeal, CSX renewed its objection to the failure to instruct on proximate cause, now defining the phrase to require a "direct relation between the injury asserted and the injurious conduct alleged." The appeals court, however, approved the District Court's instruction and affirmed its judgment for McBride. Because *Rogers* had relaxed the proximate-cause requirement in FELA cases, the court said, an instruction that simply paraphrased *Rogers*' language could not be declared erroneous.

Held: The judgment is affirmed.

598 F. 3d 388, affirmed.

Justice Ginsburg delivered the opinion of the Court with respect to all but Part III–A, concluding, in accord with FELA's text and purpose, *Rogers*, and the uniform view of the federal appellate courts, that FELA does not incorporate stock "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA

cases simply tracks the language Congress employed, informing juries that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part—no matter how small—in bringing about the injury." That, indeed, is the test Congress prescribed for proximate causation in FELA cases. Pp. 691–701, 703–705.

(a) CSX's interpretation of *Rogers* is not persuasive. Pp. 691–699.

(1) Given FELA's "broad" causation language, *Urie* v. *Thompson*, 337 U. S. 163, 181, and Congress' "humanitarian" and "remedial goal[s]" in enacting the statute, FELA's causation standard is "relaxed" compared to that applicable in common-law tort litigation, *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532, 542–543. *Rogers* described that relaxed standard as "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U. S., at 506. Because the District Court's instruction tracked *Rogers*' language, the instruction was plainly proper so long as *Rogers* actually prescribes the causation definition applicable under FELA. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172. CSX, however, contends that *Rogers* was a narrowly focused decision that did not displace common-law formulations of "proximate cause." Drawing largely on Justice Souter's concurrence in *Norfolk Southern R. Co.* v. *Sorrell*, 549 U. S. 158, 173, CSX urges that *Rogers'* "any part . . . in producing the injury" test displaced only common-law restrictions on recovery for injuries involving contributory negligence or other multiple causes, but did not address the requisite directness of a cause. Pp. 691–693.

(2) In *Rogers*, the employee was burning vegetation that lined his employer's railroad tracks. A passing train fanned the flames, which spread to the top of the culvert where he was standing. Attempting to escape, he slipped and fell on the sloping gravel covering the culvert, sustaining serious injuries. 352 U. S., at 501–503. The state-court jury returned a verdict for him, but the Missouri Supreme Court reversed. Even if the railroad had been negligent in failing to maintain a flat surface, the court reasoned, the employee was at fault because of his lack of attention to the spreading fire. As the fire "was something extraordinary, unrelated to, and disconnected from the incline of the gravel," the court found that "plaintiff's injury was not the natural and probable consequence of any negligence of defendant." *Rogers* v. *Thompson*, 284 S. W. 2d 467, 472. This Court reversed. FELA, this Court affirmed, did not incorporate any traditional common-law formulation of "proximate causation[,] which [requires] the jury [to] find that the defendant's negligence was the sole, efficient, producing cause of injury." 352 U. S., at 506. Whether the railroad's negligent act was

the "immediate reason" for the fall, the Court added, was "irrelevant." *Id.*, at 503. The Court then announced its "any part . . . in producing the injury" test, *id.*, at 506.

Rogers is most sensibly read as a comprehensive statement of FELA's causation standard. The State Supreme Court there acknowledged that a FELA injury might have multiple causes, but considered the respondent railroad's part too indirect to establish the requisite causation. That is the very reasoning this Court rejected in *Rogers.* It is also the reasoning CSX asks this Court to resurrect. The interpretation adopted today is informed by the statutory history, see *Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 3, the precedents on which *Rogers* drew, see, *e. g.*, *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 523–524, this Court's subsequent decisions, see, *e. g.*, *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523–524, the decisions of every Court of Appeals that reviews FELA cases, and the overwhelming majority of state courts and scholars. This understanding of *Rogers* "has been accepted as settled law for several decades." *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 32. To discard or restrict the instruction now would ill serve *stare decisis.* Pp. 693–699.

(b) CSX nonetheless worries that the *Rogers* "any part" instruction opens the door to unlimited liability, inviting juries to impose liability on the basis of "but for" causation. A half century's experience with *Rogers* gives little cause for concern: CSX has not identified even *one* trial in which the instruction generated an absurd or untoward award.

FELA's "in whole or in part" language is straightforward. "[R]easonable foreseeability of harm is an essential ingredient of [FELA] *negligence,*" *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U. S. 108, 117 (emphasis added). If negligence is proved, however, and is shown to have "played any part, even the slightest, in producing the injury," *Rogers*, 352 U. S., at 506, then the carrier is answerable in damages even if " 'the extent of the [injury] or the manner in which it occurred' " was not "[p]robable" or "foreseeable." *Gallick*, 372 U. S., at 120–121, and n. 8. Properly instructed on negligence and causation, and told, as is standard practice in FELA cases, to use their "common sense" in reviewing the evidence, juries would have no warrant to award damages in far out "but for" scenarios, and judges would have no warrant to submit such cases to the jury. Pp. 699–701, 703–705.

GINSBURG, J., delivered the opinion of the Court, except as to Part III–A. BREYER, SOTOMAYOR, and KAGAN, JJ., joined that opinion in full, and THOMAS, J., joined as to all but Part III–A. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, KENNEDY, and ALITO, JJ., joined, *post*, p. 705.

Charles A. Rothfeld argued the cause for petitioner. With him on the briefs were *Evan M. Tager*, *Dan Himmelfarb*, and *James A. Bax*.

David C. Frederick argued the cause for respondent. With him on the brief were *Derek T. Ho*, *Brendan J. Crimmins*, *Daniel G. Bird*, *Michael A. Gross*, *Lawrence M. Mann*, *John P. Kujawski*, and *Robert P. Marcus*.*

JUSTICE GINSBURG delivered the opinion of the Court, except as to Part III–A.†

This case concerns the standard of causation applicable in cases arising under the Federal Employers' Liability Act (FELA or Act), 45 U. S. C. § 51 *et seq.* FELA renders railroads liable for employees' injuries or deaths "resulting in whole or in part from [carrier] negligence." § 51. In accord with the text and purpose of the Act, this Court's decision in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957), and the uniform view of federal appellate courts, we conclude that the Act does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

**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;* for the American Train Dispatchers Association et al. by *Harold A. Ross* and *Clinton J. Miller III;* and for Cheryl Campagno et al. by *Michael F. Sturley*, *S. Scott Bluestein*, *John W. deGravelles*, *Ross Diamond*, *Richard J. Dodson*, *Kenneth H. Hooks III*, *Paul Edelman*, *John H. Hickey*, *Paul T. Hofmann*, and *Roger Vaughan*.

William G. Jungbauer filed a brief for the Academy of Rail Labor Attorneys as *amicus curiae*.

†JUSTICE THOMAS joins all but Part III–A of this opinion.

I

Respondent Robert McBride worked as a locomotive engineer for petitioner CSX Transportation, Inc., which operates an interstate system of railroads. On April 12, 2004, CSX assigned McBride to assist on a local run between Evansville, Indiana, and Mount Vernon, Illinois. The run involved frequent starts and stops to add and remove individual rail cars, a process known as "switching." The train McBride was to operate had an unusual engine configuration: two "wide-body" engines followed by three smaller conventional cabs. McBride protested that the configuration was unsafe, because switching with heavy, wide-body engines required constant use of a hand-operated independent brake. But he was told to take the train as is. About ten hours into the run, McBride injured his hand while using the independent brake. Despite two surgeries and extensive physical therapy, he never regained full use of the hand.

Seeking compensation for his injury, McBride commenced a FELA action against CSX in the U. S. District Court for the Southern District of Illinois. He alleged that CSX was twice negligent: First, the railroad required him to use equipment unsafe for switching; second, CSX failed to train him to operate that equipment. App. 24a–26a. A verdict for McBride would be in order, the District Court instructed, if the jury found that CSX "was negligent" and that the "negligence caused or contributed to" McBride's injury. *Id.*, at 23a.

CSX sought additional charges that the court declined to give. One of the rejected instructions would have required "the plaintiff [to] show that . . . the defendant's negligence was a proximate cause of the injury." *Id.*, at 34a. Another would have defined "proximate cause" to mean "any cause which, in natural or probable sequence, produced the injury complained of," with the qualification that a proximate cause "need not be the only cause, nor the last or nearest cause." *Id.*, at 32a.

Instead, the District Court employed, as McBride requested, the Seventh Circuit's pattern instruction for FELA cases, which reads:

> "Defendant 'caused or contributed to' Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence." *Id.*, at 31a.

For this instruction, the Seventh Circuit relied upon this Court's decision in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957). The jury returned a verdict for McBride, setting total damages at $275,000, but reducing that amount by one-third, the percentage the jury attributed to plaintiff's negligence. App. 29a.

CSX appealed to the Seventh Circuit, renewing its objection to the failure to instruct on "proximate cause." Before the appellate court, CSX "maintain[ed] that the correct definition of proximate causation is a 'direct relation between the injury asserted and the injurious conduct alleged.'" 598 F. 3d 388, 393, n. 3 (2010) (quoting *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992)). A properly instructed jury, CSX contended, might have found that the chain of causation was too indirect, or that the engine configuration was unsafe because of its propensity to cause crashes during switching, not because of any risk to an engineer's hands. Brief for Defendant-Appellant in No. 08–3557 (CA7), pp. 49–52.

The Court of Appeals approved the District Court's instruction and affirmed the judgment entered on the jury's verdict. *Rogers* had "relaxed the proximate cause requirement" in FELA cases, the Seventh Circuit concluded, a view of *Rogers* "echoed by every other court of appeals." 598 F. 3d, at 399. While acknowledging that a handful of state courts "still appl[ied] traditional formulations of proximate cause in FELA cases," *id.*, at 404, n. 7, the Seventh Circuit

said it could hardly declare erroneous an instruction that "simply paraphrase[d] the Supreme Court's own words in *Rogers*," *id.*, at 406.

We granted certiorari to decide whether the causation instruction endorsed by the Seventh Circuit is proper in FELA cases. 562 U. S. 1060 (2010). That instruction does not include the term "proximate cause," but does tell the jury defendant's negligence must "pla[y] a part—no matter how small—in bringing about the [plaintiff's] injury." App. 31a.

II

A

The railroad business was exceptionally hazardous at the dawn of the 20th century. As we have recounted, "the physical dangers of railroading . . . resulted in the death or maiming of thousands of workers every year," *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532, 542 (1994), including 281,645 casualties in the year 1908 alone, S. Rep. No. 432, 61st Cong., 2d Sess., 2 (1910). Enacted that same year in an effort to "shif[t] part of the human overhead of doing business from employees to their employers," *Gottshall*, 512 U. S., at 542 (internal quotation marks omitted), FELA prescribes:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U. S. C. § 51 (emphasis added).

Liability under FELA is limited in these key respects: Railroads are liable only to their employees, and only for injuries sustained in the course of employment. FELA's language on causation, however, "is as broad as could be framed." *Urie* v. *Thompson*, 337 U. S. 163, 181 (1949). Given the breadth of the phrase "resulting in whole or in

part from the [railroad's] negligence," and Congress' "humanitarian" and "remedial goal[s]," we have recognized that, in comparison to tort litigation at common law, "a relaxed standard of causation applies under FELA." *Gottshall*, 512 U. S., at 542–543. In our 1957 decision in *Rogers*, we described that relaxed standard as follows:

> "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U. S., at 506.

As the Seventh Circuit emphasized, the instruction the District Court gave in this case, permitting a verdict for McBride if "[railroad] negligence played a part—no matter how small—in bringing about the injury," App. 31a, tracked the language of *Rogers*. If *Rogers* prescribes the definition of causation applicable under FELA, that instruction was plainly proper. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation . . . ."). While CSX does not ask us to disturb *Rogers*, the railroad contends that lower courts have overread that opinion. In CSX's view, shared by the dissent, *post*, at 713–714, *Rogers* was a narrowly focused decision that did not touch, concern, much less displace common-law formulations of "proximate cause."

Understanding this argument requires some background. The *term* "proximate cause" is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 42, p. 273 (5th ed. 1984) (hereinafter Prosser and Keeton). "What we . . . mean by the word 'proximate,'" one noted jurist has explained, is simply this: "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf*

v. *Long Island R. Co.*, 248 N. Y. 339, 352, 162 N. E. 99, 103 (1928) (Andrews, J., dissenting). Common-law "proximate cause" formulations varied, and were often both constricted and difficult to comprehend. See T. Cooley, Law of Torts 73–77, 812–813 (2d ed. 1888) (describing, for example, prescriptions precluding recovery in the event of any "intervening" cause or any contributory negligence). Some courts cut off liability if a "proximate cause" was not the *sole* proximate cause. Prosser and Keeton § 65, p. 452 (noting "tendency . . . to look for some single, principal, dominant, 'proximate' cause of every injury"). Many used definitions resembling those CSX proposed to the District Court or urged in the Court of Appeals. See *supra*, at 689–690 (CSX proposed key words "natural or probable" or "direct" to describe required relationship between injury and alleged negligent conduct); Prosser and Keeton § 43, pp. 282–283.

Drawing largely on Justice Souter's concurring opinion in *Norfolk Southern R. Co.* v. *Sorrell*, 549 U. S. 158, 173 (2007), CSX contends that the *Rogers* "any part" test displaced only common-law restrictions on recovery for injuries involving contributory negligence or other "multiple causes." Brief for Petitioner 35 (internal quotation marks omitted).[1] *Rogers* "did not address the requisite directness of a cause," CSX argues, hence that question continues to be governed by restrictive common-law formulations. Brief for Petitioner 35.

B

To evaluate CSX's argument, we turn first to the facts of *Rogers*. The employee in that case was injured while burning off weeds and vegetation that lined the defendant's railroad tracks. A passing train had fanned the flames, which spread from the vegetation to the top of a culvert where the employee was standing. Attempting to escape, the em-

[1] In *Sorrell*, the Court held that the causation standard was the same for railroad negligence and employee contributory negligence, but said nothing about what that standard should be. 549 U. S., at 164–165.

ployee slipped and fell on the sloping gravel covering the culvert, sustaining serious injuries. 352 U. S., at 501–503. A Missouri state-court jury returned a verdict for the employee, but the Missouri Supreme Court reversed. Even if the railroad had been negligent in failing to maintain a flat surface, the court reasoned, the employee was at fault because of his lack of attention to the spreading fire. *Rogers* v. *Thompson*, 284 S. W. 2d 467, 472 (1955). As the fire "was something extraordinary, unrelated to, and disconnected from the incline of the gravel," the court felt "obliged to say [that] plaintiff's injury was not the natural and probable consequence of any negligence of defendant." *Ibid.*

We held that the jury's verdict should not have been upset. Describing two potential readings of the Missouri Supreme Court's opinion, we condemned both. First, the court erred in concluding that the employee's negligence was the "sole" cause of the injury, for the jury reasonably found that railroad negligence played a part. *Rogers*, 352 U. S., at 504–505. Second, the court erred insofar as it held that the railroad's negligence was not a sufficient cause unless it was the more "probable" cause of the injury. *Id.*, at 505. FELA, we affirmed, did not incorporate any traditional common-law formulation of "proximate causation[,] which [requires] the jury [to] find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.*, at 506. Whether the railroad's negligent act was the "immediate reason" for the fall, we added, was "an irrelevant consideration." *Id.*, at 503. We then announced the "any part" test, *id.*, at 506, and reiterated it several times. See, *e. g.*, *id.*, at 507 ("narro[w]" and "single inquiry" is whether "negligence of the employer played any part at all" in bringing about the injury); *id.*, at 508 (FELA case "rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury").[2]

[2] In face of *Rogers*' repeated admonition that the "any part . . . in producing the injury" test was the *single* test for causation under FELA, the dissent speculates that *Rogers* was simply making a veiled reference to a

Rogers is most sensibly read as a comprehensive statement of the FELA causation standard. Notably, the Missouri Supreme Court in *Rogers* did not doubt that a FELA injury might have multiple causes, including railroad negligence and employee negligence. See 284 S. W. 2d, at 472 (reciting FELA's "in whole or in part" language). But the railroad's part, according to the state court, was too indirect, not sufficiently "natural and probable," to establish the requisite causation. *Ibid.* That is the very reasoning the Court rejected in *Rogers*. It is also the reasoning CSX asks us to resurrect.

Our understanding is informed by the statutory history and precedent on which *Rogers* drew. Before FELA was enacted, the "harsh and technical" rules of state common law had "made recovery difficult or even impossible" for injured railroad workers. *Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 3 (1964). "[D]issatisfied with the [railroad's] common-law duty," Congress sought to "supplan[t] that duty with [FELA's] far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers*, 352 U. S., at 507. Yet, *Rogers* observed, the Missouri court and other lower courts continued to ignore FELA's "significan[t]" departures from the "ordinary common-law negligence" scheme, to reinsert common-law formulations of causation involving "probabilities," and consequently to "deprive litigants of their right to a jury determination." *Id.*, at 507, 509–510. Aiming to end lower court disregard of congressional purpose, the *Rogers* Court repeatedly called the "any part" test the "*single*" inquiry determining causation in FELA cases. *Id.*, at 507, 508 (emphasis added). In short, CSX's argument that the

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particular form of modified comparative negligence, *i. e.*, allowing plaintiff to prevail on showing that her negligence was "slight" while the railroad's was "gross." *Post*, at 713–714. That is not what *Rogers* conveyed. To repeat, *Rogers* instructed that "the test of a jury case [under FELA] is simply whether . . . employer negligence played any part, even the slightest, in producing the injury." 352 U. S., at 506.

Rogers standard concerns only division of responsibility among multiple actors, and not causation more generally, misses the thrust of our decision in that case.

Tellingly, in announcing the "any part . . . in producing the injury" test, *Rogers* cited *Coray* v. *Southern Pacific Co.*, 335 U. S. 520 (1949), a decision emphasizing that FELA had parted from traditional common-law formulations of causation. What qualified as a "proximate" or legally sufficient cause in FELA cases, *Coray* had explained, was determined by the statutory phrase "resulting in whole or in part," which Congress "selected . . . to fix liability" in language that was "simple and direct." *Id.*, at 524. That straightforward phrase, *Coray* observed, was incompatible with "dialectical subtleties" that common-law courts employed to determine whether a particular cause was sufficiently "substantial" to constitute a proximate cause. *Id.*, at 523–524.[3]

Our subsequent decisions have confirmed that *Rogers* announced a general standard for causation in FELA cases, not one addressed exclusively to injuries involving multiple potentially cognizable causes. The very day *Rogers* was announced, we applied its "any part" instruction in a case in which the sole causation issue was the directness or foreseeability of the connection between the carrier's negligence and the plaintiff's injury. See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523–524 (1957) (plurality opinion).

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[3] The dissent, while recognizing "the variety of formulations" courts have employed to define "proximate cause," *post*, at 707, does not say which of the many formulations it would declare applicable in FELA cases. We regard the phrase "negligence played a part—no matter how small," see *Rogers*, 352 U. S., at 508, as synonymous with "negligence played any part, even the slightest," see *id.*, at 506, and the phrase "in producing the injury" as synonymous with the phrase "in bringing about the injury." We therefore approve both the Seventh Circuit's instruction and the "any part, even the slightest, in producing the injury" formulation. The host of definitions of proximate cause, in contrast, are hardly synonymous.

A few years later, in *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U. S. 108 (1963), we held jury findings for the plaintiff proper in a case presenting the following facts: For years, the railroad had allowed a fetid pool, containing "dead and decayed rats and pigeons," to accumulate near its right-of-way; while standing near the pool, the plaintiff-employee suffered an insect bite that became infected and required amputation of his legs. *Id.*, at 109. The appellate court had concluded there was insufficient evidence of causation to warrant submission of the case to the jury. *Id.*, at 112. We reversed, reciting the causation standard *Rogers* announced. 372 U. S., at 116–117, 120–121. See also *Crane* v. *Cedar Rapids & Iowa City R. Co.*, 395 U. S. 164, 166–167 (1969) (contrasting suit by railroad employee, who "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation," with suit by nonemployee, where "definition of causation . . . [is] left to state law"); *Gottshall*, 512 U. S., at 543 ("relaxed standard of causation applies under FELA").[4]

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[4] CSX and the dissent observe, correctly, that some of our pre-*Rogers* decisions invoked common-law formulations of proximate cause. See, *e. g.*, *Brady* v. *Southern R. Co.*, 320 U. S. 476, 483 (1943) (injury must be "the natural and probable consequence of the negligence" (internal quotation marks omitted)). Indeed, the "natural or probable" charge that CSX requested was drawn from *Brady*, which in turn relied on a pre-FELA case, *Milwaukee & St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 475 (1877). But other pre-*Rogers* FELA decisions invoked no common-law formulations. See, *e. g.*, *Union Pacific R. Co.* v. *Huxoll*, 245 U. S. 535, 537 (1918) (approving instruction asking whether negligence "contribute[d] 'in whole or in part' to cause the death"); *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 524 (1949) (rejecting use of common-law "dialectical subtleties" concerning the term "proximate cause," and approving use of "simple and direct" statutory language). We rely on *Rogers* not because "time begins in 1957," *post*, at 711, but because *Rogers* stated a clear instruction, comprehensible by juries: Did the railroad's "negligence pla[y] any part, even the slightest, in producing [the plaintiff's] injury?" 352 U. S., at 506. In so instructing, *Rogers* replaced the array of formulations then prevalent. We have repeated the *Rogers* instruction in subsequent opinions, and

In reliance on *Rogers*, every Court of Appeals that reviews judgments in FELA cases has approved jury instructions on causation identical or substantively equivalent to the Seventh Circuit's instruction.[5] Each appellate court has rejected common-law formulations of proximate cause of the kind CSX requested in this case. See *supra*, at 689–690. The current model federal instruction, recognizing that the "FELA causation standard is distinct from the usual proximate cause standard," reads:

> "The fourth element [of a FELA action] is whether an injury to the plaintiff resulted in whole or part from the negligence of the railroad or its employees or agents. In other words, did such negligence play any part, even the slightest, in bringing about an injury to the plaintiff?" 5 L. Sand et al., Modern Federal Jury Instructions–Civil ¶ 89.02, pp. 89–38, 89–40, and comment (2010) (hereinafter Sand).

Since shortly after *Rogers* was decided, charges of this order have been accepted as the federal model. See W. Mathes & E. Devitt, Federal Jury Practice and Instructions § 84.12, p. 517 (1965) (under FELA, injury "is proximately caused by" the defendant's negligence if the negligence "played any part, no matter how small, in bringing about or actually

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lower courts have employed it for over 50 years. To unsettle the law as the dissent urges would show scant respect for the principle of *stare decisis*.

[5] See *Moody* v. *Maine Central R. Co.*, 823 F. 2d 693, 695–696 (CA1 1987); *Ulfik* v. *Metro-North Commuter R. Co.*, 77 F. 3d 54, 58 (CA2 1996); *Hines* v. *Consolidated Rail Corporation*, 926 F. 2d 262, 267 (CA3 1991); *Hernandez* v. *Trawler Miss Vertie Mae, Inc.*, 187 F. 3d 432, 436 (CA4 1999); *Nivens* v. *St. Louis Southwestern R. Co.*, 425 F. 2d 114, 118 (CA5 1970); *Tyree* v. *New York Central R. Co.*, 382 F. 2d 524, 527 (CA6 1967); *Nordgren* v. *Burlington No. R. Co.*, 101 F. 3d 1246, 1249 (CA8 1996); *Claar* v. *Burlington No. R. Co.*, 29 F. 3d 499, 503 (CA9 1994); *Summers* v. *Missouri Pacific R. System*, 132 F. 3d 599, 606–607 (CA10 1997); *Sea-Land Serv., Inc.* v. *Sellan*, 231 F. 3d 848, 851 (CA11 2000); *Little* v. *National Railroad Passenger Corporation*, 865 F. 2d 1329 (CADC 1988) (table).

causing the injury").[6] The overwhelming majority of state courts[7] and scholars[8] similarly comprehend FELA's causation standard.

In sum, the understanding of *Rogers* we here affirm "has been accepted as settled law for several decades." *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 32 (2005). "Congress has had [more than 50] years in which it could have corrected our decision in *[Rogers]* if it disagreed with it, and has not chosen to do so." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991). Countless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of "stability" and "predictability" that the doctrine of statutory *stare decisis* aims to ensure. 502 U. S., at 202.

III

CSX nonetheless insists that proximate causation, as captured in the charge and definitions CSX requested, is a concept fundamental to actions sounding in negligence. The *Rogers* "any part" instruction opens the door to unlimited liability, CSX worries, inviting juries to impose liability on the basis of "but for" causation. The dissent shares these fears. *Post*, at 710–711, 719–720. But a half century's ex-

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[6] All five Circuits that have published pattern FELA causation instructions use the language of the statute or of *Rogers* rather than traditional common-law formulations. See Brief for Academy of Rail Labor Attorneys as *Amicus Curiae* 19–20.

[7] See *id.*, at 21–22, 25–27 (collecting cases and pattern instructions). The parties dispute the exact figures, but all agree there are no more than a handful of exceptions. The Seventh Circuit found "[a]t most" three. 598 F. 3d 388, 404, n. 7 (2010).

[8] See, *e. g.*, DeParcq, The Supreme Court and the Federal Employers' Liability Act, 1956–57 Term, 36 Texas L. Rev. 145, 154–155 (1957); 2 J. Lee & B. Lindahl, Modern Tort Law: Liability and Litigation § 24:2, pp. 24–2 to 24–5 (2d ed. 2005); 9 A. Larson & L. Larson, Larson's Workers' Compensation Law § 147.07[7], pp. 147–19 to 147–20 (2010); Prosser and Keeton § 80, p. 579.

perience with *Rogers* gives us little cause for concern: CSX's briefs did not identify even *one* trial in which the instruction generated an absurd or untoward award.[9] Nor has the dissent managed to uncover such a case. *Post*, at 717–718 (citing no actual case but conjuring up images of falling pianos and spilled coffee).

While some courts have said that *Rogers* eliminated the *concept* of proximate cause in FELA cases,[10] we think it "more accurate . . . to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits." *Sorrell*, 549 U. S., at 178 (GINSBURG, J., concurring in judgment). That understanding was expressed by the drafters of the 1965 federal model instructions, see *supra*, at 698–699: Under FELA, injury "is proximately caused" by the railroad's negligence if that negligence "played any part . . . in . . . causing the injury." Avoiding "dialectical subtleties" that confound attempts to convey intelligibly to juries just what "proximate cause" means, see *Coray*, 335 U. S., at 524, the *Rogers* instruction uses the everyday words contained in the statute itself. Jurors can comprehend those words and apply them in light of their experience and common sense. Unless and until Congress orders otherwise, we see no good reason to tamper with an instruction tied to FELA's text,

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[9] Pressed on this point at oral argument, CSX directed us to two cases cited by its *amicus*. In *Richards* v. *Consolidated Rail Corporation*, 330 F. 3d 428, 431, 437 (CA6 2003), a defective brake malfunctioned en route, and the employee was injured while inspecting underneath the train to locate the problem; the Sixth Circuit sent the case to a jury. In *Norfolk Southern R. Co.* v. *Schumpert*, 270 Ga. App. 782, 783–786, 608 S. E. 2d 236, 238–239 (2004), the employee was injured while replacing a coupling device that fell to the ground because of a negligently absent pin; the court upheld a jury award. In our view, the causal link in these cases is hardly farfetched; in fact, in both, the lower courts observed that the evidence did not show mere "but for" causation. See *Richards*, 330 F. 3d, at 437, and n. 5; *Schumpert*, 270 Ga. App., at 784, 608 S. E. 2d, at 239.

[10] See, *e. g.*, *Summers*, 132 F. 3d, at 606; *Oglesby* v. *Southern Pacific Transp. Co.*, 6 F. 3d 603, 609 (CA9 1993).

long employed by lower courts, and hardly shown to be unfair or unworkable.

A

As we have noted, see *supra*, at 692–693, the phrase "proximate cause" is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes. Prosser and Keeton explain: "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." § 41, p. 264. To prevent "infinite liability," *ibid.*, courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim.

The term "proximate cause" itself is hardly essential to the imposition of such limits. It is a term notoriously confusing. See, *e. g.*, *id.*, § 42, p. 273 ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins. . . . It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness. For this reason 'legal cause' or perhaps even 'responsible cause' would be a more appropriate term." (footnotes omitted)).

And the lack of consensus on any one definition of "proximate cause" is manifest. *Id.*, § 41, p. 263. Common-law formulations include, *inter alia*, the "immediate" or "nearest" antecedent test; the "efficient, producing cause" test; the "substantial factor" test; and the "probable," or "natural and probable," or "foreseeable" consequence test. Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 103, 106–121 (1911); Smith, Legal Cause in Actions of Tort (Concluded), 25 Harv. L. Rev. 303, 311 (1912).

Notably, CSX itself did not settle on a uniform definition of the term "proximate cause" in this litigation, nor does the dissent. In the District Court, CSX requested a jury instruction defining "proximate cause" to mean "any cause which, in natural or probable sequence, produced the injury

complained of." App. 32a. On appeal, "CSX maintain[ed] that the correct definition . . . is a 'direct relation between the injury asserted and the injurious conduct alleged.' " 598 F. 3d, at 393, n. 3. Before this Court, CSX called for "a demonstration that the plaintiff's injury resulted from the wrongful conduct in a way that was natural, probable, and foreseeable." Tr. of Oral Arg. 9–10.

Lay triers, studies show, are scarcely aided by charges so phrased. See Steele & Thornburg, Jury Instructions: A Persistent Failure To Communicate, 67 N. C. L. Rev. 77, 88–92, 110 (1988) (85% of actual and potential jurors were unable to understand a pattern proximate-cause instruction similar to the one requested by CSX); Charrow & Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 Colum. L. Rev. 1306, 1353 (1979) (nearly one-quarter of subjects misunderstood proximate cause to mean "approximate cause" or "estimated cause"). In light of the potential of "proximate cause" instructions to leave jurors at sea, it is not surprising that the drafters of the Restatement (Third) of Torts avoided the term altogether. See 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 (2005) (confining liability to "harms that result from the risks that made the actor's conduct tortious"); *id.*, Comment *b*.

Congress, it is true, has written the words "proximate cause" into a number of statutes.[11] But when the legislative text uses less legalistic language, *e. g.*, "caused by," "occasioned by," "in consequence of," or, as in FELA, "resulting in whole or in part from," and the legislative purpose is to loosen constraints on recovery, there is little reason for

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[11] See, *e. g.,* Act of Sept. 7, 1916, ch. 458, § 1, 39 Stat. 742–743 (United States not liable to injured employee whose "intoxication . . . is the proximate cause of the injury"); Act of Oct. 6, 1917, ch. 105, § 306, 40 Stat. 407 (United States liable to member of Armed Forces for postdischarge disability that "proximately result[ed] from [a predischarge] injury"); Act of June 5, 1924, ch. 261, § 2, 43 Stat. 389 (United States liable for "any disease proximately caused" by federal employment).

courts to hark back to stock, judge-made proximate-cause formulations. See Smith, Legal Cause in Actions of Tort (Continued), 25 Harv. L. Rev. 223, 235 (1912).

B

FELA's language is straightforward: Railroads are made answerable in damages for an employee's "injury or death resulting in whole or in part from [carrier] negligence." 45 U. S. C. § 51. The argument for importing into FELA's text "previous judicial definitions or *dicta*" originating in non-statutory common-law actions, see Smith, Legal Cause in Actions of Tort (Continued), *supra*, at 235, misapprehends how foreseeability figures in FELA cases.

"[R]easonable foreseeability of harm," we clarified in *Gallick*, is indeed "an essential ingredient of [FELA] *negligence*." 372 U. S., at 117 (emphasis added). The jury, therefore, must be asked, initially: Did the carrier "fai[l] to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances[?]" *Id.*, at 118. In that regard, the jury may be told that "[the railroad's] duties are measured by what is reasonably foreseeable under like circumstances." *Ibid.* (internal quotation marks omitted). Thus, "[i]f a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition." *Id.*, at 118, n. 7 (internal quotation marks omitted).[12] If negligence is proved, however, and is shown to have "*played any part, even the slightest, in producing the injury*," *Rogers*, 352 U. S., at 506 (emphasis added),[13] then

[12] A railroad's violation of a safety statute, however, is negligence *per se*. See *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 438 (1958).

[13] The dissent protests that we would require only a showing that "defendant was negligent in the first place." *Post*, at 717. But under *Rogers* and the pattern instructions based on *Rogers*, the jury must find that defendant's negligence in fact "played a part—no matter how small—in bringing about the injury." See *supra*, at 690, 698–699 (Seventh Circuit pattern instruction and model federal instructions).

the carrier is answerable in damages even if "the extent of the [injury] or the manner in which it occurred" was not "probable" or "foreseeable." *Gallick*, 372 U. S., at 120–121, and n. 8 (internal quotation marks omitted); see 4 F. Harper, F. James, & O. Gray, Law of Torts § 20.5(6), p. 203 (3d ed. 2007); 5 Sand 89–21.

Properly instructed on negligence and causation, and told, as is standard practice in FELA cases, to use their "common sense" in reviewing the evidence, see Tr. 205 (Aug. 19, 2008), juries would have no warrant to award damages in far out "but for" scenarios. Indeed, judges would have no warrant to submit such cases to the jury. See *Nicholson* v. *Erie R. Co.*, 253 F. 2d 939, 940–941 (CA2 1958) (alleged negligence was failure to provide lavatory for female employee; employee was injured by a suitcase while looking for a lavatory in a passenger car; applying *Rogers*, appellate court affirmed lower court's dismissal for lack of causation); *Moody* v. *Boston & Maine Corp.*, 921 F. 2d 1, 2–5 (CA1 1990) (employee suffered stress-related heart attack after railroad forced him to work more than 12 hours with inadequate breaks; applying *Rogers*, appellate court affirmed grant of summary judgment for lack of causation). See also *supra*, at 699–700 (*Rogers* has generated no extravagant jury awards or appellate court decisions).

In addition to the constraints of common sense, FELA's limitations on who may sue, and for what, reduce the risk of exorbitant liability. As earlier noted, see *supra*, at 691, the statute confines the universe of compensable injuries to those sustained by employees, during employment. § 51. Hence there are no unforeseeable plaintiffs in FELA cases. And the statute weeds out the injuries most likely to bear only a tenuous relationship to railroad negligence, namely, those occurring *outside* the workplace.[14]

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[14] CSX observes, as does the dissent, *post*, at 708–709, that we have applied traditional notions of proximate causation under the Racketeer Influenced and Corrupt Organizations Act, antitrust, and securities fraud statutes. But those statutes cover broader classes of potential injuries

There is a real risk, on the other hand, that the "in natural or probable sequence" charge sought by CSX would mislead. If taken to mean the plaintiff's injury must *probably* ("more likely than not") follow from the railroad's negligent conduct, then the force of FELA's "resulting in whole or in part" language would be blunted. Railroad negligence would "probably" cause a worker's injury only if that negligence was a dominant contributor to the injury, not merely a contributor in any part.

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For the reasons stated, it is not error in a FELA case to refuse a charge embracing stock proximate-cause terminology. Juries in such cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part—no matter how small—in bringing about the injury." That, indeed, is the test Congress prescribed for proximate causation in FELA cases. See *supra*, at 696, 700. As the courts below so held, the judgment of the U. S. Court of Appeals for the Seventh Circuit is

Affirmed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE ALITO join, dissenting.

"It is a well established principle of [the common] law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause: causa proxima non remota spectatur." *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Pet. 213, 223 (1837) (Story, J.). The Court today holds that this principle does not apply to actions under the Fed-

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and complainants. And none assign liability in language akin to FELA's "resulting *in whole or in part*" standard. §51 (emphasis added). See *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 265–268 (1992); *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 529–535 (1983); *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 342–346 (2005).

eral Employers' Liability Act (FELA), and that those suing under that statute may recover for injuries that were not proximately caused by the negligence of their employers. This even though we have held that FELA generally follows the common law, unless the Act expressly provides otherwise; even though FELA expressly abrogated common law rules in four other respects, but said nothing about proximate cause; and even though our own cases, for 50 years after the passage of FELA, repeatedly recognized that proximate cause was required for recovery under that statute.

The Court is wrong to dispense with that familiar element of an action seeking recovery for negligence, an element "generally thought to be a necessary limitation on liability," *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 838 (1996). The test the Court would substitute—whether negligence played any part, even the slightest, in producing the injury—is no limit at all. It is simply "but for" causation. Nothing in FELA itself, or our decision in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957), supports such a boundless theory of liability.

I respectfully dissent.

I

"Unlike a typical workers' compensation scheme, which provides relief without regard to fault, . . . FELA provides a statutory cause of action sounding in negligence." *Norfolk Southern R. Co.* v. *Sorrell*, 549 U. S. 158, 165 (2007). When Congress creates such a federal tort, "we start from the premise" that Congress "adopts the background of general tort law." *Staub* v. *Proctor Hospital*, 562 U. S. 411, 417 (2011). With respect to FELA in particular, we have explained that "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Sorrell*, *supra*, at 165–166; see *Urie* v. *Thompson*, 337 U. S. 163, 182 (1949).

Recovery for negligence has always required a showing of proximate cause. "'In a philosophical sense, the con-

sequences of an act go forward to eternity.'" *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 266, n. 10 (1992) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984)). Law, however, is not philosophy, and the concept of proximate cause developed at common law in response to the perceived need to distinguish "but for" cause from those more direct causes of injury that can form the basis for liability at law.

The plurality breaks no new ground in criticizing the variety of formulations of the concept of proximate cause, *ante*, at 701–702; courts, commentators, and first-year law students have been doing that for generations. See *Exxon*, *supra*, at 838. But it is often easier to disparage the product of centuries of common law than to devise a plausible substitute—which may explain why Congress did not attempt to do so in FELA. Proximate cause is hardly the only enduring common law concept that is useful despite its imprecision, see *ante*, at 701. It is in good company with proof beyond a reasonable doubt, necessity, willfulness, and unconscionability—to name just a few.

Proximate cause refers to the basic requirement that before recovery is allowed in tort, there must be "some direct relation between the injury asserted and the injurious conduct alleged," *Holmes*, 503 U. S., at 268. It excludes from the scope of liability injuries that are "too remote," "purely contingent," or "indirect[ ]." *Id.*, at 268, 271, 274. Recognizing that liability must not attach to "every conceivable harm that can be traced to alleged wrongdoing," proximate cause requires a "causal connection between the wrong and the injury," *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 536, 533, n. 26 (1983), that is not so "tenuous . . . that what is claimed to be consequence is only fortuity," *Exxon*, *supra*, at 838 (internal quotation marks omitted). It limits liability at some point before the want of a nail leads to loss of the kingdom. When FELA

was passed, as now, "[t]he question whether damage in a given case is proximate or remote [was] one of great importance. . . . [T]he determination of it determines legal right," 1 T. Street, Foundations of Legal Liability 110 (1906) (reprint 1980).

FELA expressly abrogated common law tort principles in four specific ways. See *Sorrell*, *supra*, at 166, 168; *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532, 542–543 (1994). As enacted in 1908, the Act abolished the common law contributory negligence rule, which barred plaintiffs whose negligence had contributed to their injuries from recovering for the negligence of another. See Act of Apr. 22, § 3, 35 Stat. 66. FELA also abandoned the so-called fellow-servant rule, § 1, prohibited an assumption of risk defense in certain cases, § 4, and barred employees from contractually releasing their employers from liability, § 5.

But "[o]nly to the extent of these explicit statutory alterations is FELA an avowed departure from the rules of the common law." *Gottshall*, *supra*, at 544 (internal quotation marks omitted). FELA did not abolish the familiar requirement of proximate cause. Because "Congress expressly dispensed with [certain] common-law doctrines" in FELA but "did not deal at all with [other] equally well-established doctrine[s]," I do not believe that "Congress intended to abrogate [the other] doctrine[s] *sub silentio*." *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 337–338 (1988).

We have applied the standard requirement of proximate cause to actions under federal statutes where the text did not expressly provide for it. See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 342–346 (2005) (securities fraud); *Holmes*, *supra*, at 268–270 (Racketeer Influenced and Corrupt Organizations Act); *Associated Gen. Contractors of Cal., Inc.*, *supra*, at 529–535 (Clayton Act); cf. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U. S. 766, 774 (1983) ("the terms 'environmental

effect' and 'environmental impact' in [the National Environmental Policy Act of 1969 should] be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue . . . like the familiar doctrine of proximate cause from tort law").

The Court does not explicitly rest its argument on its own reading of FELA's text. The jury instruction on causation it approves, however, derives from Section 1 of FELA, 45 U. S. C. § 51. See *ante*, at 688, 703–704. But nothing in Section 1 is similar to the "express language" Congress employed elsewhere in FELA when it wanted to abrogate a common law rule, *Sorrell*, 549 U. S., at 165–166. See, *e. g.*, § 53 ("the fact that the employee may have been guilty of contributory negligence shall not bar a recovery"); § 54 ("employee shall not be held to have assumed the risks of his employment"). As the very first section of the statute, Section 1 simply outlines who could be sued by whom and for what types of injuries. It provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." § 51. The Court's theory seems to be that the words "in whole or in part" signal a departure from the historic requirement of proximate cause. But those words served a very different purpose. They did indeed mark an important departure from a common law principle, but it was the principle of contributory negligence—not proximate cause.

As noted, FELA abolished the defense of contributory negligence; the "in whole or in part" language simply reflected the fact that the railroad would remain liable even if its negligence was not the sole cause of injury. See *Sorrell*, *supra*, at 170. The Congress that was so clear when it was abolishing common law limits on recovery elsewhere in

FELA did not abrogate the fundamental principle of proximate cause in the oblique manner the Court suggests. "[I]f Congress had intended such a sea change" in negligence principles "it would have said so clearly." *Board of Trustees of Leland Stanford Junior Univ.* v. *Roche Molecular Systems, Inc.*, 563 U. S. 776, 792 (2011).

The language the Court adopts as an instruction on causation requires only that negligence have "'played any part, even the slightest, in producing the injury.'" *Ante,* at 703 (quoting *Rogers*, 352 U. S., at 506; emphasis deleted); see also *ante,* at 705 ("Juries in such cases are properly instructed that a defendant railroad 'caused or contributed to' a railroad worker's injury 'if [the railroad's] negligence played a part—no matter how small—in bringing about the injury'"). If that is proved, "then the carrier is answerable in damages even if the extent of the [injury] or the manner in which it occurred was not '[p]robable' or 'foreseeable.'" *Ante,* at 703–704 (some internal quotation marks omitted). There is nothing in that language that requires anything other than "but for" cause. The terms "even the slightest" and "no matter how small" make clear to juries that even the faintest whisper of "but for" causation will do.

At oral argument, counsel for McBride explained that the correct standard for recovery under FELA is "but-for plus a relaxed form of legal cause." Tr. of Oral Arg. 44. There is no "plus" in the rule the Court announces today. In this very case defense counsel was free to argue "but for" cause pure and simple to the jury. In closing, counsel informed the jury: "What we also have to show is defendant's negligence caused or contributed to [McBride's] injury. It never would have happened *but for* [CSX] giving him that train." App. to Pet. for Cert. 67a (emphasis added).

At certain points in its opinion, the Court acknowledges that "[i]njuries have countless causes," not all of which "should give rise to legal liability." *Ante,* at 692. But the

causation test the Court embraces contains no limit on causation at all.

II

This Court, from the time of FELA's enactment, understood FELA to require plaintiffs to prove that an employer's negligence "is a proximate cause of the accident," *Davis* v. *Wolfe*, 263 U. S. 239, 243 (1923). See, *e. g.*, *ibid.* ("The rule clearly deducible from [prior] cases is that . . . an employee cannot recover . . . if the [employer's] failure . . . is not a proximate cause of the accident . . . but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury"); *Carter* v. *Atlanta & St. Andrews Bay R. Co.*, 338 U. S. 430, 435 (1949) ("if the jury determines that the defendant's breach is a contributory proximate cause of injury, it may find for the plaintiff" (internal quotation marks omitted)); *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U. S. 384, 394 (1949) ("plaintiff was entitled to a[n] . . . instruction . . . which rendered defendant liable for injuries proximately resulting therefrom").

A comprehensive treatise written shortly after Congress enacted FELA confirmed that "the plaintiff must . . . show that the alleged negligence was the proximate cause of the damage" in order to recover. 1 M. Roberts, Federal Liabilities of Carriers § 538, p. 942 (1918). As Justice Souter has explained, for the half century after the enactment of FELA, the Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, *supra*, at 174 (concurring opinion).

No matter. For the Court, time begins in 1957, with our opinion in *Rogers* v. *Missouri Pacific R. Co.*, *supra*.

That opinion, however, "left this law where it was." *Sorrell*, *supra*, at 174 (Souter, J., concurring). A jury in that case awarded Rogers damages against his railroad employer, but the Supreme Court of Missouri reversed the jury verdict. As the Court explains today, we suggested in *Rogers* that

there were "two potential readings" of the lower court's opinion and that both were wrong. *Ante*, at 694. In doing so, we clarified the consequences of FELA's elimination of the common law contributory negligence rule. We did not do what Congress chose not to do, and abrogate the rule of proximate cause.

First, we rejected the idea "that [Rogers's] conduct was the *sole cause* of his mishap." 352 U. S., at 504 (emphasis added); contra, *Rogers* v. *Thompson*, 284 S. W. 2d 467, 472 (Mo. 1955) (while "[Rogers] was confronted by an emergency, . . . it was an emergency brought about by himself"). There were, we explained, "probative facts from which the jury could find that [the railroad] was or should have been aware of conditions which created a likelihood that [Rogers] . . . would suffer just such an injury as he did." 352 U. S., at 503. We noted that "[c]ommon experience teaches both that a passing train will fan the flames of a fire, and that a person suddenly enveloped in flames and smoke will instinctively react by retreating from the danger." *Ibid.* In referring to this predictable sequence of events, we described—in familiar terms—sufficient evidence of proximate cause. We therefore held that the railroad's negligence could have been a cause of Rogers's injury regardless of whether "the *immediate* reason" why Rogers slipped was the railroad's negligence in permitting gravel to remain on the surface or some other cause. *Ibid.* (emphasis added).

Rogers thereby clarified that, under a statute in which employer and employee could both be proximate causes of an injury, a railroad's negligence need not be the sole or last cause in order to be proximate. That is an application of proximate cause, not a repudiation of it. See Street 111 ("a cause may be sufficiently near in law to the damage to be considered its effective legal cause without by any means being the nearest or most proximate to the causes which contribute of the injury"); 1 D. Dobbs, Law of Torts § 180, p. 445 (2001).

We then considered a second interpretation. The Missouri Supreme Court's opinion could alternatively be read as having held that Rogers's "conduct was *at least as probable a cause* for his mishap as any negligence of the [railroad]," and that—in those circumstances—"there was no case for the jury." 352 U. S., at 505 (emphasis added). If this was the principle the court applied below, it was also wrong and for many of the same reasons.

Under a comparative negligence scheme in which multiple causes may act concurrently, we clarified that a railroad's negligence need not be the "sole, efficient, producing cause of injury," *id.*, at 506. The question was simply whether "employer negligence played any part, even the slightest, in producing the injury." *Ibid.* "It does not matter," we continued, "that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, *including the employee's contributory negligence.*" *Ibid.* (emphasis added).

The Court today takes the "any part, even the slightest" language out of context and views it as a rejection of proximate cause. But *Rogers* was talking about contributory negligence—it said so—and the language it chose confirms just that. "Slight" negligence was familiar usage in this context. The statute immediately preceding FELA, passed just two years earlier in 1906, moved part way from contributory to comparative negligence. It provided that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison." Act of June 11, 1906, § 2, 34 Stat. 232. Other statutes similarly made this halfway stop on the road from contributory to pure comparative negligence, again using the term "slight." See Dobbs § 201, at 503 ("One earlier [version of comparative fault] allowed the negligent plaintiff to recover if the plaintiff's negligence was slight and the defendant's gross. . . . Modern comparative negligence law

works differently, reducing the plaintiff's recovery in proportion to the plaintiff's fault"); V. Schwartz, Comparative Negligence § 2.01[b][2], p. 33 (5th ed. 2010) (a "major form of modified comparative negligence is the 'slight-gross' system"); *id.*, § 3.04[b], at 75. In 1908, FELA completed the transition to pure comparative negligence with respect to railworkers. See Dobbs § 201, at 503. Under FELA, it does not matter whose negligence was "slight" or "gross." The use of the term "even the slightest" in *Rogers* makes perfect sense when the decision is understood to be about multiple causes—not about how direct any particular cause must be. See *Sorrell*, 549 U. S., at 175 (Souter, J., concurring) (pertinent language concerned "multiplicity of causations," not "the necessary directness of . . . causation").

The Court views *Rogers* as "describ[ing] the test for proximate causation" under FELA, *ante*, at 700 (internal quotation marks omitted), but *Rogers* itself says nothing of the sort. See 352 U. S., at 506 (describing its test as "the test *of a jury case*" (emphasis added)). *Rogers* did not set forth a novel standard for proximate cause—much less an instruction designed to guide jurors in determining causation. Indeed, the trial court in *Rogers* used the term "proximate cause" in its jury instruction and directed the jury to find that Rogers could not recover if his injuries "were not directly . . . caused by" the railroad's negligence. *Id.*, at 505, n. 9 (internal quotation marks omitted). Our opinion quoted that instruction, *ibid.*, but "took no issue with [it] in this respect," *Sorrell*, *supra*, at 176 (Souter, J., concurring).

A few of our cases have characterized *Rogers* as holding that "a relaxed standard of causation applies under FELA." *Gottshall*, 512 U. S., at 543; see *Crane* v. *Cedar Rapids & Iowa City R. Co.*, 395 U. S. 164, 166 (1969). Fair enough; but these passing summations of *Rogers* do not alter its holding. FELA did, of course, change common law rules relating to causation in one respect: Under FELA, a railroad's negligence did not have to be the exclusive cause of an injury.

See *Gottshall*, *supra,* at 542–543 ("Congress did away with several common-law tort defenses . . . . Specifically, the statute . . . rejected the doctrine of contributory negligence in favor of that of comparative negligence"). And, unlike under FELA's predecessor, the proportionate degree of the employee's negligence would not necessarily bar his recovery. But we have never held—until today—that FELA entirely eliminates proximate cause as a limit on liability.

III

The Court is correct that the federal courts of appeals have read *Rogers* to support the adoption of instructions like the one given here. But we do not resolve questions such as the one before us by a show of hands. See *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 605 (2001); *id.*, at 621 (SCALIA, J., concurring) ("The dissent's insistence that we defer to the 'clear majority' of Circuit opinion is particularly peculiar in the present case, since that majority has been nurtured and preserved *by our own misleading dicta*"); cf. *McNally* v. *United States*, 483 U. S. 350, 365 (1987) (Stevens, J., dissenting) (pointing out that "[e]very court to consider the matter" had disagreed with the majority's holding).

In addition, the Court discounts the views of those state courts of last resort that agree FELA did not relegate proximate cause to the dustbin. Those courts either reject the position the Court adopts today or suggest that FELA does not entirely eliminate proximate cause. See *Ballard* v. *Union Pacific R. Co.*, 279 Neb. 638, 644, 781 N. W. 2d 47, 53 (2010) ("an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury"); *CSX Transp., Inc.* v. *Miller*, 46 So. 3d 434, 450 (Ala. 2010) ("the jury in this case was properly instructed by the trial court that [respondent] could not be compensated for any injury not proximately caused by [petitioner's] negligence"), cf. *id.*, at 461 (quoting *Rogers*);

Raab v. *Utah R. Co.*, 2009 UT 61, ¶ 20, 221 P. 3d 219, 225 ("*Rogers* did not speak to the issue of proximate cause"); *Gardner* v. *CSX Transp., Inc.*, 201 W. Va. 490, 500, 498 S. E. 2d 473, 483 (1997) ("we hold that to prevail on a claim under [FELA] . . . a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury"); *Snipes* v. *Chicago, Central, & Pacific R. Co.*, 484 N. W. 2d 162, 164–165 (Iowa 1992) (stating that "[r]ecovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident," while noting that *Rogers*'s "threshold for recovery" is "low"); *Marazzato* v. *Burlington No. R. Co.*, 249 Mont. 487, 491, 817 P. 2d 672, 675 (1991) ("plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of the plaintiff's [death]"); *Reed* v. *Pennsylvania R. Co.*, 171 Ohio St. 433, 436, 171 N. E. 2d 718, 721–722 (1961) ("such violation could not legally amount to a proximate cause of the injury to plaintiff's leg"); see also *Hager* v. *Norfolk & W. R. Co.*, No. 87553, 2006 WL 3634373, *6 (Ohio App., Dec. 14, 2006) ("the standard for proximate cause is broader under FELA than the common law" (internal quotation marks omitted)).

If nothing more, the views of these courts show that the question whether—and to what extent—FELA dispenses with proximate cause is not as "settled" as the Court would have it, *ante*, at 699 (internal quotation marks omitted). Under these circumstances, it seems important to correct an interpretation of our own case law that has run, so to speak, off its own rails.*

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*The Court's contention that our position would unsettle the law contrary to principles of *stare decisis* exaggerates the state of the law. As the court below noted, "[s]ince *Rogers*, the Supreme Court has not explained in detail how broadly or narrowly *Rogers* should be read by the lower federal courts." 598 F. 3d 388, 397 (CA7 2010). See also *Norfolk*

Even the Court seems to appreciate that it is creating a troubling gap in the FELA negligence action and ought to do *something* to patch it over. The something it proposes is "[r]easonable foreseeability of harm," *ante*, at 703 (internal quotation marks omitted). Foreseeability as a test for proximate causation would be one thing; foreseeability has, after all, long been an aspect of proximate cause. But that is not the test the Court prescribes. It instead limits the foreseeability inquiry to whether the defendant was negligent in the first place.

The Court observes that juries may be instructed that a defendant's negligence depends on "what a reasonably prudent person would anticipate or foresee as creating a potential for harm." 5 L. Sand et al., Modern Federal Jury Instructions–Civil ¶ 89.10, p. 89–21 (2010); see *ante*, at 703. That's all fine and good when a defendant's negligence results directly in the plaintiff's injury (nevermind that no "reasonable foreseeability" instruction was given in this case). For instance, if I drop a piano from a window and it falls on a person, there is no question that I was negligent and could have foreseen that the piano would hit someone—as, in fact, it did. The problem for the Court's test arises when the negligence does not directly produce the injury to the plaintiff: I drop a piano; it cracks the sidewalk; during sidewalk repairs weeks later a man barreling down the sidewalk on a bicycle hits a cone that repairmen have placed around their worksite, and is injured. Was I negligent in dropping the piano because I could have foreseen "*a* mishap and injury," *ibid.* (emphasis added; internal quotation marks omitted)? Yes. Did my negligence cause "[*the*] mishap and injury" that resulted? It depends on what is meant by cause. My negligence was a "but for" cause of the injury:

Southern R. Co. v. *Sorrell*, 549 U. S. 158, 173 (2007) (Souter, J., concurring) ("*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm").

If I had not dropped the piano, the bicyclist would not have crashed. But is it a legal cause? No.

In one respect the Court's test is needlessly rigid. If courts must instruct juries on foreseeability as an aspect of negligence, why not instruct them on foreseeability as an aspect of causation? And if the jury is simply supposed to intuit that there should also be limits on the legal chain of causation—and that "but for" cause is not enough—why hide the ball? Why not simply tell the jury? Finally, if the Court intends "foreseeability of harm" to be a kind of poor man's proximate cause, then where does the Court find that requirement in the test *Rogers*—or FELA—prescribes? Could it be derived from the common law?

Where does "foreseeability of harm" as the sole protection against limitless liability run out of steam? An answer would seem only fair to the common law.

A railroad negligently fails to maintain its boiler, which overheats. An employee becomes hot while repairing it and removes his jacket. When finished with the repairs, he grabs a thermos of coffee, which spills on his now-bare arm, burning it. Was the risk that someone would be harmed by the failure to maintain the boiler foreseeable? Was the risk that an employee would be burned while repairing the overheated boiler foreseeable? Can the railroad be liable under the Court's test for the coffee burn? According to the Court's opinion, it does not matter that the "manner in which [the injury] occurred was not . . . foreseeable," *ante*, at 704 (internal quotation marks omitted), so long as some negligence—any negligence at all—can be established.

The Court's opinion fails to settle on a single test for answering these questions: Is it that the railroad's negligence "pla[y] a part—no matter how small—in bringing about the [plaintiff's] injury," as the Court indicates, *ante*, at 692, 703, n. 13, and 705, or that "negligence play any part, even the slightest, in producing the injury," as suggested at *ante*, at 694, n. 2, 697, n. 4, and 704? The Court says there is no

difference, see *ante*, at 696, n. 3, but I suspect lawyers litigating FELA cases will prefer one instruction over the other, depending on whether they represent the employer or the employee. In any event, if the Court's test—whichever version—provides answers to these hypotheticals, the Court keeps them to itself.

Proximate cause supplies the vocabulary for answering such questions. It is useful to ask whether the injury that resulted was within the scope of the risk created by the defendant's negligent act; whether the injury was a natural or probable consequence of the negligence; whether there was a superseding or intervening cause; whether the negligence was anything more than an antecedent event without which the harm would not have occurred.

The cases do not provide a mechanical or uniform test and have been criticized for that. But they do "furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." *Exxon*, 517 U. S., at 839 (internal quotation marks omitted).

The Court forswears all these inquiries and—with them—an accumulated common law history that might provide guidance for courts and juries faced with causation questions. See *ante*, at 688 (FELA "does not incorporate 'proximate cause' standards developed in nonstatutory common-law tort actions"); *ante*, at 705 ("it is not error in a FELA case to refuse a charge embracing stock proximate-cause terminology"). It is not necessary to accept every verbal formulation of proximate cause ever articulated to recognize that these standards provide useful guidance—and that juries should receive some instruction—on the type of link required between a railroad's negligence and an employee's injury.

* * *

Law has its limits. But no longer when it comes to the causal connection between negligence and a resulting injury

covered by FELA. A new maxim has replaced the old: *Caelum terminus est*—the sky's the limit.

I respectfully dissent.

Syllabus

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC ET AL. *v.* BENNETT, SECRETARY OF STATE OF ARIZONA, ET AL.

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

No. 10–238. Argued March 28, 2011—Decided June 27, 2011*

The Arizona Citizens Clean Elections Act created a public financing system to fund the primary and general election campaigns of candidates for state office. Candidates who opt to participate, and who accept certain campaign restrictions and obligations, are granted an initial outlay of public funds to conduct their campaign. They are also granted additional matching funds if a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the publicly financed candidate's initial state allotment. Once matching funds are triggered, a publicly financed candidate receives roughly one dollar for every dollar raised or spent by the privately financed candidate—including any money of his own that a privately financed candidate spends on his campaign—and for every dollar spent by independent groups that support the privately financed candidate. When there are multiple publicly financed candidates in a race, each one receives matching funds as a result of the spending of privately financed candidates and independent expenditure groups. Matching funds top out at two times the initial grant to the publicly financed candidate.

Petitioners, past and future Arizona candidates and two independent expenditure groups that spend money to support and oppose Arizona candidates, challenged the constitutionality of the matching funds provision, arguing that it unconstitutionally penalizes their speech and burdens their ability to fully exercise their First Amendment rights. The District Court entered a permanent injunction against the enforcement of the matching funds provision. The Ninth Circuit reversed, concluding that the provision imposed only a minimal burden and that the burden was justified by Arizona's interest in reducing *quid pro quo* political corruption.

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*Together with No. 10–239, *McComish et al.* v. *Bennett, Secretary of State of Arizona, et al.*, also on certiorari to the same court.

Held: Arizona's matching funds scheme substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny. Pp. 734–755.

(a) The matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups. Pp. 734–747.

(1) Petitioners contend that their political speech is substantially burdened in the same way that speech was burdened by the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002, which was invalidated in *Davis* v. *Federal Election Comm'n*, 554 U. S. 724. That law—which permitted the opponent of a candidate who spent over $350,000 of his personal funds to collect triple the normal contribution amount, while the candidate who spent the personal funds remained subject to the original contribution cap—unconstitutionally forced a candidate "to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.*, at 739. This "unprecedented penalty" "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" that was not justified by a compelling government interest. *Id.*, at 739–740. Pp. 734–736.

(2) The logic of *Davis* largely controls here. Once a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar the privately financed candidate spends results in an award of almost one additional dollar to his opponent. The privately financed candidate must "shoulder a special and potentially significant burden" when choosing to exercise his First Amendment right to spend funds on his own candidacy. 554 U. S., at 739. If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well.

The differences between the matching funds provision and the law struck down in *Davis* make the Arizona law *more* constitutionally problematic, not less. First, the penalty in *Davis* consisted of raising the contribution limits for one candidate, who would still have to raise the additional funds. Here, the direct and automatic release of public money to a publicly financed candidate imposes a far heavier burden. Second, in elections where there are multiple publicly financed candidates—a frequent occurrence in Arizona—the matching funds provision can create a multiplier effect. Each dollar spent by the privately funded candidate results in an additional dollar of funding to each of that candidate's publicly financed opponents. Third, unlike the law in *Davis*, all of this is to some extent out of the privately financed candidate's hands. Spending by independent expenditure groups to promote a privately financed candidate's election triggers matching funds, re-

gardless whether such support is welcome or helpful. Those funds go directly to the publicly funded candidate to use as he sees fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate.

The burdens that matching funds impose on independent expenditure groups are akin to those imposed on the privately financed candidates themselves. The more money spent on behalf of a privately financed candidate or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State. The effect of a dollar spent on election speech is a guaranteed financial payout to the publicly funded candidate the group opposes, and spending one dollar can result in the flow of dollars to multiple candidates. In some ways, the burdens imposed on independent groups by matching funds are more severe than the burdens imposed on privately financed candidates. Independent groups, of course, are not eligible for public financing. As a result, those groups can only avoid matching funds by changing their message or choosing not to speak altogether. Presenting independent expenditure groups with such a choice—trigger matching funds, change your message, or do not speak—makes the matching funds provision particularly burdensome to those groups and certainly contravenes "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573. Pp. 736–740.

(3) The arguments of Arizona, the Clean Elections Institute, and *amicus* United States attempting to explain away the existence or significance of any burden imposed by matching funds are unpersuasive.

Arizona correctly points out that its law is different from the law invalidated in *Davis*, but there is no doubt that the burden on speech is significantly greater here than in *Davis*. Arizona argues that the provision actually creates more speech. But even if that were the case, only the speech of publicly financed candidates is increased by the state law. And burdening the speech of some—here privately financed candidates and independent expenditure groups—to increase the speech of others is a concept "wholly foreign to the First Amendment," *Buckley* v. *Valeo*, 424 U. S. 1, 48–49; cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 244, 258. That no candidate or group is forced to express a particular message does not mean that the matching funds provision does not burden their speech, especially since the direct result of that speech is a state-provided monetary subsidy to a political rival. And precedents upholding government subsidies against First Amendment

challenge provide no support for matching funds; none of the subsidies at issue in those cases were granted in response to the speech of another.

The burden on privately financed candidates and independent expenditure groups also cannot be analogized to the burden placed on speakers by the disclosure and disclaimer requirements upheld in *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310. A political candidate's disclosure of his funding resources does not result in a cash windfall to his opponent, or affect their respective disclosure obligations.

The burden imposed by the matching funds provision is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups. Indeed every court to have considered the question after *Davis* has concluded that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries. Arizona is correct that the candidates do not complain that providing a lump-sum payment equivalent to the maximum state financing that a candidate could obtain through matching funds would be impermissible. But it is not the amount of funding that the State provides that is constitutionally problematic. It is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups. Pp. 740–747.

(b) Arizona's matching funds provision is not "'justified by a compelling state interest,'" *Davis*, *supra*, at 740. Pp. 748–753.

(1) There is ample support for the argument that the purpose of the matching funds provision is to "level the playing field" in terms of candidate resources. The clearest evidence is that the provision operates to ensure that campaign funding is equal, up to three times the initial public funding allotment. The text of the Arizona Act confirms this purpose. The provision setting up the matching funds regime is titled "Equal funding of candidates," Ariz. Rev. Stat. Ann. § 16–952; and the Act and regulations refer to the funds as "equalizing funds," *e. g.*, § 16–952(C)(4). This Court has repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech, see, *e. g.*, *Citizens United*, *supra*, at 350, and the burdens imposed by matching funds cannot be justified by the pursuit of such an interest. Pp. 748–750.

(2) Even if the objective of the matching funds provision is to combat corruption—and not "level the playing field"—the burdens that the matching funds provision imposes on protected political speech are not justified. Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest. Indeed, "reliance on personal funds *reduces* the threat of corruption."

Davis, 554 U. S., at 740–741; see *Buckley*, *supra*, at 53. The burden on independent expenditures also cannot be supported by the anticorruption interest. Such expenditures are "political speech . . . not coordinated with a candidate." *Citizens United*, 558 U. S., at 360. That separation negates the possibility that the expenditures will result in the sort of *quid pro quo* corruption with which this Court's case law is concerned. See, *e. g.*, *id.*, at 357–361. Moreover, "[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations." *Buckley*, *supra*, at 55. Given Arizona's contribution limits, some of the most austere in the Nation, its strict disclosure requirements, and the general availability of public funding, it is hard to imagine what marginal corruption deterrence could be generated by the matching funds provision.

The State and the Clean Elections Institute contend that even if the matching funds provision does not directly serve the anticorruption interest, it indirectly does so by ensuring that enough candidates participate in the State's public funding system, which in turn helps combat corruption. But the fact that burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision. The matching funds provision substantially burdens speech, to an even greater extent than the law invalidated in *Davis*. Those burdens cannot be justified by a desire to "level the playing field," and much of the speech burdened by the matching funds provision does not pose a danger of corruption. The fact that the State may feel that the matching funds provision is necessary to allow it to calibrate its public funding system to achieve its desired level of participation—without an undue drain on public resources—is not a sufficient justification for the burden.

The flaw in the State's argument is apparent in what its reasoning would allow. By the State's logic it could award publicly financed candidates five dollars for every dollar spent by a privately financed candidate, or force candidates who wish to run on private funds to pay a $10,000 fine, in order to encourage participation in the public funding regime. Such measures might well promote such participation, but would clearly suppress or unacceptably alter political speech. How the State chooses to encourage participation in its public funding system matters, and the Court has never held that a State may burden political speech—to the extent the matching funds provision does—to ensure adequate participation in a public funding system. Pp. 750–753.

(c) Evaluating the wisdom of public financing as a means of funding political candidacy is not the Court's business. But determining whether laws governing campaign finance violate the First Amendment

is. The government "may engage in public financing of election campaigns," and doing so can further "significant governmental interest[s]." *Buckley*, 424 U. S., at 57, n. 65, 92–93, 96. But the goal of creating a viable public financing scheme can only be pursued in a manner consistent with the First Amendment. Arizona's program gives money to a candidate in direct response to the campaign speech of an opposing candidate or an independent group. It does this when the opposing candidate has chosen not to accept public financing, and has engaged in political speech above a level set by the State. This goes too far; Arizona's matching funds provision substantially burdens the speech of privately financed candidates and independent expenditure groups without serving a compelling state interest. Pp. 753–755.

611 F. 3d 510, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 755.

William R. Maurer argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 10–238 were *William H. Mellor*, *Steven M. Simpson*, and *Timothy D. Keller*. *Clint Bolick* and *Nicholas C. Dranias* filed briefs for petitioners in No. 10–239.

Bradley S. Phillips argued the cause for respondents in both cases. With him on the brief for respondent Clean Elections Institute, Inc., were *Grant A. Davis-Denny*, *Elisabeth J. Neubauer*, *Monica Youn*, and *Timothy M. Hogan*. *Eric J. Bistrow*, Chief Deputy Attorney General of Arizona, *Mary R. O'Grady*, Solicitor General, and *James E. Barton II* and *Thomas Collins*, Assistant Attorneys General, filed a brief for the state respondents.

William M. Jay argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, and *Deputy Solicitor General Stewart*.†

†Briefs of *amici curiae* urging reversal in both cases were filed for the Cato Institute by *Jonathan F. Cohn*, *Matthew D. Krueger*, and *Ilya Shapiro;* for the Center for Competitive Politics by *Allison R. Hayward;* for Four Former Chairmen and One Former Commissioner of the Federal Election Commission by *James Bopp, Jr.;* for the Justice and Freedom

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under Arizona law, candidates for state office who accept public financing can receive additional money from the State

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Fund by *James L. Hirsen* and *Deborah J. Dewart;* and for Senator Mitch McConnell by *Bobby R. Burchfield* and *Richard W. Smith.*

Herbert W. Titus, *William J. Olson*, and *John S. Miles* filed a brief for Gun Owners of America, Inc., et al. as *amici curiae* urging reversal in No. 10–238.

Benjamin T. Barr filed a brief for Wyoming Liberty Group as *amicus curiae* urging reversal in No. 10–239.

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Iowa et al. by *Thomas J. Miller*, Attorney General of Iowa, *Mark E. Schantz*, Solicitor General, and *Meghan Lee Gavin*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *George Jepsen* of Connecticut, *Douglas F. Gansler* of Maryland, *Gary K. King* of New Mexico, and *William H. Sorrell* of Vermont; for New York City et al. by *Michael A. Cardozo*, *Leonard J. Koerner*, *Edward F. X. Hart*, *Jane L. Gordon*, *Therese M. Stewart*, and *Charles W. Thompson, Jr.;* for the Campaign Legal Center et al. by *J. Gerald Hebert*, *Tara Malloy*, *Paul S. Ryan*, *Donald J. Simon*, and *Fred Wertheimer;* for the Center for Governmental Studies by *Fredric D. Woocher*, *Robert M. Stern*, and *Margaret C. Milligan;* for the Committee for Economic Development by *Paul M. Smith*, *Michael B. DeSanctis*, and *Katherine A. Fallow;* for Constitutional Scholars by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *David H. Gans;* for Former Elected Officials by *Charles Fried*, *Clifford M. Sloan*, *Bradley A. Klein*, and *Geoffrey M. Wyatt;* for Former Officials of the American Civil Liberties Union by *Norman Dorsen* and *Burt Neuborne*, both *pro se;* for Maine Citizens for Clean Elections et al. by *Brenda Wright*, *Lisa J. Danetz*, and *John Brautigam;* for Professors of Constitutional and Election Law by *Daniel F. Kolb*, *Douglas K. Yatter*, and *Richard Briffault*, *pro se;* for Self-Financing Candidates by *Thomas Bennigson* and *Seth E. Mermin;* for the Service Employees International Union by *Judith A. Scott* and *Mark D. Schneider;* for the Union for Reform Judaism by *Andrew J. Goodman*, *David Saperstein*, and *Mark Pelavin;* for Anthony Corrado et al. by *Ira M. Feinberg;* and for Costas Panagopoulos et al. by *Alexis S. Coll-Very*, *George R. Morris*, and *Deanne K. Cevasco.*

Peter J. Martin and *Justin R. Clark* filed a brief in both cases for the Yankee Institute for Public Policy as *amicus curiae.*

James E. Scarboro filed a brief for Justice at Stake et al. as *amici curiae* in No. 10–238.

in direct response to the campaign activities of privately financed candidates and independent expenditure groups. Once a set spending limit is exceeded, a publicly financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate. The publicly financed candidate also receives roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate, or to oppose the publicly financed candidate. We hold that Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.

I

A

The Arizona Citizens Clean Elections Act, passed by initiative in 1998, created a voluntary public financing system to fund the primary and general election campaigns of candidates for state office. See Ariz. Rev. Stat. Ann. § 16–940 *et seq.* (West 2006 and Supp. 2010). All eligible candidates for Governor, secretary of state, attorney general, treasurer, superintendent of public instruction, the corporation commission, mine inspector, and the state legislature (both the House and Senate) may opt to receive public funding. § 16–950(D) (West Supp. 2010). Eligibility is contingent on the collection of a specified number of five-dollar contributions from Arizona voters, §§ 16–946(B) (West 2006), 16–950 (West Supp. 2010),[1] and the acceptance of certain campaign restrictions and obligations. Publicly funded candidates must agree, among other things, to limit their expenditure of personal funds to $500, § 16–941(A)(2) (West Supp. 2010); participate in at least one public debate, § 16–956(A)(2); adhere to

[1] The number of qualifying contributions ranges from 200 for a candidate for the state legislature to 4,000 for a candidate for Governor. Ariz. Rev. Stat. Ann. § 16–950(D) (West Supp. 2010).

an overall expenditure cap, § 16–941(A); and return all unspent public moneys to the State, § 16–953.

In exchange for accepting these conditions, participating candidates are granted public funds to conduct their campaigns.[2] In many cases, this initial allotment may be the whole of the State's financial backing of a publicly funded candidate. But when certain conditions are met, publicly funded candidates are granted additional "equalizing" or matching funds. §§ 16–952(A), (B), and (C)(4)–(5) (providing for "[e]qual funding of candidates").

Matching funds are available in both primary and general elections. In a primary, matching funds are triggered when a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the primary election allotment of state funds to the publicly financed candidate. §§ 16–952(A), (C). During the general election, matching funds are triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate. § 16–952(B). A privately financed candidate's expenditures of his personal funds are counted as contributions for purposes of calculating matching funds during a general election. See *ibid.*; Citizens Clean Elections Commission, Ariz. Admin. Code, Rule R2–20–113(B)(1)(f) (Sept. 2009).

Once matching funds are triggered, each additional dollar that a privately financed candidate spends during the primary results in one dollar in additional state funding to his

[2] Publicly financed candidates who run unopposed, or who run as the representative of a party that does not have a primary, may receive less funding than candidates running in contested elections. See §§ 16–951(A)(2)–(3) and (D) (West 2006).

publicly financed opponent (less a 6% reduction meant to account for fundraising expenses). § 16–952(A). During a general election, every dollar that a candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign—results in roughly one dollar in additional state funding to his publicly financed opponent. In an election where a privately funded candidate faces multiple publicly financed candidates, one dollar raised or spent by the privately financed candidate results in an almost one dollar increase in public funding to each of the publicly financed candidates.

Once the public financing cap is exceeded, additional expenditures by independent groups can result in dollar-for-dollar matching funds as well. Spending by independent groups on behalf of a privately funded candidate, or in opposition to a publicly funded candidate, results in matching funds. § 16–952(C). Independent expenditures made in support of a publicly financed candidate can result in matching funds for other publicly financed candidates in a race. *Ibid.* The matching funds provision is not activated, however, when independent expenditures are made in opposition to a privately financed candidate. Matching funds top out at two times the initial authorized grant of public funding to the publicly financed candidate. § 16–952(E).

Under Arizona law, a privately financed candidate may raise and spend unlimited funds, subject to state-imposed contribution limits and disclosure requirements. Contributions to candidates for statewide office are limited to $840 per contributor per election cycle and contributions to legislative candidates are limited to $410 per contributor per election cycle. See §§ 16–905(A)(1), 16–941(B)(1); Ariz. Dept. of State, Office of the Secretary of State, 2009–2010 Contribution Limits (rev. Aug. 14, 2009), http://www.azsos.gov/election/2010/Info/Campaign_Contribution_Limits_2010.htm (all Internet materials as visited June 24, 2011, and available in Clerk of Court's case file).

An example may help clarify how the Arizona matching funds provision operates. Arizona is divided into 30 districts for purposes of electing members to the State's House of Representatives. Each district elects two representatives to the House biannually. In the last general election, the number of candidates competing for the two available seats in each district ranged from two to seven. See State of Arizona Official Canvass, 2010 General Election Report (compiled and issued by the Arizona secretary of state). Arizona's Fourth District had three candidates for its two available House seats. Two of those candidates opted to accept public funding; one candidate chose to operate his campaign with private funds.

In that election, if the total funds contributed to the privately funded candidate, added to that candidate's expenditure of personal funds and the expenditures of supportive independent groups, exceeded $21,479—the allocation of public funds for the general election in a contested State House race—the matching funds provision would be triggered. See Citizens Clean Elections Commission, Participating Candidate Guide 2010 Election Cycle 30 (Aug. 10, 2010). At that point, a number of different political activities could result in the distribution of matching funds. For example:

- If the privately funded candidate spent $1,000 of his own money to conduct a direct mailing, each of his publicly funded opponents would receive $940 ($1,000 less the 6% offset).
- If the privately funded candidate held a fundraiser that generated $1,000 in contributions, each of his publicly funded opponents would receive $940.
- If an independent expenditure group spent $1,000 on a brochure expressing its support for the privately financed candidate, each of the publicly financed candidates would receive $940 directly.

- If an independent expenditure group spent $1,000 on a brochure opposing one of the publicly financed candidates, but saying nothing about the privately financed candidate, the publicly financed candidates would receive $940 directly.
- If an independent expenditure group spent $1,000 on a brochure supporting one of the publicly financed candidates, the other publicly financed candidate would receive $940 directly, but the privately financed candidate would receive nothing.
- If an independent expenditure group spent $1,000 on a brochure opposing the privately financed candidate, no matching funds would be issued.

A publicly financed candidate would continue to receive additional state money in response to fundraising and spending by the privately financed candidate and independent expenditure groups until that publicly financed candidate received a total of $64,437 in state funds (three times the initial allocation for a State House race).[3]

B

Petitioners in this action, plaintiffs below, are five past and future candidates for Arizona state office—four members of the House of Representatives and the Arizona state treasurer—and two independent groups that spend money to support and oppose Arizona candidates. They filed suit chal-

[3] Maine and North Carolina have both passed matching funds statutes that resemble Arizona's law. See Me. Rev. Stat. Ann., Tit. 21–A, §§ 1125(8), (9) (2008); N. C. Gen. Stat. Ann. § 163–278.67 (Lexis 2009). Minnesota, Connecticut, and Florida have also adopted matching funds provisions, but courts have enjoined the enforcement of those schemes after concluding that their operation violates the First Amendment. See *Day* v. *Holahan*, 34 F. 3d 1356, 1362 (CA8 1994); *Green Party of Conn.* v. *Garfield*, 616 F. 3d 213, 242 (CA2 2010); *Scott* v. *Roberts*, 612 F. 3d 1279, 1297–1298 (CA11 2010).

lenging the constitutionality of the matching funds provision. The candidates and independent expenditure groups argued that the matching funds provision unconstitutionally penalized their speech and burdened their ability to fully exercise their First Amendment rights.

The District Court agreed that this provision "constitute[d] a substantial burden" on the speech of privately financed candidates because it "award[s] funds to a [privately financed] candidate's opponent" based on the privately financed candidate's speech. App. to Pet. for Cert. in No. 10–239, p. 69 (internal quotation marks omitted). That court further held that "no compelling interest [was] served by the" provision that might justify the burden imposed. *Id.*, at 69, 71. The District Court entered a permanent injunction against the enforcement of the matching funds provision, but stayed implementation of that injunction to allow the State to file an appeal. *Id.*, at 76–81.

The Court of Appeals for the Ninth Circuit stayed the District Court's injunction pending appeal. *Id.*, at 84–85.[4] After hearing the action on the merits, the Court of Appeals reversed the District Court. The Court of Appeals concluded that the matching funds provision "imposes only a minimal burden on First Amendment rights" because it "does not actually prevent anyone from speaking in the first place or cap campaign expenditures." 611 F. 3d 510, 513, 525 (2010). In that court's view, any burden imposed by the matching funds provision was justified because the provision "bears a substantial relation to the State's important

[4] Judge Bea dissented from the stay of the District Court's injunction, stating that the Arizona public financing system unconstitutionally prefers publicly financed candidates and that under the matching funds scheme "it makes no more sense for [a privately financed candidate or independent expenditure group] to spend money now than for a poker player to make a bet if he knows the house is going to match his bet for his opponent." App. to Pet. for Cert. in No. 10–239, p. 87; see *id.*, at 89.

interest in reducing *quid pro quo* political corruption." *Id.*, at 513.[5]

We stayed the Court of Appeals' decision, vacated the stay of the District Court's injunction, see 560 U. S. 938 (2010), and later granted certiorari, 562 U. S. 1060 (2010).

II

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976) (*per curiam*). As a result, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971)). "Laws that burden political speech are" accordingly "subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 340 (2010) (internal quotation marks omitted); see *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 256 (1986).

Applying these principles, we have invalidated government-imposed restrictions on campaign expenditures, *Buckley*, *supra*, at 52–54, restraints on independent expenditures applied to express advocacy groups, *Massachusetts Citizens for Life*, *supra*, at 256–265, limits on uncoordinated political party expenditures, *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 608 (1996) (opinion of BREYER, J.) (*Colorado I*), and regulations barring unions, nonprofit and other associations, and

[5] One judge concurred, relying primarily on his view that "the Arizona public financing scheme imposes no limitations whatsoever on a candidate's speech." 611 F. 3d, at 527 (Kleinfeld, J.).

corporations from making independent expenditures for electioneering communication, *Citizens United*, *supra*, at 372.

At the same time, we have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny and upheld those restrictions. For example, after finding that the restriction at issue was "closely drawn" to serve a "sufficiently important interest," see, *e. g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 136 (2003) (internal quotation marks omitted); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 387–388 (2000) (internal quotation marks omitted), we have upheld government-imposed limits on contributions to candidates, *Buckley*, *supra*, at 23–35, caps on coordinated party expenditures, *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 437 (2001) (*Colorado II*), and requirements that political funding sources disclose their identities, *Citizens United*, *supra*, at 371.

Although the speech of the candidates and independent expenditure groups that brought this suit is not directly capped by Arizona's matching funds provision, those parties contend that their political speech is substantially burdened by the state law in the same way that speech was burdened by the law we recently found invalid in *Davis* v. *Federal Election Comm'n*, 554 U. S. 724 (2008). In *Davis*, we considered a First Amendment challenge to the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002, 2 U. S. C. § 441a–1(a). Under that Amendment, if a candidate for the United States House of Representatives spent more than $350,000 of his personal funds, "a new, asymmetrical regulatory scheme [came] into play." 554 U. S., at 729. The opponent of the candidate who exceeded that limit was permitted to collect individual contributions up to $6,900 per contributor—three times the normal contribution limit of $2,300. See *ibid.* The candidate who spent more than the personal funds limit remained subject to the original con-

tribution cap. Davis argued that this scheme "burden[ed] his exercise of his First Amendment right to make unlimited expenditures of his personal funds because" doing so had "the effect of enabling his opponent to raise more money and to use that money to finance speech that counteract[ed] and thus diminishe[d] the effectiveness of Davis' own speech." *Id.*, at 736.

In addressing the constitutionality of the Millionaire's Amendment, we acknowledged that the provision did not impose an outright cap on a candidate's personal expenditures. *Id.*, at 738–739. We nonetheless concluded that the Amendment was unconstitutional because it forced a candidate "to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.*, at 739. Any candidate who chose to spend more than $350,000 of his own money was forced to "shoulder a special and potentially significant burden" because that choice gave fundraising advantages to the candidate's adversary. *Ibid.* We determined that this constituted an "unprecedented penalty" and "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech," and concluded that the Government had failed to advance any compelling interest that would justify such a burden. *Id.*, at 739–740.

A

1

The logic of *Davis* largely controls our approach to this action. Much like the burden placed on speech in *Davis*, the matching funds provision "imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s]." *Id.*, at 739. Under that provision, "the vigorous exercise of the right to use personal funds to finance campaign speech" leads to "advantages for opponents in the competitive context of electoral politics." *Ibid.*

Once a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. That plainly forces the privately financed candidate to "shoulder a special and potentially significant burden" when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. *Ibid.* If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well.

The penalty imposed by Arizona's matching funds provision is different in some respects from the penalty imposed by the law we struck down in *Davis.* But those differences make the Arizona law *more* constitutionally problematic, not less. See *Green Party of Conn.* v. *Garfield,* 616 F. 3d 213, 244–245 (CA2 2010). First, the penalty in *Davis* consisted of raising the contribution limits for one of the candidates. The candidate who benefited from the increased limits still had to go out and raise the funds. He may or may not have been able to do so. The other candidate, therefore, faced merely the possibility that his opponent would be able to raise additional funds, through contribution limits that remained subject to a cap. And still the Court held that this was an "unprecedented penalty," a "special and potentially significant burden" that had to be justified by a compelling state interest—a rigorous First Amendment hurdle. 554 U. S., at 739–740. Here the benefit to the publicly financed candidate is the direct and automatic release of public money. That is a far heavier burden than in *Davis.*

Second, depending on the specifics of the election at issue, the matching funds provision can create a multiplier effect. In the Arizona Fourth District House election previously discussed, see *supra,* at 731–732, if the spending cap were exceeded, each dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to each of that candidate's publicly financed opponents. In such

a situation, the matching funds provision forces privately funded candidates to fight a political hydra of sorts. Each dollar they spend generates two adversarial dollars in response. Again, a markedly more significant burden than in *Davis*.

Third, unlike the law at issue in *Davis*, all of this is to some extent out of the privately financed candidate's hands. Even if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate's election—regardless whether such support was welcome or helpful—could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate. That candidate can allocate the money according to his own campaign strategy, which the privately financed candidate could not do with the independent group expenditures that triggered the matching funds. Cf. *Citizens United*, 558 U. S., at 357 ("'The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate'" (quoting *Buckley*, 424 U. S., at 47)).

The burdens that this regime places on independent expenditure groups are akin to those imposed on the privately financed candidates themselves. Just as with the candidate the independent group supports, the more money spent on that candidate's behalf or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State. And just as with the privately financed candidate, the effect of a dollar spent on election speech is a guaranteed financial payout to the publicly

funded candidate the group opposes. Moreover, spending one dollar can result in the flow of dollars to multiple candidates the group disapproves of, dollars directly controlled by the publicly funded candidate or candidates.

In some ways, the burden the Arizona law imposes on independent expenditure groups is worse than the burden it imposes on privately financed candidates, and thus substantially worse than the burden we found constitutionally impermissible in *Davis*. If a candidate contemplating an electoral run in Arizona surveys the campaign landscape and decides that the burdens imposed by the matching funds regime make a privately funded campaign unattractive, he at least has the option of taking public financing. Independent expenditure groups, of course, do not.

Once the spending cap is reached, an independent expenditure group that wants to support a particular candidate—because of that candidate's stand on an issue of concern to the group—can only avoid triggering matching funds in one of two ways. The group can either opt to change its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether. Presenting independent expenditure groups with such a choice makes the matching funds provision particularly burdensome to those groups. And forcing that choice—trigger matching funds, change your message, or do not speak—certainly contravenes "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995); cf. *Citizens United*, *supra*, at 340 ("the First Amendment stands against attempts to disfavor certain subjects or viewpoints"); *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 477, n. 9 (2007) (opinion of ROBERTS, C. J.) (the argument that speakers can avoid the burdens of a law "by

changing what they say" does not mean the law complies with the First Amendment).[6]

2

Arizona, the Clean Elections Institute, Inc., and the United States offer several arguments attempting to explain away the existence or significance of any burden imposed by matching funds. None is persuasive.

Arizona contends that the matching funds provision is distinguishable from the law we invalidated in *Davis*. The State correctly points out that our decision in *Davis* focused on the asymmetrical contribution limits imposed by the Millionaire's Amendment. See 554 U. S., at 729. But that is not because—as the State asserts—the reach of that opinion is limited to asymmetrical contribution limits. Brief for State Respondents 26–32. It is because that was the particular burden on candidate speech we faced in *Davis*. And whatever the significance of the distinction in general, there can be no doubt that the burden on speech is significantly greater in this action than in *Davis*: That means that the law here—like the one in *Davis*—must be justified by a compelling state interest.

The State argues that the matching funds provision actually results in more speech by "increas[ing] debate about issues of public concern" in Arizona elections and "promot[ing] the free and open debate that the First Amendment was intended to foster." Brief for State Respondents 41; see Brief

[6] The dissent sees *"chutzpah"* in candidates exercising their right not to participate in the public financing scheme, while objecting that the system violates their First Amendment rights. See *post*, at 766 (opinion of KAGAN, J.). The charge is unjustified, but, in any event, it certainly cannot be leveled against the independent expenditure groups. The dissent barely mentions such groups in its analysis, and fails to address not only the distinctive burdens imposed on these groups—as set forth above—but also the way in which privately financed candidates are particularly burdened when matching funds are triggered by independent group speech.

for Respondent Clean Elections Institute 55. In the State's view, this promotion of First Amendment ideals offsets any burden the law might impose on some speakers.

Not so. Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates. The burden imposed on privately financed candidates and independent expenditure groups reduces their speech; "restriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Buckley*, 424 U. S., at 19. Thus, even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups. This sort of "beggar thy neighbor" approach to free speech—"restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others"—is "wholly foreign to the First Amendment." *Id.*, at 48–49.[7]

We have rejected government efforts to increase the speech of some at the expense of others outside the campaign finance context. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 244, 258 (1974), we held unconstitutional a Florida law that required any newspaper assailing a political candidate's character to allow that candidate to print a reply. We have explained that while the statute in that case

[7] The dissent also repeatedly argues that the Arizona matching funds regime results in "*more* political speech," *post*, at 763–764 (emphasis in original); see *post*, at 756, 763, 767, 769, 784, but—given the logic of the dissent's position—that is only as a step to *less* speech. If the matching funds provision achieves its professed goal and causes candidates to switch to public financing, *post*, at 778, 781, there will be less speech: no spending above the initial state-set amount by formerly privately financed candidates, and no associated matching funds for anyone. Not only that, the level of speech will depend on the State's judgment of the desirable amount, an amount tethered to available (and often scarce) state resources.

"purported to advance free discussion, . . . its effect was to deter newspapers from speaking out in the first instance" because it "penalized the newspaper's own expression." *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 10 (1986) (plurality opinion). Such a penalty, we concluded, could not survive First Amendment scrutiny. The Arizona law imposes a similar penalty: The State grants funds to publicly financed candidates as a direct result of the speech of privately financed candidates and independent expenditure groups. The argument that this sort of burden promotes free and robust discussion is no more persuasive here than it was in *Tornillo*.[8]

Arizona asserts that no "candidate or independent expenditure group is 'obliged personally to express a message he disagrees with'" or "'required by the government to subsidize a message he disagrees with.'" Brief for State Respondents 32 (quoting *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550, 557 (2005)). True enough. But that does not mean that the matching funds provision does not burden speech. The direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival. That cash subsidy, conferred in response to political speech, penalizes speech to a greater extent and more directly than the

[8] Along the same lines, we have invalidated government mandates that a speaker "help disseminate hostile views" opposing that speaker's message. *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 14 (1986) (plurality opinion). In *Pacific Gas*, we found a public utility commission order forcing a utility company to disseminate in its billing envelopes views that the company opposed ran afoul of the First Amendment. That case is of course distinguishable from the instant action on its facts, but the central concern—that an individual should not be compelled to "help disseminate hostile views"—is implicated here as well. *Ibid.* If a candidate uses his own money to engage in speech above the initial public funding threshold, he is forced to "help disseminate hostile views" in a most direct way—his own speech triggers the release of state money to his opponent.

Millionaire's Amendment in *Davis*. The fact that this may result in more speech by the other candidates is no more adequate a justification here than it was in *Davis*. See 554 U. S., at 741–742.

In disagreeing with our conclusion, the dissent relies on cases in which we have upheld government subsidies against First Amendment challenge, and asserts that "[w]e have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another." *Post*, at 769. But none of those cases—not one—involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech. And nothing in the analysis we employed in those cases suggests that the challenged subsidies would have survived First Amendment scrutiny if they were triggered by someone else's political speech.[9]

The State also argues, and the Court of Appeals concluded, that any burden on privately financed candidates and independent expenditure groups is more analogous to the burden placed on speakers by the disclosure and disclaimer requirements we recently upheld in *Citizens United* than to direct restrictions on candidate and independent expenditures. See 611 F. 3d, at 525; Brief for State Respondents 21, 35; Brief for Respondent Clean Elections Institute 16–17. This analogy is not even close. A political candidate's disclosure of his funding resources does not result in a cash windfall to his opponent, or affect their respective disclosure obligations.

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[9] The dissent cites *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*), in response, see *post*, at 765, n. 3, but the funding in *Buckley* was of course not triggered by the speech of a publicly funded candidate's political opponent, or the speech of anyone else for that matter. See 424 U. S., at 91–95. Whether Arizona's matching funds provision comports with the First Amendment is not simply a question whether the State can give a subsidy to a candidate to fund that candidate's election, but whether that subsidy can be triggered by the speech of another candidate or independent group.

The State and the Clean Elections Institute assert that the candidates and independent expenditure groups have failed to "cite specific instances in which they decided not to raise or spend funds," Brief for State Respondents 11; see *id.*, at 11–12, and have "failed to present any reliable evidence that Arizona's triggered matching funds deter their speech," Brief for Respondent Clean Elections Institute 6; see *id.*, at 6–8. The record in this action, which we must review in its entirety, does not support those assertions. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984).

That record contains examples of specific candidates curtailing fundraising efforts, and actively discouraging supportive independent expenditures, to avoid triggering matching funds. See, *e. g.*, App. 567 (Rick Murphy), 578 (Dean Martin); App. to Pet. for Cert. in No. 10–239, at 329 (John McComish), 300 (Tony Bouie). The record also includes examples of independent expenditure groups deciding not to speak in opposition to a candidate, App. 569 (Arizona Taxpayers Action Committee), or in support of a candidate, *id.*, at 290 (Club for Growth), to avoid triggering matching funds. In addition, Dr. David Primo, an expert involved in the action, "found that privately financed candidates facing the prospect of triggering matching funds changed the timing of their fundraising activities, the timing of their expenditures, and, thus, their overall campaign strategy." Reply Brief for Petitioner Arizona Free Enterprise Club's (AFEC) Freedom Club PAC et al. 12; see also *id.*, at 11–17 (listing additional sources of evidence detailing the burdens imposed by the matching funds provision); Brief for Petitioner AFEC's Freedom Club PAC et al. 14–21 (AFEC Brief) (same); Brief for Petitioner McComish et al. 30–37 (same).

The State contends that if the matching funds provision truly burdened the speech of privately financed candidates and independent expenditure groups, spending on behalf of privately financed candidates would cluster just below the

triggering level, but no such phenomenon has been observed. Brief for State Respondents 39; Brief for Respondent Clean Elections Institute 18–19. That should come as no surprise. The hypothesis presupposes a privately funded candidate who would spend his own money just up to the matching funds threshold, when he could have simply taken matching funds in the first place.

Furthermore, the Arizona law takes into account all manner of uncoordinated political activity in awarding matching funds. If a privately funded candidate wanted to hover just below the triggering level, he would have to make guesses about how much he will receive in the form of contributions and supportive independent expenditures. He might well guess wrong.

In addition, some candidates may be willing to bear the burden of spending above the cap. That a candidate is willing to do so does not make the law any less burdensome. See *Davis*, 554 U. S., at 739 (that candidates may choose to make "personal expenditures to support their campaigns" despite the burdens imposed by the Millionaire's Amendment does not change the fact that "they must shoulder a special and potentially significant burden if they make that choice"). If the State made privately funded candidates pay a $500 fine to run as such, the fact that candidates might choose to pay it does not make the fine any less burdensome.

While there is evidence to support the contention of the candidates and independent expenditure groups that the matching funds provision burdens their speech, "it is never easy to prove a negative"—here, that candidates and groups did not speak or limited their speech because of the Arizona law. *Elkins* v. *United States*, 364 U. S. 206, 218 (1960). In any event, the burden imposed by the matching funds provision is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups. Cf. *Davis*, *supra*, at 738–740. Indeed even candidates who sign up for public funding recognize the burden

matching funds impose on private speech, stating that they participate in the program because "matching funds . . . discourage[ ] opponents, special interest groups, and lobbyists from campaigning against" them. GAO, Campaign Finance Reform: Experiences of Two States That Offered Full Public Funding for Political Candidates 27 (GAO–10–390, 2010). As in *Davis*, we do not need empirical evidence to determine that the law at issue is burdensome. See 554 U. S., at 738–740 (requiring no evidence of a burden whatsoever).

It is clear not only to us but to every other court to have considered the question after *Davis* that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries. See, *e. g.*, *Green Party of Conn.*, 616 F. 3d, at 242 (matching funds impose "a substantial burden on the exercise of First Amendment rights" (internal quotation marks omitted)); 611 F. 3d, at 524 (case below) (matching funds create "potential chilling effects" and "impose some First Amendment burden"); *Scott* v. *Roberts*, 612 F. 3d 1279, 1290 (CA11 2010) ("we think it is obvious that the [matching funds] subsidy imposes a burden on [privately financed] candidates"); *id.*, at 1291 ("we know of no court that doubts that a [matching funds] subsidy like the one at issue here burdens" the speech of privately financed candidates); see also *Day* v. *Holahan*, 34 F. 3d 1356, 1360 (CA8 1994) (it is "clear" that matching funds provisions infringe on "protected speech because of the chilling effect" they have "on the political speech of the person or group making the [triggering] expenditure" (cited in *Davis*, *supra*, at 739)). The dissent's disagreement is little more than disagreement with *Davis*.

The State correctly asserts that the candidates and independent expenditure groups "do not . . . claim that a single lump sum payment to publicly funded candidates," equivalent to the maximum amount of state financing that a candidate can obtain through matching funds, would impermissi-

bly burden their speech. Brief for State Respondents 56; see Tr. of Oral Arg. 5. The State reasons that if providing all the money up front would not burden speech, providing it piecemeal does not do so either. And the State further argues that such incremental administration is necessary to ensure that public funding is not under- or over-distributed. See Brief for State Respondents 56–57.

These arguments miss the point. It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this action. It is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups. And the fact that the State's matching mechanism may be more efficient than other alternatives—that it may help the State in "finding the sweet-spot" or "fine-tuning" its financing system to avoid a drain on public resources, *post*, at 779 (KAGAN, J., dissenting)—is of no moment; "the First Amendment does not permit the State to sacrifice speech for efficiency," *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988).

The United States as *amicus* contends that "[p]roviding additional funds to petitioners' opponents does not make petitioners' own speech any less effective" and thus does not substantially burden speech. Brief for United States 27. Of course it does. One does not have to subscribe to the view that electoral debate is zero sum, see AFEC Brief 30, to see the flaws in the United States' perspective. All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted. And even if the publicly funded candidate decides to use his new money to address a different issue altogether, the end goal of that spending is to claim electoral victory over the opponent that triggered the additional state funding. See *Davis*, 554 U. S., at 736.

B

Because the Arizona matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, "that provision cannot stand unless it is 'justified by a compelling state interest,'" *id.*, at 740 (quoting *Massachusetts Citizens for Life*, 479 U. S., at 256).

There is a debate between the parties in this action as to what state interest is served by the matching funds provision. The privately financed candidates and independent expenditure groups contend that the provision works to "level[ ] electoral opportunities" by equalizing candidate "resources and influence." Brief for Petitioner McComish et al. 64; see AFEC Brief 23. The State and the Clean Elections Institute counter that the provision "furthers Arizona's interest in preventing corruption and the appearance of corruption." Brief for State Respondents 42; Brief for Respondent Clean Elections Institute 47.

1

There is ample support for the argument that the matching funds provision seeks to "level the playing field" in terms of candidate resources. The clearest evidence is of course the very operation of the provision: It ensures that campaign funding is equal, up to three times the initial public funding allotment. The text of the Citizens Clean Elections Act itself confirms this purpose. The statutory provision setting up the matching funds regime is titled "Equal funding of candidates." Ariz. Rev. Stat. Ann. § 16–952 (West Supp. 2010). The Act refers to the funds doled out after the Act's matching mechanism is triggered as "equalizing funds." See §§ 16–952(C)(4), (5). And the regulations implementing the matching funds provision refer to those funds as "equalizing funds" as well. See Citizens Clean Elections Commission, Ariz. Admin. Code, Rule R2–20–113.

Other features of the Arizona law reinforce this understanding of the matching funds provision. If the Citizens Clean Election Commission cannot provide publicly financed candidates with the moneys that the matching funds provision envisions because of a shortage of funds, the statute allows a publicly financed candidate to "accept private contributions to bring the total monies received by the candidate" up to the matching funds amount. Ariz. Rev. Stat. Ann. § 16–954(F) (West 2006). Limiting contributions, of course, is the primary means we have upheld to combat corruption. *Buckley*, 424 U. S., at 23–35, 46–47. Indeed the State argues that one of the principal ways that the matching funds provision combats corruption is by eliminating the possibility of any *quid pro quo* between private interests and publicly funded candidates by eliminating contributions to those candidates altogether. See Brief for State Respondents 45–46. But when confronted with a choice between fighting corruption and equalizing speech, the drafters of the matching funds provision chose the latter. That significantly undermines any notion that the "Equal funding of candidates" provision is meant to serve some interest other than an interest in equalizing funds.[10]

We have repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech. See, *e. g.*, *Citizens United*, 558 U. S., at 350. In *Davis*, we stated that discriminatory contribution limits meant to "level electoral opportunities for candidates of different personal

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[10] Prior to oral argument in this action, the Citizens Clean Elections Commission's Web site stated, "'The Citizens Clean Elections Act was passed by the people of Arizona in 1998 to level the playing field when it comes to running for office.'" AFEC Brief 10, n. 3 (quoting http://www.azcleanelections.gov/about-us/get-involved.aspx); Tr. of Oral Arg. 48. The Web site now says, "The Citizens Clean Elections Act was passed by the people of Arizona in 1998 to restore citizen participation and confidence in our political system."

wealth" did not serve "a legitimate government objective," let alone a compelling one. 554 U. S., at 741 (internal quotation marks omitted). And in *Buckley*, we held that limits on overall campaign expenditures could not be justified by a purported government "interest in equalizing the financial resources of candidates." 424 U. S., at 56; see *id.*, at 56–57. After all, equalizing campaign resources "might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Id.*, at 57.

"Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election," *Davis*, *supra*, at 742—a dangerous enterprise and one that cannot justify burdening protected speech. The dissent essentially dismisses this concern, see *post*, at 780–782, but it needs to be taken seriously; we have, as noted, held that it is not legitimate for the government to attempt to equalize electoral opportunities in this manner. And such basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values.

"Leveling the playing field" can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the "unfettered interchange of ideas"—not whatever the State may view as fair. *Buckley*, *supra*, at 14 (internal quotation marks omitted).

2

As already noted, the State and the Clean Elections Institute disavow any interest in "leveling the playing field." They instead assert that the "Equal funding of candidates" provision, Ariz. Rev. Stat. Ann. § 16–952 (West Supp. 2010), serves the State's compelling interest in combating corrup-

tion and the appearance of corruption. See, *e. g.*, *Davis*, *supra*, at 740; *Wisconsin Right to Life*, 551 U. S., at 478–479 (opinion of ROBERTS, C. J.). But even if the ultimate objective of the matching funds provision is to combat corruption—and not "level the playing field"—the burdens that the matching funds provision imposes on protected political speech are not justified.

Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest. Indeed, we have said that "reliance on personal funds *reduces* the threat of corruption" and that "discouraging [the] use of personal funds[ ] disserves the anticorruption interest." *Davis*, *supra*, at 740–741. That is because "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse" of money in politics. *Buckley*, *supra*, at 53. The matching funds provision counts a candidate's expenditures of his own money on his own campaign as contributions, and to that extent cannot be supported by any anticorruption interest.

We have also held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U. S., at 357. "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Id.*, at 360. The candidate-funding circuit is broken. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned. See *id.*, at 357–361; cf. *Buckley*, 424 U. S., at 46. Including independent expenditures in the matching funds provision cannot be supported by any anticorruption interest.

We have observed in the past that "[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations." *Id.*, at 55. Arizona

already has some of the most austere contribution limits in the United States. See *Randall* v. *Sorrell*, 548 U. S. 230, 250–251 (2006) (plurality opinion). Contributions to statewide candidates are limited to $840 per contributor per election cycle and contributions to legislative candidates are limited to $410 per contributor per election cycle. See Ariz. Rev. Stat. Ann. §§ 16–905(A)(1), 16–941(B)(1); Ariz. Dept. of State, Office of the Secretary of State, 2009–2010 Contribution Limits, see *supra*, at 730. Arizona also has stringent fundraising disclosure requirements. In the face of such ascetic contribution limits, strict disclosure requirements, and the general availability of public funding, it is hard to imagine what marginal corruption deterrence could be generated by the matching funds provision.

Perhaps recognizing that the burdens the matching funds provision places on speech cannot be justified in and of themselves, either as a means of leveling the playing field or directly fighting corruption, the State and the Clean Elections Institute offer another argument: They contend that the provision indirectly serves the anticorruption interest, by ensuring that enough candidates participate in the State's public funding system, which in turn helps combat corruption.[11] See Brief for State Respondents 46–47; Brief for Respondent Clean Elections Institute 47–49. We have said that a voluntary system of "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Buckley*, *supra*, at 96. But the fact that burdening constitutionally protected speech

[11] The State claims that the Citizens Clean Elections Act was passed in response to rampant corruption in Arizona politics—elected officials "literally taking duffle bags full of cash in exchange for sponsoring legislation." Brief for State Respondents 45. That may be. But, as the candidates and independent expenditure groups point out, the corruption that plagued Arizona politics is largely unaddressed by the matching funds regime. AFEC Brief 11, n. 4. Public financing does nothing to prevent politicians from accepting bribes in exchange for their votes.

might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision.

We have explained that the matching funds provision substantially burdens the speech of privately financed candidates and independent groups. It does so to an even greater extent than the law we invalidated in *Davis*. We have explained that those burdens cannot be justified by a desire to "level the playing field." We have also explained that much of the speech burdened by the matching funds provision does not, under our precedents, pose a danger of corruption. In light of the foregoing analysis, the fact that the State may feel that the matching funds provision is necessary to allow it to "find[ ] the sweet-spot" and "fine-tun[e]" its public funding system, *post*, at 779 (KAGAN, J., dissenting), to achieve its desired level of participation without an undue drain on public resources, is not a sufficient justification for the burden.

The flaw in the State's argument is apparent in what its reasoning would allow. By the State's logic it could grant a publicly funded candidate five dollars in matching funds for every dollar his privately financed opponent spent, or force candidates who wish to run on private funds to pay a $10,000 fine in order to encourage participation in the public funding regime. Such measures might well promote participation in public financing, but would clearly suppress or unacceptably alter political speech. How the State chooses to encourage participation in its public funding system matters, and we have never held that a State may burden political speech—to the extent the matching funds provision does—to ensure adequate participation in a public funding system. Here the State's chosen method is unduly burdensome and not sufficiently justified to survive First Amendment scrutiny.

III

We do not today call into question the wisdom of public financing as a means of funding political candidacy. That is

not our business. But determining whether laws governing campaign finance violate the First Amendment is very much our business. In carrying out that responsibility over the past 35 years, we have upheld some restrictions on speech and struck down others. See, *e. g.*, *Buckley*, 424 U. S., at 35–38, 51–54 (upholding contribution limits and striking down expenditure limits); *Colorado I*, 518 U. S., at 608 (opinion of BREYER, J.) (invalidating ban on independent expenditures for electioneering communication); *Colorado II*, 533 U. S., at 437 (upholding caps on coordinated party expenditures); *Davis*, 554 U. S., at 736 (invalidating asymmetrical contribution limits triggered by candidate spending).

We have said that governments "may engage in public financing of election campaigns" and that doing so can further "significant governmental interest[s]," such as the state interest in preventing corruption. *Buckley*, *supra*, at 57, n. 65, 92–93, 96. But the goal of creating a viable public financing scheme can only be pursued in a manner consistent with the First Amendment. The dissent criticizes the Court for standing in the way of what the people of Arizona want. *Post*, at 756–757, 784–785. But the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign.

Arizona's program gives money to a candidate in direct response to the campaign speech of an opposing candidate or an independent group. It does this when the opposing candidate has chosen not to accept public financing, and has engaged in political speech above a level set by the State. The professed purpose of the state law is to cause a sufficient number of candidates to sign up for public financing, see *post*, at 759, which subjects them to the various restrictions on speech that go along with that program. This goes too far; Arizona's matching funds provision substantially burdens the speech of privately financed candidates and independent

expenditure groups without serving a compelling state interest.

"[T]here is practically universal agreement that a major purpose of" the First Amendment "was to protect the free discussion of governmental affairs," "includ[ing] discussions of candidates." *Buckley*, 424 U. S., at 14 (internal quotation marks omitted; second alteration in original). That agreement "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Ibid.* (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)). True when we said it and true today. Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand.

The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

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

Imagine two States, each plagued by a corrupt political system. In both States, candidates for public office accept large campaign contributions in exchange for the promise that, after assuming office, they will rank the donors' interests ahead of all others. As a result of these bargains, politicians ignore the public interest, sound public policy languishes, and the citizens lose confidence in their government.

Recognizing the cancerous effect of this corruption, voters of the first State, acting through referendum, enact several campaign finance measures previously approved by this Court. They cap campaign contributions; require disclosure of substantial donations; and create an optional public financing program that gives candidates a fixed public subsidy if they refrain from private fundraising. But these measures do not work. Individuals who "bundle" campaign contributions become indispensable to candidates in need of money.

Simple disclosure fails to prevent shady dealing. And candidates choose not to participate in the public financing system because the sums provided do not make them competitive with their privately financed opponents. So the State remains afflicted with corruption.

Voters of the second State, having witnessed this failure, take an ever-so-slightly different tack to cleaning up their political system. They too enact contribution limits and disclosure requirements. But they believe that the greatest hope of eliminating corruption lies in creating an effective public financing program, which will break candidates' dependence on large donors and bundlers. These voters realize, based on the first State's experience, that such a program will not work unless candidates agree to participate in it. And candidates will participate only if they know that they will receive sufficient funding to run competitive races. So the voters enact a program that carefully adjusts the money given to would-be officeholders, through the use of a matching funds mechanism, in order to provide this assurance. The program does not discriminate against any candidate or point of view, and it does not restrict any person's ability to speak. In fact, by providing resources to many candidates, the program creates more speech and thereby broadens public debate. And just as the voters had hoped, the program accomplishes its mission of restoring integrity to the political system. The second State rids itself of corruption.

A person familiar with our country's core values—our devotion to democratic self-governance, as well as to "uninhibited, robust, and wide-open" debate, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)—might expect this Court to celebrate, or at least not to interfere with, the second State's success. But today, the majority holds that the second State's system—the system that produces honest government, working on behalf of all the people—clashes with our Constitution. The First Amendment, the majority insists, requires us all to rely on the measures employed in the

first State, even when they have failed to break the stranglehold of special interests on elected officials.

I disagree. The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate. Nothing in Arizona's anti-corruption statute, the Arizona Citizens Clean Elections Act, violates this constitutional protection. To the contrary, the Act promotes the values underlying both the First Amendment and our entire Constitution by enhancing the "opportunity for free political discussion to the end that government may be responsive to the will of the people." *Id.*, at 269 (internal quotation marks omitted). I therefore respectfully dissent.

I

A

Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system. If an officeholder owes his election to wealthy contributors, he may act for their benefit alone, rather than on behalf of all the people. As we recognized in *Buckley* v. *Valeo*, 424 U. S. 1, 26 (1976) *(per curiam)*, our seminal campaign finance case, large private contributions may result in "political *quid pro quo[s]*," which undermine the integrity of our democracy. And even if these contributions are not converted into corrupt bargains, they still may weaken confidence in our political system because the public perceives "the opportunities for abuse[s]." *Id.*, at 27. To prevent both corruption and the appearance of corruption—and so to protect our democratic system of governance—citizens have implemented reforms designed to curb the power of special interests.

Among these measures, public financing of elections has emerged as a potentially potent mechanism to preserve elected officials' independence. President Theodore Roosevelt proposed the reform as early as 1907 in his State of the Union address. "The need for collecting large campaign

funds would vanish," he said, if the government "provided an appropriation for the proper and legitimate expenses" of running a campaign, on the condition that a "party receiving campaign funds from the Treasury" would forgo private fundraising. 42 Cong. Rec. 78 (1907). The idea was—and remains—straightforward. Candidates who rely on public, rather than private, moneys are "beholden [to] no person and, if elected, should feel no post-election obligation toward any contributor." *Republican Nat. Comm.* v. *Federal Election Comm'n*, 487 F. Supp. 280, 284 (SDNY), aff'd, 445 U. S. 955 (1980). By supplanting private cash in elections, public financing eliminates the source of political corruption.

For this reason, public financing systems today dot the national landscape. Almost one-third of the States have adopted some form of public financing, and so too has the Federal Government for presidential elections. See R. Garrett, Congressional Research Service Report for Congress, Public Financing of Congressional Campaigns: Overview and Analysis 2, 32 (2009). The federal program—which offers presidential candidates a fixed public subsidy if they abstain from private fundraising—originated in the campaign finance law that Congress enacted in 1974 on the heels of the Watergate scandal. Congress explained at the time that the "potentia[l] for abuse" inherent in privately funded elections was "all too clear." S. Rep. No. 93–689, p. 4 (1974). In Congress's view, public financing represented the "only way . . . [to] eliminate reliance on large private contributions" and its attendant danger of corruption, while still ensuring that a wide range of candidates had access to the ballot. *Id.*, at 5 (emphasis deleted).

We declared the presidential public financing system constitutional in *Buckley* v. *Valeo*. Congress, we stated, had created the program "for the 'general welfare'—to reduce the deleterious influence of large contributions on our political process," as well as to "facilitate communication by candi-

dates with the electorate, and to free candidates from the rigors of fundraising." 424 U. S., at 91. We reiterated "that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.*, at 96. And finally, in rejecting a challenge based on the First Amendment, we held that the program did not "restrict[ ] or censor speech, but rather . . . use[d] public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.*, at 92–93. We declared this result "vital to a self-governing people," and so concluded that the program "further[ed], not abridge[d], pertinent First Amendment values." *Id.*, at 93. We thus gave state and municipal governments the green light to adopt public financing systems along the presidential model.

But this model, which distributes a lump-sum grant at the beginning of an election cycle, has a significant weakness: It lacks a mechanism for setting the subsidy at a level that will give candidates sufficient incentive to participate, while also conserving public resources. Public financing can achieve its goals only if a meaningful number of candidates receive the state subsidy, rather than raise private funds. See 611 F. 3d 510, 527 (CA9 2010) ("A public financing system with no participants does nothing to reduce the existence or appearance of *quid pro quo* corruption"). But a public funding program must be voluntary to pass constitutional muster, because of its restrictions on contributions and expenditures. See *Buckley*, 424 U. S., at 57, n. 65, 95. And candidates will choose to sign up only if the subsidy provided enables them to run competitive races. If the grant is pegged too low, it puts the participating candidate at a disadvantage: Because he has agreed to spend no more than the amount of the subsidy, he will lack the means to respond if his privately funded opponent spends over that threshold. So when lump-sum grants do not keep up with campaign expenditures, more and

more candidates will choose not to participate.[1] But if the subsidy is set too high, it may impose an unsustainable burden on the public fisc. See 611 F. 3d, at 527 (noting that large subsidies would make public funding "prohibitively expensive and spell its doom"). At the least, hefty grants will waste public resources in the many state races where lack of competition makes such funding unnecessary.

The difficulty, then, is in finding the Goldilocks solution—not too large, not too small, but just right. And this in a world of countless variables—where the amount of money needed to run a viable campaign against a privately funded candidate depends on, among other things, the district, the office, and the election cycle. A State may set lump-sum grants district-by-district, based on spending in past elections; but even that approach leaves out many factors—including the resources of the privately funded candidate—that alter the competitiveness of a seat from one election to the next. See App. 714–716 (record evidence chronicling the history of variation in campaign spending levels in Arizona's legislative districts). In short, the dynamic nature of our electoral system makes *ex ante* predictions about campaign expenditures almost impossible. And that creates a chronic problem for lump-sum public financing programs, because in-

[1] The problem is apparent in the federal system. In recent years, the number of presidential candidates opting to receive public financing has declined because the subsidy has not kept pace with spending by privately financed candidates. See Corrado, Public Funding of Presidential Campaigns, in The New Campaign Finance Sourcebook 180, 200 (A. Corrado, T. Mann, D. Ortiz, & T. Potter 2005). The last election cycle offers a stark example: Then-candidate Barack Obama raised $745.7 million in private funds in 2008, Federal Election Commission, 2008 Presidential Campaign Financial Activity Summarized, June 8, 2009, online at http://www.fec.gov/press/press2009/20090608PresStat.shtml, in contrast with the $105.4 million he could have received in public funds, see Federal Election Commission, Presidential Election Campaign Fund, online at http://www.fec.gov/press/bkgnd/fund.shtml (all Internet materials as visited June 24, 2011, and available in Clerk of Court's case file).

accurate estimates produce subsidies that either dissuade candidates from participating or waste taxpayer money. And so States have made adjustments to the lump-sum scheme that we approved in *Buckley*, in attempts to more effectively reduce corruption.

B

The people of Arizona had every reason to try to develop effective anti-corruption measures. Before turning to public financing, Arizonans voted by initiative to establish campaign contribution limits. See Ariz. Rev. Stat. Ann. § 16–905 (West Supp. 2010). But that effort to abate corruption, standing alone, proved unsuccessful. Five years after the enactment of these limits, the State suffered "the worst public corruption scandal in its history." Brief for State Respondents 1. In that scandal, known as "AzScam," nearly 10% of the State's legislators were caught accepting campaign contributions or bribes in exchange for supporting a piece of legislation. Following that incident, the voters of Arizona decided that further reform was necessary. Acting once again by initiative, they adopted the public funding system at issue here.

The hallmark of Arizona's program is its inventive approach to the challenge that bedevils all public financing schemes: fixing the amount of the subsidy. For each electoral contest, the system calibrates the size of the grant automatically to provide sufficient—but no more than sufficient—funds to induce voluntary participation. In effect, the program's designers found the Goldilocks solution, which produces the "just right" grant to ensure that a participant in the system has the funds needed to run a competitive race.

As the Court explains, Arizona's matching funds arrangement responds to the shortcoming of the lump-sum model by adjusting the public subsidy in each race to reflect the expenditures of a privately financed candidate and the independent groups that support him. See Ariz. Rev. Stat. Ann.

§ 16–940 *et seq.* (West 2006 and Supp. 2010). A publicly financed candidate in Arizona receives an initial lump sum to get his campaign off the ground. See § 16–951 (West 2006). But for every dollar his privately funded opponent (or the opponent's supporters) spends over the initial subsidy, the publicly funded candidate will—to a point—get an additional 94 cents. See § 16–952 (West Supp. 2010). Once the publicly financed candidate has received three times the amount of the initial disbursement, he gets no further public funding, see *ibid.*, and remains barred from receiving private contributions, no matter how much more his privately funded opponent spends, see § 16–941(A).

This arrangement, like the lump-sum model, makes use of a pre-set amount to provide financial support to participants. For example, all publicly funded legislative candidates collect an initial grant of $21,479 for a general election race. And they can in no circumstances receive more than three times that amount ($64,437); after that, their privately funded competitors hold a marked advantage. But the Arizona system improves on the lump-sum model in a crucial respect. By tying public funding to private spending, the State can afford to set a more generous upper limit—because it knows that in each campaign it will only have to disburse what is necessary to keep a participating candidate reasonably competitive. Arizona can therefore assure candidates that, if they accept public funds, they will have the resources to run a viable race against those who rely on private money. And at the same time, Arizona avoids wasting taxpayers' dollars. In this way, the Clean Elections Act creates an effective and sustainable public financing system.

The question here is whether this modest adjustment to the public financing program that we approved in *Buckley* makes the Arizona law unconstitutional. The majority contends that the matching funds provision "substantially burdens protected political speech" and does not "serv[e] a com-

pelling state interest." *Ante,* at 728. But the Court is wrong on both counts.

II

Arizona's statute does not impose a "'restrictio[n],'" *ante,* at 741, or "substantia[l] burde[n]," *ante,* at 728, on expression. The law has quite the opposite effect: It subsidizes and so produces *more* political speech. We recognized in *Buckley* that, for this reason, public financing of elections "facilitate[s] and enlarge[s] public discussion," in support of First Amendment values. 424 U. S., at 92–93. And what we said then is just as true today. Except in a world gone topsy-turvy, additional campaign speech and electoral competition is not a First Amendment injury.

A

At every turn, the majority tries to convey the impression that Arizona's matching fund statute is of a piece with laws prohibiting electoral speech. The majority invokes the language of "limits," "bar[s]," and "restraints." *Ante,* at 734. It equates the law to a "restrictio[n] on the amount of money a person or group can spend on political communication during a campaign." *Ante,* at 741 (internal quotation marks omitted). It insists that the statute "restrict[s] the speech of some elements of our society" to enhance the speech of others. *Ibid.* (internal quotation marks omitted). And it concludes by reminding us that the point of the First Amendment is to protect "against unjustified government restrictions on speech." *Ante,* at 754.

There is just one problem. Arizona's matching funds provision does not restrict, but instead subsidizes, speech. The law "impose[s] no ceiling on [speech] and do[es] not prevent anyone from speaking." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 366 (2010) (citation and internal quotation marks omitted); see *Buckley*, 424 U. S., at 92 (holding that a public financing law does not "abridge, restrict, or

censor" expression). The statute does not tell candidates or their supporters how much money they can spend to convey their message, when they can spend it, or what they can spend it on. Rather, the Arizona law, like the public financing statute in *Buckley*, provides funding for political speech, thus "facilitat[ing] communication by candidates with the electorate." *Id.*, at 91. By enabling participating candidates to respond to their opponents' expression, the statute expands public debate, in adherence to "our tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U. S., at 361. What the law does—all the law does—is fund more speech.[2]

And under the First Amendment, that makes all the difference. In case after case, year upon year, we have distinguished between speech restrictions and speech subsidies. "'There is a basic difference,'" we have held, "'between direct state interference with [First Amendment] protected activity and state encouragement'" of other expression. *Rust* v. *Sullivan*, 500 U. S. 173, 193 (1991) (quoting *Maher* v. *Roe*, 432 U. S. 464, 475 (1977)); see also, *e. g.*, *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 256, n. 9 (1986); *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 550 (1983); *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 587–588 (1998); *id.*, at 599 (SCALIA, J., concurring in judgment) (noting the "fundamental divide" between "'abridging' speech and funding it"). Government subsidies of speech, designed "to stimulate . . . expression[,] . . . [are] consistent with the First Amendment," so long as they do not discriminate on the basis of viewpoint. *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 234 (2000); see, *e. g.*, *Rosenberger* v. *Rector and*

[2] And the law appears to do that job well. Between 1998 (when the statute was enacted) and 2006, overall candidate expenditures increased between 29% and 67%; overall independent expenditures rose by a whopping 253%; and average candidate expenditures grew by 12% to 40%. App. to Pet. for Cert. in No. 10–239, pp. 284–285; App. 916–917.

Visitors of Univ. of Va., 515 U. S. 819, 834 (1995); *Finley*, 524 U. S., at 587–588. That is because subsidies, by definition and contra the majority, do not restrict any speech.

No one can claim that Arizona's law discriminates against particular ideas, and so violates the First Amendment's sole limitation on speech subsidies. The State throws open the doors of its public financing program to all candidates who meet minimal eligibility requirements and agree not to raise private funds. Republicans and Democrats, conservatives and liberals may participate; so too, the law applies equally to independent expenditure groups across the political spectrum. Arizona disburses funds based not on a candidate's (or supporter's) ideas, but on the candidate's decision to sign up for public funding. So under our precedent, Arizona's subsidy statute should easily survive First Amendment scrutiny.[3]

This suit, in fact, may merit less attention than any challenge to a speech subsidy ever seen in this Court. In the usual First Amendment subsidy case, a person complains that the government declined to finance his speech, while

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[3] The majority claims that none of our subsidy cases involved the funding of "respons[ive]" expression. See *ante*, at 743. But the majority does not explain why this distinction, created to fit the facts of this case, should matter so long as the government is not discriminating on the basis of viewpoint. Indeed, the difference the majority highlights should cut in the opposite direction, because facilitating responsive speech fosters "uninhibited, robust, and wide-open" public debate. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). In any event, the majority is wrong to say that we have never approved funding to "allow the recipient to counter" someone else's political speech. *Ante*, at 743. That is *exactly* what we approved in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*. See *supra*, at 759. The majority notes that the public financing scheme in *Buckley* lacked the trigger mechanism used in the Arizona law. See *ante*, at 743, n. 9. But again, that is just to describe a difference, not to say why it matters. As I will show, the trigger is constitutionally irrelevant—as we made clear in the very case (*Davis* v. *Federal Election Comm'n*, 554 U. S. 724 (2008)) on which the majority principally relies. See *infra*, at 772–776.

bankrolling someone else's; we must then decide whether the government differentiated between these speakers on a prohibited basis—because it preferred one speaker's ideas to another's. See, *e. g.*, *id.*, at 577–578; *Regan*, 461 U. S., at 543–545. But the candidates bringing this challenge do not make that claim—because they were never denied a subsidy. Arizona, remember, offers to support any person running for state office. Petitioners here *refused* that assistance. So they are making a novel argument: that Arizona violated *their* First Amendment rights by disbursing funds to *other* speakers even though they could have received (but chose to spurn) the same financial assistance. Some people might call that *chutzpah*.

Indeed, what petitioners demand is essentially a right to quash others' speech through the prohibition of a (universally available) subsidy program. Petitioners are able to convey their ideas without public financing—and they would prefer the field to themselves, so that they can speak free from response. To attain that goal, they ask this Court to prevent Arizona from funding electoral speech—even though that assistance is offered to every state candidate, on the same (entirely unobjectionable) basis. And this Court gladly obliges.

If an ordinary citizen, without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct. That Amendment protects no person's, nor any candidate's, "right to be free from vigorous debate." *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 14 (1986) (plurality opinion). Indeed, the Amendment exists so that this debate can occur—robust, forceful, and contested. It is the theory of the Free Speech Clause that "falsehood and fallacies" are exposed through "discussion," "education," and "more speech." *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring). Or once again from *Citizens United:* "[M]ore speech, not less, is the governing rule." 558 U. S., at 361. And this

is no place more true than in elections, where voters' ability to choose the best representatives depends on debate—on charge and countercharge, call and response. So to invalidate a statute that restricts no one's speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.[4]

We said all this in *Buckley*, when we upheld the presidential public financing system—a ruling this Court has never since questioned. The principal challenge to that system came from minor-party candidates not eligible for benefits—surely more compelling plaintiffs than petitioners, who could have received funding but refused it. Yet we rejected that attack in part because we understood the federal program as supporting, rather than interfering with, expression. See 424 U. S., at 90–108; see also *Regan*, 461 U. S., at 549 (relying on *Buckley* to hold that selective subsidies of expression comport with the First Amendment if they are viewpoint neutral). *Buckley* rejected any idea, along the lines the majority proposes, that a subsidy of electoral speech was in truth a restraint. And more: *Buckley* recognized that public financing of elections *fosters* First Amendment principles. "[T]he central purpose of the Speech and Press Clauses," we explained, "was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." 424 U. S., at 93, n. 127 (quoting *New York Times*, 376

[4] The majority argues that more speech will quickly become "less speech," as candidates switch to public funding. *Ante*, at 741, n. 7. But that claim misunderstands how a voluntary public financing system works. Candidates with significant financial resources will likely decline public funds, so that they can spend in excess of the system's expenditure caps. Other candidates accept public financing because they believe it will enhance their communication with voters. So the system continually pushes toward more speech. That is exactly what has happened in Arizona, see n. 2, *supra*, and the majority offers no counter-examples.

U. S., at 270). And we continued: "[L]aws providing financial assistance to the exercise of free speech"—including the campaign finance statute at issue—"enhance these First Amendment values." 424 U. S., at 93, n. 127. We should be saying the same today.

B

The majority has one, and only one, way of separating this case from *Buckley* and our other, many precedents involving speech subsidies. According to the Court, the special problem here lies in Arizona's matching funds mechanism, which the majority claims imposes a "substantia[l] burde[n]" on a privately funded candidate's speech. *Ante*, at 728. Sometimes, the majority suggests that this "burden" lies in the way the mechanism "'diminishe[s] the effectiveness'" of the privately funded candidate's expression by enabling his opponent to respond. *Ante*, at 736 (quoting *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 736 (2008)); see *ante*, at 747. At other times, the majority indicates that the "burden" resides in the deterrent effect of the mechanism: The privately funded candidate "might not spend money" because doing so will trigger matching funds. *Ante*, at 746. Either way, the majority is wrong to see a substantial burden on expression.[5]

Most important, and as just suggested, the very notion that additional speech constitutes a "burden" is odd and unsettling. Here is a simple fact: Arizona imposes nothing re-

[5] The majority's error on this score extends both to candidates and to independent expenditure groups. Contrary to the majority's suggestion, see *ante*, at 740, n. 6, nearly all of my arguments showing that the Clean Elections Act does not impose a substantial burden apply to both sets of speakers (and apply regardless of whether independent or candidate expenditures trigger the matching funds). That is also true of every one of my arguments demonstrating the State's compelling interest in this legislation. See *infra*, at 776–780. But perhaps the best response to the majority's view that the Act inhibits independent expenditure groups lies in an empirical fact already noted: Expenditures by these groups have risen by 253% since Arizona's law was enacted. See n. 2, *supra*.

motely resembling a coercive penalty on privately funded candidates. The State does not jail them, fine them, or subject them to any kind of lesser disability. (So the majority's analogies to a fine on speech, *ante*, at 745, 753, are inapposite.) The only "burden" in this case comes from the grant of a subsidy to another person, and the opportunity that subsidy allows for responsive speech. But that means the majority cannot get out from under our subsidy precedents. Once again: We have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another. (And that is so even when the subsidy is not open to all, as it is here.) Yet in this case, the majority says that the prospect of more speech—responsive speech, competitive speech, the kind of speech that drives public debate—counts as a constitutional injury. That concept, for all the reasons previously given, is "wholly foreign to the First Amendment." *Buckley*, 424 U. S., at 49.

But put to one side this most fundamental objection to the majority's argument; even then, has the majority shown that the burden resulting from the Arizona statute is "substantial"? See *Clingman* v. *Beaver*, 544 U. S. 581, 592 (2005) (holding that stringent judicial review is "appropriate only if the burden is severe"). I will not quarrel with the majority's assertion that responsive speech by one candidate may make another candidate's speech less effective, see *ante*, at 747; that, after all, is the whole idea of the First Amendment, and a *benefit* of having more responsive speech. See *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market"). And I will assume that the operation of this statute may on occasion deter a privately funded candidate from spending money, and conveying ideas by that means.[6] My

[6] I will note, however, that the record evidence of this effect is spotty at best. The majority finds anecdotal evidence supporting its argument on just 6 pages of a 4,500-page summary judgment record. See *ante*, at

guess is that this does not happen often: Most political candidates, I suspect, have enough faith in the power of their ideas to prefer speech on both sides of an issue to speech on neither. But I will take on faith that the matching funds provision may lead one or another privately funded candidate to stop spending at one or another moment in an election. Still, does that effect count as a severe burden on expression? By the measure of our prior decisions—which have upheld campaign reforms with an equal or greater impact on speech—the answer is no.

Number one: *Any* system of public financing, including the lump-sum model upheld in *Buckley*, imposes a similar burden on privately funded candidates. Suppose Arizona were to do what all parties agree it could under *Buckley*—provide a single upfront payment (say, $150,000) to a participating candidate, rather than an initial payment (of $50,000) plus 94% of whatever his privately funded opponent spent, up to a ceiling (the same $150,000). That system would "diminis[h] the effectiveness" of a privately funded candidate's speech at least as much, and in the same way: It would give his opponent, who presumably would not be able to raise that sum on his own, more money to spend. And so too, a lump-sum system may deter speech. A person relying on

744. (The majority also cites sections of petitioners' briefs, which cite the same six pages in the record. See *ibid.*) That is consistent with the assessment of the District Court Judge who presided over the proceedings in this case: She stated that petitioners had presented only "vague" and "scattered" evidence of the law's deterrent impact. App. to Pet. for Cert. in No. 10–239, at 54. The appellate court discerned even less evidence of any deterrent effect. 611 F. 3d 510, 523 (CA9 2010) ("No Plaintiff . . . has pointed to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds"); see also *id.*, at 522–525. I understand the majority to essentially concede this point ("'it is never easy to prove a negative,'" *ante*, at 745) and to say it does not matter ("we do not need empirical evidence," *ante*, at 746). So I will not belabor the issue by detailing the substantial testimony (much more than six pages' worth) that the matching funds provision has not put a dent in privately funded candidates' spending.

private resources might well choose not to enter a race at all, because he knows he will face an adequately funded opponent. And even if he decides to run, he likely will choose to speak in different ways—for example, by eschewing dubious, easy-to-answer charges—because his opponent has the ability to respond. Indeed, privately funded candidates may well find the lump-sum system *more* burdensome than Arizona's (assuming the lump is big enough). Pretend you are financing your campaign through private donations. Would you prefer that your opponent receive a guaranteed, upfront payment of $150,000, or that he receive only $50,000, with the *possibility*—a possibility that you mostly get to control—of collecting another $100,000 somewhere down the road? Me too. That's the first reason the burden on speech cannot command a different result in this case than in *Buckley*.

Number two: Our decisions about disclosure and disclaimer requirements show the Court is wrong. Starting in *Buckley* and continuing through last Term, the Court has repeatedly declined to view these requirements as a substantial First Amendment burden, even though they discourage some campaign speech. "It is undoubtedly true," we stated in *Buckley*, that public disclosure obligations "will deter some individuals" from engaging in expressive activity. 424 U. S., at 68; see *Davis*, 554 U. S., at 744. Yet we had no difficulty upholding these requirements there. And much more recently, in *Citizens United* and *Doe* v. *Reed*, 561 U. S. 186 (2010), we followed that precedent. "'[D]isclosure requirements may burden the ability to speak,'" we reasoned, but they "'do not prevent anyone from speaking.'" *Id.*, at 196 (quoting *Citizens United*, 558 U. S., at 366). So too here. Like a disclosure rule, the matching funds provision may occasionally deter, but "'impose[s] no ceiling'" on, electoral expression. *Id.*, at 366.

The majority breezily dismisses this comparison, labeling the analogy "not even close" because disclosure requirements result in no payment of money to a speaker's opponent.

Ante, at 743. That is indeed the factual distinction: A matching fund provision, we can all agree, is not a disclosure rule. But the majority does not tell us why this difference matters. Nor could it. The majority strikes down the matching funds provision because of its ostensible *effect*—most notably, that it may deter a person from spending money in an election. But this Court has acknowledged time and again that disclosure obligations have the selfsame effect. If that consequence does not trigger the most stringent judicial review in the one case, it should not do so in the other.

Number three: Any burden that the Arizona law imposes does not exceed the burden associated with contribution limits, which we have also repeatedly upheld. Contribution limits, we have stated, "impose *direct quantity restrictions* on political communication and association," *Buckley*, 424 U. S., at 18 (emphasis added), thus "'significant[ly] interfer[ing]'" with First Amendment interests, *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 387 (2000) (quoting *Buckley*, 424 U. S., at 25). Rather than potentially deterring or "'diminish[ing] the effectiveness'" of expressive activity, *ante*, at 736 (quoting *Davis*, 554 U. S., at 736), these limits stop it cold. Yet we have never subjected these restrictions to the most stringent review. See *Buckley*, 424 U. S., at 29–38. I doubt I have to reiterate that the Arizona statute imposes no restraints on any expressive activity. So the majority once again has no reason here to reach a different result.

In this way, our campaign finance cases join our speech subsidy cases in supporting the constitutionality of Arizona's law. Both sets of precedents are in accord that a statute funding electoral speech in the way Arizona's does imposes no First Amendment injury.

C

The majority thinks it has one case on its side—*Davis* v. *Federal Election Comm'n*, 554 U. S. 724—and it pegs every-

thing on that decision. See *ante*, at 735–738. But *Davis* relies on principles that fit securely within our First Amendment law and tradition—most unlike today's opinion.

As the majority recounts, *Davis* addressed the constitutionality of federal legislation known as the Millionaire's Amendment. Under that provision (which applied in elections not involving public financing), a candidate's expenditure of more than $350,000 of his own money activated a change in applicable contribution limits. Before, each candidate in the race could accept $2,300 from any donor; but now, the opponent of the self-financing candidate could accept three times that much, or up to $6,900 per contributor. So one candidate's expenditure of personal funds on campaign speech triggered discriminatory contribution restrictions favoring that candidate's opponent.

Under the First Amendment, the similarity between *Davis* and this case matters far less than the differences. Here is the similarity: In both cases, one candidate's campaign expenditure triggered . . . something. Now here are the differences: In *Davis*, the candidate's expenditure triggered a discriminatory speech restriction, which Congress could not otherwise have imposed consistent with the First Amendment; by contrast, in this case, the candidate's expenditure triggers a non-discriminatory speech subsidy, which all parties agree Arizona could have provided in the first instance. In First Amendment law, that difference makes a difference—indeed, it makes *all* the difference. As I have indicated before, two great fault lines run through our First Amendment doctrine: one, between speech restrictions and speech subsidies, and the other, between discriminatory and neutral government action. See *supra*, at 764–765. The Millionaire's Amendment fell on the disfavored side of both divides: To reiterate, it imposed a discriminatory speech restriction. The Arizona Clean Elections Act lands on the opposite side of both: It grants a non-discriminatory

speech subsidy.[7] So to say that *Davis* "largely controls" this case, *ante,* at 736, is to decline to take our First Amendment doctrine seriously.

And let me be clear: This is not my own idiosyncratic or *post hoc* view of *Davis;* it is the *Davis* Court's self-expressed, contemporaneous view. That decision began, continued, and ended by focusing on the Millionaire Amendment's "discriminatory contribution limits." 554 U. S., at 740. We made that clear in the very first sentence of the opinion, where we summarized the question presented. *Id.*, at 728 ("In this appeal, we consider the constitutionality of federal election law provisions that . . . impose different campaign contribution limits on candidates"). And our focus on the law's discriminatory restrictions was evident again when we examined how the Court's prior holdings informed the case. *Id.*, at 738 ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates"). And then again, when we concluded that the Millionaire's Amendment could not stand. *Id.*, at 740 (explaining that "the activation of a scheme of discriminatory contribution limits" burdens speech). Our decision left no doubt (because we repeated the point many times over, see also *id.*, at 729, 730, 739, 740, n. 7, 741, 744): The constitutional problem with the Millionaire's Amendment lay in its use of discriminatory speech restrictions.

But what of the trigger mechanism—in *Davis,* as here, a candidate's campaign expenditures? That, after all, is the only thing that this case and *Davis* share. If *Davis* had held

[7] Of course, only publicly funded candidates receive the subsidy. But that is because only those candidates have agreed to abide by stringent spending caps (which privately funded candidates can exceed by any amount). And *Buckley* specifically approved that exchange as consistent with the First Amendment. See 424 U. S., at 57, n. 65, 95. By contrast, *Davis* involved a scheme in which one candidate in a race received concrete fundraising advantages, in the form of asymmetrical contribution limits, just because his opponent had spent a certain amount of his own money.

that the trigger mechanism itself violated the First Amendment, then the case would support today's holding. But *Davis* said nothing of the kind. It made clear that the trigger mechanism could not *rescue* the discriminatory contribution limits from constitutional invalidity; that the limits went into effect only after a candidate spent substantial personal resources rendered them no more permissible under the First Amendment. See *id.*, at 739. But *Davis* did not call into question the trigger mechanism itself. Indeed, *Davis* explained that Congress could have used that mechanism to activate a *non-discriminatory* (*i. e.*, across-the-board) increase in contribution limits; in that case, the Court stated, "Davis' argument would plainly fail." *Id.*, at 737.[8] The constitutional infirmity in *Davis* was not the trigger mechanism, but rather what lay on the other side of it—a discriminatory speech restriction.

The Court's response to these points is difficult to fathom. The majority concedes that "our decision in *Davis* focused on the asymmetrical contribution limits imposed by the Millionaire's Amendment." *Ante*, at 740. That was because, the majority explains, *Davis* presented only that issue. See *ante*, at 740. And yet, the majority insists (without explaining how this can be true), the reach of *Davis* is not so limited. And in any event, the majority claims, the burden on speech is "greater in this action than in *Davis*." *Ante*, at 740. But for reasons already stated, that is not so. The burden on speech in *Davis*—the penalty that campaign spending triggered—*was* the discriminatory contribution restriction, which Congress could not otherwise have imposed. By con-

[8] Notably, the Court found this conclusion obvious even though an across-the-board increase in contribution limits works to the comparative advantage of the non-self-financing candidate—that is, the candidate who actually depends on contributions. Such a system puts the self-financing candidate to a choice: Do I stop spending, or do I allow the higher contribution limits (which will help my opponent) to kick in? That strategic choice parallels the one that the Arizona statute forces. See *supra*, at 769.

trast, the thing triggered here is a non-discriminatory subsidy, of a kind this Court has approved for almost four decades. Maybe the majority is saying today that it had something like this case in mind all the time. But nothing in the logic of *Davis* controls this decision.[9]

III

For all these reasons, the Court errs in holding that the government action in this case substantially burdens speech and so requires the State to offer a compelling interest. But in any event, Arizona has come forward with just such an interest, explaining that the Clean Elections Act attacks corruption and the appearance of corruption in the State's political system. The majority's denigration of this interest—the suggestion that it either is not real or does not matter—wrongly prevents Arizona from protecting the strength and integrity of its democracy.

A

Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest. See, *e. g.*, *Davis*, 554 U. S., at 741; *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 496–497 (1985) *(NCPAC)*. And so too, these precedents are clear: Public financing of

[9] The majority also briefly relies on *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), but that case is still wider of the mark. There, we invalidated a law compelling newspapers (by threat of criminal sanction) to print a candidate's rejoinder to critical commentary. That law, we explained, overrode the newspaper's own editorial judgment and forced the paper both to pay for and to convey a message with which it disagreed. See *id.*, at 256–258. An analogy might be if Arizona forced privately funded candidates to purchase their opponents' posters, and then to display those posters in their own campaign offices. But that is very far from this case. The Arizona statute does not require petitioners to disseminate or fund any opposing speech; nor does it in any way associate petitioners with that speech.

elections serves this interest. See *supra*, at 758–759. As *Buckley* recognized, and as I earlier described, public financing "reduce[s] the deleterious influence of large contributions on our political process." 424 U. S., at 91; see *id.*, at 96. When private contributions fuel the political system, candidates may make corrupt bargains to gain the money needed to win election. See *NCPAC*, 470 U. S., at 497. And voters, seeing the dependence of candidates on large contributors (or on bundlers of smaller contributions), may lose faith that their representatives will serve the public's interest. See *Shrink Missouri*, 528 U. S., at 390 (the "assumption that large donors call the tune [may] jeopardize the willingness of voters to take part in democratic governance"). Public financing addresses these dangers by minimizing the importance of private donors in elections. Even the majority appears to agree with this premise. See *ante*, at 752 ("We have said that . . . 'public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest' ").

This compelling interest appears on the very face of Arizona's public financing statute. Start with the title: The Citizens Clean Elections Act. Then proceed to the statute's formal findings. The public financing program, the findings state, was "inten[ded] to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money." § 16–940(A) (West 2006). That measure was needed because the prior system of private fundraising had "[u]ndermine[d] public confidence in the integrity of public officials"; allowed those officials "to accept large campaign contributions from private interests over which they ha[d] governmental jurisdiction"; favored "a small number of wealthy special interests" over "the vast majority of Arizona citizens"; and "[c]os[t] average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors."

§ 16–940(B).[10] The State, appearing before us, has reiterated its important anti-corruption interest. The Clean Elections Act, the State avers, "deters *quid pro quo* corruption and the appearance of corruption by providing Arizona candidates with an option to run for office without depending on outside contributions." Brief for State Respondents 19. And so Arizona, like many state and local governments, has implemented public financing on the theory (which this Court has previously approved, see *supra*, at 759) that the way to reduce political corruption is to diminish the role of private donors in campaigns.[11]

And that interest justifies the matching funds provision at issue because it is a critical facet of Arizona's public financing program. The provision is no more than a disbursement mechanism; but it is also the thing that makes the whole Clean Elections Act work. As described earlier, see *supra*, at 759–760, public financing has an Achilles' heel—the diffi-

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[10] The legislative findings also echo what the *Buckley* Court found true of public financing—that it "encourage[s] citizen participation in the political process" and "promote[s] freedom of speech" by enhancing the ability of candidates to "communicat[e] to voters." §§ 16–940(A), (B).

[11] The majority briefly suggests that the State's "austere contribution limits" lessen the need for public financing, see *ante*, at 752, but provides no support for that dubious claim. As Arizona and other jurisdictions have discovered, contribution limits may not eliminate the risk of corrupt dealing between candidates and donors, especially given the widespread practice of bundling small contributions into large packages. See Brief for United States as *Amicus Curiae* 31. For much this reason, *Buckley* upheld *both* limits on contributions to federal candidates *and* public financing of presidential campaigns. See 424 U. S., at 23–38, 90–108. Arizona, like Congress, was "surely entitled to conclude" that contribution limits were only a "partial measure," *id.*, at 28, and that a functional public financing system was also necessary to eliminate political corruption. In stating otherwise, the Court substitutes its judgment for that of Arizona's voters, contrary to our practice of declining to "second-guess a . . . determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U. S. 197, 210 (1982).

culty of setting the subsidy at the right amount. Too small, and the grant will not attract candidates to the program; and with no participating candidates, the program can hardly decrease corruption. Too large, and the system becomes unsustainable, or at the least an unnecessary drain on public resources. But finding the sweet-spot is near impossible because of variation, across districts and over time, in the political system. Enter the matching funds provision, which takes an ordinary lump-sum amount, divides it into thirds, and disburses the last two of these (to the extent necessary) via a self-calibrating mechanism. That provision is just a fine-tuning of the lump-sum program approved in *Buckley*—a fine-tuning, it bears repeating, that prevents no one from speaking and discriminates against no message. But that fine-tuning can make the difference between a wholly ineffectual program and one that removes corruption from the political system.[12] If public financing furthers a compelling interest—and according to this Court, it does—then so too does the disbursement formula that Arizona uses to make public financing effective. The one conclusion follows directly from the other.

Except in this Court, where the inescapable logic of the State's position is . . . virtually ignored. The Court, to be sure, repeatedly asserts that the State's interest in preventing corruption does not "sufficiently justif[y]" the mechanism it has chosen to disburse public moneys. *Ante*, at 753; see *ante*, at 752–753. Only one thing is missing from the Court's response: any reasoning to support this conclusion. Nowhere

[12] For this reason, the majority is quite wrong to say that the State's interest in combating corruption does not support the matching fund provision's application to a candidate's expenditure of his own money or to an independent expenditure. *Ante*, at 751. The point is not that these expenditures themselves corrupt the political process. Rather, Arizona includes these, as well as all other, expenditures in the program to ensure that participating candidates receive the funds necessary to run competitive races—and so to attract those candidates in the first instance. That is in direct service of the State's anti-corruption interest.

does the majority dispute the State's view that the success of its public financing system depends on the matching funds mechanism; and nowhere does the majority contest that, if this mechanism indeed spells the difference between success and failure, the State's interest in preventing corruption justifies its use. And so the majority dismisses, but does not actually answer the State's contention—even though that contention is the linchpin of the entire case. Assuming (against reason and precedent) that the matching funds provision substantially burdens speech, the question becomes whether the State has offered a sufficient justification for imposing that burden. Arizona has made a forceful argument on this score, based on the need to establish an effective public financing system. The majority does not even engage that reasoning.

B

The majority instead devotes most of its energy to trying to show that "level[ing] the playing field," not fighting corruption, was the State's real goal. *Ante*, at 748 (internal quotation marks omitted); see *ante*, at 748–749. But the majority's distaste for "leveling" provides no excuse for striking down Arizona's law.

1

For starters, the Court has no basis to question the sincerity of the State's interest in rooting out political corruption. As I have just explained, that is the interest the State has asserted in this Court; it is the interest predominantly expressed in the "findings and declarations" section of the statute; and it is the interest universally understood (stretching back to Teddy Roosevelt's time) to support public financing of elections. See *supra*, at 757–758, 777–778. As against all this, the majority claims to have found three smoking guns that reveal the State's true (and nefarious) intention to level the playing field. But the only smoke here is the majority's, and it is the kind that goes with mirrors.

The majority first observes that the matching funds provision is titled "'Equal funding of candidates'" and that it refers to matching grants as "'equalizing funds.'" *Ante*, at 748 (quoting § 16–952). Well, yes. The statute provides for matching funds (above and below certain thresholds); a synonym for "match" is "equal"; and so the statute uses that term. In sum, the statute describes what the statute does. But the relevant question here (according to the majority's own analysis) is *why* the statute does that thing—otherwise said, what interest the statute serves. The State explains that its goal is to prevent corruption, and nothing in the Act's descriptive terms suggests any other objective.

Next, the majority notes that the Act allows participating candidates to accept private contributions if (but only if) the State cannot provide the funds it has promised (for example, because of a budget crisis). *Ante*, at 749 (citing § 16–954(F) (West 2006)). That provision, the majority argues, shows that when push comes to shove, the State cares more about "leveling" than about fighting corruption. *Ante*, at 749. But this is a plain misreading of the law. All the statute does is assure participating candidates that they will not be left in the lurch if public funds suddenly become unavailable. That guarantee helps persuade candidates to enter the program by removing the risk of a state default. And so the provision directly advances the Act's goal of combating corruption.

Finally, the Court remarks in a footnote that the Clean Elections Commission's website once stated that the "'"Act was passed by the people of Arizona . . . to level the playing field."'" *Ante*, at 749, n. 10. I can understand why the majority does not place much emphasis on this point. Some Members of the majority have ridiculed the practice of relying on subsequent statements by legislators to demonstrate an earlier Congress's intent in enacting a statute. See, *e. g.*, *Sullivan* v. *Finkelstein*, 496 U. S. 617, 631–632 (1990) (SCALIA, J., concurring in part); *United States* v. *Hayes*, 555

U. S. 415, 434–435 (2009) (ROBERTS, C. J., dissenting). Yet here the majority makes a much stranger claim: that a statement appearing on a government website in 2011 (written by who-knows-whom?) reveals what hundreds of thousands of Arizona's voters sought to do in 1998 when they enacted the Clean Elections Act by initiative. Just to state that proposition is to know it is wrong.

So the majority has no evidence—zero, none—that the objective of the Act is anything other than the interest that the State asserts, the Act proclaims, and the history of public financing supports: fighting corruption.

2

But suppose the majority had come up with some evidence showing that Arizona had sought to "equalize electoral opportunities." *Ante*, at 750. Would that discovery matter? Our precedent says no, so long as Arizona had a compelling interest in eliminating political corruption (which it clearly did). In these circumstances, any interest of the State in "leveling" should be irrelevant. That interest could not support Arizona's law (assuming the law burdened speech), but neither would the interest invalidate the legislation.

To see the point, consider how the matter might arise. Assume a State has two reasons to pass a statute affecting speech. It wants to reduce corruption. But in addition, it wishes to "level the playing field." Under our First Amendment law, the interest in preventing corruption is compelling and may justify restraints on speech. But the interest in "leveling the playing field," according to well-established precedent, cannot support such legislation.[13] So would this

[13] I note that this principle relates only to actions restricting speech. See *Buckley*, 424 U. S., at 48–49 (rejecting the notion "that government may restrict the speech of some . . . to enhance the relative voice of others"). As previously explained, speech subsidies stand on a different constitutional footing, see *supra*, at 764–765; so long as the government remains neutral among viewpoints, it may choose to assist the speech of

statute (assuming it met all other constitutional standards) violate the First Amendment?

The answer must be no. This Court, after all, has never said that a law restricting speech (or any other constitutional right) demands two compelling interests. One is enough. And this statute has one: preventing corruption. So it does not matter that equalizing campaign speech is an insufficient interest. The statute could violate the First Amendment only if "equalizing" qualified as a forbidden motive—a motive that itself could annul an otherwise constitutional law. But we have never held that to be so. And that should not be surprising: It is a "fundamental principle of constitutional adjudication," from which we have deviated only in exceptional cases, "that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968); see *id.*, at 384 (declining to invalidate a statute when "Congress had the undoubted power to enact" it without the suspect motive); accord, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 652 (1994); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 47–48 (1986). When a law is otherwise constitutional—when it either does not restrict speech or rests on an interest sufficient to justify any such restriction—that is the end of the story.

That proposition disposes of this case, even if Arizona had an adjunct interest here in equalizing electoral opportunities. No special rule of automatic invalidation applies to statutes having some connection to equality; like any other laws, they pass muster when supported by an important enough government interest. Here, Arizona has demonstrated in detail how the matching funds provision is necessary to serve a compelling interest in combating corruption. So the hunt for evidence of "leveling" is a waste of time; Arizona's law

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persons who might not otherwise be heard. But here I am assuming for the sake of argument that the Clean Elections Act imposes the kind of restraint on expression requiring that the State show a compelling interest.

survives constitutional scrutiny no matter what that search would uncover.

IV

This case arose because Arizonans wanted their government to work on behalf of all the State's people. On the heels of a political scandal involving the near-routine purchase of legislators' votes, Arizonans passed a law designed to sever political candidates' dependence on large contributors. They wished, as many of their fellow Americans wish, to stop corrupt dealing—to ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office. The legislation that Arizona's voters enacted was the product of deep thought and care. It put into effect a public financing system that attracted large numbers of candidates at a sustainable cost to the State's taxpayers. The system discriminated against no ideas and prevented no speech. Indeed, by increasing electoral competition and enabling a wide range of candidates to express their views, the system "further[ed] . . . First Amendment values." *Buckley*, 424 U. S., at 93 (citing *New York Times*, 376 U. S., at 270). Less corruption, more speech. Robust campaigns leading to the election of representatives not beholden to the few, but accountable to the many. The people of Arizona might have expected a decent respect for those objectives.

Today, they do not get it. The Court invalidates Arizonans' efforts to ensure that in their State, "'[t]he people . . . possess the absolute sovereignty.'" *Id.*, at 274 (quoting James Madison in 4 Debates on the Federal Constitution 569–570 (J. Elliot 2d ed. 1876)). No precedent compels the Court to take this step; to the contrary, today's decision is in tension with broad swaths of our First Amendment doctrine. No fundamental principle of our Constitution backs the Court's ruling; to the contrary, it is the law struck down today that fostered both the vigorous competition of ideas and its ultimate object—a government responsive to the will

of the people. Arizonans deserve better. Like citizens across this country, Arizonans deserve a government that represents and serves them all. And no less, Arizonans deserve the chance to reform their electoral system so as to attain that most American of goals.

Truly, democracy is not a game. See *ante*, at 750. I respectfully dissent.

Syllabus

BROWN, GOVERNOR OF CALIFORNIA, ET AL. *v.* ENTERTAINMENT MERCHANTS ASSOCIATION ET AL.

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

No. 08–1448. Argued November 2, 2010—Decided June 27, 2011

Respondents, representing the video-game and software industries, filed a preenforcement challenge to a California law that restricts the sale or rental of violent video games to minors. The Federal District Court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. The Ninth Circuit affirmed.

Held: The Act does not comport with the First Amendment. Pp. 790–805.

(a) Video games qualify for First Amendment protection. Like protected books, plays, and movies, they communicate ideas through familiar literary devices and features distinctive to the medium. And "the basic principles of freedom of speech . . . do not vary" with a new and different communication medium. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503. The most basic principle—that government lacks the power to restrict expression because of its message, ideas, subject matter, or content, *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573—is subject to a few limited exceptions for historically unprotected speech, such as obscenity, incitement, and fighting words. But a legislature cannot create new categories of unprotected speech simply by weighing the value of a particular category against its social costs and then punishing it if it fails the test. See *United States* v. *Stevens*, 559 U. S. 460, 469–472. Unlike the New York law upheld in *Ginsberg* v. *New York*, 390 U. S. 629, California's Act does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. Instead, the State wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children. That is unprecedented and mistaken. This country has no tradition of specially restricting children's access to depictions of violence. And California's claim that "interactive" video games present special problems, in that the player participates in the violent action on screen and determines its outcome, is unpersuasive. Pp. 790–799.

(b) Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny, *i. e.*, it is justified by a compelling government interest

Syllabus

and is narrowly drawn to serve that interest. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 395. California cannot meet that standard. Psychological studies purporting to show a connection between exposure to violent video games and harmful effects on children do not prove that such exposure causes minors to act aggressively. Any demonstrated effects are both small and indistinguishable from effects produced by other media. Since California has declined to restrict those other media, *e. g.*, Saturday morning cartoons, its video-game regulation is wildly underinclusive, raising serious doubts about whether the State is pursuing the interest it invokes or is instead disfavoring a particular speaker or viewpoint. California also cannot show that the Act's restrictions meet the alleged substantial need of parents who wish to restrict their children's access to violent videos. The video-game industry's voluntary rating system already accomplishes that to a large extent. Moreover, as a means of assisting parents the Act is greatly overinclusive, since not all of the children who are prohibited from purchasing violent video games have parents who disapprove of their doing so. The Act cannot satisfy strict scrutiny. Pp. 799–805.

556 F. 3d 950, affirmed.

SCALIA, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., joined, *post*, p. 805. THOMAS, J., *post*, p. 821, and BREYER, J., *post*, p. 840, filed dissenting opinions.

Zackery P. Morazzini, Supervising Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Edmund G. Brown, Jr.*, Attorney General, *David S. Chaney*, Chief Assistant Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Gordon Burns*, Deputy Solicitor General, *Jonathan K. Renner*, Senior Assistant Attorney General, and *Daniel J. Powell*, Deputy Attorney General.

Paul M. Smith argued the cause for respondents. With him on the brief were *Katherine A. Fallow*, *Matthew S. Hellman*, *Duane C. Pozza*, *William M. Hohengarten*, and *Kenneth L. Doroshow*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General of Louisiana, *James Trey Phillips*, First Assistant Attorney General, and *S. Kyle Dun-*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment.

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can, Appellate Chief, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Greg Abbott* of Texas, and *Kenneth T. Cuccinelli II* of Virginia; for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly;* and for California State Senator Leland Y. Yee et al. by *Steven F. Gruel.*

Briefs of *amici curiae* urging affirmance were filed for the State of Rhode Island et al. by *Patrick C. Lynch*, Attorney General of Rhode Island, *Joseph M. Lipner*, and *Elliot Brown*, and by the Attorneys General for their respective jurisdictions as follows: *Dustin McDaniel* of Arkansas, *Thurbert E. Baker* of Georgia, *Jon C. Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Guillermo A. Somoza-Colombani* of Puerto Rico, *Henry McMaster* of South Carolina, *Mark L. Shurtleff* of Utah, and *Robert M. McKenna* of Washington; for Activision Blizzard, Inc., by *Paul J. Watford;* for the American Booksellers Foundation for Free Expression et al. by *Michael A. Bamberger* and *Richard M. Zuckerman;* for the American Civil Liberties Union et al. by *Christopher A. Hansen*, *Steven R. Shapiro*, *David Blair-Loy*, *Joan E. Bertin*, *Peter J. Eliasberg*, and *Alan Schlosser;* for the Chamber of Commerce of the United States of America by *Lisa S. Blatt*, *Christopher S. Rhee*, *Robin S. Conrad*, and *Amar Sarwal;* for the Computer & Communications Industry Association et al. by *John B. Morris, Jr.;* for the Consumer Electronic Retailers Coalition et al. by *Seth D. Greenstein;* for the Entertainment Consumers Association et al. by *William R. Stein*, *Daniel H. Weiner*, *Daniel C. Doeschner*, and *Jennifer Mercurio;* for the First Amendment Lawyers Association by *Lawrence G. Walters* and *Jennifer S. Kinsley;* for First Amendment Scholars by *Donald M. Falk* and *Eugene Volokh;* for the Future of Music Coalition et al. by *Andrew Jay Schwartzman;* for Id Software LLC by *James T. Drakeley*, *Kevin J. Keith*, *Paul E. Salamanca*, and *J. Griffin Lesher;* for the International Game Developers Association et al. by *Christopher J. Wright*, *Timothy J. Simeone*, and *Mark D. Davis;* for the Marion B. Brechner First Amendment Project et al. by *Clay Calvert* and *Robert D. Richards;* for Microsoft Corp. by *Theodore B. Olson* and *Matthew D. McGill;* for the Motion Picture Association of America, Inc., et al. by *Kannon K. Shanmugam*, *David E. Ken-*

I

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§ 1746–1746.5 (West 2009) (Act), prohibits the sale or rental of "violent video games" to minors, and requires their packaging to be labeled "18." The Act covers games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." § 1746(d)(1)(A). Violation of the Act is punishable by a civil fine of up to $1,000. § 1746.3.

Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in the United States District Court for the Northern District

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dall, and *Thomas G. Hentoff;* for the National Association of Broadcasters by *Robert A. Long, Jr.*, *Stephen A. Weiswasser*, *Mark W. Mosier*, *Jane E. Mago*, and *Jerianne Timmerman;* for the National Cable & Telecommunications Association by *H. Bartow Farr III*, *Rick Chessen*, *Neal M. Goldberg*, *Michael S. Schooler*, and *Diane B. Burstein;* for the Progress & Freedom Foundation et al. by *Cindy Cohn;* for Social Scientists et al. by *Patricia A. Millett* and *Michael C. Small;* for the Thomas Jefferson Center for the Protection of Free Expression et al. by *Robert M. O'Neil* and *J. Joshua Wheeler;* and for Vindicia, Inc., by *Alan Gura* and *Laura Possessky.*

Briefs of *amici curiae* were filed for the Cato Institute by *John P. Elwood*, *Ilya Shapiro*, and *Thomas S. Leatherbury;* for the Comic Book Legal Defense Fund by *Robert Corn-Revere* and *Ronald G. London;* for Common Sense Media by *Theodore M. Shaw* and *Kevin W. Saunders;* for the First Amendment Coalition by *Gary L. Bostwick* and *Jean-Paul Jassy;* for the Reporters Committee for Freedom of the Press et al. by *Lucy Dalglish*, *Gregg P. Leslie*, *Kevin M. Goldberg*, *David Greene*, *Mickey H. Osterreicher*, *Bruce W. Sanford*, *Bruce D. Brown*, and *Laurie A. Babinski;* and for the Rutherford Institute by *John W. Whitehead.*

of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. *Video Software Dealers Assn.* v. *Schwarzenegger*, No. C–05–04188 RMW (2007), App. to Pet. for Cert. 39a. The Court of Appeals affirmed, *Video Software Dealers Assn.* v. *Schwarzenegger*, 556 F. 3d 950 (CA9 2009), and we granted certiorari, 559 U. S. 1092 (2010).

II

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters* v. *New York*, 333 U. S. 507, 510 (1948). Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 818 (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503 (1952).

The most basic of those principles is this: "[A]s a general matter, . . . government has no power to restrict expression

because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (internal quotation marks omitted). There are of course exceptions. "'From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *United States* v. *Stevens*, 559 U. S. 460, 468 (2010) (quoting *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382–383 (1992)). These limited areas—such as obscenity, *Roth* v. *United States*, 354 U. S. 476, 483 (1957), incitement, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449 (1969) *(per curiam)*, and fighting words, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942)—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.*, at 571–572.

Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. See 18 U. S. C. §48 (amended 2010). The statute covered depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that harm to the animal was illegal where "the creation, sale, or possession t[ook] place," §48(c)(1). A saving clause largely borrowed from our obscenity jurisprudence, see *Miller* v. *California*, 413 U. S. 15, 24 (1973), exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value," §48(b). We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the *depiction of* animal cruelty—though States have long had laws against *committing* it.

The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. *Stevens*, 559 U. S., at 470. We emphatically rejected that "startling and dangerous" proposition. *Ibid.* "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." *Id.*, at 472. But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs." *Id.*, at 470.

That holding controls this case.[1] As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does

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[1] JUSTICE ALITO distinguishes *Stevens* on several grounds that seem to us ill founded. He suggests, *post*, at 814 (opinion concurring in judgment), that *Stevens* did not apply strict scrutiny. If that is so (and we doubt it), it would make this an *a fortiori* case. He says, *post*, at 814, that the California Act punishes the sale or rental rather than the "creation" or "possession" of violent depictions. That distinction appears nowhere in *Stevens* itself, and for good reason: It would make permissible the prohibition of printing or selling books—though not the writing of them. Whether government regulation applies to creating, distributing, or consuming speech makes no difference. And finally, JUSTICE ALITO points out, *post*, at 814, that *Stevens* "left open the possibility that a more narrowly drawn statute" would be constitutional. True, but entirely irrelevant. *Stevens* said, 559 U. S., at 482, that the "crush-video" statute at issue there might pass muster if it were limited to videos of acts of animal cruelty that violated the law where the acts were performed. There is no contention that any of the virtual characters depicted in the imaginative videos at issue here are criminally liable.

not cover whatever a legislature finds shocking, but only depictions of "sexual conduct," *Miller*, *supra*, at 24. See also *Cohen* v. *California*, 403 U. S. 15, 20 (1971); *Roth*, *supra*, at 487, and n. 20.

Stevens was not the first time we have encountered and rejected a State's attempt to shoehorn speech about violence into obscenity. In *Winters*, we considered a New York criminal statute "forbid[ding] the massing of stories of bloodshed and lust in such a way as to incite to crime against the person," 333 U. S., at 514. The New York Court of Appeals upheld the provision as a law against obscenity. "[T]here can be no more precise test of written indecency or obscenity," it said, "than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. " *Ibid.* (internal quotation marks omitted). That is of course the same expansive view of governmental power to abridge the freedom of speech based on interest balancing that we rejected in *Stevens*. Our opinion in *Winters*, which concluded that the New York statute failed a heightened vagueness standard applicable to restrictions upon speech entitled to First Amendment protection, 333 U. S., at 517–519, made clear that violence is not part of the obscenity that the Constitution permits to be regulated. The speech reached by the statute contained "no indecency or obscenity in any sense heretofore known to the law." *Id.*, at 519.

Because speech about violence is not obscene, it is of no consequence that California's statute mimics the New York statute regulating obscenity for minors that we upheld in *Ginsberg* v. *New York*, 390 U. S. 629 (1968). That case approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child.[2] We

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[2] The statute in *Ginsberg* restricted the sale of certain depictions of "'nudity, sexual conduct, sexual excitement, or sado-masochistic abuse'" that were "'[h]armful to minors.'" A depiction was harmful to minors if it:

held that the legislature could "adjus[t] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . ' of . . . minors." *Id.*, at 638 (quoting *Mishkin* v. *New York*, 383 U. S. 502, 509 (1966)). And because "obscenity is not protected expression," the New York statute could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children "was not irrational." 390 U. S., at 641.

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works *to adults*—and it is wise not to, since that is but a hair's breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 212–213 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, *Ginsberg*, *supra*, at 640–641; *Prince* v. *Massachusetts*, 321 U. S. 158, 165 (1944), but that does not include a free-floating power to restrict the ideas to which children may be ex-

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"(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

"(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

"(iii) is utterly without redeeming social importance for minors." 390 U. S., at 646 (Appendix A to opinion of the Court) (quoting N. Y. Penal Law § 484–h(1)(f)).

posed. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik*, *supra*, at 213–214.[3]

California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the *books* we give children to read—or read to

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[3] JUSTICE THOMAS ignores the holding of *Erznoznik*, and denies that persons under 18 have any constitutional right to speak or be spoken to without their parents' consent. He cites no case, state or federal, supporting this view, and to our knowledge there is none. Most of his dissent is devoted to the proposition that parents have traditionally had the power to control what their children hear and say. This is true enough. And it perhaps follows from this that the state has the power to *enforce* parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised the promoters that their children are forbidden to attend. But it does not follow that the state has the power to prevent children from hearing or saying anything *without their parents' prior consent.* The latter would mean, for example, that it could be made criminal to admit persons under 18 to a political rally without their parents' prior written consent—even a political rally in support of laws against corporal punishment of children, or laws in favor of greater rights for minors. And what is good for First Amendment rights of speech must be good for First Amendment rights of religion as well: It could be made criminal to admit a person under 18 to church, or to give a person under 18 a religious tract, without his parents' prior consent. Our point is not, as JUSTICE THOMAS believes, *post*, at 836, n. 2, merely that such laws are "undesirable." They are obviously an infringement upon the religious freedom of young people and those who wish to proselytize young people. Such laws do not enforce *parental* authority over children's speech and religion; they impose *governmental* authority, subject only to a parental veto. In the absence of any precedent for state control, uninvited by the parents, over a child's speech and religion (JUSTICE THOMAS cites none), and in the absence of any justification for such control that would satisfy strict scrutiny, those laws must be unconstitutional. This argument is not, as JUSTICE THOMAS asserts, "circular," *ibid.* It is the absence of any historical warrant or compelling justification for such restrictions, not our *ipse dixit*, that renders them invalid.

them when they are younger—contain no shortage of gore. Grimm's Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." The Complete Brothers Grimm Fairy Tales 198 (2006 ed.). Cinderella's evil stepsisters have their eyes pecked out by doves. *Id.*, at 95. And Hansel and Gretel (children!) kill their captor by baking her in an oven. *Id.*, at 54.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. 22 The Odyssey of Homer, Book IX, p. 125 (S. Butcher & A. Lang transls. 1909) ("Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame"). In the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. Canto XXI, pp. 187–189 (A. Mandelbaum transl. Bantam Classic ed. 1982). And Golding's Lord of the Flies recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island. W. Golding, Lord of the Flies 208–209 (1997 ed.).[4]

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[4] JUSTICE ALITO accuses us of pronouncing that playing violent video games "is not different in 'kind' " from reading violent literature. *Post*, at 806. Well of course it is different in kind, but not in a way that causes the provision and viewing of violent video games, unlike the provision and reading of books, not to be expressive activity and hence not to enjoy First Amendment protection. Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not *constitutional* ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny—a question to which we devote our attention in Part III, *infra.* Even if we can see in them "nothing of any possible value to society . . . , they are as much entitled to the protection

This is not to say that minors' consumption of violent entertainment has never encountered resistance. In the 1800's, dime novels depicting crime and "penny dreadfuls" (named for their price and content) were blamed in some quarters for juvenile delinquency. See Brief for Cato Institute as *Amicus Curiae* 6–7. When motion pictures came along, they became the villains instead. "The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close. . . . They say that the moving picture machine . . . tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison." Moving Pictures as Helps to Crime, N. Y. Times, Feb. 21, 1909, quoted in Brief for Cato Institute 8. For a time, our Court did permit broad censorship of movies because of their capacity to be "used for evil," see *Mutual Film Corp.* v. *Industrial Comm'n of Ohio*, 236 U. S. 230, 242 (1915), but we eventually reversed course, *Joseph Burstyn, Inc.*, 343 U. S., at 502; see also *Erznoznik*, *supra*, at 212–214 (invalidating a drive-in movies restriction designed to protect children). Radio dramas were next, and then came comic books. Brief for Cato Institute 10–11. Many in the late 1940's and early 1950's blamed comic books for fostering a "preoccupation with violence and horror" among the young, leading to a rising juvenile crime rate. See Note, Regulation of Comic Books, 68 Harv. L. Rev. 489, 490 (1955). But efforts to convince Congress to restrict comic books failed. Brief for Comic Book Legal Defense Fund as *Amicus Curiae* 11–15.[5]

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of free speech as the best of literature." *Winters* v. *New York*, 333 U. S. 507, 510 (1948).

[5] The crusade against comic books was led by a psychiatrist, Frederic Wertham, who told the Senate Judiciary Committee that "as long as the crime comic books industry exists in its present forms there are no secure homes." Juvenile Delinquency (Comic Books): Hearings before the Subcommittee to Investigate Juvenile Delinquency, 83d Cong., 2d Sess., 84 (1954). Wertham's objections extended even to Superman comics, which he described as "particularly injurious to the ethical development of chil-

And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. Cf. *Interactive Digital Software Assn.* v. *St. Louis County*, 329 F. 3d 954, 957–958 (CA8 2003). As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." *American Amusement Machine Assn.* v. *Kendrick*, 244 F. 3d 572, 577 (CA7 2001) (striking down a similar restriction on violent video games).

JUSTICE ALITO has done considerable independent research to identify, see *post*, at 818–819, nn. 13–18, video games in which "the violence is astounding," *post*, at 818. "Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . Blood gushes, splatters, and pools." *Ibid.* JUSTICE ALITO recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of JUSTICE ALITO's description, *post*, at 819, of those

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dren." *Id.*, at 86. Wertham's crusade did convince the New York Legislature to pass a ban on the sale of certain comic books to minors, but it was vetoed by Governor Thomas Dewey on the ground that it was unconstitutional given our opinion in *Winters*, *supra*. See *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409, 412–413, 201 N. E. 2d 14, 15–16 (1964).

video games he has discovered that have a racial or ethnic motive for their violence—"'ethnic cleansing' [of] . . . African-Americans, Latinos, or Jews." To what end does he relate this? Does it somehow increase the "aggressiveness" that California wishes to suppress? Who knows? But it does arouse the reader's ire, and the reader's desire to put an end to this horrible message. Thus, ironically, JUSTICE ALITO's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

III

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. *R. A. V.*, 505 U. S., at 395. The State must specifically identify an "actual problem" in need of solving, *Playboy*, 529 U. S., at 822–823, and the curtailment of free speech must be actually necessary to the solution, see *R. A. V.*, *supra*, at 395. That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, *supra*, at 818.

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994), the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation. *Id.*, at 661–662. California's burden is much higher, and because it bears the

risk of uncertainty, see *Playboy*, *supra*, at 816–817, ambiguous proof will not suffice.

The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them,[6] and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." 556 F. 3d, at 964. They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.[7]

Even taking for granted Dr. Anderson's conclusions that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistin-

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[6] See *Video Software Dealers Assn.* v. *Schwarzenegger*, 556 F. 3d 950, 963–964 (CA9 2009); *Interactive Digital Software Assn.* v. *St. Louis County*, 329 F. 3d 954 (CA8 2003); *American Amusement Machine Assn.* v. *Kendrick*, 244 F. 3d 572, 578–579 (CA7 2001); *Entertainment Software Assn.* v. *Foti*, 451 F. Supp. 2d 823, 832–833 (MD La. 2006); *Entertainment Software Assn.* v. *Hatch*, 443 F. Supp. 2d 1065, 1070 (Minn. 2006), aff'd, 519 F. 3d 768 (CA8 2008); *Entertainment Software Assn.* v. *Granholm*, 426 F. Supp. 2d 646, 653 (ED Mich. 2006); *Entertainment Software Assn.* v. *Blagojevich*, 404 F. Supp. 2d 1051, 1063 (ND Ill. 2005), aff'd, 469 F. 3d 641 (CA7 2006).

[7] One study, for example, found that children who had just finished playing violent video games were more likely to fill in the blank letter in "explo_e" with a "d" (so that it reads "explode") than with an "r" ("explore"). App. 496, 506 (internal quotation marks omitted). The prevention of this phenomenon, which might have been anticipated with common sense, is not a compelling state interest.

guishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the "effect sizes" of children's exposure to violent video games are "about the same" as that produced by their exposure to violence on television. App. 1263. And he admits that the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, *id.*, at 1304, or when they play video games like Sonic the Hedgehog that are rated "E" (appropriate for all ages), *id.*, at 1270, or even when they "vie[w] a picture of a gun," *id.*, at 1315–1316.[8]

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young

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[8] JUSTICE ALITO is mistaken in thinking that we fail to take account of "new and rapidly evolving technology," *post*, at 806. The studies in question pertain to that new and rapidly evolving technology, and fail to show, with the degree of certitude that strict scrutiny requires, that this subject-matter restriction on speech is justified. Nor is JUSTICE ALITO correct in attributing to us the view that "violent video games really present no serious problem." *Ibid.* Perhaps they do present a problem, and perhaps none of us would allow our own children to play them. But there are all sorts of "problems"—some of them surely more serious than this one—that cannot be addressed by governmental restriction of free expression: for example, the problem of encouraging anti-Semitism *(National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam))*, the problem of spreading a political philosophy hostile to the Constitution (*Noto* v. *United States*, 367 U. S. 290 (1961)), or the problem of encouraging disrespect for the Nation's flag (*Texas* v. *Johnson*, 491 U. S. 397 (1989)).

JUSTICE BREYER would hold that California has satisfied strict scrutiny based upon his own research into the issue of the harmfulness of violent video games. See *post*, at 858–872 (appendixes to dissenting opinion) (listing competing academic articles discussing the harmfulness *vel non* of violent video games). The vast preponderance of this research is outside the record—and in any event we do not see how it could lead to JUSTICE BREYER's conclusion, since he admits he cannot say whether the studies on his side are right or wrong. *Post*, at 853. Similarly, JUSTICE ALITO says he is not "sure" whether there are any constitutionally dispositive differences between video games and other media. *Post*, at 806. If that is so, then strict scrutiny plainly has not been satisfied.

children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. See *City of Ladue* v. *Gilleo*, 512 U. S. 43, 51 (1994); *Florida Star* v. *B. J. F.*, 491 U. S. 524, 540 (1989). Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child's or putative parent's, aunt's, or uncle's say-so suffices. That is not how one addresses a serious social problem.

California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]." *Erznoznik*, 422 U. S., at 212–213.

But leaving that aside, California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). App. 86. The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell "M" rated games to minors only with parental consent. *Id.*, at 47. In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, "the video game industry outpaces the movie and music industries" in "(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-rated products at retail." FTC, Report to Congress, Marketing Violent Entertainment to Children 30 (Dec. 2009), online at http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf (as visited June 24, 2011, and available in Clerk of Court's case file) (FTC Report). This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest.[9]

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[9] JUSTICE BREYER concludes that the remaining gap is compelling because, according to the FTC's report, some "20% of those under 17 are still able to buy M-rated video games." *Post*, at 856 (citing FTC Report 28). But some gap in compliance is unavoidable. The sale of alcohol to minors, for example, has long been illegal, but a 2005 study suggests that

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires.

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California's effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors. While we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them—concerns that may and doubtless do prompt a good deal of parental oversight. We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a "well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky*, 315 U. S., at 571–572 (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection

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about 18% of retailers still sell alcohol to those under the drinking age. Brief for State of Rhode Island et al. as *Amici Curiae* 18. Even if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.

of children is the object, the constitutional limits on governmental action apply.

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 546 (1993). As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

We affirm the judgment below.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

The California statute that is before us in this case represents a pioneering effort to address what the state legislature and others regard as a potentially serious social problem: the effect of exceptionally violent video games on impressionable minors, who often spend countless hours immersed in the alternative worlds that these games create. Although the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court that this particular law cannot be sustained.

I disagree, however, with the approach taken in the Court's opinion. In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution.

In the view of the Court, all those concerned about the effects of violent video games—federal and state legislators, educators, social scientists, and parents—are unduly fearful, for violent video games really present no serious problem. See *ante*, at 798–801, 803–804. Spending hour upon hour controlling the actions of a character who guns down scores of innocent victims is not different in "kind" from reading a description of violence in a work of literature. See *ante*, at 798.

The Court is sure of this; I am not. There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.

I

Respondents in this case, representing the video-game industry, ask us to strike down the California law on two grounds: the broad ground adopted by the Court and the narrower ground that the law's definition of "violent video game," see Cal. Civ. Code Ann. § 1746(d)(1)(A) (West 2009), is impermissibly vague. See Brief for Respondents 23–61. Because I agree with the latter argument, I see no need to

reach the broader First Amendment issues addressed by the Court.[1]

A

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972). The lack of such notice in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 871–872 (1997). Vague laws force potential speakers to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964) (quoting *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958)). While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 794 (1989), "government may regulate in the area" of First Amendment freedoms "only with narrow specificity," *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); see also *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982). These principles apply to laws that regulate expression for the purpose of protecting children. See *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 689 (1968).

Here, the California law does not define "violent video games" with the "narrow specificity" that the Constitution demands. In an effort to avoid First Amendment problems, the California Legislature modeled its violent video game statute on the New York law that this Court upheld in *Ginsberg* v. *New York*, 390 U. S. 629 (1968)—a law that prohibited the sale of certain sexually related materials to minors, see *id.*, at 631–633. But the California Legislature departed

[1] It is well established that a judgment may be affirmed on an alternative ground that was properly raised but not addressed by the lower court. *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 476–478, n. 20 (1979).

from the *Ginsberg* model in an important respect, and the legislature overlooked important differences between the materials falling within the scope of the two statutes.

B

The law at issue in *Ginsberg* prohibited the sale to minors of materials that were deemed "harmful to minors," and the law defined "harmful to minors" simply by adding the words "for minors" to each element of the definition of obscenity set out in what were then the Court's leading obscenity decisions, see *Roth* v. *United States*, 354 U. S. 476 (1957), and *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413 (1966).

Seeking to bring its violent video game law within the protection of *Ginsberg*, the California Legislature began with the obscenity test adopted in *Miller* v. *California*, 413 U. S. 15 (1973), a decision that revised the obscenity tests previously set out in *Roth* and *Memoirs*. The legislature then made certain modifications to accommodate the aim of the violent video game law.

Under *Miller*, an obscenity statute must contain a threshold limitation that restricts the statute's scope to specifically described "hard core" materials. See 413 U. S., at 23–25, 27. Materials that fall within this "hard core" category may be deemed to be obscene if three additional requirements are met:

> (1) An "average person, applying contemporary community standards [must] find . . . the work, taken as a whole, appeals to the prurient interest";
>
> (2) "the work [must] depic[t] or describ[e], in a patently offensive way, sexual conduct specifically defined by the applicable state law; and"
>
> (3) "the work, taken as a whole, [must] lac[k] serious literary, artistic, political, or scientific value." *Id.*, at 24 (internal quotation marks omitted).

Adapting these standards, the California law imposes the following threshold limitation: "[T]he range of options available to a player [must] includ[e] killing, maiming, dismembering, or sexually assaulting an image of a human being." § 1746(d)(1). Any video game that meets this threshold test is subject to the law's restrictions if it also satisfies three further requirements:

> "(i) A reasonable person, considering the game as a whole, would find [the game] appeals to a deviant or morbid interest of minors.
>
> "(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
>
> "(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." § 1746(d)(1)(A).[2]

C

The first important difference between the *Ginsberg* law and the California violent video game statute concerns their respective threshold requirements. As noted, the *Ginsberg* law built upon the test for adult obscenity, and the current adult obscenity test, which was set out in *Miller*, requires an obscenity statute to contain a threshold limitation that restricts the statute's coverage to specifically defined "hard core" depictions. See 413 U. S., at 23–25, 27. The *Miller* Court gave as an example a statute that applies to only "[p]atently offensive representations or descriptions of ultimate sexual acts," "masturbation, excretory functions, and

[2] Under the California law, a game that meets the threshold requirement set out in text also qualifies as "violent" if it "[e]nables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim." § 1746(d)(1)(B). In the Court of Appeals, California conceded that this alternative definition is unconstitutional, *Video Software Dealers Assn.* v. *Schwarzenegger*, 556 F. 3d 950, 954, n. 5 (CA9 2009), and therefore only the requirements set out in text are now before us.

lewd exhibition of the genitals." *Id.*, at 25. The *Miller* Court clearly viewed this threshold limitation as serving a vital notice function. "We are satisfied," the Court wrote, "that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Id.*, at 27; see also *Reno*, 521 U. S., at 873 (observing that *Miller*'s threshold limitation "reduces the vagueness inherent in the open-ended term 'patently offensive' ").[3]

By contrast, the threshold requirement of the California law does not perform the narrowing function served by the limitation in *Miller*. At least when *Miller* was decided, depictions of "hard core" sexual conduct were not a common feature of mainstream entertainment. But nothing similar can be said about much of the conduct covered by the California law. It provides that a video game cannot qualify as "violent" unless "the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being." § 1746(d)(1).

For better or worse, our society has long regarded many depictions of killing and maiming[4] as suitable features of popular entertainment, including entertainment that is widely available to minors. The California law's threshold requirement would more closely resemble the limitation in *Miller* if it targeted a narrower class of graphic depictions.

Because of this feature of the California law's threshold test, the work of providing fair notice is left in large part to

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[3] The provision of New York law under which the petitioner was convicted in *Ginsberg* v. *New York*, 390 U. S. 629 (1968), was framed with similar specificity. This provision applied to depictions of "nudity" and "sexual conduct," and both those terms were specifically and unambiguously defined. See *id.*, at 645–647 (Appendix A to opinion of the Court).

[4] The California law does not define the term "maiming," nor has the State cited any decisions from its courts that define the term in this context. Accordingly, I take the term to have its ordinary meaning, which includes the infliction of any serious wound, see Webster's Third New International Dictionary 1362 (2002) (hereinafter Webster's).

the three requirements that follow, but those elements are also not up to the task. In drafting the violent video game law, the California Legislature could have made its own judgment regarding the kind and degree of violence that is acceptable in games played by minors (or by minors in particular age groups). Instead, the legislature relied on undefined societal or community standards.

One of the three elements at issue here refers expressly to "prevailing standards in the community as to what is suitable for minors." § 1746(d)(1)(A)(ii). Another element points in the same direction, asking whether "[a] reasonable person, considering [a] game as a whole," would find that it "appeals to a *deviant* or *morbid* interest of minors." § 1746(d)(1)(A)(i) (emphasis added).

The terms "deviant" and "morbid" are not defined in the statute, and California offers no reason to think that its courts would give the terms anything other than their ordinary meaning. See Reply Brief for Petitioners 5 (arguing that "[a] reasonable person can make this judgment through . . . a common understanding and definition of the applicable terms"). I therefore assume that "deviant" and "morbid" carry the meaning that they convey in ordinary speech. The adjective "deviant" ordinarily means "deviating . . . from some accepted norm," and the term "morbid" means "of, relating to, or characteristic of disease." Webster's 618, 1469. A "deviant or morbid interest" in violence, therefore, appears to be an interest that deviates from what is regarded—presumably in accordance with some generally accepted standard—as normal and healthy. Thus, the application of the California law is heavily dependent on the identification of generally accepted standards regarding the suitability of violent entertainment for minors.

The California Legislature seems to have assumed that these standards are sufficiently well known so that a person of ordinary intelligence would have fair notice as to whether the kind and degree of violence in a particular game is

enough to qualify the game as "violent." And because the *Miller* test looks to community standards, the legislature may have thought that the use of undefined community standards in the violent video game law would not present vagueness problems.

There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. By the time of this Court's landmark obscenity cases in the 1960's, obscenity had long been prohibited, see *Roth*, 354 U. S., at 484–485, and this experience had helped to shape certain generally accepted norms concerning expression related to sex.

There is no similar history regarding expression related to violence. As the Court notes, classic literature contains descriptions of great violence, and even children's stories sometimes depict very violent scenes. See *ante*, at 795–797.

Although our society does not generally regard all depictions of violence as suitable for children or adolescents, the prevalence of violent depictions in children's literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite "deviant" or "morbid" impulses. See Edwards & Berman, Regulating Violence on Television, 89 Nw. U. L. Rev. 1487, 1523 (1995) (observing that the *Miller* test would be difficult to apply to violent expression because "there is nothing even approaching a consensus on low-value violence").

Finally, the difficulty of ascertaining the community standards incorporated into the California law is compounded by the legislature's decision to lump all minors together. The California law draws no distinction between young children and adolescents who are nearing the age of majority.

In response to a question at oral argument, the attorney defending the constitutionality of the California law said that the State would accept a narrowing construction of the law under which the law's references to "minors" would be interpreted to refer to the oldest minors—that is, those just short

of 18. Tr. of Oral Arg. 11–12. However, "it is not within our power to construe and narrow state laws." *Grayned*, 408 U. S., at 110. We can only " 'extrapolate [their] allowable meaning' " from the statutory text and authoritative interpretations of similar laws by courts of the State. *Ibid.* (quoting *Garner* v. *Louisiana*, 368 U. S. 157, 174 (1961) (Frankfurter, J., concurring in judgment)).

In this case, California has not provided any evidence that the California Legislature intended the law to be limited in this way, or cited any decisions from its courts that would support an "oldest minors" construction.[5]

For these reasons, I conclude that the California violent video game law fails to provide the fair notice that the Constitution requires. And I would go no further. I would not express any view on whether a properly drawn statute would or would not survive First Amendment scrutiny. We should address that question only if and when it is necessary to do so.

II

Having outlined how I would decide this case, I will now briefly elaborate on my reasons for questioning the wisdom of the Court's approach. Some of these reasons are touched upon by the dissents, and while I am not prepared at this time to go as far as either JUSTICE THOMAS or JUSTICE BREYER, they raise valid concerns.

A

The Court is wrong in saying that the holding in *United States* v. *Stevens*, 559 U. S. 460 (2010), "controls this case." *Ante*, at 792. First, the statute in *Stevens* differed sharply

[5] At oral argument, California also proposed that the term "minors" could be interpreted as referring to the "typical age group of minors" who play video games. Tr. of Oral Arg. 11. But nothing in the law's text supports such a limitation. Nor has California cited any decisions indicating that its courts would restrict the law in this way. And there is nothing in the record indicating what this age group might be.

from the statute at issue here. *Stevens* struck down a law that broadly prohibited *any person* from creating, selling, or possessing depictions of animal cruelty for commercial gain. The California law involved here, by contrast, is limited to the sale or rental of violent video games *to minors.* The California law imposes no restriction on the creation of violent video games, or on the possession of such games by anyone, whether above or below the age of 18. The California law does not regulate the sale or rental of violent games by adults. And the California law does not prevent parents and certain other close relatives from buying or renting violent games for their children or other young relatives if they see fit.

Second, *Stevens* does not support the proposition that a law like the one at issue must satisfy strict scrutiny. The portion of *Stevens* on which the Court relies rejected the Government's contention that depictions of animal cruelty were categorically outside the range of *any* First Amendment protection. 559 U. S., at 471–472. Going well beyond *Steven*s, the Court now holds that any law that attempts to prevent minors from purchasing violent video games must satisfy strict scrutiny instead of the more lenient standard applied in *Ginsberg,* 390 U. S. 629, our most closely related precedent. As a result of today's decision, a State may prohibit the sale to minors of what *Ginsberg* described as "girlie magazines," but a State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable.

Third, *Stevens* expressly left open the possibility that a more narrowly drawn statute targeting depictions of animal cruelty might be compatible with the First Amendment. See 559 U. S., at 482. In this case, the Court's sweeping opinion will likely be read by many, both inside and outside the video-game industry, as suggesting that no regulation of minors' access to violent video games is allowed—at least

without supporting evidence that may not be realistically obtainable given the nature of the phenomenon in question.

B

The Court's opinion distorts the effect of the California law. I certainly agree with the Court that the government has no "free-floating power to restrict the ideas to which children may be exposed," *ante*, at 794–795, but the California law does not exercise such a power. If parents want their child to have a violent video game, the California law does not interfere with that parental prerogative. Instead, the California law reinforces parental decisionmaking in exactly the same way as the New York statute upheld in *Ginsberg*. Under both laws, minors are prevented from purchasing certain materials; and under both laws, parents are free to supply their children with these items if that is their wish.

Citing the video-game industry's voluntary rating system, the Court argues that the California law does not "meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so." *Ante*, at 803. The Court does not mention the fact that the industry adopted this system in response to the threat of federal regulation, Brief for Activision Blizzard, Inc., as *Amicus Curiae* 7–10, a threat that the Court's opinion may now be seen as largely eliminating. Nor does the Court acknowledge that compliance with this system at the time of the enactment of the California law left much to be desired[6]—or that future enforcement may decline if the video-

[6] A 2004 Federal Trade Commission Report showed that 69 percent of unaccompanied children ages 13 to 16 were able to buy M-rated games and that 56 percent of 13-year-olds were able to buy an M-rated game. Marketing Violent Entertainment to Children: A Fourth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries 26–28 (July 2004), http://www.ftc.gov/os/2004/07/040708kidsviolencerpt.pdf (all Internet materials as visited June 24, 2011, and available in Clerk of Court's case file).

game industry perceives that any threat of government regulation has vanished. Nor does the Court note, as JUSTICE BREYER points out, see *post*, at 849–850 (dissenting opinion), that many parents today are simply not able to monitor their children's use of computers and gaming devices.

C

Finally, the Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before. Any assessment of the experience of playing video games must take into account certain characteristics of the video games that are now on the market and those that are likely to be available in the near future.

Today's most advanced video games create realistic alternative worlds in which millions of players immerse themselves for hours on end. These games feature visual imagery and sounds that are strikingly realistic, and in the near future video-game graphics may be virtually indistinguishable from actual video footage.[7] Many of the games already on the market can produce high definition images,[8] and it is predicted that it will not be long before video-game images will be seen in three dimensions.[9] It is also forecast that

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[7] See Chayka, Visual Games: Photorealism in Crisis, Kill Screen (May 2011), http://killscreendaily.com/articles/visual-games-photorealism-crisis.

[8] To see brief video excerpts from games with highly realistic graphics, see Spike TV Video Game Awards 2010—Game of the Year Nominees, GameTrailers.com (Dec. 10, 2010), http://www.gametrailers.com/video/game-of-spike-tv-vga/707755?type=flv.

[9] See Selleck, Sony PS3 Launching 50 3D-Capable Video Games in the Near Future, SlashGear (Nov. 23, 2010), http://www.slashgear.com/sony-ps3-launching-50-3d-capable-video-games-in-the-near-future-23115866; Sofge, Why 3D Doesn't Work for TV, But Is Great for Gaming, Popular Mechanics (Mar. 11, 2010), http://www.popularmechanics.com/technology/digital/gaming/4342437.

video games will soon provide sensory feedback.[10] By wearing a special vest or other device, a player will be able to experience physical sensations supposedly felt by a character on the screen.[11] Some *amici* who support respondents foresee the day when "'virtual-reality shoot-'em-ups'" will allow children to "'actually feel the splatting blood from the blown-off head'" of a victim. Brief for Reporters Committee for Freedom of the Press et al. as *Amici Curiae* 29 (quoting H. Schechter, Savage Pastimes 18 (2005)).

Persons who play video games also have an unprecedented ability to participate in the events that take place in the virtual worlds that these games create. Players can create their own video-game characters and can use photos to produce characters that closely resemble actual people. A person playing a sophisticated game can make a multitude of choices and can thereby alter the course of the action in the game. In addition, the means by which players control the action in video games now bear a closer relationship to the means by which people control action in the real world. While the action in older games was often directed with buttons or a joystick, players dictate the action in newer games by engaging in the same motions that they desire a character

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[10] T. Chatfield, Fun Inc.: Why Games Are the Twenty-first Century's Most Serious Business 211 (2010) (predicting that "[w]e can expect . . . physical feedback and motion detection as standard in every gaming device in the near future"); J. Blascovich & J. Bailenson, Infinite Reality: Avatars, Eternal Life, New Worlds, and the Dawn of the Virtual Revolution 2 (2011) ("Technological developments powering virtual worlds are accelerating, ensuring that virtual experiences will become more *immersive* by providing sensory information that makes people feel they are 'inside' virtual worlds" (emphasis in the original)).

[11] See Topolsky, The Mindwire V5 Turns Gaming Into Pure Electroshock Torture, Engadget (Mar. 9, 2008), http://www.engadget.com/2008/03/09/the-mindwire-v5-turns-gaming-into-pure-electroshock-torture; Greenemeier, Video Game Vest Simulates Sensation of Being Capped, Scientific American (Oct. 25, 2007), http://www.scientificamerican.com/article.cfm?id=video-game-vest-simulates.

in the game to perform.[12] For example, a player who wants a video-game character to swing a baseball bat—either to hit a ball or smash a skull—could bring that about by simulating the motion of actually swinging a bat.

These present-day and emerging characteristics of video games must be considered together with characteristics of the violent games that have already been marketed.

In some of these games, the violence is astounding.[13] Victims by the dozens are killed with every imaginable implement, including machineguns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech.[14] The objec-

[12] See Schiesel, A Real Threat Now Faces the Nintendo Wii, N. Y. Times, Dec. 3, 2010, p. F7 (describing how leading developers of video-game consoles are competing to deliver gesture-controlled gaming devices).

[13] For a sample of violent video games, see Wilson, The 10 Most Violent Video Games of All Time, PCMag.com (Feb. 10, 2011), http://www.pcmag.com/article2/0,2817,2379959,00.asp. To see brief video excerpts from violent games, see Chomik, Top 10: Most Violent Video Games, AskMen.com, http://www.askmen.com/top_10/videogame/top-10-most-violent-video-games.html; Sayed, 15 Most Violent Video Games That Made You Puke, Gamingbolt (May 2, 2010), http://gamingbolt.com/15-most-violent-video-games-that-made-you-puke.

[14] Webley, "School Shooter" Video Game To Reenact Columbine, Virginia Tech Killings, Time (Apr. 20, 2011), http://newsfeed.time.com/2011/04/20/school-shooter-video-game-reenacts-columbine-virginia-tech-killings. After a Web site that made School Shooter available for download re-

tive of one game is to rape a mother and her daughters;[15] in another, the goal is to rape Native American women.[16] There is a game in which players engage in "ethnic cleansing" and can choose to gun down African-Americans, Latinos, or Jews.[17] In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.[18]

If the technological characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.

The Court is untroubled by this possibility. According to the Court, the "interactive" nature of video games is "nothing new" because "all literature is interactive." *Ante*, at 798. Disagreeing with this assessment, the International Game Developers Association (IGDA)—a group that presumably understands the nature of video games and that supports respondents—tells us that video games are "far more concretely interactive." Brief for IGDA et al. as *Amici Curiae* 3. And on this point, the game developers are surely correct.

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moved it in response to mounting criticism, the developer stated that it may make the game available on its own Web site. Inside the Sick Site of a School Shooter Mod (Mar. 26, 2011), http://ssnat.com.

[15] Lah, "RapeLay" Video Game Goes Viral Amid Outrage, CNN (Mar. 30, 2010), http://articles.cnn.com/2010-03-30/world/japan.video.game.rape_1_game-teenage-girl-japanese-government?_s=PM:WORLD.

[16] Graham, Custer May Be Shot Down Again in a Battle of the Sexes Over X-Rated Video Games, People, Nov. 15, 1982, pp. 110, 115.

[17] Scheeres, Games Elevate Hate to Next Level, Wired (Feb. 20, 2002), http://www.wired.com/print/culture/lifestyle/news/2002/02/50523.

[18] Thompson, A View to a Kill: JFK Reloaded Is Just Plain Creepy, Slate (Nov. 22, 2004), http://www.slate.com/id/2110034.

It is certainly true, as the Court notes, that "'[l]iterature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.'" *Ante*, at 798 (quoting *American Amusement Machine Assn.* v. *Kendrick*, 244 F. 3d 572, 577 (CA7 2001)). But only an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game. To take an example, think of a person who reads the passage in Crime and Punishment in which Raskolnikov kills the old pawnbroker with an ax. See F. Dostoyevsky, Crime and Punishment 78 (Modern Library ed. 1950). Compare that reader with a videogame player who creates an avatar that bears his own image; who sees a realistic image of the victim and the scene of the killing in high definition and in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an ax, to raise it above the head of the victim, and then to bring it down; who hears the thud of the ax hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands. For most people, the two experiences will not be the same.[19]

When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so,

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[19] As the Court notes, there are a few children's books that ask young readers to step into the shoes of a character and to make choices that take the stories along one of a very limited number of possible lines. See *ante*, at 798. But the very nature of the print medium makes it impossible for a book to offer anything like the same number of choices as those provided by a video game.

then for at least some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand.

* * *

For all these reasons, I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires. I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.

JUSTICE THOMAS, dissenting.

The Court's decision today does not comport with the original public understanding of the First Amendment. The majority strikes down, as facially unconstitutional, a state law that prohibits the direct sale or rental of certain video games to minors because the law "abridg[es] the freedom of speech." U. S. Const., Amdt. 1. But I do not think the First Amendment stretches that far. The practices and beliefs of the founding generation establish that "the freedom of speech," as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians. I would hold that the law at issue is not facially unconstitutional under the First Amendment, and reverse and remand for further proceedings.[1]

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[1] JUSTICE ALITO concludes that the law is too vague to satisfy due process, but neither the District Court nor the Court of Appeals addressed that question. *Ante*, at 806–813 (opinion concurring in judgment). As we have often said, this Court is "one of final review, 'not of first view.'" *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005)).

I

When interpreting a constitutional provision, "the goal is to discern the most likely public understanding of [that] provision at the time it was adopted." *McDonald* v. *Chicago*, 561 U. S. 742, 828 (2010) (THOMAS, J., concurring in part and concurring in judgment). Because the Constitution is a written instrument, "its meaning does not alter." *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 359 (1995) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). "That which it meant when adopted, it means now." *Ibid.* (internal quotation marks omitted).

As originally understood, the First Amendment's protection against laws "abridging the freedom of speech" did not extend to *all* speech. "There are certain 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 also *United States* v. *Stevens*, 559 U. S. 460, 468–469 (2010). Laws regulating such speech do not "abridg[e] the freedom of speech" because such speech is understood to fall outside "the freedom of speech." See *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 245–246 (2002).

In my view, the "practices and beliefs held by the Founders" reveal another category of excluded speech: speech to minor children bypassing their parents. *McIntyre*, *supra*, at 360. The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents. Cf. Brief for Common Sense Media as *Amicus Curiae* 12–15. The founding generation would not have considered it an abridgment of "the

freedom of speech" to support parental authority by restricting speech that bypasses minors' parents.

A

Attitudes toward children were in a state of transition around the time that the States ratified the Bill of Rights. A complete understanding of the founding generation's views on children and the parent-child relationship must therefore begin roughly a century earlier, in colonial New England.

In the Puritan tradition common in the New England Colonies, fathers ruled families with absolute authority. "The patriarchal family was the basic building block of Puritan society." S. Mintz, Huck's Raft 13 (2004) (hereinafter Mintz); see also R. MacDonald, Literature for Children in England and America From 1646 to 1774, p. 7 (1982) (hereinafter MacDonald). The Puritans rejected many customs, such as godparenthood, that they considered inconsistent with the patriarchal structure. Mintz 13.

Part of the father's absolute power was the right and duty "to fill his children's minds with knowledge and . . . make them apply their knowledge in right action." E. Morgan, The Puritan Family 97 (rev. ed. 1966) (hereinafter Morgan). Puritans thought children were "innately sinful and that parents' primary task was to suppress their children's natural depravity." S. Mintz & S. Kellogg, Domestic Revolutions 2 (1988) (hereinafter Mintz & Kellogg); see also B. Wadsworth, The Well-Ordered Family 55 (1712) ("Children should not be left to themselves . . . to do as they please; . . . not being fit to govern themselves"); C. Mather, A Family Well-Ordered 38 (1699). Accordingly, parents were not to let their children read "vain Books, profane Ballads, and filthy Songs" or "fond and amorous Romances, . . . fabulous Histories of Giants, the bombast Achievements of Knight Errantry, and the like." The History of Genesis, pp. vi–vii (3d ed. corrected 1708).

This conception of parental authority was reflected in laws at that time. In the Massachusetts Colony, for example, it was unlawful for tavern keepers (or anyone else) to entertain children without their parents' consent. 2 Records and Files of the Quarterly Courts of Essex County, Massachusetts, p. 180 (1912); 4 *id.*, at 237, 275 (1914); 5 *id.*, at 143 (1916); see also Morgan 146. And a "stubborn or REBELLIOUS SON" of 16 years or more committed a capital offense if he disobeyed "the voice of his Father, or the voice of his Mother." The Laws and Liberties of Massachusetts 6 (1648) (reprint M. Farrand ed. 1929); see also J. Kamensky, Governing the Tongue 102, n. 14 (1997) (citing similar laws in the Connecticut, New Haven, Plymouth, and New Hampshire Colonies in the late 1600's).

B

In the decades leading up to and following the Revolution, attitudes toward children changed. See, *e. g.*, J. Reinier, From Virtue to Character: American Childhood, 1775–1850, p. 1 (1996) (hereinafter Reinier). Children came to be seen less as innately sinful and more as blank slates requiring careful and deliberate development. But the same overarching principles remained. Parents continued to have both the right and duty to ensure the proper development of their children. They exercised significant authority over their children, including control over the books that children read. And laws at the time continued to reflect strong support for parental authority and the sense that children were not fit to govern themselves.

1

The works of John Locke and Jean-Jacques Rousseau were a driving force behind the changed understanding of children and childhood. See *id.*, at 2–5; H. Brewer, By Birth or Consent 97 (2005) (hereinafter Brewer); K. Calvert, Children in

the House 59–60 (1992) (hereinafter Calvert). Locke taught that children's minds were blank slates and that parents therefore had to be careful and deliberate about what their children were told and observed. Parents had only themselves to blame if, "by humouring and cockering" their children, they "poison'd the fountain" and later "taste[d] the bitter waters." Some Thoughts Concerning Education (1692), in 37 English Philosophers of the Seventeenth and Eighteenth Centuries 27–28 (C. Eliot ed. 1910). All vices, he explained, were sowed by parents and "those about children." *Id.*, at 29. Significantly, Locke did not suggest circumscribing parental authority but rather articulated a new basis for it. Rousseau disagreed with Locke in important respects, but his philosophy was similarly premised on parental control over a child's development. Although Rousseau advocated that children should be allowed to develop naturally, he instructed that the environment be directed by "a tutor who is given total control over the child and who removes him from society, from all competing sources of authority and influence." J. Fliegelman, Prodigals and Pilgrims 30 (1982) (hereinafter Fliegelman); see also Reinier 15.

These writings received considerable attention in America. Locke's An Essay Concerning Human Understanding and his Some Thoughts Concerning Education were significantly more popular than his Two Treatises of Government, according to a study of 92 colonial libraries between 1700 and 1776. Lundberg & May, The Enlightened Reader in America, 28 American Quarterly 262, 273 (1976) (hereinafter Lundberg). And Rousseau's Emile, a treatise on education, was more widely advertised and distributed than his political work, The Social Contract. Fliegelman 29; see also Lundberg 285. In general, the most popular books in the Colonies on the eve of the American Revolution were not political discourses but ones concerned with child rearing. See Mintz & Kellogg 45.

2

Locke's and Rousseau's writings fostered a new conception of childhood. Children were increasingly viewed as malleable creatures, and childhood came to be seen as an important period of growth, development, and preparation for adulthood. See *id.*, at 17, 21, 47; M. Grossberg, Governing the Hearth 8 (1985) (hereinafter Grossberg). Noah Webster, called the father of American education, wrote that "[t]he impressions received in early life usually form the characters of individuals." On the Education of Youth in America (1790) (hereinafter Webster), in Essays on Education in the Early Republic 43 (F. Rudolph ed. 1965) (hereinafter Rudolph); cf. Slater, Noah Webster: Founding Father of American Scholarship and Education, in Noah Webster's First Edition of an American Dictionary of the English Language (1967). Elizabeth Smith, sister-in-law to John Adams, similarly wrote: "The Infant Mind, I beleive[,] is a blank, that eassily receives any impression." M. Norton, Liberty's Daughters 101 (1996) (hereinafter Norton) (internal quotation marks omitted; alteration in original); see also S. Doggett, A Discourse on Education (1796) (hereinafter Doggett), in Rudolph 151 ("[I]n early youth, . . . every power and capacity is pliable and susceptible of any direction or impression"); J. Abbott, The Mother at Home 2 (1834) (hereinafter Abbott) ("What impressions can be more strong, and more lasting, than those received upon the mind in the freshness and the susceptibility of youth").

Children lacked reason and decisionmaking ability. They "have not Judgment or Will of their own," John Adams noted. Letter to James Sullivan (May 26, 1776), in 4 Papers of John Adams 210 (R. Taylor ed. 1979); see also Vol. 1 1787: Drafting the Constitution, p. 229 (W. Benton ed. 1986) (quoting Gouverneur Morris in James Madison's notes from the Constitutional Convention explaining that children do not vote because they "want prudence" and "have no will of their own"). Children's "utter incapacity" rendered them "almost

wholly at the mercy of their Parents or Instructors for a set of habits to regulate their whole conduct through life." J. Burgh, Thoughts on Education 7 (1749) (hereinafter Burgh) (emphasis deleted).

This conception of childhood led to great concern about influences on children. "Youth are ever learning to do what they see others around them doing, and these imitations grow into habits." Doggett, in Rudolph 151; see also B. Rush, A Plan for the Establishment of Public Schools (1786) (hereinafter Rush), in Rudolph 16 ("The vices of young people are generally learned from each other"); Webster, in Rudolph 58 ("[C]hildren, artless and unsuspecting, resign their hearts to any person whose manners are agreeable and whose conduct is respectable"). Books therefore advised parents "not to put children in the way of those whom you dare not trust." L. Child, The Mother's Book 149 (1831) (hereinafter Child); see also S. Coontz, The Social Origins of Private Life 149–150 (1988) (noting that it was "considered dangerous to leave children to the supervision of servants or apprentices").

As a result, it was widely accepted that children needed close monitoring and carefully planned development. See B. Wishy, The Child and the Republic 24–25, 32 (1968) (hereinafter Wishy); Grossberg 8. Managing the young mind was considered "infinitely important." Doggett, in Rudolph 151; see also A. MacLeod, A Moral Tale 72–73 (1975) (hereinafter MacLeod). In an essay on the education of youth in America, Noah Webster described the human mind as "a rich field, which, without constant care, will ever be covered with a luxuriant growth of weeds." Rudolph 54. He advocated sheltering children from "every low-bred, drunken, immoral character" and keeping their minds "untainted till their reasoning faculties have acquired strength and the good principles which may be planted in their minds have taken deep root." *Id.*, at 63; see also Rush, in *id.*, at 16 ("[T]he most useful citizens have been formed from those youth who have

never known or felt their own wills till they were one and twenty years of age"); Burgh 7 ("[T]he souls of Youth are more immediately committed to the care of their Parents and Instructors than even those of a People are to their Pastor").

The Revolution only amplified these concerns. The Republic would require virtuous citizens, which necessitated proper training from childhood. See Mintz 54, 71; MacLeod 40; Saxton, French and American Childhoods, in Children and Youth in a New Nation 69 (J. Marten ed. 2009) (hereinafter Marten); see also W. Cardell, Story of Jack Halyard, pp. xv–xvi (30th ed. 1834) (hereinafter Cardell) ("[T]he glory and efficacy of our institutions will soon rest with those who are growing up to succede us"). Children were "the pivot of the moral world," and their proper development was "a subject of as high interest, as any to which the human mind ha[d] ever been called." *Id.*, at xvi.

3

Based on these views of childhood, the founding generation understood parents to have a right and duty to govern their children's growth. Parents were expected to direct the development and education of their children and ensure that bad habits did not take root. See Calvert 58–59; MacLeod 72; Mintz & Kellogg 23. They were responsible for instilling "moral prohibitions, behavioral standards, and a capacity for self-government that would prepare a child for the outside world." Mintz & Kellogg 58; see also Youth's Companion, Apr. 16, 1827, p. 1 (hereinafter Youth's Companion) ("Let [children's] minds be formed, their hearts prepared, and their characters moulded for the scenes and the duties of a brighter day"). In short, "[h]ome and family bore the major responsibility for the moral training of children and thus, by implication, for the moral health of the nation." MacLeod 29; see also Introduction, in Marten 6; Reinier, p. xi; Smith, Autonomy and Affection: Parents and Children

in Eighteenth-Century Chesapeake Families, in Growing up in America 54 (N. Hiner & J. Hawes eds. 1985).

This conception of parental rights and duties was exemplified by Thomas Jefferson's approach to raising children. He wrote letters to his daughters constantly and often gave specific instructions about what the children should do. See, *e. g.*, Letter to Martha Jefferson (Nov. 28, 1783), in S. Randolph, The Domestic Life of Thomas Jefferson 44 (1939) (dictating her daily schedule of music, dancing, drawing, and studying); Letter to Martha Jefferson (Dec. 22, 1783), in *id.*, at 45–46 ("I do not wish you to be gaily clothed at this time of life . . . . [A]bove all things and at all times let your clothes be neat, whole, and properly put on"). Jefferson expected his daughter, Martha, to write "by every post" and instructed her, "Inform me what books you read [and] what tunes you learn." Letter (Nov. 28, 1783), in *id.*, at 44. He took the same approach with his nephew, Peter Carr, after Carr's father died. See Letter (Aug. 19, 1785), in 8 The Papers of Thomas Jefferson 405–408 (J. Boyd ed. 1953) (detailing a course of reading and exercise, and asking for monthly progress reports describing "in what manner you employ every hour in the day"); see also 3 Dictionary of Virginia Biography 29 (2006).

Jefferson's rigorous management of his charges was not uncommon. "[M]uch evidence indicates that mothers and fathers both believed in giving their children a strict upbringing, enforcing obedience to their commands and stressing continued subjection to the parental will." Norton 96. Two parenting books published in the 1830's gave prototypical advice. In The Mother's Book, Lydia Child advised that "[t]he first and most important step in management is, that whatever a mother says, always *must* be done." Child 26. John Abbott, the author of The Mother at Home, likewise advised that "[o]bedience is absolutely essential to proper family government." Abbott 18. Echoing Locke, Abbott warned that parents who indulged a child's "foolish and un-

reasonable wishes" would doom that child to be indulgent in adulthood. *Id.*, at 16.

The concept of total parental control over children's lives extended into the schools. "The government both of families and schools should be absolute," declared Noah Webster. Rudolph 57–58. Dr. Benjamin Rush concurred: "In the education of youth, let the authority of our masters be as *absolute* as possible." *Id.*, at 16. Through the doctrine of *in loco parentis*, teachers assumed the "'sacred dut[y] of parents . . . to train up and qualify their children'" and exercised the same authority "'to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.'" *Morse* v. *Frederick*, 551 U. S. 393, 413–414 (2007) (THOMAS, J., concurring) (quoting *State* v. *Pendergrass*, 19 N. C. 365, 365–366 (1837)); see also Wishy 73. Thus, the quality of teachers and schools had to "be watched with the most scrupulous attention." Webster, in Rudolph 64.

For their part, children were expected to be dutiful and obedient. Mintz & Kellogg 53; Wishy 31; cf. J. Kett, Rites of Passage 45 (1977). Schoolbooks instructed children to do so and frequently featured vignettes illustrating the consequences of disobedience. See Adams, "Pictures of the Vicious ultimately overcome by misery and shame": The Cultural Work of Early National Schoolbooks (hereinafter Adams), in Marten 156. One oft-related example was the hangings of 19 alleged witches in 1692, which, the schoolbooks noted, likely began with false complaints by two young girls. See J. Morse, The American Geography 191 (1789); see also Adams, in Marten 164.

An entire genre of books, "loosely termed 'advice to youth,'" taught similar lessons well into the 1800's. J. Demos, Circles and Lines: The Shape of Life in Early America 73 (2004); cf. Wishy 54. "NEXT to your duty to God," advised one book, "is your duty to your parents," even if the child did not "understand the reason of their commands." L. Sigourney, The Girl's Reading Book 44 (14th ed.

1843); see also Filial Duty Recommended and Enforced, Introduction, p. iii (c. 1798); The Parent's Present 44 (3d ed. 1841). "Disobedience is generally punished in some way or other," warned another, "and often very severely." S. Goodrich, Peter Parley's Book of Fables 43 (1836); see also The Country School-House 27 (1848) ("[T]he number of children who die from the effects of disobedience to their parents is very large").

4

Society's concern with children's development extended to the books they read. "Vice always spreads by being published," Noah Webster observed. Rudolph 62. "[Y]oung people are taught many vices by fiction, books, or public exhibitions, vices which they never would have known had they never read such books or attended such public places." *Ibid.;* see also Cardell, p. xii (cautioning parents that "[t]he first reading lessons for children have an extensive influence on the acquisitions and habits of future years"); Youth's Companion 1 ("[T]he capacities of children, and the peculiar situation and duties of youth, require select and appropriate reading"). Prominent children's authors harshly criticized fairy tales and the use of anthropomorphic animals. See, *e. g.,* S. Goodrich, 2 Recollections of a Lifetime 320, n.* (1856) (describing fairy tales as "calculated to familiarize the mind with things shocking and monstrous; to cultivate a taste for tales of bloodshed and violence; to teach the young to use coarse language, and cherish vulgar ideas; . . . and to fill [the youthful mind] with the horrors of a debased and debauched fancy"); 1 *id.*, at 167 (recalling that children's books were "full of nonsense" and "lies"); Cardell, p. xiv ("The fancy of converting inferior animals into 'teachers of children,' has been carried to ridiculous extravagance"); see also MacDonald 83, 103 (noting that fables and works of fantasy were not popular in America in the 1700's).

Adults carefully controlled what they published for children. Stories written for children were dedicated to moral

instruction and were relatively austere, lacking details that might titillate children's minds. See MacLeod 24–25, 42–48; see also *id.*, at 42 ("The authors of juvenile fiction imposed the constraints upon themselves in the name of duty, and for the sake of giving to children what they thought children should have, although they were often well aware that children might prefer more exciting fare"); Francis, American Children's Literature, 1646–1880, in American Childhood 208–209 (J. Hawes & N. Hiner eds. 1985). John Newbery, the publisher often credited with creating the genre of children's literature, removed traditional folk characters, like Tom Thumb, from their original stories and placed them in new morality tales in which good children were rewarded and disobedient children punished. Reinier 12.

Parents had total authority over what their children read. See A. MacLeod, American Childhood 177 (1994) ("Ideally, if not always actually, nineteenth-century parents regulated their children's lives fully, certainly including their reading"). Lydia Child put it bluntly in The Mother's Book: "Children . . . should not read anything without a mother's knowledge and sanction; this is particularly necessary between the ages of twelve and sixteen." Child 92; see also *id.*, at 143 ("[P]arents, or some guardian friends, should carefully examine every volume they put into the hands of young people"); E. Monaghan, Learning To Read and Write in Colonial America 337 (2005) (reviewing a 12-year-old girl's journal from the early 1770's and noting that the child's aunts monitored and guided her reading).

5

The law at the time reflected the founding generation's understanding of parent-child relations. According to Sir William Blackstone, parents were responsible for maintaining, protecting, and educating their children, and therefore had "power" over their children. 1 Commentaries on the Laws of England 434, 440–441 (1765); cf. *Washington* v.

Glucksberg, 521 U. S. 702, 712 (1997) (Blackstone's Commentaries was "a primary legal authority for 18th- and 19th-century American lawyers"). Chancellor James Kent agreed. 2 Commentaries on American Law *189–*207. The law entitled parents to "the custody of their [children]," "the value of th[e] [children's] labor and services," and the "right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." *Id.*, at *193, *203. Children, in turn, were charged with "obedience and assistance during their own minority, and gratitude and reverance during the rest of their lives." *Id.*, at *207.

Thus, in case after case, courts made clear that parents had a right to the child's labor and services until the child reached majority. In 1810, the Supreme Judicial Court of Massachusetts explained, "There is no question but that a father, who is entitled to the services of his minor son, and for whom he is obliged to provide, may, at the common law, assign those services to others, for a consideration to enure to himself." *Day* v. *Everett*, 7 Mass. 145, 147; see also *Benson* v. *Remington*, 2 Mass. 113, 115 (1806) (opinion of Parsons, C. J.) ("The law is very well settled, that parents are under obligations to support their children, and that they are entitled to their earnings"). Similarly, the Supreme Court of Judicature of New Hampshire noted that the right of parents to recover for the services of their child, while a minor, "cannot be contested." *Gale* v. *Parrot*, 1 N. H. 28, 29 (1817). And parents could bring tort suits against those who knowingly enticed a minor away from them. See, *e. g.*, *Kirkpatrick* v. *Lockhart*, 2 Brev. 276 (S. C. Constitutional Ct. 1809); *Jones* v. *Tevis*, 4 Litt. 25 (Ky. App. 1823).

Relatedly, boys could not enlist in the military without parental consent. Many of those who did so during the Revolutionary War found, afterwards, that their fathers were entitled to their military wages. See Cox, Boy Soldiers of the American Revolution, in Marten 21–24. And after the

war, minors who enlisted without parental consent in violation of federal law could find themselves returned home on writs of habeas corpus issued at their parents' request. See, *e. g.*, *United States* v. *Anderson*, 24 F. Cas. 813 (No. 14,449) (CC Tenn. 1812); *Commonwealth* v. *Callan*, 6 Binn. 255 (Pa. 1814) *(per curiam)*.

Laws also set age limits restricting marriage without parental consent. For example, from 1730 until at least 1849, Pennsylvania law required parental consent for the marriage of anyone under the age of 21. See 4 Statutes at Large of Pennsylvania 153 (J. Mitchell & H. Flanders eds. 1897) (hereinafter Pa. Stats. at Large); General Laws of Pennsylvania 82–83 (J. Dunlop 2d ed. 1849) (including the 1730 marriage law with no amendments); see also Perpetual Laws of the Commonwealth of Massachusetts 253 (1788), in The First Laws of the Commonwealth of Massachusetts (J. Cushing ed. 1981). In general, "[p]ost-Revolutionary marriage law assumed that below a certain age, children could . . . no[t] intellectually understand its significance." Grossberg 105.

Indeed, the law imposed age limits on all manner of activities that required judgment and reason. Children could not vote, could not serve on juries, and generally could not be witnesses in criminal cases unless they were older than 14. See Brewer 43, 145, 148, 159. Nor could they swear loyalty to a State. See, *e. g.*, 9 Pa. Stats. at Large 111 (1903 ed.). Early federal laws granting aliens the ability to become citizens provided that those under 21 were deemed citizens if their fathers chose to naturalize. See, *e. g.*, Act of Mar. 26, 1790, 1 Stat. 104; Act of Jan. 29, 1795, ch. 20, 1 Stat. 415.

C

The history clearly shows a founding generation that believed parents to have complete authority over their minor children and expected parents to direct the development of those children. The Puritan tradition in New England laid the foundation of American parental authority and duty.

See MacDonald 6 ("The Puritans are virtually the inventors of the family as we know it today"). In the decades leading up to and following the Revolution, the conception of the child's mind evolved but the duty and authority of parents remained. Indeed, society paid closer attention to potential influences on children than before. See Mintz 72 ("By weakening earlier forms of patriarchal authority, the Revolution enhanced the importance of childrearing and education in ensuring social stability"). Teachers and schools came under scrutiny, and children's reading material was carefully supervised. Laws reflected these concerns and often supported parental authority with the coercive power of the state.

II

A

In light of this history, the Framers could not possibly have understood "the freedom of speech" to include an unqualified right to speak to minors. Specifically, I am sure that the founding generation would not have understood "the freedom of speech" to include a right to speak to children without going through their parents. As a consequence, I do not believe that laws limiting such speech—for example, by requiring parental consent to speak to a minor—"abridg[e] the freedom of speech" within the original meaning of the First Amendment.

We have recently noted that this Court does not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U. S., at 472. But we also recognized that there may be "some categories of speech that have been historically unprotected [and] have not yet been specifically identified or discussed as such in our case law." *Ibid.* In my opinion, the historical evidence here plainly reveals one such category.[2]

[2] The majority responds that "it does not follow" from the historical evidence "that the state has the power to prevent children from hear-

B

Admittedly, the original public understanding of a constitutional provision does not always comport with modern sensibilities. See *Morse*, 551 U. S., at 419 (THOMAS, J., concurring) (treating students "as though it were still the 19th century would find little support today"). It may also be inconsistent with precedent. See *McDonald*, 561 U. S., at 851–855 (THOMAS, J., concurring in part and concurring in judgment) (rejecting the *Slaughter-House Cases*, 16 Wall. 36 (1873), as inconsistent with the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment).

This, however, is not such a case. Although much has changed in this country since the Revolution, the notion that parents have authority over their children and that the law can support that authority persists today. For example, at least some States make it a crime to lure or entice a minor away from the minor's parent. See, *e. g.*, Cal. Penal Code Ann. § 272(b)(1) (West 2008); Fla. Stat. § 787.03 (2010). Every State in the Union still establishes a minimum age for marriage without parental or judicial consent. Cf. *Roper* v. *Simmons*, 543 U. S. 551, 558 (2005) (Appendix D to opinion

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ing . . . anything *without their parents' prior consent.*" *Ante*, at 795, n. 3. Such a conclusion, the majority asserts, would lead to laws that, in its view, would be undesirable and "obviously" unconstitutional. *Ibid.*

The majority's circular argument misses the point. The question is not whether certain laws might make sense to judges or legislators today, but rather what the public likely understood "the freedom of speech" to mean when the First Amendment was adopted. See *District of Columbia* v. *Heller*, 554 U. S. 570, 634–635 (2008). I believe it is clear that the founding public would not have understood "the freedom of speech" to include speech to minor children bypassing their parents. It follows that the First Amendment imposes no restriction on state regulation of such speech. To note that there may not be "precedent for [such] state control," *ante*, at 795, n. 3, "is not to establish that [there] is a constitutional right," *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 373 (1995) (SCALIA, J., dissenting).

of the Court). Individuals less than 18 years old cannot enlist in the military without parental consent. 10 U. S. C. § 505(a). And minors remain subject to curfew laws across the country, see Brief for State of Louisiana et al. as *Amici Curiae* 16, and cannot unilaterally consent to most medical procedures, *id.*, at 15.

Moreover, there are many things minors today cannot do at all, whether they have parental consent or not. State laws set minimum ages for voting and jury duty. See *Roper*, *supra*, at 581–585 (Appendixes B and C to opinion of the Court). In California (the State at issue here), minors cannot drive for hire or drive a school bus, Cal. Veh. Code Ann. §§ 12515, 12516 (West 2010), purchase tobacco, Cal. Penal Code Ann. § 308(b) (West 2008), play bingo for money, § 326.5(e), or execute a will, Cal. Prob. Code Ann. § 6220 (West 2009).

My understanding of "the freedom of speech" is also consistent with this Court's precedents. To be sure, the Court has held that children are entitled to the protection of the First Amendment, see, *e. g.*, *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 212–213 (1975), and the government may not unilaterally dictate what children can say or hear, see *id.*, at 213–214; *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 511 (1969). But this Court has never held, until today, that "the freedom of speech" includes a right to speak to minors (or a right of minors to access speech) without going through the minors' parents. To the contrary, "[i]t is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik*, *supra*, at 212; cf. *post*, at 841–842 (BREYER, J., dissenting).

The Court's constitutional jurisprudence "historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979). Under that case law,

"legislature[s] [can] properly conclude that parents and others, teachers for example, who have . . . primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968); see also *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979) (opinion of Powell, J.) ("[T]he State is entitled to adjust its legal system to account for children's vulnerability and their needs for concern, . . . sympathy, and . . . paternal attention" (internal quotation marks omitted)). This is because "the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter." *Id.*, at 638; *id.*, at 638–639 ("Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding").

III

The California law at issue here forbids the sale or rental of "violent video game[s]" to minors, defined as anyone "under 18 years of age." Cal. Civ. Code Ann. §§ 1746.1(a), 1746 (West 2009). A violation of the law is punishable by a civil fine of up to $1,000. § 1746.3. Critically, the law does not prohibit adults from buying or renting violent video games for a minor or prohibit minors from playing such games. Cf. *ante,* at 814 (ALITO, J., concurring in judgment); *post,* at 848 (BREYER, J., dissenting). The law also does not restrict a "minor's parent, grandparent, aunt, uncle, or legal guardian" from selling or renting him a violent video game. § 1746.1(c).

Respondents, associations of companies in the video game industry, brought a preenforcement challenge to California's law, claiming that on its face the law violates the free speech rights of their members. The Court holds that video games are speech for purposes of the First Amendment and finds

the statute facially unconstitutional. See *ante,* at 789–790, 799–804. I disagree.

Under any of this Court's standards for a facial First Amendment challenge, this one must fail. The video game associations cannot show "that no set of circumstances exists under which [the law] would be valid," "that the statute lacks any plainly legitimate sweep," or that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens,* 559 U. S., at 472, 473 (internal quotation marks omitted). Even assuming that video games are speech, in most applications the California law does not implicate the First Amendment. All that the law does is prohibit the direct sale or rental of a violent video game to a minor by someone other than the minor's parent, grandparent, aunt, uncle, or legal guardian. Where a minor has a parent or guardian, as is usually true, the law does not prevent that minor from obtaining a violent video game with his parent's or guardian's help. In the typical case, the only speech affected is speech that bypasses a minor's parent or guardian. Because such speech does not fall within "the freedom of speech" as originally understood, California's law does not ordinarily implicate the First Amendment and is not facially unconstitutional.[3]

* * *

"The freedom of speech," as originally understood, does not include a right to speak to minors without going through the minors' parents or guardians. Therefore, I cannot agree that the statute at issue is facially unconstitutional under the First Amendment.

I respectfully dissent.

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[3] Whether the statute would survive an as-applied challenge in the unusual case of an emancipated minor is a question for another day. To decide this case, it is enough that the statute is not unconstitutional on its face.

JUSTICE BREYER, dissenting.

California imposes a civil fine of up to $1,000 upon any person who distributes a violent video game in California without labeling it "18," or who sells or rents a labeled violent video game to a person under the age of 18. Representatives of the video game and software industries, claiming that the statute violates the First Amendment on its face, seek an injunction against its enforcement. Applying traditional First Amendment analysis, I would uphold the statute as constitutional on its face and would consequently reject the industries' facial challenge.

I

A

California's statute defines a violent video game as: A game in which a player "kill[s], maim[s], dismember[s], or sexually assault[s] an image of a human being," *and*

> "[a] reasonable person, considering the game as a whole, would find [the game] appeals to a deviant or morbid interest of minors,"

and

> "[the game] is patently offensive to prevailing standards in the community as to what is suitable for minors,"

and

> "the game, as a whole, . . . lack[s] serious literary, artistic, political, or scientific value for minors." Cal. Civ. Code Ann. § 1746(d)(1) (West 2009).

The statute in effect forbids the sale of such a game to minors unless they are accompanied by a parent; it requires the makers of the game to affix a label identifying it as a game suitable only for those aged 18 and over; it exempts retailers from liability unless such a label is properly affixed to the

game; and it imposes a civil fine of up to $1,000 upon a violator. See §§ 1746.1–1746.3.

B

A facial challenge to this statute based on the First Amendment can succeed only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U. S. 460, 473 (2010) (internal quotation marks omitted). Moreover, it is more difficult to mount a facial First Amendment attack on a statute that seeks to regulate activity that involves action as well as speech. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 614–615 (1973). Hence, I shall focus here upon an area within which I believe the State can legitimately apply its statute, namely, sales to minors under the age of 17 (the age cutoff used by the industry's own ratings system), of highly realistic violent video games, which a reasonable game maker would know meet the Act's criteria. That area lies at the heart of the statute. I shall assume that the number of instances in which the State will enforce the statute within that area is comparatively large, and that the number outside that area (for example, sales to 17-year-olds) is comparatively small. And the activity the statute regulates combines speech with action (a virtual form of target practice).

C

In determining whether the statute is unconstitutional, I would apply both this Court's "vagueness" precedents and a strict form of First Amendment scrutiny. In doing so, the special First Amendment category I find relevant is not (as the Court claims) the category of "depictions of violence," *ante*, at 795, but rather the category of "protection of children." This Court has held that the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince* v. *Massachusetts*, 321 U. S. 158, 170 (1944). And the " 'regulatio[n] of communica-

tion addressed to [children] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults.'" *Ginsberg* v. *New York*, 390 U. S. 629, 638, n. 6 (1968) (quoting Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 939 (1963)).

The majority's claim that the California statute, if upheld, would create a "new categor[y] of unprotected speech," *ante*, at 791, 794, is overstated. No one here argues that depictions of violence, even extreme violence, *automatically* fall outside the First Amendment's protective scope as, for example, do obscenity and depictions of child pornography. We properly speak of *categories* of expression that lack protection when, like "child pornography," the category is broad, when it applies automatically, and when the State can prohibit everyone, including adults, from obtaining access to the material within it. But where, as here, careful analysis must precede a narrower judicial conclusion (say, denying protection to a shout of "fire" falsely made in a crowded theater, or to an effort to teach a terrorist group how to peacefully petition the United Nations), we do not normally describe the result as creating a "new category of unprotected speech." See *Schenck* v. *United States*, 249 U. S. 47, 52 (1919); *Holder* v. *Humanitarian Law Project*, 561 U. S. 1 (2010).

Thus, in *Stevens*, after rejecting the claim that *all* depictions of animal cruelty (a category) fall outside the First Amendment's protective scope, we went on to decide whether the particular statute at issue violates the First Amendment under traditional standards; and we held that, because the statute was overly broad, it was invalid. Similarly, here the issue is whether, applying traditional First Amendment standards, this statute does, or does not, pass muster.

II

In my view, California's statute provides "fair notice of what is prohibited," and consequently it is not impermissibly vague. *United States* v. *Williams*, 553 U. S. 285, 304 (2008).

Ginsberg explains why that is so. The Court there considered a New York law that forbade the sale to minors of a

> "picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity . . . ,"

that

> "predominately appeals to the prurient, shameful or morbid interest of minors,"

and

> "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors,"

and

> "is utterly without redeeming social importance for minors." 390 U. S., at 646–647.

This Court upheld the New York statute in *Ginsberg* (which is sometimes unfortunately confused with a very different, earlier case, *Ginzburg* v. *United States*, 383 U. S. 463 (1966)). The five-Justice majority, in an opinion written by Justice Brennan, wrote that the statute was sufficiently clear. 390 U. S., at 643–645. No Member of the Court voiced any vagueness objection. See *id.*, at 648–650 (Stewart, J., concurring in result); *id.*, at 650–671 (Douglas, J., joined by Black, J., dissenting); *id.*, at 671–675 (Fortas, J., dissenting).

Comparing the language of California's statute (set forth *supra*, at 840) with the language of New York's statute (set forth immediately above), it is difficult to find any vagueness-related difference. Why are the words "kill," "maim," and "dismember" any more difficult to understand than the word "nudity?" JUSTICE ALITO objects that these words do "not perform the narrowing function" that this Court has required in adult obscenity cases, where statutes

can only cover "'hard core'" depictions. *Ante,* at 810 (opinion concurring in judgment). But the relevant comparison is not to adult obscenity cases but to *Ginsberg,* which dealt with "nudity," a category no more "narrow" than killing and maiming. And in any event, *narrowness* and *vagueness* do not necessarily have anything to do with one another. All that is required for vagueness purposes is that the terms "kill," "maim," and "dismember" give fair notice as to what they cover, which they do.

The remainder of California's definition copies, almost word for word, the language this Court used in *Miller* v. *California,* 413 U. S. 15 (1973), in permitting a *total ban* on material that satisfied its definition (one enforced with *criminal* penalties). The California law's reliance on "community standards" adheres to *Miller,* and in *Fort Wayne Books, Inc.* v. *Indiana,* 489 U. S. 46, 57–58 (1989), this Court specifically upheld the use of *Miller*'s language against charges of vagueness. California only departed from the *Miller* formulation in two significant respects: It substituted the word "deviant" for the words "prurient" and "shameful," and it three times added the words "for minors." The word "deviant" differs from "prurient" and "shameful," but it would seem no less suited to defining and narrowing the reach of the statute. And the addition of "for minors" to a version of the *Miller* standard was approved in *Ginsberg, supra,* at 643, even though the New York law "dr[ew] no distinction between young children and adolescents who are nearing the age of majority," *ante,* at 812 (opinion of ALITO, J.).

Both the *Miller* standard and the law upheld in *Ginsberg* lack perfect clarity. But that fact reflects the difficulty of the Court's long search for words capable of protecting expression without depriving the State of a legitimate constitutional power to regulate. As is well known, at one point Justice Stewart thought he could do no better in defining obscenity than, "I know it when I see it." *Jacobellis* v. *Ohio,* 378 U. S. 184, 197 (1964) (concurring opinion). And Justice

Douglas dissented from *Miller*'s standard, which he thought was still too vague. 413 U. S., at 39–40. Ultimately, however, this Court accepted the "community standards" tests used in *Miller* and *Ginsberg*. They reflect the fact that sometimes, even when a precise standard proves elusive, it is easy enough to identify instances that fall within a legitimate regulation. And they seek to draw a line, which, while favoring free expression, will nonetheless permit a legislature to find the words necessary to accomplish a legitimate constitutional objective. Cf. *Williams*, 553 U. S., at 304 (the Constitution does not always require "'perfect clarity and precise guidance,'" even when "'expressive activity'" is involved).

What, then, is the difference between *Ginsberg* and *Miller* on the one hand and the California law on the other? It will often be easy to pick out cases at which California's statute directly aims, involving, say, a character who shoots out a police officer's knee, douses him with gasoline, lights him on fire, urinates on his burning body, and finally kills him with a gunshot to the head. (Footage of one such game sequence has been submitted in the record.) See also *ante*, at 818–819 (opinion of ALITO, J.). As in *Miller* and *Ginsberg*, the California law clearly *protects* even the most violent games that possess serious literary, artistic, political, or scientific value. § 1746(d)(1)(A)(iii). And it is easier here than in *Miller* or *Ginsberg* to separate the sheep from the goats at the statute's border. That is because here the industry itself has promulgated standards and created a review process, in which adults who "typically have experience with children" assess what games are inappropriate for minors. See Entertainment Software Rating Board, Rating Process, online at http://www.esrb.org/ratings/&ratings_/process.jsp (all Internet materials as visited June 24, 2011, and available in Clerk of Court's case file).

There is, of course, one obvious difference: The *Ginsberg* statute concerned depictions of "nudity," while California's statute concerns extremely violent video games. But for

purposes of vagueness, why should that matter? JUSTICE ALITO argues that the *Miller* standard sufficed because there are "certain generally accepted norms concerning expression related to sex," whereas there are no similarly "accepted standards regarding the suitability of violent entertainment." *Ante,* at 811–812. But there is no evidence that is so. The Court relied on "community standards" in *Miller* precisely because of the difficulty of articulating "accepted norms" about depictions of sex. I can find no difference—historical or otherwise—that is *relevant* to the vagueness question. Indeed, the majority's examples of literary descriptions of violence, on which JUSTICE ALITO relies, do not show anything relevant at all.

After all, one can find in literature as many (if not more) descriptions of physical love as descriptions of violence. Indeed, sex "has been a theme in art and literature throughout the ages." *Ashcroft* v. *Free Speech Coalition,* 535 U. S. 234, 246 (2002). For every Homer, there is a Titian. For every Dante, there is an Ovid. And for all the teenagers who have read the original versions of Grimm's Fairy Tales, I suspect there are those who know the story of Lady Godiva.

Thus, I can find no meaningful vagueness-related differences between California's law and the New York law upheld in *Ginsberg.* And if there remain any vagueness problems, the state courts can cure them through interpretation. See *Erznoznik* v. *Jacksonville,* 422 U. S. 205, 216 (1975) ("state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts"). Cf. *Ginsberg,* 390 U. S., at 644 (relying on the fact that New York Court of Appeals would read a knowledge requirement into the statute); *Berry* v. *Santa Barbara,* 40 Cal. App. 4th 1075, 1088–1089, 47 Cal. Rptr. 2d 661, 669 (1995) (reading a knowledge requirement into a statute). Consequently, for purposes of this facial challenge, I would not find the statute unconstitutionally vague.

III

Video games combine physical action with expression. Were physical activity to predominate in a game, government could appropriately intervene, say, by requiring parents to accompany children when playing a game involving actual target practice, or restricting the sale of toys presenting physical dangers to children. See generally Consumer Product Safety Improvement Act of 2008, 122 Stat. 3016 ("Title I—Children's Product Safety"). But because video games also embody important expressive and artistic elements, I agree with the Court that the First Amendment significantly limits the State's power to regulate. And I would determine whether the State has exceeded those limits by applying a strict standard of review.

Like the majority, I believe that the California law must be "narrowly tailored" to further a "compelling interest," without there being a "less restrictive" alternative that would be "at least as effective." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 874, 875, 879 (1997). I would not apply this strict standard "mechanically." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 841 (2000) (BREYER, J., joined by Rehnquist, C. J., and O'Connor and SCALIA, JJ., dissenting). Rather, in applying it, I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially justifying "compelling interests," the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, "the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide." *Ibid.* See also *Burson* v. *Freeman*, 504 U. S. 191, 210 (1992) (plurality opinion) (applying strict scrutiny and finding relevant the lack of a "significant impingement" on speech).

First Amendment standards applied in this way are difficult but not impossible to satisfy. Applying "strict scrutiny"

the Court has upheld restrictions on speech that, for example, ban the teaching of peaceful dispute resolution to a group on the State Department's list of terrorist organizations, *Holder*, 561 U. S., at 27–39; but cf. *id.*, at 41 (BREYER, J., dissenting), and limit speech near polling places, *Burson*, *supra*, at 210–211 (plurality opinion). And applying less clearly defined but still rigorous standards, the Court has allowed States to require disclosure of petition signers, *Doe* v. *Reed*, 561 U. S. 186 (2010), and to impose campaign contribution limits that were "'closely drawn' to match a 'sufficiently important interest,'" *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 387–388 (2000).

Moreover, although the Court did not specify the "level of scrutiny" it applied in *Ginsberg*, we have subsequently described that case as finding a "compelling interest" in protecting children from harm sufficient to justify limitations on speech. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). Since the Court in *Ginsberg* specified that the statute's prohibition applied to material that was *not* obscene, 390 U. S., at 634, I cannot dismiss *Ginsberg* on the ground that it concerned obscenity. But cf. *ante*, at 793–794 (majority opinion). Nor need I depend upon the fact that the Court in *Ginsberg* insisted only that the legislature have a "rational" basis for finding the depictions there at issue harmful to children. 390 U. S., at 639. For in this case, California has substantiated its claim of harm with considerably stronger evidence.

A

California's law imposes no more than a modest restriction on expression. The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help. § 1746.1(c). All it prevents is a child or adolescent from buying, without a parent's assistance, a gruesomely violent video game of a kind that

the industry *itself* tells us it wants to keep out of the hands of those under the age of 17. See Brief for Respondents 8.

Nor is the statute, if upheld, likely to create a precedent that would adversely affect other media, say, films, or videos, or books. A typical video game involves a significant amount of physical activity. See *ante*, at 817–818 (ALITO, J., concurring in judgment) (citing examples of the increasing interactivity of video game controllers). And pushing buttons that achieve an interactive, virtual form of target practice (using images of human beings as targets), while containing an expressive component, is not just like watching a typical movie. See *infra*, at 853.

B

The interest that California advances in support of the statute is compelling. As this Court has previously described that interest, it consists of both (1) the "basic" parental claim "to authority in their own household to direct the rearing of their children," which makes it proper to enact "laws designed to aid discharge of [parental] responsibility," and (2) the State's "independent interest in the well-being of its youth." *Ginsberg*, 390 U. S., at 639–640. Cf. *id.*, at 639, n. 7 ("'[O]ne can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit'" (quoting Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391, 413, n. 68 (1963))). And where these interests work in tandem, it is not fatally "underinclusive" for a State to advance its interests in protecting children against the special harms present in an interactive video game medium through a default rule that still allows parents to provide their children with what their parents wish.

Both interests are present here. As to the need to help parents guide their children, the Court noted in 1968 that

"'parental control or guidance cannot always be provided.'" 390 U. S., at 640. Today, 5.3 million grade-school-age children of working parents are routinely home alone. See Dept. of Commerce, Census Bureau, Who's Minding the Kids? Child Care Arrangements: Spring 2005/Summer 2006, p. 12 (2010), online at http://www.census.gov/prod/2010pubs/p70-121.pdf. Thus, it has, if anything, become more important to supplement parents' authority to guide their children's development.

As to the State's independent interest, we have pointed out that juveniles are more likely to show a "'lack of maturity'" and are "more vulnerable or susceptible to negative influences and outside pressures," and that their "character . . . is not as well formed as that of an adult." *Roper* v. *Simmons*, 543 U. S. 551, 569–570 (2005). And we have therefore recognized "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications*, *supra*, at 126.

At the same time, there is considerable evidence that California's statute significantly furthers this compelling interest. That is, in part, because video games are excellent teaching tools. Learning a practical task often means developing habits, becoming accustomed to performing the task, and receiving positive reinforcement when performing that task well. Video games can help develop habits, accustom the player to performance of the task, and reward the player for performing that task well. Why else would the Armed Forces incorporate video games into its training? See CNN, War Games: Military Training Goes High-Tech (Nov. 22, 2001), online at http://articles.cnn.com/2001–11–2/tech/2war.games_1_ictbill-swartout-real-world-training?_s=PM:TECH.

When the military uses video games to help soldiers train for missions, it is using this medium for a beneficial purpose. But California argues that when the teaching features of video games are put to less desirable ends, harm can ensue.

In particular, extremely violent games can harm children by rewarding them for being violently aggressive in play, and thereby often teaching them to be violently aggressive in life. And video games can cause more harm in this respect than can typically passive media, such as books or films or television programs.

There are many scientific studies that support California's views. Social scientists, for example, have found *causal* evidence that playing these games results in harm. Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period. See Möller & Krahé, Exposure to Violent Video Games and Aggression in German Adolescents: A Longitudinal Analysis, 35 Aggressive Behavior 75 (2009); Gentile & Gentile, Violent Video Games as Exemplary Teachers: A Conceptual Analysis, 37 J. Youth & Adolescence 127 (2008); Anderson et al., Longitudinal Effects of Violent Video Games on Aggression in Japan and the United States, 122 Pediatrics e1067 (2008); Wallenius & Punamäki, Digital Game Violence and Direct Aggression in Adolescence: A Longitudinal Study of the Roles of Sex, Age, and Parent-Child Communication, 29 J. Applied Developmental Psychology 286 (2008).

Experimental studies in laboratories have found that subjects randomly assigned to play a violent video game subsequently displayed more characteristics of aggression than those who played nonviolent games. See, *e. g.*, Anderson et al., Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior, 36 Advances in Experimental Soc. Psychology 199 (2004).

Surveys of eighth and ninth grade students have found a correlation between playing violent video games and aggression. See, *e. g.*, Gentile, Lynch, Linder, & Walsh, The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance, 27 J. Adolescence 5 (2004).

Cutting-edge neuroscience has shown that "virtual violence in video game playing results in those neural patterns that are considered characteristic for aggressive cognition and behavior." Weber, Ritterfeld, & Mathiak, Does Playing Violent Video Games Induce Aggression? Empirical Evidence of a Functional Magnetic Resonance Imaging Study, 8 Media Psychology 39, 51 (2006).

And "meta-analyses," *i. e.*, studies of all the studies, have concluded that exposure to violent video games "was positively associated with aggressive behavior, aggressive cognition, and aggressive affect," and that "playing violent video games is a *causal* risk factor for long-term harmful outcomes." Anderson et al., Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review, 136 Psychological Bull. 151, 167, 169 (2010) (emphasis added).

Some of these studies take care to explain in a commonsense way why video games are potentially more harmful than, say, films or books or television. In essence, they say that the closer a child's behavior comes, not to watching, but to *acting* out horrific violence, the greater the potential psychological harm. See Bushman & Huesmann, Aggression, in 2 Handbook of Social Psychology 833, 851 (S. Fiske, D. Gilbert, & G. Lindzey eds., 5th ed. 2010) (video games stimulate more aggression because "[p]eople learn better when they are actively involved," players are "more likely to identify with violent characters," and "violent games directly reward violent behavior"); Polman, de Castro, & van Aken, Experimental Study of the Differential Effects of Playing Versus Watching Violent Video Games on Children's Aggressive Behavior, 34 Aggressive Behavior 256 (2008) (finding greater aggression resulting from playing, as opposed to watching, a violent game); C. Anderson, D. Gentile, & K. Buckley, Violent Video Game Effects on Children and Adolescents 136–137 (2007) (three studies finding greater effects from games as opposed to television). See also *infra*

this page and 854–855 (statements of expert public health associations agreeing that interactive games can be more harmful than "passive" media like television); *ante,* at 816–821 (ALITO, J., concurring in judgment).

Experts debate the conclusions of all these studies. Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions. (I list both sets of research in the appendixes.) I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.

Eleven years ago, for example, the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association released a joint statement, which said:

> "[O]ver 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children . . . [and, though less research had been done at that time, preliminary studies indicated that] the impact of violent interactive entertainment (video games and other interactive media) on young people . . . may be *significantly more severe* than that wrought by television, movies, or music." Joint Statement on the Impact of Entertainment Violence on Children (2000) (emphasis added), online at http://www.aap.org/advocacy/releases/jstmtevc.htm.

Five years later, after more research had been done, the American Psychological Association adopted a resolution that said:

> "[C]omprehensive analysis of violent interactive video game research suggests such exposure . . . increases aggressive behavior, . . . increases aggressive thoughts, . . . increases angry feelings, . . . decreases helpful behavior, and . . . increases physiological arousal." Resolution on Violence in Video Games and Interactive Media (2005), online at http://www.apa.org/about/governance/council/policy/interactive-media.pdf.

The association added:

> "[T]he practice, repetition, and rewards for acts of violence may be *more conducive* to increasing aggressive behavior among children and youth than passively watching violence on TV and in films." *Ibid.* (emphasis added).

Four years after that, in 2009, the American Academy of Pediatrics issued a statement in significant part about interactive media. It said:

> "Studies of these rapidly growing and ever-more-sophisticated types of media have indicated that the effects of child-initiated virtual violence may be *even more profound than those of passive media* such as television. In many games, the child or teenager is 'embedded' in the game and uses a 'joystick' (handheld controller) that enhances both the experience and the aggressive feelings." Policy Statement—Media Violence, 124 Pediatrics 1495, 1498 (2009) (emphasis added).

It added:

> "Correlational and experimental studies have revealed that violent video games lead to increases in aggressive behavior and aggressive thinking and decreases in prosocial behavior. Recent longitudinal studies . . . have revealed that in as little as 3 months, high exposure to violent video games increased physical aggression.

> Other recent longitudinal studies . . . have revealed similar effects across 2 years." *Ibid.* (footnotes omitted).

Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature's conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases. See *Holder*, 561 U. S., at 33–34 (deferring, while applying strict scrutiny, to the Government's national security judgments); *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 195–196 (1997) (deferring, while applying intermediate scrutiny, to the Government's technological judgments). The majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislature no deference at all. Compare *ante*, at 800 (stating that the studies do not provide evidence that violent video games "cause" harm (emphasis deleted)), with *supra*, at 851 (citing longitudinal studies finding causation).

C

I can find no "less restrictive" alternative to California's law that would be "at least as effective." See *Reno*, 521 U. S., at 874. The majority points to a voluntary alternative: The industry tries to prevent those under 17 from buying extremely violent games by labeling those games with an "M" (Mature) and encouraging retailers to restrict their sales to those 17 and older. See *ante*, at 803. But this voluntary system has serious enforcement gaps. When California enacted its law, a Federal Trade Commission (FTC) study had found that nearly 70% of unaccompanied 13- to 16-year-olds were able to buy M-rated video games. FTC, Marketing Violent Entertainment to Children 27 (2004), online at http://www.ftc.gov/os/2004/07/040708kidsviolencerpt.

pdf. Subsequently the voluntary program has become more effective. But as of the FTC's most recent update to Congress, 20% of those under 17 are still able to buy M-rated video games, and, breaking down sales by store, one finds that this number rises to nearly 50% in the case of one large national chain. FTC, Marketing Violent Entertainment to Children 28 (2009), online at http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf. And the industry could easily revert back to the substantial noncompliance that existed in 2004, particularly after today's broad ruling reduces the industry's incentive to police itself.

The industry also argues for an alternative technological solution, namely, "[f]iltering at the console level." Brief for Respondents 53. But it takes only a quick search of the Internet to find guides explaining how to circumvent any such technological controls. YouTube viewers, for example, have watched one of those guides (called "How to bypass parental controls on the Xbox 360") more than 47,000 times. See http://www.youtube.com/watch?v=CFlVfVmvN6k.

IV

The upshot is that California's statute, as applied to its heartland of applications (*i. e.*, buyers under 17; extremely violent, realistic video games), imposes a restriction on speech that is modest at most. That restriction is justified by a compelling interest (supplementing parents' efforts to prevent their children from purchasing potentially harmful violent, interactive material). And there is no equally effective, less restrictive alternative. California's statute is consequently constitutional on its face—though litigants remain free to challenge the statute as applied in particular instances, including any effort by the State to apply it to minors aged 17.

I add that the majority's different conclusion creates a serious anomaly in First Amendment law. *Ginsberg* makes

clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman—bound, gagged, tortured, and killed—is also topless?

This anomaly is not compelled by the First Amendment. It disappears once one recognizes that extreme violence, where interactive, and *without literary, artistic, or similar justification*, can prove at least as, if not more, harmful to children as photographs of nudity. And the record here is more than adequate to support such a view. That is why I believe that *Ginsberg* controls the outcome here *a fortiori*. And it is why I believe California's law is constitutional on its face.

This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children—by their parents, by their teachers, and by the people acting democratically through their governments. In my view, the First Amendment does not disable government from helping parents make such a choice here—a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children.

For these reasons, I respectfully dissent.

APPENDIXES

With the assistance of the Supreme Court Library, I have compiled these two appendixes listing peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video games. The library conducted a search for relevant articles on the following databases: PsycINFO, PubMed, Academic Search Premier, ArticleFirst (OCLC), and Dialog (files 1, 7, 34, 98, 121, 142, 144, 149). The following search terms were used: "(video* or computer or arcade or online) and (game*) and (attack* or fight* or aggress* or violen* or hostil* or ang* or arous* or prosocial or help* or desens* or empathy)." After eliminating irrelevant matches based on title or abstract, I categorized these articles as either supporting the hypothesis that violent video games are harmful (listed in Appendix A), or not supporting/rejecting the hypothesis that violent video games are harmful (listed in Appendix B).

Many, but not all, of these articles were available to the California Legislature or the parties in briefing this case. I list them because they suggest that there is substantial (though controverted) evidence supporting the expert associations of public health professionals that have concluded that violent video games can *cause* children psychological harm. See *supra*, at 853–855. And consequently, these studies help to substantiate the validity of the original judgment of the California Legislature, as well as that judgment's continuing validity.

A

Anderson & Bushman, Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature, 12 Psychological Science: J. Am. Psychological Society 353 (2001).

Anderson & Dill, Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life, 78 J. Personality & Soc. Psychology 772 (2000).

Anderson et al., Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior, 36 Advances in Experimental Soc. Psychology 199 (2004).

Anderson & Ford, Affect of the Game Player: Short-Term Effects of Highly and Mildly Aggressive Video Games, 12 Personality & Soc. Psychology Bull. 390 (1986).

Anderson & Morrow, Competitive Aggression Without Interaction: Effects of Competitive Versus Cooperative Instructions on Aggressive Behavior in Video Games, 21 Personality & Soc. Psychology Bull. 1020 (1995).

Anderson et al., Longitudinal Effects of Violent Video Games on Aggression in Japan and the United States, 122 Pediatrics e1067 (2008).

Anderson et al., Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review, 136 Psychological Bull. 151 (2010).

Anderson, An Update on the Effects of Playing Violent Video Games, 27 J. Adolescence 113 (2004).

Anderson et al., The Influence of Media Violence on Youth, 4 Psychological Science in the Public Interest 81 (2003).

Anderson & Carnagey, Causal Effects of Violent Sports Video Games on Aggression: Is It Competitiveness or Violent Content? 45 J. Experimental Soc. Psychology 731 (2009).

Anderson & Murphy, Violent Video Games and Aggressive Behavior in Young Women, 29 Aggressive Behavior 423 (2003).

Arriaga, Esteves, Carneiro, & Monteiro, Violent Computer Games and Their Effects on State Hostility and Physiological Arousal, 32 Aggressive Behavior 146 (2006).

Arriaga, Esteves, Carneiro, & Monteiro, Are the Effects of *Unreal* Violent Video Games Pronounced When Playing With a Virtual Reality System? 34 Aggressive Behavior 521 (2008).

Baldaro et al., Aggressive and Non-Violent Videogames: Short-Term Psychological and Cardiovascular Effects on Habitual Players, 20 Stress & Health: J. Int'l Society for Investigation of Stress 203 (2004).

Ballard, Hamby, Panee, & Nivens, Repeated Exposure to Video Game Play Results in Decreased Blood Pressure Responding, 8 Media Psychology 323 (2006).

Ballard & Lineberger, Video Game Violence and Confederate Gender: Effects on Reward and Punishment Given by College Males, 41 Sex Roles 541 (1999).

Ballard & Wiest, Mortal Kombat (tm): The Effects of Violent Videogame Play on Males' Hostility and Cardiovascular Responding, 26 J. Applied Soc. Psychology 717 (1996).

Barlett, Branch, Rodeheffer, & Harris, How Long Do the Short-Term Violent Video Game Effects Last? 35 Aggressive Behavior 225 (2009).

Barlett, Rodeheffer, Baldassaro, Hinkin, & Harris, The Effect of Advances in Video Game Technology and Content on Aggressive Cognitions, Hostility, and Heart Rate, 11 Media Psychology 540 (2008).

Barlett, Harris, & Baldassaro, Longer You Play, the More Hostile You Feel: Examination of First Person Shooter Video Games and Aggression During Video Game Play, 33 Aggressive Behavior 486 (2007).

Barlett, Harris, & Bruey, The Effect of the Amount of Blood in a Violent Video Game on Aggression, Hostility, and Arousal, 44 J. Experimental Soc. Psychology 539 (2008).

Barlett & Rodeheffer, Effects of Realism on Extended Violent and Nonviolent Video Game Play on Aggressive Thoughts, Feelings, and Physiological Arousal, 35 Aggressive Behavior 213 (2009).

Barlett, Anderson, & Swing, Video Game Effects—Confirmed, Suspected, and Speculative: A Review of the Evidence, 40 Simulation & Gaming 377 (2009).

Bartholow, Sestir, & Davis, Correlates and Consequences of Exposure to Video Game Violence: Hostile Personality,

Empathy, and Aggressive Behavior, 31 Personality & Soc. Psychology Bull. 1573 (2005).

Bartholow & Anderson, Effects of Violent Video Games on Aggressive Behavior: Potential Sex Differences, 38 J. Experimental Soc. Psychology 283 (2002).

Bartholow, Bushman, & Sestir, Chronic Violent Video Game Exposure and Desensitization to Violence: Behavioral and Event-Related Brain Potential Data, 42 J. Experimental Soc. Psychology 532 (2006).

Bluemke, Friedrich, & Zumbach, The Influence of Violent and Nonviolent Computer Games on Implicit Measures of Aggressiveness, 36 Aggressive Behavior 1 (2010).

Brady & Matthews, Effects of Media Violence on Health-Related Outcomes Among Young Men, 160 Archives of Pediatrics & Adolescent Med. 341 (2006).

Browne & Hamilton-Giachritsis, The Influence of Violent Media on Children and Adolescents: A Public-Health Approach, 365 Lancet 702 (2005).

Bushman & Anderson, Violent Video Games and Hostile Expectations: A Test of the General Aggression Model, 28 Personality & Soc. Psychology Bull. 1679 (2002).

Bushman & Anderson, Comfortably Numb: Desensitizing Effects of Violent Media on Helping Others, 20 Psychological Science: J. Am. Psychological Society 273 (2009).

Bushman, Rothstein, & Anderson, Much Ado About Something: Violent Video Game Effects and a School of Red Herring: Reply to Ferguson and Kilburn, 136 Psychological Bull. 182 (2010).

Calvert & Tan, Impact of Virtual Reality on Young Adults' Physiological Arousal and Aggressive Thoughts: Interaction Versus Observation, 15 J. Applied Developmental Psychology 125 (1994).

Carnagey, Anderson, & Bartholow, Media Violence and Social Neuroscience: New Questions and New Opportunities, 16 Current Directions in Psychological Science 178 (2007).

Carnagey & Anderson, Violent Video Game Exposure and Aggression: A Literature Review, 45 Minerva Psichiatrica 1 (2004).

Carnagey & Anderson, The Effects of Reward and Punishment in Violent Video Games on Aggressive Affect, Cognition, and Behavior, 16 Psychological Science: J. Am. Psychological Society 882 (2005).

Carnagey, Anderson, & Bushman, The Effect of Video Game Violence on Physiological Desensitization to Real-Life Violence, 43 J. Experimental Soc. Psychology 489 (2007).

Chambers & Ascione, The Effects of Prosocial and Aggressive Videogames on Children's Donating and Helping, 148 J. Genetic Psychology: Research and Theory on Human Development 499 (1987).

Chory & Cicchirillo, The Relationship Between Video Game Play and Trait Verbal Aggressiveness: An Application of the General Aggression Model, 24 Communication Research Reports 113 (2007).

Cicchirillo & Chory-Assad, Effects of Affective Orientation and Video Game Play on Aggressive Thoughts and Behaviors, 49 J. Broadcasting & Electronic Media 435 (2005).

Colwell & Payne, Negative Correlates of Computer Game Play in Adolescents, 91 British J. Psychology 295 (2000).

Cooper & Mackie, Video Games and Aggression in Children, 16 J. Applied Soc. Psychology 726 (1986).

Deselms & Altman, Immediate and Prolonged Effects of Videogame Violence, 33 J. Applied Soc. Psychology 1553 (2003).

Dill & Dill, Video Game Violence: A Review of the Empirical Literature, 3 Aggression & Violent Behavior 407 (1998).

Doğan, Video Games and Children: Violence in Video Games, 44 Yeni Symposium 161 (2006).

Eastin, Video Game Violence and the Female Game Player: Self- and Opponent Gender Effects on Presence and Aggressive Thoughts, 32 Human Communication Research 351 (2006).

Emes, Is Mr Pac Man Eating Our Children? A Review of the Effect of Video Games on Children, 42 Canadian J. Psychiatry 409 (1997).

Farrar, Krcmar, & Nowak, Contextual Features of Violent Video Games, Mental Models, and Aggression, 56 J. Communication 387 (2006).

Fischer, Kastenmüller, & Greitemeyer, Media Violence and the Self: The Impact of Personalized Gaming Characters in Aggressive Video Games on Aggressive Behavior, 46 J. Experimental Soc. Psychology 192 (2010).

Funk, Children's Exposure to Violent Video Games and Desensitization to Violence, 14 Child & Adolescent Psychiatric Clinics North Am. 387 (2005).

Funk, Video Games, 16 Adolescent Med. Clinics 395 (2005).

Funk, Baldacci, Pasold, & Baumgardner, Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization? 27 J. Adolescence 23 (2004).

Funk, Buchman, Jenks, & Bechtoldt, Playing Violent Video Games, Desensitization, and Moral Evaluation in Children, 24 J. Applied Developmental Psychology 413 (2003).

Funk et al., Aggression and Psychopathology in Adolescents With a Preference for Violent Electronic Games, 28 Aggressive Behavior 134 (2002).

Funk, Buchman, Jenks, & Bechtoldt, An Evidence-Based Approach to Examining the Impact of Playing Violent Video and Computer Games, SIMILE: Studies in Media & Information Literacy Educ., vol. 2, no. 4, p. 1 (Nov. 2002).

Gentile & Stone, Violent Video Game Effects on Children and Adolescents: A Review of the Literature, 57 Minerva Pediatrica 337 (2005).

Gentile et al., The Effects of Prosocial Video Games on Prosocial Behaviors: International Evidence From Correlational, Longitudinal, and Experimental Studies, 35 Personality & Soc. Psychology Bull. 752 (2009).

Gentile, Lynch, Linder, & Walsh, The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance, 27 J. Adolescence 5 (2004).

Gentile & Gentile, Violent Video Games as Exemplary Teachers: A Conceptual Analysis, 37 J. Youth & Adolescence 127 (2008).

Giumetti & Markey, Violent Video Games and Anger as Predictors of Aggression, 41 J. Research in Personality 1234 (2007).

Graybill, Kirsch, & Esselman, Effects of Playing Violent Versus Nonviolent Video Games on the Aggressive Ideation of Aggressive and Nonaggressive Children, 15 Child Study J. 199 (1985).

Grigoryan, Stepanyan, Stepanyan, & Agababyan, Influence of Aggressive Computer Games on the Brain Cortex Activity Level in Adolescents, 33 Human Physiology 34 (2007).

Hastings et al., Young Children's Video/Computer Game Use: Relations With School Performance and Behavior, 30 Issues in Mental Health Nursing 638 (2009).

Huesmann, Nailing the Coffin Shut on Doubts That Violent Video Games Stimulate Aggression: Comment on Anderson et al., 136 Psychological Bull. 179 (2010).

Huesmann, The Impact of Electronic Media Violence: Scientific Theory and Research, 41 J. Adolescent Health S6 (2007).

Huesmann & Taylor, The Role of Media Violence in Violent Behavior, 27 Annual Rev. Public Health 393 (2006).

Hummer et al., Short-Term Violent Video Game Play by Adolescents Alters Prefrontal Activity During Cognitive Inhibition, 13 Media Psychology 136 (2010).

Irwin & Gross, Cognitive Tempo, Violent Video Games, and Aggressive Behavior in Young Boys, 10 J. Family Violence 337 (1995).

Kirsh & Mounts, Violent Video Game Play Impacts Facial Emotion Recognition, 33 Aggressive Behavior 353 (2007).

Kirsh, Mounts, & Olczak, Violent Media Consumption and the Recognition of Dynamic Facial Expressions, 21 J. Interpersonal Violence 571 (2006).

Kirsh, Olczak, & Mounts, Violent Video Games Induce an Affect Processing Bias, 7 Media Psychology 239 (2005).

Kirsh, The Effects of Violent Video Games on Adolescents: The Overlooked Influence of Development, 8 Aggression & Violent Behavior 377 (2003).

Kirsh, Seeing the World Through Mortal Kombat-Colored Glasses: Violent Video Games and the Development of a Short-term Hostile Attribution Bias, 5 Childhood 177 (1998).

Konijn, Bijvank, & Bushman, I Wish I Were a Warrior: The Role of Wishful Identification in the Effects of Violent Video Games on Aggression in Adolescent Boys, 43 Developmental Psychology 1038 (2007).

Krahé & Möller, Playing Violent Electronic Games, Hostile Attributional Style, and Aggression-Related Norms in German Adolescents, 27 J. Adolescence 53 (2004).

Krcmar, Farrar, & McGloin, The Effects of Video Game Realism on Attention, Retention and Aggressive Outcomes, 27 Computers in Human Behavior 432 (2011).

Krcmar & Lachlan, Aggressive Outcomes and Videogame Play: The Role of Length of Play and the Mechanisms at Work, 12 Media Psychology 249 (2009).

Krcmar & Farrar, Retaliatory Aggression and the Effects of Point of View and Blood in Violent Video Games, 12 Mass Communication & Society 115 (2009).

Kronenberger et al., Media Violence Exposure in Aggressive and Control Adolescents: Differences in Self- and Parent-Reported Exposure to Violence on Television and in Video Games, 31 Aggressive Behavior 201 (2005).

Kronenberger et al., Media Violence Exposure and Executive Functioning in Aggressive and Control Adolescents, 61 J. Clinical Psychology 725 (2005).

Kuntsche, Hostility Among Adolescents in Switzerland? Multivariate Relations Between Excessive Media Use and Forms of Violence, 34 J. Adolescent Health 230 (2004).

Lee, Peng, & Klein, Will the Experience of Playing a Violent Role in a Video Game Influence People's Judgments of Violent Crimes? 26 Computers in Human Behavior 1019 (2010).

Lemmens & Bushman, The Appeal of Violent Video Games to Lower Educated Aggressive Adolescent Boys From Two Countries, 9 CyberPsychology & Behavior 638 (2006).

Mathiak & Weber, Toward Brain Correlates of Natural Behavior: fMRI During Violent Video Games, 27 Human Brain Mapping 948 (2006).

Möller & Krahé, Exposure to Violent Video Games and Aggression in German Adolescents: A Longitudinal Analysis, 35 Aggressive Behavior 75 (2009).

Nowak, Krcmar, & Farrar, The Causes and Consequences of Presence: Considering the Influence of Violent Video Games on Presence and Aggression, 17 Presence: Teleoperators & Virtual Environments 256 (2008).

Olson et al., M-Rated Video Games and Aggressive or Problem Behavior Among Young Adolescents, 13 Applied Developmental Science 188 (2009).

Panee & Ballard, High Versus Low Aggressive Priming During Video-Game Training: Effects on Violent Action During Game Play, Hostility, Heart Rate, and Blood Pressure, 32 J. Applied Soc. Psychology 2458 (2002).

Persky & Blascovich, Immersive Virtual Environments Versus Traditional Platforms: Effects of Violent and Nonviolent Video Game Play, 10 Media Psychology 135 (2007).

Persky & Blascovich, Immersive Virtual Video Game Play and Presence: Influences on Aggressive Feelings and Be-

havior, 17 Presence: Teleoperators & Virtual Environments 57 (2008).

Polman, de Castro, & van Aken, Experimental Study of the Differential Effects of Playing Versus Watching Violent Video Games on Children's Aggressive Behavior, 34 Aggressive Behavior 256 (2008).

Potera, Sex and Violence in the Media Influence Teen Behavior: Three Studies Show a Correlation, 109 American J. Nursing 20 (2009).

Richmond & Wilson, Are Graphic Media Violence, Aggression, and Moral Disengagement Related? 15 Psychiatry, Psychology & Law 350 (2008).

Schaefer & Harrison, The Effects of Violent Fantasy on Children's Aggressive Behavior, 41 Psychology & Educ. 35 (2004).

Schmierbach, "Killing Spree": Exploring the Connection Between Competitive Game Play and Aggressive Cognition, 37 Communication Research 256 (2010).

Sheese & Graziano, Deciding To Defect: The Effects of Video-Game Violence on Cooperative Behavior, 16 Psychological Science: J. Am. Psychological Society 354 (2005).

Sherry, The Effects of Violent Video Games on Aggression. A Meta-Analysis, 27 Human Communication Research 409 (2001).

Shibuya, Sakamoto, Ihori, & Yukawa, The Effects of the Presence and Contexts of Video Game Violence on Children: A Longitudinal Study in Japan, 39 Simulation & Gaming 528 (2008).

Sigurdsson, Gudjonsson, Bragason, Kristjansdottir, & Sigfusdottir, The Role of Violent Cognition in the Relationship Between Personality and the Involvement in Violent Films and Computer Games, 41 Personality & Individual Differences 381 (2006).

Silvern & Williamson, The Effects of Video Game Play on Young Children's Aggression, Fantasy, and Prosocial Behavior, 8 J. Applied Developmental Psychology 453 (1987).

Slater, Henry, Swaim, & Cardador, Vulnerable Teens, Vulnerable Times: How Sensation Seeking, Alienation, and Victimization Moderate the Violent Media Content—Aggressiveness Relation, 31 Communication Research 642 (2004).

Slater, Henry, Swaim, & Anderson, Violent Media Content and Aggressiveness in Adolescents: A Downward Spiral Model, 30 Communication Research 713 (2003).

Staude-Müller, Bliesener, & Luthman, Hostile and Hardened? An Experimental Study on (De-)sensitization to Violence and Suffering Through Playing Video Games, 67 Swiss J. Psychology 41 (2008).

Steward & Follina, Informing Policies in Forensic Settings: A Review of Research Investigating the Effects of Exposure to Media Violence on Challenging/Offending Behaviour, 8 British J. Forensic Prac. 31 (2006).

Swing & Anderson, The Unintended Negative Consequences of Exposure to Violent Video Games, 12 Int. J. Cognitive Tech. 3 (2007).

Tamborini et al., Violent Virtual Video Games and Hostile Thoughts, 48 J. Broadcasting & Electronic Media 335 (2004).

Uhlmann & Swanson, Exposure to Violent Video Games Increases Automatic Aggressiveness, 27 J. Adolescence 41 (2004).

Vaughan, Inadvertent Script Change and Increased Propensity for Violence: The Danger of Interactive Video Games, 34 Transactional Analysis J. 30 (2004).

Wallenius & Punamäki, Digital Game Violence and Direct Aggression in Adolescence: A Longitudinal Study of the Roles of Sex, Age, and Parent-Child Communication, 29 J. Applied Developmental Psychology 286 (2008).

Wallenius, Punamäki, & Rimpelä, Digital Game Playing and Direct and Indirect Aggression in Early Adolescence: The Roles of Age, Social Intelligence, and Parent-Child Communication, 36 J. Youth & Adolescence 325 (2007).

Wang et al., Short Term Exposure to a Violent Video Game Induces Changes in Frontolimbic Circuitry in Adolescents, 3 Brain Imaging & Behavior 38 (2009).

Weber, Ritterfeld, & Mathiak, Does Playing Violent Video Games Induce Aggression? Empirical Evidence of a Functional Magnetic Resonance Imaging Study, 8 Media Psychology 39 (2006).

Wiegman & van Schie, Video Game Playing and Its Relations With Aggressive and Prosocial Behaviour, 37 British J. Soc. Psychology 367 (1998).

Williams, The Effects of Frustration, Violence, and Trait Hostility After Playing a Video Game, 12 Mass Communication & Society 291 (2009).

Ybarra et al., Linkages Between Internet and Other Media Violence With Seriously Violent Behavior by Youth, 122 Pediatrics 929 (2008).

B

Bensley & Van Eenwyk, Video Games and Real-Life Aggression: Review of the Literature, 29 J. Adolescent Health 244 (2001).

Bösche, Violent Content Enhances Video Game Performance, 21 J. Media Psychology: Theories, Methods, and Applications 145 (2009).

Colwell & Kato, Video Game Play in British and Japanese Adolescents, 36 Simulation & Gaming 518 (2005).

Colwell & Kato, Investigation of the Relationship Between Social Isolation, Self-Esteem, Aggression and Computer Game Play in Japanese Adolescents, 6 Asian J. Soc. Psychology 149 (2003).

Dominick, Videogames, Television Violence, and Aggression in Teenagers, 34 J. Communication 136 (1984).

Ferguson, Blazing Angels or Resident Evil? Can Violent Video Games Be a Force for Good? 14 Rev. Gen. Psychology 68 (2010).

Ferguson, Violent Video Games: Dogma, Fear, and Pseudoscience, 33 Skeptical Inquirer 38 (2009).

Ferguson, The Good, the Bad and the Ugly: A Meta-Analytic Review of Positive and Negative Effects of Violent Video Games, 78 Psychiatric Q. 309 (2007).

Ferguson & Meehan, Saturday Night's Alright for Fighting: Antisocial Traits, Fighting, and Weapons Carrying in a Large Sample of Youth, 81 Psychiatric Q. 293 (2010).

Ferguson et al., Violent Video Games and Aggression, 35 Crim. Justice & Behavior 311 (2008).

Ferguson, Research on the Effects of Violent Video Games: A Critical Analysis, 3 Soc. & Personality Psychology Compass 351 (2009).

Ferguson & Rueda, The Hitman Study: Violent Video Game Exposure Effects on Aggressive Behavior, Hostile Feelings, and Depression, 15 European Psychologist 99 (2010).

Ferguson, San Miguel, & Hartley, A Multivariate Analysis of Youth Violence and Aggression: The Influence of Family, Peers, Depression, and Media Violence, 155 J. Pediatrics 904 (2009).

Ferguson, Evidence for Publication Bias in Video Game Violence Effects Literature: A Meta-Analytic Review, 12 Aggression & Violent Behavior 470 (2007).

Ferguson, The School Shooting/Violent Video Game Link: Causal Relationship or Moral Panic? 5 J. Investigative Psychology & Offender Profiling 25 (2008).

Ferguson et al., Personality, Parental, and Media Influences on Aggressive Personality and Violent Crime in Young Adults, 17 J. Aggression, Maltreatment & Trauma 395 (2008).

Ferguson & Kilburn, Much Ado About Nothing: The Misestimation and Overinterpretation of Violent Video Game Effects in Eastern and Western Nations: Comment on Anderson et al. (2010), 136 Psychological Bull. 174 (2010).

Fleming & Rickwood, Effects of Violent Versus Nonviolent Video Games on Children's Arousal, Aggressive Mood, and Positive Mood, 31 J. Applied Soc. Psychology 2047 (2001).

Griffiths, Violent Video Games and Aggression: A Review of the Literature, 4 Aggression & Violent Behavior 203 (1999).

Griffiths, Video Games and Aggression, 10 The Psychologist 397 (1997).

Ivory & Kalyanaraman, The Effects of Technological Advancement and Violent Content in Video Games on Players' Feelings of Presence, Involvement, Physiological Arousal, and Aggression, 57 J. Communication 532 (2007).

Kestenbaum & Weinstein, Personality, Psychopathology, and Developmental Issues in Male Adolescent Video Game Use, 24 J. Am. Academy Child Psychiatry 329 (1985).

Markey & Markey, Vulnerability to Violent Video Games: A Review and Integration of Personality Research, 14 Rev. Gen. Psychology 82 (2010).

Markey & Scherer, An Examination of Psychoticism and Motion Capture Controls as Moderators of the Effects of Violent Video Games, 25 Computers in Human Behavior 407 (2009).

Mitrofan, Paul, & Spencer, Is Aggression in Children With Behavioural and Emotional Difficulties Associated With Television Viewing and Video Game Playing? A Systematic Review, 35 Child: Care, Health & Development 5 (2009).

Olson, Media Violence Research and Youth Violence Data: Why Do They Conflict? 28 Academic Psychiatry 144 (2004).

Porter & Starcevic, Are Violent Video Games Harmful? 15 Australasian Psychiatry 422 (2007).

Regenbogen, Herrmann, & Fehr, The Neural Processing of Voluntary Completed, Real and Virtual Violent and Non-Violent Computer Game Scenarios Displaying Predefined Actions in Gamers and Nongamers, 5 Soc. Neuroscience 221 (2010).

Scott, The Effect of Video Games on Feelings of Aggression, 129 J. Psychology 121 (1995).

Sestir & Bartholow, Violent and Nonviolent Video Games Produce Opposing Effects on Aggressive and Prosocial Outcomes, 46 J. Experimental Soc. Psychology 934 (2010).

Unsworth, Devilly, & Ward, The Effect of Playing Violent Video Games on Adolescents: Should Parents Be Quaking in Their Boots? 13 Psychology, Crime & Law 383 (2007).

Unsworth & Ward, Video Games and Aggressive Behaviour, 36 Australian Psychologist 184 (2001).

Williams & Skoric, Internet Fantasy Violence: A Test of Aggression in an Online Game, 72 Communication Monographs 217 (2005).

Winkel, Novak, & Hopson, Personality Factors, Subject Gender, and the Effects of Aggressive Video Games on Aggression in Adolescents, 21 J. Research in Personality 211 (1987).

Syllabus

J. McINTYRE MACHINERY, LTD. *v.* NICASTRO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF NICASTRO

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 09–1343. Argued January 11, 2011—Decided June 27, 2011

Respondent Nicastro injured his hand while using a metal-shearing machine that petitioner J. McIntyre Machinery, Ltd. (J. McIntyre), manufactured in England, where the company is incorporated and operates. Nicastro filed this products-liability suit in a state court in New Jersey, where the accident occurred, but J. McIntyre sought to dismiss the suit for want of personal jurisdiction. Nicastro's jurisdictional claim was based on three primary facts: A U. S. distributor agreed to sell J. McIntyre's machines in this country; J. McIntyre officials attended trade shows in several States, albeit not in New Jersey; and no more than four J. McIntyre machines (the record suggests only one), including the one at issue, ended up in New Jersey. The State Supreme Court held that New Jersey's courts can exercise jurisdiction over a foreign manufacturer without contravening the Fourteenth Amendment's Due Process Clause so long as the manufacturer knew or reasonably should have known that its products are distributed through a nationwide distribution system that might lead to sales in any of the States. Invoking this "stream-of-commerce" doctrine of jurisdiction, the court relied in part on *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102. Applying its test, the court concluded that J. McIntyre was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the State.

Held: The judgment is reversed.

201 N. J. 48, 987 A. 2d 575, reversed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS, concluded that because J. McIntyre never engaged in any activities in New Jersey that revealed an intent to invoke or benefit from the protection of the State's laws, New Jersey is without power to adjudge the company's rights and liabilities, and its exercise of jurisdiction would violate due process. Pp. 879–887.

(a) Due process protects the defendant's right not to be coerced except by lawful judicial power. A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend 'traditional no-

tions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316. Freeform fundamental fairness notions divorced from traditional practice cannot transform a judgment rendered without authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U. S. 235, 253. In cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with "fair play and substantial justice" notions. No "stream-of-commerce" doctrine can displace that general rule for products-liability cases.

The rules and standards for determining state jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi*. The imprecision arising from *Asahi*, for the most part, results from its statement of the relation between jurisdiction and the "stream of commerce." That concept, like other metaphors, has its deficiencies as well as its utilities. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact. A defendant's placement of goods into commerce "with the expectation that they will be purchased by consumers in the forum State" may indicate purposeful availment. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 298. But that does not amend the general rule of personal jurisdiction. The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. See, *e. g.*, *Hanson*, *supra*, at 253. In *Asahi*, Justice Brennan's concurrence (joined by three other Justices) discarded the central concept of sovereign authority in favor of fairness and foreseeability considerations on the theory that the defendant's ability to anticipate suit is the touchstone of jurisdiction. 480 U. S., at 117. However, Justice O'Connor's lead opinion (also for four Justices) stated that "[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Id.*, at 112. Since *Asahi*, the courts have sought to reconcile the competing opinions. But Justice Brennan's rule based on general notions of fairness and foreseeability is inconsistent with the premises of lawful judicial power under this Court's precedents. Today's conclusion that the authority to subject a defendant to judgment depends on purposeful availment is consistent with Justice O'Connor's *Asahi* opinion. Pp. 879–885.

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(b) Nicastro has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. The company had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, the trial court found that petitioner did not have a single contact with the State apart from the fact that the machine in question ended up there. Neither these facts, nor the three on which Nicastro centered his jurisdictional claim, show that J. McIntyre purposefully availed itself of the New Jersey market. Pp. 885–887.

JUSTICE BREYER, joined by JUSTICE ALITO, agreed that the New Jersey Supreme Court's judgment must be reversed, but concluded that because this case does not present issues arising from recent changes in commerce and communication, it is unwise to announce a rule of broad applicability without fully considering modern-day consequences. Rather, the outcome of the case is determined by the Court's precedents. Pp. 888–893.

(a) Based on the record, respondent Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer). The three primary facts the state high court relied on do not satisfy due process. None of the Court's precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286; *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102. Here, the relevant facts show no "regular . . . flow" or "regular course" of sales in New Jersey, *id.*, at 117 (Brennan, J., concurring in part and concurring in judgment); *id.*, at 122 (Stevens, J., concurring in part and concurring in judgment); and there is no "something more," such as special state-related design, advertising, advice, or marketing, *id.*, at 111, 112 (opinion of O'Connor, J.), that would warrant the assertion of jurisdiction. Nicastro has shown no specific effort by the British Manufacturer to sell in New Jersey. And he has not otherwise shown that the British Manufacturer "'purposefully avail[ed] itself of the privilege of conducting activities'" within New Jersey, or that it delivered its goods in the stream of commerce "with the expectation that they will be purchased" by New Jersey users. *World-Wide Volkswagen*, *supra*, at 297–298. Pp. 888–890.

(b) JUSTICE BREYER would not go further. Because the incident at issue does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules. At a minimum, he would not work such a change to the law in the way either

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the plurality or the New Jersey Supreme Court suggests without a better understanding of the relevant contemporary commercial circumstances. Insofar as such considerations are relevant to any change in present law, they might be presented in a case (unlike the present one) in which the Solicitor General participates. Pp. 890–893.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, in which ALITO, J., joined, *post,* p. 887. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined, *post,* p. 893.

Arthur F. Fergenson argued the cause for petitioner. With him on the briefs were *Steven F. Gooby*, *Robert A. Assuncao*, *James S. Coons*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup.*

Alexander W. Ross, Jr., argued the cause for respondent. With him on the brief were *Janice L. Heinold*, *John Vail*, *Andre M. Mura*, and *Valerie M. Nannery.**

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Peter B. Rutledge* and *Robin S. Conrad;* for the Organization for International Investment et al. by *Carter G. Phillips* and *Marinn Carlson;* and for the Product Liability Advisory Council, Inc., by *Alan E. Untereiner.*

Briefs of *amici curiae* urging affirmance were filed for the State of Arkansas et al. by *Dustin McDaniel,* Attorney General of Arkansas, and *Ali M. Brady,* Assistant Attorney General, by *Russell A. Suzuki,* Acting Attorney General of Hawaii, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Chris Koster* of Missouri, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Henry McMaster* of South Carolina, *Robert E. Cooper, Jr.,* of Tennessee, *Mark L. Shurtleff* of Utah, and *Darrell V. McGraw, Jr.,* of West Virginia; for the American Association for Justice by *Jonathan W. Miller* and *Gene Locks;* for Law Professors by *Justin T. Green* and *James P. Kreindler;* for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve;* and for the Workers' Injury Law & Advocacy Group by *Kathleen G. Sumner.*

Gennaro A. Filice III and *Paul R. Johnson* filed a brief for Dow Chemical Canada ULC as *amicus curiae.*

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

Whether a person or entity is subject to the jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction, is a question that arises with great frequency in the routine course of litigation. The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102 (1987).

Here, the Supreme Court of New Jersey, relying in part on *Asahi*, held that New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer "knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." *Nicastro* v. *McIntyre Machinery America, Ltd.*, 201 N. J. 48, 76, 77, 987 A. 2d 575, 591, 592 (2010). Applying that test, the court concluded that a British manufacturer of scrap metal machines was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the State.

That decision cannot be sustained. Although the New Jersey Supreme Court issued an extensive opinion with careful attention to this Court's cases and to its own precedent, the "stream of commerce" metaphor carried the decision far afield. Due process protects the defendant's right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958). There may be exceptions, say, for instance,

in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called "stream-of-commerce" doctrine cannot displace it.

I

This case arises from a products-liability suit filed in New Jersey state court. Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre). The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there. Nicastro was a plaintiff in the New Jersey trial court and is the respondent here; J. McIntyre was a defendant and is now the petitioner.

At oral argument in this Court, Nicastro's counsel stressed three primary facts in defense of New Jersey's assertion of jurisdiction over J. McIntyre. See Tr. of Oral Arg. 29–30.

First, an independent company agreed to sell J. McIntyre's machines in the United States. J. McIntyre itself did not sell its machines to buyers in this country beyond the U. S. distributor, and there is no allegation that the distributor was under J. McIntyre's control.

Second, J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre's machines alongside the distributor. The conventions took place in various States, but never in New Jersey.

Third, no more than four machines (the record suggests only one, see App. to Pet. for Cert. 130a), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.

In addition to these facts emphasized by respondent, the New Jersey Supreme Court noted that J. McIntyre held both United States and European patents on its recycling technol-

ogy. 201 N. J., at 55, 987 A. 2d, at 579. It also noted that the U. S. distributor "structured [its] advertising and sales efforts in accordance with" J. McIntyre's "direction and guidance whenever possible," and that "at least some of the machines were sold on consignment to" the distributor. *Id.*, at 55, 56, 987 A. 2d, at 579 (internal quotation marks omitted).

In light of these facts, the New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over petitioner without contravention of the Due Process Clause. Jurisdiction was proper, in that court's view, because the injury occurred in New Jersey; because petitioner knew or reasonably should have known "that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states"; and because petitioner failed to "take some reasonable step to prevent the distribution of its products in this State." *Id.*, at 77, 987 A. 2d, at 592.

Both the New Jersey Supreme Court's holding and its account of what it called "[t]he stream-of-commerce doctrine of jurisdiction," *id.*, at 80, 987 A. 2d, at 594, were incorrect, however. This Court's *Asahi* decision may be responsible in part for that court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.

II

The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. Cf. *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 403 (1966) (The Clause "protect[s] a person against having the Government impose burdens upon him except in accordance with the valid laws of the land"). This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94 (1998) (" 'Jurisdiction is power to declare the

law' '"). As a general rule, neither statute nor judicial decree may bind strangers to the State. Cf. *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 608–609 (1990) (opinion of SCALIA, J.) (invoking "the phrase *coram non judice*, 'before a person not a judge'—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*").

A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945) (quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940)). Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, 357 U. S., at 253, though in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws. In products-liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with "traditional notions of fair play and substantial justice."

A person may submit to a State's authority in a number of ways. There is, of course, explicit consent. *E. g.*, *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 703 (1982). Presence within a State at the time suit commences through service of process is another example. See *Burnham*, *supra*. Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations—also indicates general submission to a State's powers. *Goodyear Dunlop Tires Operations, S. A.*

v. *Brown*, *post*, p. 915. Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State. Cf. *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 476 (1985). These examples support exercise of the general jurisdiction of the State's courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere. *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414, and n. 9 (1984). By contrast, those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.

There is also a more limited form of submission to a State's authority for disputes that "arise out of or are connected with the activities within the state." *International Shoe Co.*, *supra*, at 319. Where a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, *supra*, at 253, it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State. In other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, *supra*, at 414, n. 8; see also *Goodyear*, *post*, at 919.

The imprecision arising from *Asahi*, for the most part, results from its statement of the relation between jurisdiction and the "stream of commerce." The stream of commerce, like other metaphors, has its deficiencies as well as its utility. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact. This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased

by consumers in the forum State" may indicate purposeful availment. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 298 (1980) (finding that expectation lacking). But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors "seek to serve" a given State's market. *Id.*, at 295. The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, *supra*, at 253; *Insurance Corp.*, *supra*, at 704–705 ("[A]ctions of the defendant may amount to a legal submission to the jurisdiction of the court"). Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

In *Asahi*, an opinion by Justice Brennan for four Justices outlined a different approach. It discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability. As that concurrence contended, "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause," for "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." 480 U. S., at 117 (opinion concurring in part and concurring in judgment). It was the premise of the concurring opinion that the defendant's ability to anticipate suit renders the assertion of jurisdiction fair. In

this way, the opinion made foreseeability the touchstone of jurisdiction.

The standard set forth in Justice Brennan's concurrence was rejected in an opinion written by Justice O'Connor; but the relevant part of that opinion, too, commanded the assent of only four Justices, not a majority of the Court. That opinion stated: "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.*, at 112 (emphasis deleted; citations omitted).

Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.

The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* "conducted no independent inquiry into the desirability or fairness" of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant. 495 U. S., at 621 (opinion of SCALIA, J.). As that opinion explained, "[t]he view developed early that each State had the power to hale before its courts any individual who could be found within its borders." *Id.*, at 610. Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.

That such considerations have not been deemed controlling is instructive. See, *e. g.*, *World-Wide Volkswagen*, *supra*, at 294.

Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. *Insurance Corp.*, 456 U. S., at 702. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.

The second principle is a corollary of the first. Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. Ours is "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring). For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however. If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States. Fur-

thermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.

It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town. And the issue of foreseeability may itself be contested so that significant expenses are incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible.

The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi,* does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases. The defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.

III

In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power. See *Asahi,* 480 U. S., at 113, n. Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in

a federal court in New Jersey. See *Hanson*, 357 U. S., at 254 ("The issue is personal jurisdiction, not choice of law"). A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts. Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.

Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state." App. to Pet. for Cert. 130a. These facts may reveal an intent to serve the U. S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.

It is notable that the New Jersey Supreme Court appears to agree, for it could "not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case." 201 N. J., at 61, 987 A. 2d, at 582. The court nonetheless held that petitioner could be sued in New Jersey based on a "stream-of-commerce theory of jurisdiction." *Ibid.* As discussed, however, the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures. The New Jersey Supreme Court also

cited "significant policy reasons" to justify its holding, including the State's "strong interest in protecting its citizens from defective products." *Id.*, at 75, 987 A. 2d, at 590. That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency.

* * *

Due process protects petitioner's right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process. The contrary judgment of the New Jersey Supreme Court is

Reversed.

JUSTICE BREYER, with whom JUSTICE ALITO joins, concurring in the judgment.

The Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that "[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade." *Nicastro* v. *McIntyre Machinery America, Ltd.*, 201 N. J. 48, 52, 987 A. 2d 575, 577 (2010). I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.

In my view, the outcome of this case is determined by our precedents. Based on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer), a British firm that manufactures

scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.

I

In asserting jurisdiction over the British Manufacturer, the Supreme Court of New Jersey relied most heavily on three primary facts as providing constitutionally sufficient "contacts" with New Jersey, thereby making it fundamentally fair to hale the British Manufacturer before its courts: (1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro's employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in "such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco." *Id.*, at 54–55, 987 A. 2d, at 578–579. In my view, these facts do not provide contacts between the British firm and the State of New Jersey constitutionally sufficient to support New Jersey's assertion of jurisdiction in this case.

None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court's previous holdings suggest the contrary. The Court has held that a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286 (1980). And the Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the

stream of commerce, fully aware (and hoping) that such a sale will take place. See *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 111, 112 (1987) (opinion of O'Connor, J.) (requiring "something more" than simply placing "a product into the stream of commerce," even if defendant is "awar[e]" that the stream "may or will sweep the product into the forum State"); *id.*, at 117 (Brennan, J., concurring in part and concurring in judgment) (jurisdiction should lie where a sale in a State is part of "the regular and anticipated flow" of commerce into the State, but not where that sale is only an "edd[y]," *i. e.*, an isolated occurrence); *id.*, at 122 (Stevens, J., concurring in part and concurring in judgment) (indicating that "the volume, the value, and the hazardous character" of a good may affect the jurisdictional inquiry and emphasizing Asahi's "regular course of dealing").

Here, the relevant facts found by the New Jersey Supreme Court show no "regular . . . flow" or "regular course" of sales in New Jersey; and there is no "something more," such as special state-related design, advertising, advice, marketing, or anything else. Mr. Nicastro, who here bears the burden of proving jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey. He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows. And he has not otherwise shown that the British Manufacturer "purposefully avail[ed] itself of the privilege of conducting activities" within New Jersey, or that it delivered its goods in the stream of commerce "with the expectation that they will be purchased" by New Jersey users. *World-Wide Volkswagen*, *supra*, at 297–298 (internal quotation marks omitted).

There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts. See *post*, at 895 (opinion of GINSBURG, J.) (describing the size and scope of New Jersey's scrap-metal business). But the plaintiff bears

the burden of establishing jurisdiction, and here I would take the facts precisely as the New Jersey Supreme Court stated them. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 709 (1982); *Blakey* v. *Continental Airlines, Inc.*, 164 N. J. 38, 71, 751 A. 2d 538, 557 (2000); see 201 N. J., at 54–56, 987 A. 2d, at 578–579; App. to Pet. for Cert. 128a–137a (trial court's "reasoning and finding(s)").

Accordingly, on the record present here, resolving this case requires no more than adhering to our precedents.

II

I would not go further. Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.

A

The plurality seems to state strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign" and cannot "be said to have targeted the forum." *Ante*, at 882. But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

B

But though I do not agree with the plurality's seemingly strict no-jurisdiction rule, I am not persuaded by the absolute approach adopted by the New Jersey Supreme Court and urged by respondent and his *amici*. Under that view,

a producer is subject to jurisdiction for a products-liability action so long as it "knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states." 201 N. J., at 76–77, 987 A. 2d, at 592 (emphasis added). In the context of this case, I cannot agree.

For one thing, to adopt this view would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between "the defendant, the *forum*, and the litigation," it is fair, in light of the defendant's contacts *with that forum*, to subject the defendant to suit there. *Shaffer* v. *Heitner*, 433 U. S. 186, 204 (1977) (emphasis added). It would ordinarily rest jurisdiction instead upon no more than the occurrence of a product-based accident in the forum State. But this Court has rejected the notion that a defendant's amenability to suit "travel[s] with the chattel." *World-Wide Volkswagen*, 444 U. S., at 296.

For another, I cannot reconcile so automatic a rule with the constitutional demand for "minimum contacts" and "purposefu[l] avail[ment]," each of which rests upon a particular notion of defendant-focused fairness. *Id.*, at 291, 297 (internal quotation marks omitted). A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue. What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant

State (Hawaii). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach.

Further, the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain. I am again less certain than is the New Jersey Supreme Court that the nature of international commerce has changed so significantly as to require a new approach to personal jurisdiction.

It may be that a larger firm can readily "alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen*, *supra*, at 297. But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirtmaker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good. And a rule like the New Jersey Supreme Court suggests would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law. See, *e. g.*, Dept. of Justice, Bureau of Justice Statistics Bulletin, T. Cohen, Tort Trials and Verdicts in Large Counties, 2001, p. 11 (NCJ 206240, 2004) (reporting percentage of plaintiff winners in tort trials among 46 populous counties, ranging from 17.9% (Worcester, Mass.) to 69.1% (Milwaukee, Wis.)).

C

At a minimum, I would not work such a change to the law in the way either the plurality or the New Jersey Supreme Court suggests without a better understanding of the rele-

vant contemporary commercial circumstances. Insofar as such considerations are relevant to any change in present law, they might be presented in a case (unlike the present one) in which the Solicitor General participates. Cf. Tr. of Oral Arg. in *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, O. T. 2010, No. 10–76, pp. 20–22 (Government declining invitation at oral argument to give its views with respect to issues in this case).

This case presents no such occasion, and so I again reiterate that I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court. And on those grounds, I do not think we can find jurisdiction in this case. Accordingly, though I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.

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

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U. S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?

Under this Court's pathmarking precedent in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Incon-

ceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it." Weintraub, A Map Out of the Personal Jurisdiction Labyrinth, 28 U. C. D. L. Rev. 531, 555 (1995).

I

On October 11, 2001, a three-ton metal shearing machine severed four fingers on Robert Nicastro's right hand. *Nicastro* v. *McIntyre Machinery America, Ltd.*, 201 N. J. 48, 53, 987 A. 2d 575, 577 (2010); see App. 6a–8a (Complaint). Alleging that the machine was a dangerous product defectively made, Nicastro sought compensation from the machine's manufacturer, J. McIntyre Machinery, Ltd. (McIntyre UK). Established in 1872 as a United Kingdom corporation, and headquartered in Nottingham, England, McIntyre UK "designs, develops and manufactures a complete range of equipment for metal recycling." *Id.*, at 22a, 33a. The company's product line, as advertised on McIntyre UK's Web site, includes "metal shears, balers, cable and can recycling equipment, furnaces, casting equipment and . . . the world's best aluminium dross processing and cooling system." *Id.*, at 31a. McIntyre UK holds both United States and European patents on its technology. 201 N. J., at 55, 987 A. 2d, at 579; App. 36a.

The machine that injured Nicastro, a "McIntyre Model 640 Shear," sold in the United States for $24,900 in 1995, *id.*, at 43a, and features a "massive cutting capacity," *id.*, at 44a. According to McIntyre UK's product brochure, the machine is "use[d] throughout the [w]orld." *Ibid.* McIntyre UK represented in the brochure that, by "incorporat[ing] off-the-shelf hydraulic parts from suppliers with international sales outlets," the 640 Shear's design guarantees serviceability "wherever [its customers] may be based." *Ibid.* The

instruction manual advises "owner[s] and operators of a 640 Shear [to] make themselves aware of [applicable health and safety regulations]," including "the American National Standards Institute Regulations (USA) for the use of Scrap Metal Processing Equipment." *Id.*, at 46a.

Nicastro operated the 640 Shear in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey. *Id.*, at 7a, 43a. "New Jersey has long been a hotbed of scrap-metal businesses . . . ." Drake, The Scrap-Heap Rollup Hits New Jersey, Business News New Jersey, June 1, 1998, p. 1. In 2008, New Jersey recycling facilities processed 2,013,730 tons of scrap iron, steel, aluminum, and other metals—more than any other State—outpacing Kentucky, its nearest competitor, by nearly 30 percent. Van Haaren, Themelis, & Goldstein, The State of Garbage in America, 51 BioCycle, No. 10, pp. 16, 19 (Oct. 2010).

CSM's owner, Frank Curcio, "first heard of [McIntyre UK's] machine while attending an Institute of Scrap [Recycling] Industries [(ISRI)] convention in Las Vegas in 1994 or 1995, where [McIntyre UK] was an exhibitor." App. 78a. ISRI "presents the world's largest scrap recycling industry trade show each year." *Id.*, at 47a. The event attracts "owners [and] managers of scrap processing companies" and others "interested in seeing—and purchasing—new equipment." *Id.*, at 48a–49a. According to ISRI, more than 3,000 potential buyers of scrap processing and recycling equipment attend its annual conventions, "primarily because th[e] exposition provides them with the most comprehensive industry-related shopping experience concentrated in a single, convenient location." *Id.*, at 47a. Exhibitors who are ISRI members pay $3,000 for 10- by 10-foot booth space. *Id.*, at 48a–49a.[1]

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[1] New Jersey is home to nearly 100 ISRI members. See Institute of Scrap Recycling Industries, Inc., Member Directory, http://www.isri.org/imis15_prod/core/directory.aspx (all Internet materials as visited June 24, 2011, and included in Clerk of Court's case file).

McIntyre UK representatives attended every ISRI convention from 1990 through 2005. *Id.*, at 114a–115a. These annual expositions were held in diverse venues across the United States; in addition to Las Vegas, conventions were held in New Orleans, Orlando, San Antonio, and San Francisco. *Ibid.* McIntyre UK's president, Michael Pownall, regularly attended ISRI conventions. *Ibid.* He attended ISRI's Las Vegas convention the year CSM's owner first learned of, and saw, the 640 Shear. *Id.*, at 78a–79a, 115a. McIntyre UK exhibited its products at ISRI trade shows, the company acknowledged, hoping to reach "anyone interested in the machine from anywhere in the United States." *Id.*, at 161a.

Although McIntyre UK's U. S. sales figures are not in the record, it appears that for several years in the 1990's, earnings from sales of McIntyre UK products in the United States "ha[d] been good" in comparison to "the rest of the world." *Id.*, at 136a (Letter from Sally Johnson, McIntyre UK's Managing Director, to Gary and Mary Gaither, officers of McIntyre UK's exclusive distributor in the United States (Jan. 13, 1999)). In response to interrogatories, McIntyre UK stated that its commissioning engineer had installed the company's equipment in several States—Illinois, Iowa, Kentucky, Virginia, and Washington. *Id.*, at 119a.

From at least 1995 until 2001, McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd. (McIntyre America), "as its exclusive distributor for the entire United States." *Nicastro* v. *McIntyre Machinery America, Ltd.*, 399 N. J. Super. 539, 558, 945 A. 2d 92, 104 (App. Div. 2008).[2] Though similarly named, the two companies were separate and independent entities with "no com-

[2] McIntyre America filed for bankruptcy in 2001, is no longer operating, and has not participated in this lawsuit. Brief for Petitioner 3. After "the demise of . . . McIntyre America," McIntyre UK authorized a Texas-based company to serve as exclusive United States distributor of McIntyre UK shears. App. 52a–53a (internal quotation marks omitted).

monality of ownership or management." *Id.*, at 545, 945 A. 2d, at 95. In invoices and other written communications, McIntyre America described itself as McIntyre UK's national distributor, "America's Link" to "Quality Metal Processing Equipment" from England. App. 43a, 78a.

In a November 23, 1999 letter to McIntyre America, McIntyre UK's president spoke plainly about the manufacturer's objective in authorizing the exclusive distributorship: "All we wish to do is sell our products in the [United] States—and get paid!" *Id.*, at 134a. Notably, McIntyre America was concerned about U. S. litigation involving McIntyre UK products, in which the distributor had been named as a defendant. McIntyre UK counseled McIntyre America to respond personally to the litigation, but reassured its distributor that "the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there's something wrong with the machine." *Id.*, at 129a–130a. Answering jurisdictional interrogatories, McIntyre UK stated that it had been named as a defendant in lawsuits in Illinois, Kentucky, Massachusetts, and West Virginia. *Id.*, at 98a, 108a. And in correspondence with McIntyre America, McIntyre UK noted that the manufacturer had products liability insurance coverage. *Id.*, at 129a.

Over the years, McIntyre America distributed several McIntyre UK products to U. S. customers, including, in addition to the 640 Shear, McIntyre UK's "Niagara" and "Tardis" systems, wire strippers, and can machines. *Id.*, at 123a–128a. In promoting McIntyre UK's products at conventions and demonstration sites and in trade journal advertisements, McIntyre America looked to McIntyre UK for direction and guidance. *Ibid.* To achieve McIntyre UK's objective, *i. e.*, "to sell [its] machines to customers throughout the United States," 399 N. J. Super., at 548, 945 A. 2d, at 97, "the two companies were acting closely in concert with each other," *ibid.* McIntyre UK never instructed its distributor to avoid certain States or regions of the country; rather, as just

noted, the manufacturer engaged McIntyre America to attract customers "from anywhere in the United States." App. 161a.

In sum, McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products "anywhere in the United States." At least as purposeful was McIntyre UK's engagement of McIntyre America as the conduit for sales of McIntyre UK's machines to buyers "throughout the United States." Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicastro's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicastro's New Jersey workplace not randomly or fortuitously, but as a result of the U. S. connections and distribution system that McIntyre UK deliberately arranged.[3] On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?

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[3] McIntyre UK resisted Nicastro's efforts to determine whether other McIntyre machines had been sold to New Jersey customers. See *id.*, at 100a–101a. McIntyre did allow that McIntyre America "may have resold products it purchased from [McIntyre UK] to a buyer in New Jersey," *id.*, at 117a, but said it kept no record of the ultimate destination of machines it shipped to its distributor, *ibid.* A private investigator engaged by Nicastro found at least one McIntyre UK machine, of unspecified type, in use in New Jersey. *Id.*, at 140a–144a. But McIntyre UK objected that the investigator's report was "unsworn and based upon hearsay." Reply Brief 10. Moreover, McIntyre UK maintained, no evidence showed that the machine the investigator found in New Jersey had been "sold into [that State]." *Ibid.* (internal quotation marks omitted).

II

A few points on which there should be no genuine debate bear statement at the outset. First, all agree, McIntyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly "at home" in New Jersey. See *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, *post*, at 919–920, 926–929. The question, rather, is one of specific jurisdiction, which turns on an "affiliatio[n] between the forum and the underlying controversy." *Goodyear Dunlop*, *post*, at 919 (quoting von Mehren & Trautman, Jurisdiction To Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman) (internal quotation marks omitted)); see also *Goodyear Dunlop*, *post*, at 923–924.

Second, no issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case. New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any other State. Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297 (1980) (if a manufacturer or distributor endeavors to develop a market for a product in several States, it is reasonable "to subject it to suit in one of those States if its allegedly defective [product] has there been the source of injury"); 28 U. S. C. § 1391(a)–(b) (in federal-court suits, whether resting on diversity or federal-question jurisdiction, venue is proper in the judicial district "in which a substantial part of the events or omissions giving rise to the claim occurred").

Third, the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty. As the Court clarified in *Insurance*

Corp. of Ireland v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694 (1982):

> "The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected." *Id.*, at 703, n. 10.

See also *Shaffer* v. *Heitner*, 433 U. S. 186, 204, and n. 20 (1977) (recognizing that "the mutually exclusive sovereignty of the States [is not] the central concern of the inquiry into personal jurisdiction"). But see *ante*, at 882 (plurality opinion) (asserting that "sovereign authority," not "fairness," is the "central concept" in determining personal jurisdiction).

Finally, in *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably "presence" and "implied consent," should be discarded, for they conceal the actual bases on which jurisdiction rests. See 326 U. S., at 316, 318; *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F. 2d 139, 141 (CA2 1930) (L. Hand, J.) ("nothing is gained by [resort to words that] concea[l] what we do"). "[T]he relationship among the defendant, the forum, and the litigation" determines whether due process permits the exercise of personal jurisdiction over a defendant, *Shaffer*, 433 U. S., at 204, and "fictions of implied consent" or "corporate presence" do not advance the proper inquiry, *id.*, at 202. See also *Burnham* v. *Superior Court of Cal., County of*

Marin, 495 U. S. 604, 618 (1990) (opinion of SCALIA, J.) (*International Shoe* "cast . . . aside" fictions of "consent" and "presence").

Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines,[4] the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful. See, *e. g.*, *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 472 (1985) (Due Process Clause permits "forum . . . to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there"); *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222 (1957) ("[T]his Court [has] abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [out-of-state] corporations.").[5]

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[4] Compare Brilmayer, Rights, Fairness, and Choice of Law, 98 Yale L. J. 1277, 1304–1306 (1989) (hereinafter Brilmayer) (criticizing as circular jurisdictional theories founded on "consent" or "[s]ubmission to state authority"); Perdue, Personal Jurisdiction and the Beetle in the Box, 32 Boston College L. Rev. 529, 536–544 (1991) (same), with Trangsrud, The Federal Common Law of Personal Jurisdiction, 57 Geo. Wash. L. Rev. 849, 884–885 (1989) (endorsing a consent-based doctrine of personal jurisdiction); Epstein, Consent, Not Power, as the Basis of Jurisdiction, 2001 U. Chi. Legal Forum 1, 2, 30–32 (urging that "the consent principle neatly explains the dynamics of many of our jurisdictional doctrines," but recognizing that in tort cases, the victim ordinarily should be able to sue in the place where the harm occurred).

[5] But see *ante*, at 880–884 (plurality opinion) (maintaining that a forum may be fair and reasonable, based on its links to the episode in suit, yet off limits because the defendant has not submitted to the State's authority). The plurality's notion that jurisdiction over foreign corporations depends upon the defendant's "submission," *ante*, at 881, seems scarcely different from the long-discredited fiction of implied consent. It bears emphasis that a majority of this Court's Members do not share the plurality's view.

III

This case is illustrative of marketing arrangements for sales in the United States common in today's commercial world.[6] A foreign-country manufacturer engages a U. S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers. The product proves defective and injures a user in the State where the user lives or works. Often, as here, the manufacturer will have liability insurance covering personal injuries caused by its products. See Cupp, Redesigning Successor Liability, 1999 U. Ill. L. Rev. 845, 870–871 (noting the ready availability of products liability insurance for manufacturers and citing a study showing, "between 1986 and 1996, [such] insurance cost manufacturers, on average, only sixteen cents for each $100 of product sales"); App. 129a–130a.

When industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer. For example, the State's statute might provide, as does New York's long-arm statute, for the "exercise [of] personal jurisdiction over any non-domiciliary . . . who . . .

> "commits a tortious act without the state causing injury to person or property within the state, . . . if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue

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[6] Last year, the United States imported nearly $2 trillion in foreign goods. Census Bureau, U. S. International Trade in Goods and Services 1 (FT–900, Apr. 2011), http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf. Capital goods, such as the metal shear machine that injured Nicastro, accounted for almost $450 billion in imports for 2010. *Id.*, at 6. New Jersey is the fourth-largest destination for manufactured commodities imported into the United States, after California, Texas, and New York. *Id.*, FT–900 Supplement, p. 3.

from interstate or international commerce." N. Y. Civ. Prac. Law Ann. § 302(a)(3)(ii) (West 2010).[7]

Or, the State might simply provide, as New Jersey does, for the exercise of jurisdiction "consistent with due process of law." N. J. Ct. Rule 4:4–4(b)(1) (2011).[8]

The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury?[9] Do not litigational convenience[10] and choice-of-law considerations[11] point in that direction?

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[7] This provision was modeled in part on the Uniform Interstate and International Procedure Act. See N. Y. Legislative Doc. 90, Judicial Conference of the State of New York, 11th Ann. Rep. 132–147 (1966). Connecticut's long-arm statute also uses the "derives substantial revenue from interstate or international commerce" formulation. See Conn. Gen. Stat. § 52–59b(a) (2011).

[8] State long-arm provisions allow the exercise of jurisdiction subject only to a due process limitation in Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, North Dakota, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and West Virginia. 4 C. Wright & A. Miller, Federal Practice and Procedure § 1068, pp. 577–578, n. 12 (3d ed. 2002).

[9] The plurality objects to a jurisdictional approach "divorced from traditional practice." *Ante*, at 880. But "the fundamental transformation of our national economy," this Court has recognized, warrants enlargement of "the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222–223 (1957).

[10] See von Mehren & Trautman, Jurisdiction To Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1167 (1966) ("[C]onsiderations of litigational convenience, particularly with respect to the taking of evidence, tend in accident cases to point insistently to the community in which the accident occurred.").

[11] Historically, "tort cases were governed by the place where the last act giving rise to a claim occurred—that is, the place of injury." Brilmayer 1291–1292. Even as many jurisdictions have modified the traditional rule

On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States?[12] Is not the burden on McIntyre UK to defend in New Jersey fair, *i. e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England, to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?

McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States. See Hay, Judicial Jurisdiction Over Foreign-Country Corporate Defendants—Comments on Recent Case Law, 63 Ore. L. Rev. 431, 433 (1984) (hereinafter Hay). As a McIntyre UK officer wrote in an e-mail to McIntyre America: "American law—who needs it?!" App. 129a–130a (e-mail dated April 26, 1999, from Sally Johnson to Mary Gaither). If McIntyre UK is answerable in the United States at all, is it not "perfectly appropriate to permit the exercise of that jurisdiction . . . at the place of injury"? See Hay 435; Degnan & Kane, The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants, 39

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of *lex loci delicti*, the location of injury continues to hold sway in choice-of-law analysis in tort cases. See generally Whytock, Myth of Mess? International Choice of Law in Action, 84 N. Y. U. L. Rev. 719 (2009).

[12] The plurality suggests that the Due Process Clause might permit a federal district court in New Jersey, sitting in diversity and applying New Jersey law, to adjudicate McIntyre UK's liability to Nicastro. See *ante*, at 885–886. In other words, McIntyre UK might be compelled to bear the burden of traveling to New Jersey and defending itself there under New Jersey's products liability law, but would be entitled to federal adjudication of Nicastro's state-law claim. I see no basis in the Due Process Clause for such a curious limitation.

Hastings L. J. 799, 813–815 (1988) (noting that "[i]n the international order," the State that counts is the United States, not its component States,[13] and that the fair place of suit within the United States is essentially a question of venue).

In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, "purposefully availed itself" of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor. "Th[e] 'purposeful availment' requirement," this Court has explained, simply "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U. S., at 475. Adjudicatory authority is appropriately exercised where "actions by the defendant *himself*" give rise to the affiliation with the forum. *Ibid.* How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth-largest destination for imports among all States of the United States and the largest scrap metal market? See *supra*, at 895, 902, n. 6. But see *ante*, at 886 (plurality opinion) (manufacturer's purposeful efforts to sell its products nationwide are "not . . . relevant" to the personal jurisdiction inquiry).

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[13] "For purposes of international law and foreign relations, the separate identities of individual states of the Union are generally irrelevant." Born, Reflections on Judicial Jurisdiction in International Cases, 17 Ga. J. Int'l & Comp. L. 1, 36 (1987). See also *Hines* v. *Davidowitz*, 312 U. S. 52, 63 (1941) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." (internal quotation marks omitted)); Restatement (Third) of Foreign Relations Law of the United States § 421, Comment *f*, p. 307 (1986) ("International law . . . does not concern itself with the allocation of jurisdiction among domestic courts within a [nation,] for example, between national and local courts in a federal system.").

Courts, both state and federal, confronting facts similar to those here, have rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury. They have held, instead, that it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer's products caused injury. See, *e. g.*, *Tobin* v. *Astra Pharmaceutical Prods., Inc.*, 993 F. 2d 528, 544 (CA6 1993); *A. Uberti & C.* v. *Leonardo*, 181 Ariz. 565, 573, 892 P. 2d 1354, 1362 (1995).[14]

IV

A

While this Court has not considered in any prior case the now-prevalent pattern presented here—a foreign-country manufacturer enlisting a U. S. distributor to develop a market in the United States for the manufacturer's products—none of the Court's decisions tug against the judgment made by the New Jersey Supreme Court. McIntyre contends otherwise, citing *World-Wide Volkswagen* and *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102 (1987).

World-Wide Volkswagen concerned a New York car dealership that sold solely in the New York market, and a New York distributor who supplied retailers in three States only: New York, Connecticut, and New Jersey. 444 U. S., at 289. New York residents had purchased an Audi from the New York dealer and were driving the new vehicle through Oklahoma en route to Arizona. On the road in Oklahoma, another car struck the Audi in the rear, causing a fire which severely burned the Audi's occupants. *Id.*, at 288. Rejecting the Oklahoma courts' assertion of jurisdiction over the

[14] For a more complete set of examples, see Appendix, *infra*.

New York dealer and distributor, this Court observed that the defendants had done nothing to serve the market for cars in Oklahoma. *Id.*, at 295–298. Jurisdiction, the Court held, could not be based on the *customer's* unilateral act of driving the vehicle to Oklahoma. *Id.*, at 298; see *Asahi*, 480 U. S., at 109 (opinion of O'Connor, J.) (*World-Wide Volkswagen* "rejected the assertion that a *consumer's* unilateral act of bringing the defendant's product into the forum State was a sufficient constitutional basis for personal jurisdiction over the defendant").

Notably, the foreign manufacturer of the Audi in *World-Wide Volkswagen* did not object to the jurisdiction of the Oklahoma courts and the U. S. importer abandoned its initially stated objection. 444 U. S., at 288, and n. 3. And most relevant here, the Court's opinion indicates that an objection to jurisdiction by the manufacturer or national distributor would have been unavailing. To reiterate, the Court said in *World-Wide Volkswagen* that, when a manufacturer or distributor aims to sell its product to customers in several States, it is reasonable "to subject it to suit in [any] one of those States if its allegedly defective [product] has there been the source of injury." *Id.*, at 297.

Asahi arose out of a motorcycle accident in California. Plaintiff, a California resident injured in the accident, sued the Taiwanese manufacturer of the motorcycle's tire tubes, claiming that defects in its product caused the accident. The tube manufacturer cross-claimed against Asahi, the Japanese maker of the valve assembly, and Asahi contested the California courts' jurisdiction. By the time the case reached this Court, the injured plaintiff had settled his case and only the indemnity claim by the Taiwanese company against the Japanese valve-assembly manufacturer remained.

The decision was not a close call. The Court had before it a foreign plaintiff, the Taiwanese manufacturer, and a foreign defendant, the Japanese valve-assembly maker, and the indemnification dispute concerned a transaction between

those parties that occurred abroad. All agreed on the bottom line: The Japanese valve-assembly manufacturer was not reasonably brought into the California courts to litigate a dispute with another foreign party over a transaction that took place outside the United States.

Given the confines of the controversy, the dueling opinions of Justice Brennan and Justice O'Connor were hardly necessary. How the Court would have "estimate[d] . . . the inconveniences," *International Shoe*, 326 U. S., at 317 (internal quotation marks omitted), had the injured Californian originally sued Asahi is a debatable question. Would this Court have given the same weight to the burdens on the foreign defendant had those been counterbalanced by the burdens litigating in Japan imposed on the local California plaintiff? Cf. *Calder* v. *Jones*, 465 U. S. 783, 788 (1984) (a plaintiff's contacts with the forum "may be so manifold as to permit jurisdiction when it would not exist in their absence").

In any event, Asahi, unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world. Moreover, Asahi was a component-part manufacturer with "little control over the final destination of its products once they were delivered into the stream of commerce." *A. Uberti*, 181 Ariz., at 572, 892 P. 2d, at 1361. It was important to the Court in *Asahi* that "those who use Asahi components in their final products, and sell those products in California, [would be] subject to the application of California tort law." 480 U. S., at 115 (majority opinion). To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong.[15]

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[15] The plurality notes the low volume of sales in New Jersey, *ante*, at 878, 886. A $24,900 shearing machine, however, is unlikely to sell in bulk worldwide, much less in any given State. By dollar value, the price of a single machine represents a significant sale. Had a manufacturer sold in

B

The Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction "in matters relating to tort . . . in the courts for the place where the harmful event occurred." Council Reg. 44/2001, Art. 5, 2001 O. J. (L. 12) 4.[16] The European Court of Justice has interpreted this prescription to authorize jurisdiction either where the harmful act occurred or at the place of injury. See *Handelskwekerij G. J. Bier B. V.* v. *Mines de Potasse d'Alsace S. A.*, 1976 E. C. R. 1735, 1748–1749.[17]

V

The commentators who gave names to what we now call "general jurisdiction" and "specific jurisdiction" anticipated that when the latter achieves its full growth, considerations of litigational convenience and the respective situations of the parties would determine when it is appropriate to sub-

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New Jersey $24,900 worth of flannel shirts, see *Nelson* v. *Park Industries, Inc.*, 717 F. 2d 1120 (CA7 1983), cigarette lighters, see *Oswalt* v. *Scripto, Inc.*, 616 F. 2d 191 (CA5 1980), or wire-rope splices, see *Hedrick* v. *Daiko Shoji Co.*, 715 F. 2d 1355 (CA9 1983), the Court would presumably find the defendant amenable to suit in that State.

[16] The Regulation replaced the "European" or "Brussels" Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, entered into in 1968 by the original Common Market member states. In the interim, the Lugano Convention "extended the Brussels Convention scheme to [European Free Trade Association] countries." Clermont & Palmer, Exorbitant Jurisdiction, 58 Me. L. Rev. 474, 491, n. 82 (2006).

[17] For a concise comparison of the European regime and this Court's decisions, see Weintraub, A Map Out of the Personal Jurisdiction Labyrinth, 28 U. C. D. L. Rev. 531, 550–554 (1995).

ject a defendant to trial in the plaintiff's community. See von Mehren & Trautman 1166–1179. Litigational considerations include "the convenience of witnesses and the ease of ascertaining the governing law." *Id.*, at 1168–1169. As to the parties, courts would differently appraise two situations: (1) cases involving a substantially local plaintiff, like Nicastro, injured by the activity of a defendant engaged in interstate or international trade; and (2) cases in which the defendant is a natural or legal person whose economic activities and legal involvements are largely home based, *i. e.*, entities without designs to gain substantial revenue from sales in distant markets. See *id.*, at 1167–1169.[18] As the attached appendix of illustrative cases indicates, courts presented with von Mehren and Trautman's first scenario—a local plaintiff injured by the activity of a manufacturer seeking to exploit a multistate or global market—have repeatedly confirmed that jurisdiction is appropriately exercised by courts of the place where the product was sold and caused injury.

* * *

For the reasons stated, I would hold McIntyre UK answerable in New Jersey for the harm Nicastro suffered at his workplace in that State using McIntyre UK's shearing machine. While I dissent from the Court's judgment, I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the "notions of fair play and substantial justice" underlying *International Shoe*. 326 U. S., at 316 (internal quotation marks omitted).

APPENDIX

Illustrative cases upholding exercise of personal jurisdiction over an alien or out-of-state corporation that, through a

[18] Assigning weight to the local or international stage on which the parties operate would, to a considerable extent, answer the concerns expressed by JUSTICE BREYER. See *ante*, at 891–893 (opinion concurring in judgment).

distributor, targeted a national market, including any and all States:[19]

Clune v. *Alimak AB*, 233 F. 3d 538, 544 (CA8 2000) (wrongful-death action against the Swedish manufacturer of a construction hoist that allegedly caused a workplace death in Missouri; holding the manufacturer amenable to suit in Missouri, the Eighth Circuit stated: "Although we can imagine a case where a foreign manufacturer selects discrete regional distributors for the purpose of penetrating the markets in some states to the exclusion of others, that situation is not before us." In this case, the foreign manufacturer had "successfully employ[ed] one or two distributors to cover the [entire] United States[,] intend[ing] to reap the benefit of sales in every state where those distributors market." Were the court to conclude that the manufacturer "did not intend its products to flow into Missouri," the court "would be bound to the conclusion that the [manufacturer] did not intend its products to flow into *any* of the United States.").

Kernan v. *Kurz-Hastings, Inc.*, 175 F. 3d 236, 242–244 (CA2 1999) (products liability action against the Japanese manufacturer of an allegedly defective stamping press that caused a workplace injury in New York; holding the manufacturer amenable to suit in New York, the Second Circuit stated that an "exclusive sales rights agreement" between the Japanese manufacturer and a Pennsylvania distributor "contemplates that [the distributor] will sell [the manufacturer's] machines in North America and throughout the world, serv[ing] as evidence of [the manufacturer's] attempt to serve the New York market, albeit indirectly" (internal quotation marks omitted)).

Barone v. *Rich Bros. Interstate Display Fireworks Co.*, 25 F. 3d 610, 613–615 (CA8 1994) (products liability suit against a Japanese fireworks manufacturer for injuries sustained in

[19] The listed cases are by no means exhaustive of decisions fitting this pattern. For additional citations, see Brief for Public Citizen, Inc., as *Amicus Curiae* 16, n. 5.

Nebraska; Eighth Circuit held the manufacturer amenable to suit in Nebraska, although the manufacturer had no distributor or sales agents in that State, did not advertise in Nebraska, and claimed it was unaware that its distributors sold products there; Court of Appeals stated: "In this age of [North American Free Trade Agreement] and [General Agreement on Tariffs and Trade], one can expect further globalization of commerce, and it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states.").

Tobin v. *Astra Pharmaceutical Prods., Inc.*, 993 F. 2d 528, 544 (CA6 1993) (products liability action against the Dutch pharmaceutical manufacturer of a drug alleged to have caused Kentucky resident's heart disease; holding the manufacturer amenable to suit in Kentucky, the Sixth Circuit reasoned: "[Defendant] argues that it has done nothing in particular to purposefully avail itself of the Kentucky market as distinguished from any other state in the union. If we were to accept defendant's argument on this point, a foreign manufacturer could insulate itself from liability in each of the fifty states simply by using an independent national distributor to market its products.").

Hedrick v. *Daiko Shoji Co.*, 715 F. 2d 1355, 1358 (CA9 1983) (products liability suit arising from injuries plaintiff sustained in Oregon caused by an allegedly defective wire-rope splice manufactured in Japan; holding the Japanese manufacturer amenable to suit in Oregon, the Ninth Circuit noted that the manufacturer "performed a forum-related act when it produced a splice that it knew was destined for ocean-going vessels serving United States ports, including those of Oregon").

Oswalt v. *Scripto, Inc.*, 616 F. 2d 191, 200 (CA5 1980) (products liability action stemming from an injury plaintiff sustained in Texas when using a cigarette lighter made in Japan; holding the manufacturer amenable to suit in Texas,

the Fifth Circuit noted that the manufacturer "had every reason to believe its product would be sold to a nationwide market, that is, in any or all states").

Stokes v. *L. Geismar, S. A.*, 815 F. Supp. 904, 907 (ED Va. 1993), aff'd on other grounds, 16 F. 3d 411 (CA4 1994) (action by worker injured in Virginia while using a rail-cutting saw manufactured by a French corporation; holding the manufacturer amenable to suit in Virginia, the District Court noted that there was "no evidence of any attempt . . . to limit th[e] U. S. marketing strategy to avoid Virginia or any other particular state").

Felty v. *Conaway Processing Equip. Co.*, 738 F. Supp. 917, 919–920 (ED Pa. 1990) (personal injury suit against the Dutch manufacturer of a poultry processing machine that allegedly caused injury in Pennsylvania; holding the manufacturer amenable to suit in Pennsylvania, the District Court observed that the manufacturer "clearly and purposefully used [distributors] to deal in the international market for poultry processing equipment" and was "well aware that its equipment was being sold for use in the United States, including Pennsylvania").

Scanlan v. *Norma Projektil Fabrik*, 345 F. Supp. 292, 293 (Mont. 1972) (products liability action occasioned by defect in ammunition used while hunting in Montana; plaintiff sued the Swedish ammunition manufacturer; holding the manufacturer amenable to suit in Montana, the District Court noted that the distributor intended "a nationwide product distribution").

Ex parte DBI, Inc., 23 So. 3d 635, 654–655 (Ala. 2009) (wrongful-death action arising out of an automobile accident in Alabama; plaintiff sued the Korean manufacturer of an allegedly defective seatbelt; Supreme Court of Alabama held the manufacturer amenable to suit in Alabama, although the manufacturer had supplied its seatbelts to the carmaker in Korea and "maintain[ed] there [was] no evidence . . . showing that it knew its products were being marketed in Alabama").

A. Uberti & C. v. *Leonardo*, 181 Ariz. 565, 573, 892 P. 2d 1354, 1362 (1995) (wrongful-death action against the Italian manufacturer of an allegedly defective handgun that caused child's death in Arizona; Arizona Supreme Court stated: "[F]or all this record shows, Defendant never heard of Arizona. This raises the following question: Having shown that the gun was knowingly designed for and exported to exploit the market of the United States or western United States, must Plaintiffs additionally show that Defendant had the specific intent to market the gun in Arizona, or is it enough to show that Defendant intended to market it in any state, group of states, or all states? We conclude that only the latter is necessary.").

Hill by Hill v. *Showa Denko, K. K.*, 188 W. Va. 654, 661, 425 S. E. 2d 609, 616 (1992) (products liability suit against the Japanese manufacturer of a sleep aid alleged to have caused West Virginia plaintiff's blood disorder; holding the manufacturer amenable to suit in West Virginia, that State's Supreme Court noted that the manufacturer had profited from sales in the United States and considered it unfair to "requir[e] the plaintiff to travel to Japan to litigate th[e] case").

Syllabus

GOODYEAR DUNLOP TIRES OPERATIONS, S. A., ET AL. *v.* BROWN ET UX., CO-ADMINISTRATORS OF THE ESTATE OF BROWN, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

No. 10–76. Argued January 11, 2011—Decided June 27, 2011

Respondents, North Carolina residents whose sons died in a bus accident outside Paris, France, filed a suit for wrongful-death damages in North Carolina state court. Alleging that the accident was caused by tire failure, they named as defendants Goodyear USA, an Ohio corporation, and petitioners, three Goodyear USA subsidiaries, organized and operating, respectively, in Luxembourg, Turkey, and France. Petitioners' tires are manufactured primarily for European and Asian markets and differ in size and construction from tires ordinarily sold in the United States. Petitioners are not registered to do business in North Carolina; have no place of business, employees, or bank accounts in the State; do not design, manufacture, or advertise their products in the State; and do not solicit business in the State or sell or ship tires to North Carolina customers. Even so, a small percentage of their tires were distributed in North Carolina by other Goodyear USA affiliates. The trial court denied petitioners' motion to dismiss the claims against them for want of personal jurisdiction. The North Carolina Court of Appeals affirmed, concluding that the North Carolina courts had general jurisdiction over petitioners, whose tires had reached the State through "the stream of commerce."

Held: Petitioners were not amenable to suit in North Carolina on claims unrelated to any activity of petitioners in the forum State. Pp. 923–931.

(a) The Fourteenth Amendment's Due Process Clause sets the outer boundaries of a state tribunal's authority to proceed against a defendant. The pathmarking decision of *International Shoe Co.* v. *Washington*, 326 U. S. 310, provides that state courts may exercise personal jurisdiction over an out-of-state defendant who has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.*, at 316. Endeavoring to give specific content to the "fair play and substantial justice" concept, the Court in *International Shoe* classified cases involving out-of-state corporate defendants. First, the Court recognized that jurisdiction could be asserted where the corporation's in-state activity is

"continuous and systematic" and gave rise to the episode-in-suit. *Id.*, at 317. It also observed that the commission of "single or occasional acts" in a State may be sufficient to render a corporation answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections. *Id.*, at 318. These two categories compose what is now known as "specific jurisdiction." *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414, n. 8. *International Shoe* distinguished from cases that fit within the "specific jurisdiction" categories, "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U. S., at 318. Adjudicatory authority so grounded is now called "general jurisdiction." *Helicopteros*, 466 U. S., at 414, n. 9. Since *International Shoe*, this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction. In only two decisions postdating *International Shoe* has this Court considered whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those contacts: *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437; and *Helicopteros*, 466 U. S. 408. Pp. 923–925.

(b) Petitioners lack "the kind of continuous and systematic general business contacts" necessary to allow North Carolina to entertain a suit against them unrelated to anything that connects them to the State. *Helicopteros*, 466 U. S., at 416. The stream-of-commerce cases on which the North Carolina court relied relate to exercises of specific jurisdiction in products liability actions, in which a nonresident defendant, acting *outside* the forum, places in the stream of commerce a product that ultimately causes harm *inside* the forum. Many state long-arm statutes authorize courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum State. The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and general jurisdiction. Flow of a manufacturer's products into the forum may bolster an affiliation germane to *specific* jurisdiction, see, *e. g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297; but ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant. A corporation's "continuous activity of some sorts within a state," *International Shoe* instructed, "is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U. S., at 318.

Syllabus

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. In the 1952 *Perkins* case, general jurisdiction was appropriately exercised over a Philippine corporation sued in Ohio, where the company's affairs were overseen during World War II. In *Helicopteros*, however, the survivors of U. S. citizens killed when a helicopter owned by a Colombian corporation crashed in Peru could not maintain wrongful-death actions against that corporation in Texas, where the company's contacts "consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas enterprise]; and sending personnel to [Texas] for training." 466 U. S., at 416. These links to Texas did not "constitute the kind of continuous and systematic general business contacts . . . found to exist in *Perkins*," and were insufficient to support the exercise of jurisdiction over a claim that neither "'ar[o]se out of' . . . no[r] related to" the defendant's activities in Texas. *Id.*, at 415–416. This Court sees no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners' tires sporadically made in North Carolina through intermediaries. Pp. 926–929.

(c) Neither below nor in their brief in opposition to the petition for certiorari did respondents urge disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a "unitary business," so that jurisdiction over the parent would draw in the subsidiaries as well. Respondents have therefore forfeited this contention. Pp. 930–931.

199 N. C. App. 50, 681 S. E. 2d 382, reversed.

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

Meir Feder argued the cause for petitioners. With him on the briefs were *Glen D. Nager*, *Samuel Estreicher*, *James M. Brogan*, and *William K. Davis*.

Benjamin J. Horwich argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, and *Michael S. Raab*.

Collyn A. Peddie argued the cause for respondents. With her on the brief were *David F. Kirby*, *William B. Bystrynski*, and *C. Mark Holt*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the jurisdiction of state courts over corporations organized and operating abroad. We address, in particular, this question: Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?

A bus accident outside Paris that took the lives of two 13-year-old boys from North Carolina gave rise to the litigation we here consider. Attributing the accident to a defective tire manufactured in Turkey at the plant of a foreign subsidiary of The Goodyear Tire and Rubber Company (Goodyear USA), the boys' parents commenced an action for damages in a North Carolina state court; they named as defendants Goodyear USA, an Ohio corporation, and three of its subsidiaries, organized and operating, respectively, in Turkey, France, and Luxembourg. Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it; Goodyear USA's foreign subsidiaries, however, maintained that North Carolina lacked adjudicatory authority over them.

A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause. *International Shoe Co.* v. *Washing-*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Peter B. Rutledge* and *Robin S. Conrad;* for the Organization for International Investment et al. by *Carter G. Phillips* and *Marinn Carlson;* for the Product Liability Advisory Council, Inc., by *Alan E. Untereiner;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Cory L. Andrews.*

ton, 326 U. S. 310, 316 (1945) (assertion of jurisdiction over out-of-state corporation must comply with "'traditional notions of fair play and substantial justice'" (quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940))). Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction. *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414, nn. 8, 9 (1984).

A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State. See *International Shoe*, 326 U. S., at 317. Specific jurisdiction, on the other hand, depends on an "affiliatio[n] between the forum and the underlying controversy," principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. von Mehren & Trautman, Jurisdiction To Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman); see Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L. Rev. 721, 782 (1988) (hereinafter Brilmayer). In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction." von Mehren & Trautman 1136.

Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. The North Carolina Court of Appeals so acknowledged. *Brown* v. *Meter*, 199 N. C. App. 50, 57–58, 681 S. E. 2d 382, 388 (2009). Were the foreign subsidiaries nonetheless amenable to general jurisdiction in North Carolina courts? Confusing or blending general and specific jurisdictional inquiries, the

North Carolina courts answered yes. Some of the tires made abroad by Goodyear's foreign subsidiaries, the North Carolina Court of Appeals stressed, had reached North Carolina through "the stream of commerce"; that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations. *Id.*, at 67–68, 681 S. E. 2d, at 394–395.

A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the "continuous and systematic" affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State.

I

On April 18, 2004, a bus destined for Charles de Gaulle Airport overturned on a road outside Paris, France. Passengers on the bus were young soccer players from North Carolina beginning their journey home. Two 13-year-olds, Julian Brown and Matthew Helms, sustained fatal injuries. The boys' parents, respondents in this Court, filed a suit for wrongful-death damages in the Superior Court of Onslow County, North Carolina, in their capacity as administrators of the boys' estates. Attributing the accident to a tire that failed when its plies separated, the parents alleged negligence in the "design, construction, testing, and inspection" of the tire. 199 N. C. App., at 51, 681 S. E. 2d, at 384 (internal quotation marks omitted).

Goodyear Luxembourg Tires, SA (Goodyear Luxembourg), Goodyear Lastikleri T. A. S. (Goodyear Turkey), and Goodyear Dunlop Tires France, SA (Goodyear France), petitioners here, were named as defendants. Incorporated in Luxembourg, Turkey, and France, respectively, petitioners are indirect subsidiaries of Goodyear USA, an Ohio corporation also named as a defendant in the suit. Petitioners manufac-

ture tires primarily for sale in European and Asian markets. Their tires differ in size and construction from tires ordinarily sold in the United States. They are designed to carry significantly heavier loads, and to serve under road conditions and speed limits in the manufacturers' primary markets.[1]

In contrast to the parent company, Goodyear USA, which does not contest the North Carolina courts' personal jurisdiction over it, petitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. Even so, a small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers. Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.

Petitioners moved to dismiss the claims against them for want of personal jurisdiction. The trial court denied the motion, and the North Carolina Court of Appeals affirmed. Acknowledging that the claims neither "related to, nor . . . ar[o]se from, [petitioners'] contacts with North Carolina," the Court of Appeals confined its analysis to "general rather

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[1] Respondents portray Goodyear USA's structure as a reprehensible effort to "outsource" all manufacturing, and correspondingly, tort litigation, to foreign jurisdictions. See Brief for Respondents 51–53. Yet Turkey, where the tire alleged to have caused the accident-in-suit was made, is hardly a strange location for a facility that primarily supplies markets in Europe and Asia.

than specific jurisdiction," which the court recognized required a "higher threshold" showing: A defendant must have "continuous and systematic contacts" with the forum. *Id.*, at 58, 681 S. E. 2d, at 388 (internal quotation marks omitted). That threshold was crossed, the court determined, when petitioners placed their tires "in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina." *Id.*, at 67, 681 S. E. 2d, at 394.

Nothing in the record, the court observed, indicated that petitioners "took any affirmative action to cause tires which they had manufactured to be shipped into North Carolina." *Id.*, at 64, 681 S. E. 2d, at 392. The court found, however, that tires made by petitioners reached North Carolina as a consequence of a "highly-organized distribution process" involving other Goodyear USA subsidiaries. *Id.*, at 67, 681 S. E. 2d, at 394. Petitioners, the court noted, made "no attempt to keep these tires from reaching the North Carolina market." *Id.*, at 66, 681 S. E. 2d, at 393. Indeed, the very tire involved in the accident, the court observed, conformed to tire standards established by the U. S. Department of Transportation and bore markings required for sale in the United States. *Ibid.*[2] As further support, the court invoked North Carolina's "interest in providing a forum in which its citizens are able to seek redress for [their] injuries," and noted the hardship North Carolina plaintiffs would experience "[were they] required to litigate their claims in France," a country to which they have no ties. *Id.*, at 68, 681 S. E. 2d, at 394. The North Carolina Supreme Court

[2] Such markings do not necessarily show that any of the tires were destined for sale in the United States. To facilitate trade, the Solicitor General explained, the United States encourages other countries to "treat compliance with [Department of Transportation] standards, including through use of DOT markings, as evidence that the products are safely manufactured." Brief for United States as *Amicus Curiae* 32.

denied discretionary review. *Brown* v. *Meter*, 364 N. C. 128, 695 S. E. 2d 756 (2010).

We granted certiorari to decide whether the general jurisdiction the North Carolina courts asserted over petitioners is consistent with the Due Process Clause of the Fourteenth Amendment. 561 U. S. 1058 (2010).

II

A

The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant. *Shaffer* v. *Heitner*, 433 U. S. 186, 207 (1977). The canonical opinion in this area remains *International Shoe*, 326 U. S. 310, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.*, at 316 (quoting *Meyer*, 311 U. S., at 463).

Endeavoring to give specific content to the "fair play and substantial justice" concept, the Court in *International Shoe* classified cases involving out-of-state corporate defendants. First, as in *International Shoe* itself, jurisdiction unquestionably could be asserted where the corporation's in-state activity is "continuous and systematic" and *that activity gave rise to the episode-in-suit.* 326 U. S., at 317. Further, the Court observed, the commission of certain "single or occasional acts" in a State may be sufficient to render a corporation answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections. *Id.*, at 318. The heading courts today use to encompass these two *International Shoe* categories is "specific jurisdiction." See von Mehren & Trautman 1144–1163. Adjudicatory authority is "specific" when the suit "aris[es]

out of or relate[s] to the defendant's contacts with the forum." *Helicopteros*, 466 U. S., at 414, n. 8.

International Shoe distinguished from cases that fit within the "specific jurisdiction" categories, "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U. S., at 318. Adjudicatory authority so grounded is today called "general jurisdiction." *Helicopteros*, 466 U. S., at 414, n. 9. For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. See Brilmayer 728 (identifying domicile, place of incorporation, and principal place of business as "paradig[m]" bases for the exercise of general jurisdiction).

Since *International Shoe*, this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving "single or occasional acts" occurring or having their impact within the forum State. As a rule in these cases, this Court has inquired whether there was "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958). See, *e. g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 287, 297 (1980) (Oklahoma court may not exercise personal jurisdiction "over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma"); *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 474–475 (1985) (franchisor headquartered in Flor-

ida may maintain breach-of-contract action in Florida against Michigan franchisees, where agreement contemplated ongoing interactions between franchisees and franchisor's headquarters); *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 105 (1987) (Taiwanese tire manufacturer settled product liability action brought in California and sought indemnification there from Japanese valve assembly manufacturer; Japanese company's "mere awareness . . . that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce" held insufficient to permit California court's adjudication of Taiwanese company's cross-complaint); *id.*, at 109 (opinion of O'Connor, J.); *id.*, at 116–117 (Brennan, J., concurring in part and concurring in judgment). See also Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610, 628 (1988) (in the wake of *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role").

In only two decisions postdating *International Shoe*, discussed *infra*, at 927–929, has this Court considered whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those contacts: *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437 (1952) (general jurisdiction appropriately exercised over Philippine corporation sued in Ohio, where the company's affairs were overseen during World War II); and *Helicopteros*, 466 U. S. 408 (helicopter owned by Colombian corporation crashed in Peru; survivors of U. S. citizens who died in the crash, the Court held, could not maintain wrongful-death actions against the Colombian corporation in Texas, for the corporation's helicopter purchases and purchase-linked activity in Texas were insufficient to subject it to Texas court's general jurisdiction).

B

To justify the exercise of general jurisdiction over petitioners, the North Carolina courts relied on the petitioners' placement of their tires in the "stream of commerce." See *supra*, at 921–923. The stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting "jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer." 18 W. Fletcher, Cyclopedia of the Law of Corporations § 8640.40, p. 133 (rev. ed. 2007). Typically, in such cases, a nonresident defendant, acting *outside* the forum, places in the stream of commerce a product that ultimately causes harm *inside* the forum. See generally Dayton, Personal Jurisdiction and the Stream of Commerce, 7 Rev. Litigation 239, 262–268 (1988) (discussing origins and evolution of the stream-of-commerce doctrine).

Many States have enacted long-arm statutes authorizing courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum state. For example, the "Local Injury; Foreign Act" subsection of North Carolina's long-arm statute authorizes North Carolina courts to exercise personal jurisdiction in "any action claiming injury to person or property within this State arising out of [the defendant's] act or omission outside this State," if, "in addition[,] at or about the time of the injury," "[p]roducts . . . manufactured by the defendant were used or consumed, within this State in the ordinary course of trade." N. C. Gen. Stat. Ann. § 1–75.4(4)(b) (Lexis 2009).[3] As the North Carolina Court of Appeals recognized, this provision of the State's long-arm statute "does not apply to this case," for both the act alleged to have caused injury (the fabrication of the allegedly defective tire) and its impact (the

[3] Cf. D. C. Code § 13–423(a)(4) (2001) (providing for specific jurisdiction over defendant who "caus[es] tortious injury in the [forum] by an act or omission outside the [forum]" when, in addition, the defendant "derives substantial revenue from goods used or consumed . . . in the [forum]").

accident) occurred outside the forum. See 199 N. C. App., at 61, n. 6, 681 S. E. 2d, at 390, n. 6.[4]

The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to *specific* jurisdiction. See, *e. g.*, *World-Wide Volkswagen*, 444 U. S., at 297 (where "the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise *has there been the source of injury to its owner or to others*" (emphasis added)). But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant. See, *e. g.*, *Stabilisierungsfonds Fur Wein* v. *Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F. 2d 200, 203, n. 5 (CADC 1981) (defendants' marketing arrangements, although "adequate to permit litigation of claims relating to [their] introduction of . . . wine into the United States stream of commerce, . . . would not be adequate to support general, 'all purpose' adjudicatory authority").

A corporation's "continuous activity of some sorts within a state," *International Shoe* instructed, "is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U. S., at 318. Our

[4] The court instead relied on N. C. Gen. Stat. Ann. § 1–75.4(1)(d), see 199 N. C. App., at 57, 681 S. E. 2d, at 388, which provides for jurisdiction, "whether the claim arises within or without [the] State," when the defendant "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." This provision, the North Carolina Supreme Court has held, was "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon* v. *Numismatic Funding Corp.*, 291 N. C. 674, 676, 231 S. E. 2d 629, 630 (1977).

1952 decision in *Perkins* v. *Benguet Consol. Mining Co.* remains "[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Donahue* v. *Far Eastern Air Transport Corp.*, 652 F. 2d 1032, 1037 (CADC 1981).

Sued in Ohio, the defendant in *Perkins* was a Philippine mining corporation that had ceased activities in the Philippines during World War II. To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio: The corporation's president maintained his office there, kept the company files in that office, and supervised from the Ohio office "the necessarily limited wartime activities of the company." 342 U. S., at 447–448. Although the claim-in-suit did not arise in Ohio, this Court ruled that it would not violate due process for Ohio to adjudicate the controversy. *Ibid.*; see *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 779–780, n. 11 (1984) (Ohio's exercise of general jurisdiction was permissible in *Perkins* because "Ohio was the corporation's principal, if temporary, place of business").

We next addressed the exercise of general jurisdiction over an out-of-state corporation over three decades later, in *Helicopteros.* In that case, survivors of United States citizens who died in a helicopter crash in Peru instituted wrongful-death actions in a Texas state court against the owner and operator of the helicopter, a Colombian corporation. The Colombian corporation had no place of business in Texas and was not licensed to do business there. "Basically, [the company's] contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas enterprise] for substantial sums; and sending personnel to [Texas] for training." 466 U. S., at 416. These links to Texas, we determined, did not "constitute the kind of continuous and

systematic general business contacts . . . found to exist in *Perkins*," and were insufficient to support the exercise of jurisdiction over a claim that neither "ar[o]se out of . . . no[r] related to" the defendant's activities in Texas. *Id.*, at 415–416 (internal quotation marks omitted).

Helicopteros concluded that "mere purchases [made in the forum State], even if occurring at regular intervals, are not enough to warrant a State's assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.*, at 418. We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners' tires sporadically made in North Carolina through intermediaries. Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed. But cf. *World-Wide Volkswagen*, 444 U. S., at 296 (every seller of chattels does not, by virtue of the sale, "appoint the chattel his agent for service of process").

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State, see *supra*, at 921, fall far short of the "the continuous and systematic general business contacts" necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State. *Helicopteros*, 466 U. S., at 416.[5]

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[5] As earlier noted, see *supra*, at 922, the North Carolina Court of Appeals invoked the State's "well-recognized interest in providing a forum in which its citizens are able to seek redress for injuries that they have sustained." 199 N. C. App., at 68, 681 S. E. 2d, at 394. But "[g]eneral juris-

C

Respondents belatedly assert a "single enterprise" theory, asking us to consolidate petitioners' ties to North Carolina with those of Goodyear USA and other Goodyear entities. See Brief for Respondents 44–50. In effect, respondents would have us pierce Goodyear corporate veils, at least for jurisdictional purposes. See Brilmayer & Paisley, Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency, 74 Cal. L. Rev. 1, 14, 29–30 (1986) (merging parent and subsidiary for jurisdictional purposes requires an inquiry "comparable to the corporate law question of piercing the corporate veil"). But see 199 N. C. App., at 64, 681 S. E. 2d, at 392 (North Carolina Court of Appeals understood that petitioners are "separate corporate entities . . . not directly responsible for the presence in North Carolina of tires that they had manufactured"). Neither below nor in their brief in opposition to the petition for certiorari did respondents urge disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a "unitary business," so that jurisdiction over the parent would draw in the subsidiaries as well.[6] Brief for Respond-

diction to adjudicate has in [United States] practice never been based on the plaintiff's relationship to the forum. There is nothing in [our] law comparable to . . . article 14 of the Civil Code of France (1804) under which the French nationality of the plaintiff is a sufficient ground for jurisdiction." von Mehren & Trautman 1137; see Clermont & Palmer, Exorbitant Jurisdiction, 58 Me. L. Rev. 474, 492–495 (2006) (French law permitting plaintiff-based jurisdiction is rarely invoked in the absence of other supporting factors). When a defendant's act outside the forum causes injury in the forum, by contrast, a plaintiff's residence in the forum may strengthen the case for the exercise of *specific jurisdiction.* See *Calder* v. *Jones*, 465 U. S. 783, 788 (1984); von Mehren & Trautman 1167–1173.

[6] In the brief they filed in the North Carolina Court of Appeals, respondents stated that petitioners were part of "integrated world-wide efforts to design, manufacture, market and sell *their tires* in the United States, including in North Carolina." App. 485 (emphasis added). See also Brief in Opposition 18. Read in context, that assertion was offered in support of a narrower proposition: The distribution of petitioners' tires in North

ents 44. Respondents have therefore forfeited this contention, and we do not address it. This Court's Rule 15.2; *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 306 (2010).

* * *

For the reasons stated, the judgment of the North Carolina Court of Appeals is

Reversed.

Carolina, respondents maintained, demonstrated petitioners' own "calculated and deliberate efforts to take advantage of the North Carolina market." App. 485. As already explained, see *supra*, at 929, even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.

Per Curiam

UNITED STATES *v.* JUVENILE MALE

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

No. 09–940. Decided June 27, 2011

Respondent turned 21 while appealing a District Court order requiring him, as a "special condition" of his juvenile supervision, to register and keep current as a sex offender under the Sex Offender Registration and Notification Act (SORNA) until his 21st birthday. Nonetheless, the Ninth Circuit decided his appeal on the merits, concluding that the retroactive application of SORNA to juvenile delinquents violates the Ex Post Facto Clause. This Court certified to the Montana Supreme Court the question whether, under Montana law, a decision invalidating the District Court's registration conditions would enable respondent to remove his name from the State's sex-offender registry. 560 U. S. 558. The State Supreme Court answered that respondent's duty to remain registered was an independent requirement of Montana law that did not depend on the validity of the District Court's order.

Held: The Ninth Circuit lacked the authority under Article III to decide this case on the merits. Under Article III's requirement that a justiciable case or controversy remain "extant at all stages of review, not merely at the time the complaint is filed," *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 67, respondent must show some "continuing injury" or "collateral consequence," *Spencer* v. *Kemna*, 523 U. S. 1, 7, beyond the expiration of his sentence, such as an obligation to remain registered under Montana law. But, as the Montana Supreme Court noted, respondent's duty to remain registered under state law continues to apply regardless of the outcome here. And any independent duty to register under SORNA would not be a consequence of the District Court's order. Nor does this case fall under the capable-of-repetition exception to mootness. See *id.*, at 17.

Certiorari granted; 590 F. 3d 924, vacated and remanded.

PER CURIAM.

The Court of Appeals in this case held that the requirements of the Sex Offender Registration and Notification Act (SORNA), 42 U. S. C. §16901 *et seq.*, violate the *Ex Post Facto* Clause of the Constitution, Art. I, §9, cl. 3, when ap-

plied to juveniles adjudicated as delinquent before SORNA's enactment. We conclude that the Court of Appeals had no authority to enter that judgment because it had no live controversy before it.

I

Respondent Juvenile Male was 13 years old when he began sexually abusing a 10-year-old boy on the Fort Belknap Indian Reservation in Montana. The abuse continued for approximately two years, until respondent was 15 and his victim 12. In 2005, respondent was charged in the District of Montana with delinquency under the Federal Juvenile Delinquency Act, 18 U. S. C. § 5031 *et seq.* Respondent pleaded "true" to charges that he knowingly engaged in sexual acts with a child under 12, which would have been a federal crime had respondent been an adult. See §§ 2241(c), 1153(a). The court sentenced respondent to two years of juvenile detention, followed by juvenile supervision until his 21st birthday. Respondent was to spend the first six months of his postconfinement supervision in a prerelease center. See *United States* v. *Juvenile Male*, 560 U. S. 558, 559 (2010) *(per curiam)*.

In 2006, while respondent remained in juvenile detention, Congress enacted SORNA. 120 Stat. 590. Under SORNA, a sex offender must "register, and keep the registration current, in each jurisdiction" where the offender resides, is employed, or attends school. 42 U. S. C. § 16913(a). This registration requirement extends to certain juveniles adjudicated as delinquent for serious sex offenses. § 16911(8). In addition, an interim rule issued by the Attorney General mandates that SORNA's requirements apply retroactively to sex offenders convicted before the statute's enactment. 72 Fed. Reg. 8897 (2007) (codified at 28 CFR pt. 72 (2010)); see 42 U. S. C. § 16913(d).[1]

[1] On December 29, 2010, the Attorney General finalized the interim rule. See 75 Fed. Reg. 81849. In *Reynolds* v. *United States*, No. 10–6549, this Court granted certiorari on the question whether sex offenders convicted

Per Curiam

In July 2007, the District Court determined that respondent had failed to comply with the requirements of his prerelease program. The court revoked respondent's juvenile supervision, imposed an additional 6-month term of detention, and ordered that the detention be followed by supervision until respondent's 21st birthday. 560 U. S., at 559. At the Government's urging, and over respondent's objection, the court also imposed a "special conditio[n]" of supervision requiring respondent to register and keep current as a sex offender. *Id.*, at 560 (internal quotation marks omitted); see Pet. for Cert. 9 (noting the Government's argument in the District Court that respondent should be required to register under SORNA " 'at least until' " his release from juvenile supervision on his 21st birthday).

On appeal to the Ninth Circuit, respondent challenged this "special conditio[n]" of supervision. He requested that the Court of Appeals "reverse th[e] portion of his sentence requiring Sex Offender Registration and remand with instructions that the district court . . . strik[e] Sex Offender Registration as a condition of juvenile supervision." Opening Brief for Defendant-Appellant in No. 07–30290 (CA9), p. 25. Then, in May 2008, with his appeal still pending in the Ninth Circuit, respondent turned 21, and the juvenile-supervision order requiring him to register as a sex offender expired. 560 U. S., at 560.

Over a year after respondent's 21st birthday, the Court of Appeals handed down its decision. 581 F. 3d 977 (CA9 2009), amended, 590 F. 3d 924 (2010). No party had raised any issue of mootness in the Ninth Circuit, and the Court of Appeals did not address the issue *sua sponte*. The court's opinion discussed only the merits and concluded that applying SORNA to juvenile delinquents who committed their offenses "before SORNA's passage violates the Ex Post

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before the enactment of SORNA have standing to challenge the validity of the Attorney General's interim rule. 562 U. S. 1199 (2011); Pet. for Cert. in *Reynolds*, p. *i*. *Reynolds* is slated to be heard next Term.

Facto Clause." *Id.*, at 927. On that basis, the court vacated the District Court's condition of supervision requiring sex-offender registration and reporting. *Id.*, at 942. The United States petitioned for a writ of certiorari.

While that petition was pending, this Court entered a *per curiam* opinion in this case certifying a preliminary question of Montana law to the Montana Supreme Court. 560 U. S. 558. The opinion noted that a "threshold issue of mootness" might prevent us from reviewing the decision below on the merits. *Id.*, at 560. We explained that, because respondent is "no longer . . . subject" to the District Court's "sex-offender-registration conditions," respondent must "show that a decision invalidating" those conditions "would be sufficiently likely to redress 'collateral consequences adequate to meet Article III's injury-in-fact requirement.'" *Ibid.* (quoting *Spencer* v. *Kemna*, 523 U. S. 1, 14 (1998)). We noted that by the time of the Ninth Circuit's decision, "respondent had become registered as a sex offender in Montana." 560 U. S., at 561 (internal quotation marks omitted). Thus, "[p]erhaps the most likely potential 'collateral consequenc[e]' that might be remedied by a judgment in respondent's favor is the requirement that respondent remain registered as a sex offender under Montana law." *Id.*, at 560–561. In order to ascertain whether a decision invalidating the District Court's registration conditions would enable respondent to remove his name from the Montana sex-offender registry, the Court certified the following question to the Montana Supreme Court:

> "Is respondent's duty to remain registered as a sex offender under Montana law contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender, or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions?" *Id.*, at 561 (citations omitted).

The Montana Supreme Court has now responded to our certified question. See *United States* v. *Juvenile Male*, 2011 MT 104, 360 Mont. 317, 255 P. 3d 110. Its answer is that respondent's "state law duty to remain registered as a sex offender is not contingent upon the validity of the conditions of his federal supervision order, but is an independent requirement of Montana law." *Id.*, at 318, 255 P. 3d, at 111.

II

It is a basic principle of Article III that a justiciable case or controversy must remain "extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 67 (1997) (internal quotation marks omitted). "[T]hroughout the litigation," the party seeking relief "'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer*, *supra*, at 7 (quoting *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 477 (1990)).

In criminal cases, this requirement means that a defendant wishing to continue his appeals after the expiration of his sentence must suffer some "continuing injury" or "collateral consequence" sufficient to satisfy Article III. See *Spencer*, 523 U. S., at 7–8. When the defendant challenges his underlying *conviction*, this Court's cases have long presumed the existence of collateral consequences. *Id.*, at 8; see *Sibron* v. *New York*, 392 U. S. 40, 55–56 (1968). But when a defendant challenges only an expired *sentence*, no such presumption applies, and the defendant must bear the burden of identifying some ongoing "collateral consequenc[e]" that is "traceable" to the challenged portion of the sentence and "likely to be redressed by a favorable judicial decision." See *Spencer*, *supra*, at 7, 14 (internal quotation marks omitted).

At the time of the Ninth Circuit's decision in this case, the District Court's order of juvenile supervision had expired, and respondent was no longer subject to the sex-offender-registration conditions that he sought to challenge on appeal. 560 U. S., at 560. As a result, respondent's challenge was moot before the Ninth Circuit unless he could "show that a decision invalidating" the District Court's order would likely redress some collateral consequence of the registration conditions. *Ibid.* (citing *Spencer*, *supra*, at 14).

As we noted in our prior opinion, one "potential collateral consequence that might be remedied" by an order invalidating the registration conditions "is the requirement that respondent remain registered" under Montana law. 560 U. S., at 560–561 (internal quotation marks and brackets omitted). But as the Montana Supreme Court has now clarified, respondent's "state law duty to remain registered as a sex offender is not contingent upon the validity of the conditions of his federal supervision order," 360 Mont., at 318, 255 P. 3d, at 111, and continues to apply regardless of the outcome in this case. True, a favorable decision in this case might serve as a useful precedent for respondent in a hypothetical lawsuit challenging Montana's registration requirement on *ex post facto* grounds. But this possible, indirect benefit in a future lawsuit cannot save *this* case from mootness. See *Camreta* v. *Greene*, 563 U. S. 692, 712 (2011); *Commodity Futures Trading Comm'n* v. *Board of Trade of Chicago*, 701 F. 2d 653, 656 (CA7 1989) (Posner, J.) ("[O]ne can never be certain that findings made in a decision concluding one lawsuit will not some day . . . control the outcome of another suit. But if that were enough to avoid mootness, no case would ever be moot").

Respondent also argues that this case "cannot be considered moot in any practical sense" because, under current law, respondent may have "an independent duty to register as a

sex offender" under SORNA itself. Brief in Opposition 6.[2] But the duty to register under SORNA is not a *consequence*—collateral or otherwise—of the District Court's special conditions of supervision. The statutory duty to register is, as respondent notes, an obligation that exists "independent" of those conditions. That continuing obligation might provide grounds for a preenforcement challenge to SORNA's registration requirements. It does not, however, render the current controversy regarding the validity of respondent's sentence any less moot.

Respondent further argues that this case falls within the established exception to mootness for disputes that are "'capable of repetition, yet evading review.'" *Id.*, at 8 (quoting *Weinstein* v. *Bradford*, 423 U. S. 147, 148–149 (1975) *(per curiam)*). This exception, however, applies only where "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer*, *supra*, at 17 (internal quotation marks omitted). At the very least, respondent cannot satisfy the second of these requirements. He has now turned 21, and he will never again be subject to an order imposing special conditions of juvenile supervision. See, *e. g.*, *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974) *(per curiam)*. The capable-of-repetition exception to mootness thus does not apply, and the Ninth Circuit lacked the authority under Article III to decide this case on the merits.

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judg-

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[2] See 42 U. S. C. § 16911(8) (SORNA applicable if the juvenile was "14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18)"); 72 Fed. Reg. 8897 (codified at 28 CFR pt. 72) (SORNA's requirements extend to sex offenders convicted before the statute's enactment).

ment of the Court of Appeals is vacated, and the case is remanded with instructions to dismiss the appeal.

It is so ordered.

JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR would remand the case to the Ninth Circuit for that court's consideration of mootness in the first instance.

JUSTICE KAGAN took no part in the consideration or decision of this case.

Per Curiam

LEAL GARCIA, AKA LEAL *v.* TEXAS

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

No. 11–5001 (11A1). Decided July 7, 2011*

This Court has held that the International Court of Justice's holding in *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. 12—that the United States violated the Vienna Convention on Consular Relations by failing to inform Mexican nationals incarcerated in this country, including petitioner, of their right to consular assistance—is not directly enforceable federal law. *Medellín* v. *Texas*, 552 U. S. 491. Petitioner and the United States nonetheless claim that Texas may not execute petitioner while Congress is considering whether to enact legislation implementing *Avena.*

Held: The applications for stay and for a petition for a writ of habeas corpus are denied. The Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might authorize a collateral attack on that judgment. Nor is there likely to be any other basis for staying a lower court judgment in such circumstances. This Court's task is to rule on what the law is. And in light of *Medellín*, there is no "fair prospect that a majority of the Court will conclude that the decision below was erroneous." *O'Brien* v. *O'Laughlin*, 557 U. S. 1301, 1302.

Applications for stay and petition for writ of habeas corpus denied.

PER CURIAM.

Petitioner Humberto Leal Garcia (Leal) is a Mexican national who has lived in the United States since before the age of two. In 1994, he kidnaped 16-year-old Adria Sauceda, raped her with a large stick, and bludgeoned her to death with a piece of asphalt. He was convicted of murder and sentenced to death by a Texas court. He now seeks a stay

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*Together with No. 11–5002 (11A2), *In re Leal Garcia*, on application for stay and on petition for writ of habeas corpus, and No. 11–5081 (11A21), *Leal Garcia* v. *Thaler*, on application for stay and on petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

of execution on the ground that his conviction was obtained in violation of the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U. S. T. 77, T. I. A. S. No. 6820. He relies on *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. 12 (Judgt. of Mar. 31), in which the International Court of Justice (ICJ) held that the United States had violated the Vienna Convention by failing to notify him of his right to consular assistance. His argument is foreclosed by *Medellín* v. *Texas*, 552 U. S. 491 (2008) *(Medellín I)*, in which we held that neither the *Avena* decision nor the President's memorandum purporting to implement that decision constituted directly enforceable federal law. 552 U. S., at 498–499.

Leal and the United States ask us to stay the execution so that Congress may consider whether to enact legislation implementing the *Avena* decision. Leal contends that the Due Process Clause prohibits Texas from executing him while such legislation is under consideration. This argument is meritless. The Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment.

The United States does not endorse Leal's due process claim. Instead, it asks us to stay the execution until January 2012 in support of our "future jurisdiction to review the judgment in a proceeding" under this yet-to-be-enacted legislation. Brief for United States as *Amicus Curiae* 2–3, n. 1. It relies on the fact that on June 14, 2011, Senator Patrick Leahy introduced implementing legislation in the Senate with the Executive Branch's support. No implementing legislation has been introduced in the House.

We reject this suggestion. First, we are doubtful that it is ever appropriate to stay a lower court judgment in light of unenacted legislation. Our task is to rule on what the law is, not what it might eventually be. In light of *Medellín I*, it is clear that there is no "fair prospect that a majority of

the Court will conclude that the decision below was erroneous," *O'Brien* v. *O'Laughlin*, 557 U. S. 1301, 1302 (2009) (BREYER, J., in chambers), and our task should be at an end. Neither the United States nor JUSTICE BREYER, *post*, p. 943 (dissenting opinion), cites a single instance in this Court's history in which a stay issued under analogous circumstances.

Even if there were circumstances under which a stay could issue in light of proposed legislation, this action would not present them. Medellín himself sought a stay of execution on the ground that Congress might enact implementing legislation. We denied his stay application, explaining that "Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in *[Medellín I]*." *Medellín* v. *Texas*, 554 U. S. 759, 760 (2008) *(per curiam) (Medellín II)*. It has now been seven years since the ICJ ruling and three years since our decision in *Medellín I*, making a stay based on the bare introduction of a bill in a single house of Congress even less justified. If a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now.

The United States and JUSTICE BREYER complain of the grave international consequences that will follow from Leal's execution. *Post*, at 946. Congress evidently did not find these consequences sufficiently grave to prompt its enactment of implementing legislation, and we will follow the law as written by Congress. We have no authority to stay an execution in light of an "appeal of the President," *post*, at 947, presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim.

Finally, we noted in *Medellín II* that "[t]he beginning premise for any stay . . . must be that petitioner's confession was obtained unlawfully," and that "[t]he United States has not wavered in its position that petitioner was not prejudiced

by his lack of consular access." 554 U. S., at 760. Here, the United States studiously refuses to argue that Leal was prejudiced by the Vienna Convention violation, contending instead that the Court should issue a stay simply in light of the possibility that Leal might be able to bring a Vienna Convention claim in federal court, regardless of whether his conviction will be found to be invalid. We decline to follow the United States' suggestion of granting a stay to allow Leal to bring a claim based on hypothetical legislation when it cannot even bring itself to say that his attempt to overturn his conviction has any prospect of success. We may note that in a portion of its opinion vacated by the Fifth Circuit on procedural grounds, the District Court found that any violation of the Vienna Convention would have been harmless. *Leal* v. *Quarterman*, 2007 WL 4521519, *7 (WD Tex., Dec. 17, 2007), vacated in part *sub nom. Leal Garcia* v. *Quarterman*, 573 F. 3d 214, 224–225 (2009).

The applications for stay of execution presented to JUSTICE SCALIA and by him referred to the Court are denied. The petition for a writ of habeas corpus is denied.*

It is so ordered.

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

The petitioner, Humberto Leal Garcia (Leal), convicted 16 years ago of capital murder, is scheduled to be executed this evening. He asks this Court to stay his execution pending resolution of his petitions for writs of certiorari and habeas corpus. I would grant the applications and stay the execution.

As the Solicitor General points out, Leal's execution at this time "would place the United States in irreparable breach" of its "obligation[s]" under international law. Brief for United States as *Amicus Curiae* 1 (hereinafter U. S. Brief); see also

*The United States' motion for leave to file an *amicus* brief is granted.

id., at 11–13, 26, 30. The United States has signed and ratified the Vienna Convention, a treaty under which the United States has promised, among other things, to inform an arrested foreign national, such as Leal, that he has a right to request the assistance of his country's consulate. Vienna Convention on Consular Relations (Vienna Convention), Art. 36, Apr. 24, 1963, 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820. The United States has also signed and ratified an optional protocol, a treaty in which the United States agrees that "[d]isputes arising out of the interpretation of application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), Art. I, Apr. 24, 1963, 21 U. S. T. 325, 326, T. I. A. S. No. 6820. Although the United States has since given notice of withdrawal from the Optional Protocol, see Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005), that withdrawal does not alter the binding status of its prewithdrawal obligations, see U. S. Brief 22, n. 4.

When officials of the State of Texas arrested Leal, they failed to inform him of his Vienna Convention rights, thereby placing the United States in violation of its obligations under that Convention. And so far neither Texas nor any other judicial authority has implemented what the International Court of Justice found (in a related case brought by the Government of Mexico) to be the proper remedy for that Convention violation, namely, a hearing to determine whether that violation amounted in effect to harmless error. *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. 12, 61–64 (Judgt. of Mar. 31). See also U. S. Brief 15 (explaining that "President Bush acknowledged the international legal obligation created by *Avena*"). In other words, the international court made clear that Leal is entitled to a certain *procedure*, namely, a hearing. That

being so, a domestic court's guesses as to the results of that procedure are, as far as our treaty obligations are concerned, irrelevant.

This Court subsequently held that, *because Congress had not embodied our international legal obligations in a statute*, the Court lacked the power to enforce those obligations as a matter of domestic law. *Medellín* v. *Texas*, 552 U. S. 491, 525–526 (2008) ("The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress"). And the Court later refused to grant a stay of execution in a similar case in significant part because "the President . . . has [not] represented to us that there is any likelihood of congressional . . . action." *Medellín* v. *Texas*, 554 U. S. 759, 759–760 (2008) *(per curiam)*.

But these applications for stay do not suffer from this last mentioned legal defect. The Solicitor General has filed an *amicus* brief in which he states that "after extensive consultation with the Department of State and the Department of Justice," Senator Patrick Leahy, the chairman of the Senate Committee on the Judiciary, has introduced (and expressed an intention to hold speedy hearings on) a bill that would permit Leal and other similarly situated individuals to obtain the hearing that international law requires. U. S. Brief 8; see *id.*, at 8–9, 12–13 (describing the Consular Notification Compliance Act of 2011, S. 1194, 112th Cong., 1st Sess.). The *amicus* brief indicates that "congressional . . . action" is a reasonable possibility. *Medellín*, 554 U. S., at 760. And the Solicitor General urges this Court to grant a stay, providing Congress with adequate time to carry out the legal responsibility that this Court has held belongs to the Legislative Branch, *Medellín*, 552 U. S., at 525–526, namely, the enactment of a law that will bring the United States into compliance with its treaty obligations and provide Leal with the hearing that those obligations legally demand. U. S. Brief 2.

At the same time, the Solicitor General sets forth strong reasons, related to the conduct of foreign affairs, for granting a stay. Representing the Executive Branch (hence the President), the Solicitor General tells us that "[p]etitioner's execution would cause irreparable harm" to "foreign-policy interests of the highest order." *Id.*, at 11. The Solicitor General says that failing to halt Leal's execution would place "the United States in irremediable breach of its international-law obligation," with

> "serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention." *Id.*, at 12.

These statements are supported by the fact that the Government of Mexico has also filed a brief in which it states that declining to stay Leal's imminent execution

> "would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assistance, and our efforts to strengthen our common border." Brief for United Mexican States as *Amicus Curiae* 23 (internal quotation marks omitted).

This Court has described interests of the kind set forth by the Solicitor General as "plainly compelling." *Medellín*, 552 U. S., at 524; *id.*, at 537 (Stevens, J., concurring in judgment); see also *id.*, at 566 (BREYER, J., dissenting) (observing harms that would flow from noncompliance). The Court has long recognized the President's special constitutionally based authority in matters of foreign relations. See, *e. g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936). And it has ordinarily given his views significant weight in such matters. *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 348 (2005) (noting the

Court's "customary policy of deference to the President in matters of foreign affairs"). It should do so here.

Finally, this Court has adequate legal authority to grant the requested stay. Should Senator Leahy's bill become law by the end of September (when we would consider the petition in the ordinary course), this Court would almost certainly grant the petitions for writs of certiorari, vacate the judgment below, and remand the cases for further proceedings consistent with that law. Indeed, were the Solicitor General to indicate at that time that the bill was about to become law, I believe it likely that we would hold the petitions for at least several weeks until the bill was enacted and then do the same. And this Court, under the All Writs Act, 28 U. S. C. § 1651, can take appropriate action to preserve its "potential jurisdiction." *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 603 (1966).

Thus, on the one hand, international legal obligations, related foreign policy considerations, the prospect of legislation, and the consequent injustice involved should that legislation, coming too late for Leal, help others in identical circumstances all favor granting a stay. And issuing a brief stay until the end of September, when the Court could consider this matter in the ordinary course, would put Congress on clear notice that it must act quickly. On the other hand, the State has an interest in proceeding with an immediate execution. But it is difficult to see how the State's interest in the immediate execution of an individual convicted of capital murder 16 years ago can outweigh the considerations that support additional delay, perhaps only until the end of the summer.

Consequently I would grant the stay that the petitioner requests. In reaching its contrary conclusion, the Court ignores the appeal of the President in a matter related to foreign affairs, it substitutes its own views about the likelihood of congressional action for the views of Executive Branch officials who have consulted with Members of Congress, and

it denies the request by four Members of the Court to delay the execution until the Court can discuss the matter at Conference in September. In my view, the Court is wrong in each respect.

I respectfully dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 948 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 13 THROUGH SEPTEMBER 28, 2011

JUNE 13, 2011

Certiorari Granted—Vacated and Remanded

No. 10–868. CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* PIRTLE (Reported below: 611 F. 3d 1015); CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* JOHNSON (394 Fed. Appx. 419); HARTLEY *v.* SNEED (390 Fed. Appx. 682); CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* MOSLEY; and CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* SLATER (400 Fed. Appx. 224). C. A. 9th Cir. Motions of respondents John H. Pirtle, Robert Everett Johnson, Anthony Sneed, and Michael Craig Slater for leave to proceed *in forma pauperis* granted. Certiorari as to John H. Pirtle, Robert Everett Johnson, Anthony Sneed, and Michael Craig Slater granted, judgments vacated, and cases remanded for further consideration in light of *Swarthout* v. *Cooke*, 562 U. S. 216 (2011) *(per curiam)*. Certiorari as to Ron Mosley denied.

No. 10–987. AFFILIATED COMPUTER SERVICES, INC. *v.* FENSTERSTOCK. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011). Reported below: 611 F. 3d 124.

No. 10–1070. EISAI CO., LTD., ET AL. *v.* TEVA PHARMACEUTICALS USA, INC., THROUGH ITS GATE PHARMACEUTICALS DIVISION. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 620 F. 3d 1341.

Certiorari Dismissed

No. 10–9970. LAFOUNTAIN *v.* BALCARCEL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* de-

nied, 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. 10–10027. WHEELER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. 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)*. Reported below: 53 So. 3d 238.

No. 10–10207. WILLIAMS *v.* PIERCE, WARDEN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2570. IN RE DISBARMENT OF HELM. Disbarment entered. [For earlier order herein, see 562 U. S. 818.]

No. D–2581. IN RE DISBARMENT OF LERACH. Disbarment entered. [For earlier order herein, see 562 U. S. 1040.]

No. D–2582. IN RE DISBARMENT OF CERVIZZI. Disbarment entered. [For earlier order herein, see 562 U. S. 1040.]

No. D–2583. IN RE DISBARMENT OF REICH. Disbarment entered. [For earlier order herein, see 562 U. S. 1040.]

No. D–2584. IN RE DISBARMENT OF RYAN. Disbarment entered. [For earlier order herein, see 562 U. S. 1040.]

No. D–2585. IN RE DISBARMENT OF FORD. Disbarment entered. [For earlier order herein, see 562 U. S. 1040.]

No. D–2586. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order herein, see 562 U. S. 1041.]

No. D–2587. In re Disbarment of Trum. Disbarment entered. [For earlier order herein, see 562 U. S. 1041.]

No. 10M113. Salt River Project Agricultural Improvement and Power District et al. *v.* Arizona et al. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 10–947. Bank Melli Iran New York Representative Office *v.* Weinstein et al. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 10–8820. Gonzalez Lora *v.* United States. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [562 U. S. 1268] denied. Justice Kagan took no part in the consideration or decision of this motion.

No. 10–9938. Adams *v.* Merck & Co., Inc. C. A. 5th Cir.;

No. 10–10051. Albahri *v.* Florida. Dist. Ct. App. Fla., 1st Dist.; and

No. 10–10150. Mbakpou *v.* Committee on Admissions, District of Columbia Court of Appeals. Ct. App. D. C. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 5, 2011, 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. 10–10637. In re Eckstrom. Petition for writ of habeas corpus denied.

No. 10–10568. In re Schotz. Petition for writ of habeas corpus denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 10–9904. In re Del Rio. Petition for writ of mandamus denied.

Certiorari Granted

No. 10–875. Hall et ux. *v.* United States. C. A. 9th Cir. Certiorari granted. Reported below: 617 F. 3d 1161.

No. 10–895. Gonzalez *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Divi-

SION. C. A. 5th Cir. Certiorari granted limited to the following questions: (1) Was there jurisdiction to issue a certificate of appealability under 28 U. S. C. § 2253(c) and to adjudicate petitioner's appeal? (2) Was the application for a writ of habeas corpus out of time under 28 U. S. C. § 2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"? Reported below: 623 F. 3d 222.

No. 10–7387. SETSER *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 607 F. 3d 128.

No. 10–8145. SMITH *v.* CAIN, WARDEN. Crim. Dist. Ct. La., Orleans Parish. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied. (See also No. 10–868, *supra.*)

No. 10–1020. CONSOLIDATION COAL CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 615 F. 3d 1378.

No. 10–1117. NAGLICH ET AL. *v.* CAMP ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 519.

No. 10–1214. FREEDOM FROM RELIGION FOUNDATION *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 626 F. 3d 1.

No. 10–1225. BOMBARDIER INC. ET AL. *v.* DOW CHEMICAL CANADA ULC ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–1227. JOHNSON *v.* ROBERTS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 104.

No. 10–1235. KOVACIC ET AL. *v.* VILLARREAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 3d 209.

No. 10–1255. COWITT ET UX., INDIVIDUALLY AND AS TRUSTEES FOR THE COWITT FAMILY TRUST *v.* REILLY ET UX. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–1258. LEDBETTER ET AL. *v.* FEDERAL AVIATION ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 392 Fed. Appx. 779.

No. 10–1260. GARD ET UX. *v.* CITY OF OMAHA, NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 18 Neb. App. 504, 786 N. W. 2d 688.

No. 10–1296. COATES *v.* OFFICE OF ATTORNEY REGULATION OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied.

No. 10–1324. HANNAN *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 408 Fed. Appx. 581.

No. 10–1347. FREEMAN *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 10–1372. FULL VALUE ADVISORS, LLC *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 633 F. 3d 1101.

No. 10–1376. LEBLANC ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 410 Fed. Appx. 323.

No. 10–1379. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–1386. HOFFMAN, AKA ALAMO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 3d 993.

No. 10–7592. DOE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 617 F. 3d 766.

No. 10–8832. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 26.

No. 10–8907. GALLAHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 3d 934.

No. 10–8908. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 860.

No. 10–9076. LAWRENCE *v.* COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 884.

No. 10–9176. BURDETT *v.* REYNOSO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 276.

No. 10–9209. PURVIS *v.* OEST ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 3d 713.

No. 10–9334. ROSS *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF WASHINGTON MUTUAL BANK. C. A. 4th Cir. Certiorari denied. Reported below: 625 F. 3d 808.

No. 10–9555. ERVIN *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 333 S. W. 3d 187.

No. 10–9758. BALENTINE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 3d 842.

No. 10–9886. FLEMING *v.* CHICAGO TRANSIT AUTHORITY. C. A. 7th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 249.

No. 10–9887. GLENN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 43 So. 3d 58.

No. 10–9888. HENDERSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9895. BRIDGES *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 10–9898. GUO *v.* WAGSTAFF ET AL. C. A. 5th Cir. Certiorari denied.

No. 10–9900. B. J. G. *v.* ST. CHARLES COUNTY SHERIFF ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 127.

No. 10–9908. DINGLE *v.* KOPPEL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 380 Fed. Appx. 347.

No. 10–9920. CLARK *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 127 Nev. 1126.

No. 10–9924. STOKES *v.* MOORMAN. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 823.

No. 10–9926. MACIAS *v.* DONAT, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 44.

No. 10–9928. KING *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 10–9929. JOHNSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 365 N. C. 70, 705 S. E. 2d 736.

No. 10–9933. YOUNG *v.* LARKINS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–9940. GRAGG *v.* PROSPER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 43.

No. 10–9943. WAHL *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 236.

No. 10–9945. NORWOOD *v.* SULLIVAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 390 Fed. Appx. 762.

No. 10–9953. BROWN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9954. SAVAGE *v.* BONAVITACOLA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 404 Fed. Appx. 568.

No. 10–9958. MEDINA, AKA ALVERIO *v.* RAEMISCH ET AL. Ct. App. Wis. Certiorari denied.

No. 10–9962. MCGRUDER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–9963. MCMILLIAN *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9966. PRICE *v.* SOUTH CAROLINA. Ct. Common Pleas of Richland County, S. C. Certiorari denied.

No. 10–9967. JACKSON *v.* CHAIRMAN AND MEMBERS OF THE MISSOURI BOARD OF PROBATION AND PAROLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 10–9969. JONES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 196 Md. App. 740.

No. 10–9978. TATRO *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9981. ANDREWS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 280 Va. 231, 699 S. E. 2d 237.

No. 10–9985. MARTIN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 10–9986. MARTIN *v.* PROVINCE, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 10–9988. S. G. *v.* J. H. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 10–9992. NORTHUP *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–10001. REIS *v.* FANNIE MAE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 10–10006. ESTRADA *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–10016. HERCULES-LOPEZ *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 10–10041. FURROW *v.* LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 398.

No. 10–10043. GRAVES *v.* PADULA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 978.

No. 10–10053. SCARLETT *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 394.

No. 10–10059. ELSTER *v.* CALIFORNIA BOARD OF PAROLE HEARINGS ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10079. KAFATIA *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10105. BERMUDEZ *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 10–10127. PARTOVI *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 409 Fed. Appx. 355.

No. 10–10135. STEWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 770.

No. 10–10139. PARTOVI *v.* UNKNOWN OFFICER ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10152. GILLOTT *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10166. AKBAR *v.* PADULA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 733.

No. 10–10189. WELLMAN *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 10–10192. JASON K. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied. Reported below: 188 Cal. App. 4th 1545, 116 Cal. Rptr. 3d 443.

No. 10–10234. JOHNSON *v.* SWARTHOUT, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 161.

No. 10–10237. MCNAIR *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–10277. CUEVAS-HERNANDEZ *v.* WASDEN, ATTORNEY GENERAL OF IDAHO. C. A. 9th Cir. Certiorari denied.

No. 10–10302. ORAL H. *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 125 Conn. App. 276, 7 A. 3d 444.

No. 10–10314. SMITH *v.* STEVENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 728.

No. 10–10388. BUCKLON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 53 So. 3d 1033.

No. 10–10408. CAMERON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 626.

No. 10–10411. SALINAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 78.

No. 10–10413. REYES-REZENDES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 10–10415. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 3d 889.

No. 10–10418. PERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 471.

No. 10–10425. WOLFE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 325 Wis. 2d 401, 786 N. W. 2d 489.

No. 10–10429. ROSS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 413 Fed. Appx. 457.

No. 10–10434. WOODBURY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 813.

No. 10–10435. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 911.

No. 10–10439. SALAZAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 44.

No. 10–10440. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 3d 370.

No. 10–10441. HERNANDEZ ROJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 781.

No. 10–10442. AMAYA-RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 788.

No. 10–10445. WEATHERS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 631 F. 3d 560.

No. 10–10446. LINK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 991.

No. 10–10447. JORDAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 409 Fed. Appx. 471.

No. 10–10449. JACKSON *v.* MARBERRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 62.

No. 10–10454. DELAZARO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 739.

No. 10–10459. ANDUJAR-BASCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–10462. DANFORTH *v.* THIELEN, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 3d 915.

No. 10–10466. DUNBAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 385 Fed. Appx. 132.

No. 10–10477. PREPETIT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 10–10479. PUPOLS *v.* PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 413 Fed. Appx. 232.

No. 10–10484. CARRINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 644.

No. 10–10490. MATEO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 197.

No. 10–10496. STACKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 666.

No. 10–10497. ZEMBA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 649.

No. 10–10498. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 541.

No. 10–10499. BEGAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 631 F. 3d 1168.

No. 10–10500. BRIDGEWATER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 398.

No. 10–10502. LASLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 177.

No. 10–10503. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 401 Fed. Appx. 712.

No. 10–10505. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–10512. PORTORREAL, AKA PORTORREAL-PENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 413 Fed. Appx. 314.

No. 10–10513. MEDINA-ESQUEDA, AKA DE LA CRUZ-ESQUEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 710.

No. 10–10514. OLIVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 255.

No. 10–10520. TORREZ-CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 124.

No. 10–10522. HUNT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 419 Fed. Appx. 949.

No. 10–10523. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 662.

No. 10–10524. N-JIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 839.

No. 10–10526. WARREN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 3d 182.

No. 10–10527. ULIMWENGU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 918.

No. 10–738. RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA ET AL.; and RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., ET AL. *v.* PETTERS ET AL. C. A. 8th Cir. Motion of National Crime Victim Law Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 10–1119. STEINBECK ET AL. *v.* MCINTOSH & OTIS, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 400 Fed. Appx. 572.

No. 10–1124. TURLOCK IRRIGATION DISTRICT *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 628 F. 3d 538.

No. 10–1357. AMOROSA ET AL. *v.* ERNST & YOUNG, LLP. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 409 Fed. Appx. 412.

No. 10–10401. JASSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 634 F. 3d 305.

No. 10–10438. REYES-HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–10443. BERRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 10–10444. ACOFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 634 F. 3d 200.

No. 10–10450. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–10468. COOPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 397 Fed. Appx. 404.

Rehearing Denied

No. 10–880. TAYLOR *v.* CITY OF COLUMBIA, SOUTH CAROLINA, ET AL., 562 U. S. 1287;

No. 10–8789. BLAIR *v.* ALASKAN COPPER & BRASS CO., 563 U. S. 921;

No. 10–9040. RAMEY *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA ET AL., 563 U. S. 923;

No. 10–9044. RAMIREZ *v.* AULT, WARDEN, 563 U. S. 944;

No. 10–9049. IN RE ROCHE, 562 U. S. 1285;

No. 10–9067. ADAMS *v.* MICHIGAN, 563 U. S. 945;

No. 10–9094. WOODBURY *v.* CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT, ET AL., 563 U. S. 962;

No. 10–9289. RITTER *v.* RITTER ET AL., 563 U. S. 978;

No. 10–9426. BRAMLETT *v.* UNITED STATES, 563 U. S. 949;

No. 10–9534. IN RE ANDREWS, 563 U. S. 934;

No. 10–9535. IN RE ANDREWS, 563 U. S. 934;

No. 10–9661. GRAY *v.* UNITED STATES, 563 U. S. 954; and

No. 10–9663. IN RE SUDBERRY, 563 U. S. 934. Petitions for rehearing denied.

No. 10–9482. JENNINGS *v.* UNITED STATES, 563 U. S. 956. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

JUNE 15, 2011

Miscellaneous Orders

No. 10–7387. SETSER *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1004.] Evan A. Young, Esq., of Austin, Tex., is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 10A1226 (10–11036). BALENTINE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

Rehearing Denied

No. 09–5128 (10A1212). BALENTINE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 558 U. S. 971. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Motion for leave to file petition for rehearing denied.

JUNE 16, 2011

Miscellaneous Order

No. 10A1236 (10–11056). TAYLOR *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, pre-

sented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution.

Certiorari Denied

No. 10–10994 (10A1219). POWELL *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.

No. 10–11055 (10A1235). POWELL *v.* THOMAS, INTERIM COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 643 F. 3d 1300.

JUNE 20, 2011

Certiorari Granted—Vacated and Remanded

No. 09–10276. ROGERS *v.* UNITED STATES. C. A. 6th 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 *Sykes* v. *United States*, *ante*, p. 1. Reported below: 594 F. 3d 517.

Certiorari Dismissed

No. 10–9984. AYSISAYH *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 56 So. 3d 2.

No. 10–10596. FUTCH *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 10–10608. BEATY *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari dismissed as moot.

Miscellaneous Orders

No. D–2588. IN RE DISCIPLINE OF OSBORNE. David Robert Osborne, of Christiansted, St. Croix, V. I., is suspended from the

practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2589. IN RE DISCIPLINE OF ALDERMAN. Steven Boyd Alderman, of Syracuse, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2590. IN RE DISCIPLINE OF POLLACK. Ruth Marie Pollack, of Riverhead, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2591. IN RE DISCIPLINE OF JONES. Stephen J. Jones, of Wichita, Kan., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2592. IN RE DISCIPLINE OF KORDELL. James Michael Kordell, of Woodlake, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2593. IN RE DISCIPLINE OF LOSEY. F. Richard Losey, of San Rafael, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2594. IN RE DISCIPLINE OF TABACHNICK. Barry Stephen Tabachnick, of Folsom, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2595. IN RE DISCIPLINE OF WHITEBOOK. Merl Alan Whitebook, of Tulsa, Okla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2596. IN RE DISCIPLINE OF PLESHAW. Robert J. Pleshaw, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2597. IN RE DISCIPLINE OF SILVA. Zoila I. Silva, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 10M84. SHIPLET *v.* VILSACK, SECRETARY OF AGRICULTURE. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted, except that the order of May 15, 2009, shall be placed in the public record.

No. 10M114. FERNANDEZ *v.* MARTEL, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 10–1285. COUNTRYWIDE HOME LOANS, INC. *v.* RODRIGUEZ ET UX. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 10–10008. FIORANI *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [563 U. S. 985] denied.

No. 10–10528. DAY *v.* MINNESOTA ET AL. Ct. App. Minn. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 11, 2011, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 10–10747. IN RE CARY. Petition for writ of habeas corpus denied.

No. 10–10271. IN RE KEYES. Petition for writ of mandamus denied.

No. 10–9998. IN RE REMMERT. 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.

No. 10–10576. IN RE WHERRY. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 10–218. PPL MONTANA, LLC *v.* MONTANA. Sup. Ct. Mont. Motion of David Emmons et al. for leave to file a brief as *amici curiae* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 355 Mont. 402, 229 P. 3d 421.

No. 10–708. FIRST AMERICAN FINANCIAL CORP., SUCCESSOR IN INTEREST TO FIRST AMERICAN CORP., ET AL. *v.* EDWARDS. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 610 F. 3d 514.

No. 10–1024. FEDERAL AVIATION ADMINISTRATION ET AL. *v.* COOPER. C. A. 9th Cir. Certiorari granted. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 622 F. 3d 1016.

No. 10–1150. MAYO COLLABORATIVE SERVICES, DBA MAYO MEDICAL LABORATORIES, ET AL. *v.* PROMETHEUS LABORATORIES, INC. C. A. Fed. Cir. Certiorari granted. Reported below: 628 F. 3d 1347.

Certiorari Denied

No. 09–10868. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 586 F. 3d 1283.

No. 10–109. DISMUKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 593 F. 3d 582.

No. 10–314. WELCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 604 F. 3d 408.

No. 10–426. APPLERA CORP. ET AL. *v.* ENZO BIOCHEM, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 599 F. 3d 1325.

No. 10–535. RH CAPITAL ASSOCIATES LLC ET AL. *v.* MAYER BROWN LLP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 3d 144.

No. 10–717. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA *v.* KRAUS-ANDERSON CONSTRUCTION CO. C. A. 11th Cir. Certiorari denied. Reported below: 607 F. 3d 1268.

No. 10–803. BANJO *v.* CULLEN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 3d 964.

No. 10–838. PACIFIC BELL TELEPHONE CO., DBA AT&T CALIFORNIA *v.* CALIFORNIA PUBLIC UTILITIES COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 3d 836.

No. 10–929. DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL. *v.* YANKTON SIOUX TRIBE ET AL.;

No. 10–931. SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT *v.* YANKTON SIOUX TRIBE ET AL.;

No. 10–932. HEIN, STATE'S ATTORNEY, CHARLES MIX COUNTY, SOUTH DAKOTA, ET AL. *v.* YANKTON SIOUX TRIBE ET AL.; and

No. 10–1058. YANKTON SIOUX TRIBE ET AL. *v.* DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 606 F. 3d 994.

No. 10–1044. STRICKLAND ET AL. *v.* CITY OF SEATTLE, WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 407.

No. 10–1156. BURDINE *v.* WEISS, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION. Sup. Ct. Ark. Certiorari denied. Reported below: 2010 Ark. 455, 379 S. W. 3d 476.

No. 10–1177. WYETH LLC ET AL. *v.* SCOFIELD ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 446, 244 P. 3d 765.

No. 10–1226. ANTONIO RODRIGUEZ *v.* FEDEX FREIGHT EAST, INC. C. A. 6th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 55.

No. 10–1254. PARKER *v.* RICHMOND COUNTY BOARD OF EDUCATION. C. A. 11th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 477.

No. 10–1256. CHAN *v.* LUND ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 188 Cal. App. 4th 1159, 116 Cal. Rptr. 3d 122.

No. 10–1263. BRYSON *v.* OKLAHOMA CITY, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 627 F. 3d 784.

No. 10–1270. DOTCH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 67 So. 3d 936.

No. 10–1271. COBLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 330 S. W. 3d 253.

No. 10–1272. TALLEY *v.* HOUSING AUTHORITY OF COLUMBUS, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 463.

No. 10–1275. CONSTANT *v.* CALIFORNIA EX REL. DEPARTMENT OF TRANSPORTATION. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 10–1277. CAMPBELL *v.* KELLERMYER BUILDING SERVICES, LLC. Super. Ct. Pa. Certiorari denied.

No. 10–1279. FLINT *v.* KING, JUDGE, DISTRICT COURT OF KENTUCKY, JEFFERSON COUNTY. C. A. 6th Cir. Certiorari denied.

No. 10–1280. WIDTFELDT *v.* NEBRASKA EQUAL OPPORTUNITY COMMISSION ET AL. Ct. App. Neb. Certiorari denied.

No. 10–1281. LINDGREN *v.* GLACIAL PLAINS COOPERATIVE. Ct. App. Minn. Certiorari denied.

No. 10–1288. YILING ZHANG *v.* INLAND COUNTIES REGIONAL CENTER, INC. Ct. App. Cal., 4th App. Dist., Div. 2 Certiorari denied.

No. 10–1355. RACZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–1387. DOUGLAS *v.* UNITED STATES; and
No. 10–10483. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 634 F. 3d 852.

No. 10–1392. HAAGENSEN *v.* SUPREME COURT OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 390 Fed. Appx. 94.

No. 10–1398. BUSSON-SOKOLIK ET AL. *v.* MILWAUKEE SCHOOL OF ENGINEERING. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 3d 261.

No. 10–1400. QANTAS AIRWAYS LIMITED *v.* UPS SUPPLY CHAIN SOLUTIONS, INC., FKA MENLO WORLDWIDE FORWARDING,

INC. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 3d 1023.

No. 10–1407. MATTHIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 3d 1001.

No. 10–1429. WAMPLER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 624 F. 3d 1330.

No. 10–5289. HUGHES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 3d 669.

No. 10–6048. PARTEE ET AL. *v.* UNITED STATES; and
No. 10–6076. BUFFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 373 Fed. Appx. 602.

No. 10–6106. MEMBERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 376 Fed. Appx. 633.

No. 10–6217. RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 376 Fed. Appx. 457.

No. 10–6440. WARREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 383 Fed. Appx. 360.

No. 10–6654. WOMACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 3d 427.

No. 10–6658. WISE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 597 F. 3d 1141.

No. 10–6664. DUNSON *v.* UNITED STATES (Reported below: 603 F. 3d 1023); and RICE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–6667. PETERSEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 383 Fed. Appx. 458.

No. 10–6832. RUDD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–6864. WEEKES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 611 F. 3d 68.

No. 10–6991. MCCONNELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 F. 3d 822.

No. 10–7164. ETHINGOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 388 Fed. Appx. 858.

No. 10–7205. GOOCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–7305. ATKINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 379 Fed. Appx. 762.

No. 10–7332. ASKEW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 384 Fed. Appx. 504.

No. 10–7811. PULLUM *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 380 Fed. Appx. 663.

No. 10–7934. STEPHENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 340.

No. 10–7942. KLUGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 3d 852.

No. 10–8286. DORITY *v.* ROY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 2.

No. 10–8354. CLAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 622 F. 3d 892.

No. 10–8671. SALGADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 972.

No. 10–8734. SANCHEZ-LEDEZMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 3d 447.

No. 10–8792. SANCHEZ ARAGON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–8846. NOAH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 54.

No. 10–8926. DUNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9053. SERRATO MANCERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 977.

No. 10–9085. SPENCER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 58 So. 3d 215.

No. 10–9399. BEGAY *v.* UNITED STATES; and
No. 10–9420. WATCHMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 3d 1187.

No. 10–9514. PANETTI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 326 S. W. 3d 615.

No. 10–9516. PETTUS *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 10–9617. LUKASIEWICZ-KRUK *v.* GREENPOINT YMCA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 404 Fed. Appx. 519.

No. 10–10012. SMITH *v.* CITY OF AIKEN, SOUTH CAROLINA, PUBLIC WORKS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 665.

No. 10–10013. PARKS *v.* LOWE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 643.

No. 10–10015. MARCOS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–10017. ROUNDS *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 10–10018. ISOM *v.* ARKANSAS (two judgments). Sup. Ct. Ark. Certiorari denied. Reported below: 2010 Ark. 496, 372 S. W. 3d 809 (first judgment); 2010 Ark. 495, 370 S. W. 3d 491 (second judgment).

No. 10–10020. GARNETT *v.* NEVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 47.

No. 10–10025. SUTHERLIN *v.* OLIVER ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–10026. JONES *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 10–10028. MONKRES *v.* CAMPBELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 101.

No. 10–10031. RANSTROM *v.* ELDRIDGE CONSTRUCTION, INC., ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 10–10032. MOSBY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 44 So. 3d 1187.

No. 10–10034. CHRISTIAN *v.* FRANK BOMMARITO OLDSMOBILE, INC., DBA BOMMARITO INFINITY. C. A. 8th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 133.

No. 10–10035. CARRODINE *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10036. GEVARA, AKA GALEAS *v.* BENNETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 704.

No. 10–10037. GEVARA *v.* HUBBARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 772.

No. 10–10038. GEVARA, AKA GALEAS *v.* KELLER, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 761.

No. 10–10040. GONZALES *v.* ROMANOWSKI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10044. HENDRICKS *v.* COHEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 378 Fed. Appx. 356.

No. 10–10045. HENDRICKS *v.* WILSON, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 390 Fed. Appx. 282.

No. 10–10052. SHELTON *v.* BANKS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–10069. JONES *v.* HARMON. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 329 S. W. 3d 396.

No. 10–10070. SCHMIDT *v.* WARWICK PUBLIC SCHOOL DISTRICT #29 ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 795 N. W. 2d 37.

No. 10–10071. ALLEN *v.* MASSACHUSETTS. Super. Ct. Mass., Essex County. Certiorari denied.

No. 10–10072. ARFLACK *v.* HENDERSON COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 829.

No. 10–10074. MENCY *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–10076. LYNCH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 10–10077. LAVERGNE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 10–10085. WILKERSON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 10–10087. WILLIAMS *v.* SUMMIT COUNTY AUDITOR ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–10088. WHITLEY *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 10–10094. BELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 53 So. 3d 437.

No. 10–10095. FIGURA TORREFRANCA *v.* HORNE, ATTORNEY GENERAL OF ARIZONA, ET AL.; and FIGURA TORREFRANCA *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10097. YARBROUGH *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–10117. SIMS *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10119. ROEUTH *v.* FAYRAM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–10151. MCCARTNEY *v.* RYLAND ET AL. Sup. Ct. La. Certiorari denied. Reported below: 60 So. 3d 1256.

No. 10–10208. TENG VANG *v.* POLLARD, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 10–10222. ROBINSON *v.* UNITED STATES MARSHALS SERVICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 10–10238. ABRAMCZYK *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10248. BURGIE *v.* HANNAH, CHIEF JUSTICE, SUPREME COURT OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 84.

No. 10–10253. SPENCER *v.* HARRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10263. SCHAROSCH *v.* PALMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–10268. LAMB *v.* PALMER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10275. PERRIDON *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 115.

No. 10–10298. STEWART *v.* UTAH. Ct. App. Utah. Certiorari denied.

No. 10–10335. HITTSON *v.* HUMPHREY, WARDEN. Super. Ct. Butts County, Ga. Certiorari denied.

No. 10–10361. FRANZA *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 3d 1160, 907 N. Y. S. 2d 725.

No. 10–10373. BRATHWAITE *v.* PHELPS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 418 Fed. Appx. 142.

No. 10–10378. LAKEY *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 3d 782.

No. 10–10389. AUSSICKER *v.* CURTIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10420. BENN *v.* UNITED STATES; and
No. 10–10556. GAINES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 206.

No. 10–10489. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 757.

No. 10–10530. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–10538. WHYTE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 330 Wis. 2d 496, 792 N. W. 2d 239.

No. 10–10542. JOHNSON *v.* UPTON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 615 F. 3d 1318.

No. 10–10547. DONOVAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 979.

No. 10–10550. VINCENT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–10551. CUMMINGS, AKA DAVILA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 10–10552. ZHI YONG GUO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 3d 1119 and 422 Fed. Appx. 596.

No. 10–10554. HAMPTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 3d 334.

No. 10–10555. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 693.

No. 10–10557. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 751.

No. 10–10559. HAWKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 409 Fed. Appx. 507.

No. 10–10560. GOINGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 967.

No. 10–10561. HATCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 944.

No. 10–10564. HALSTEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 3d 270.

No. 10–10570. PINEDA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 612.

No. 10–10571. DAVIS *v.* HOUSE OF REPRESENTATIVES, ELEANOR HOLMES NORTON'S OFFICE. C. A. D. C. Cir. Certiorari denied. Reported below: 409 Fed. Appx. 355.

No. 10–10572. CORONADO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 429 Fed. Appx. 208.

No. 10–10574. CHOWDHURY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 3d 583.

No. 10–10577. PLACENCIA-MARQUEZ, AKA MORENO-MARQUEZ, AKA LOPES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 675.

No. 10–10578. NUNEZ-LUNA, AKA NUNEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 392.

No. 10–10579. GOMEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–10582. TOCHOLKE *v.* WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 889.

No. 10–10584. TURNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–10585. BAUGUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 10–10587. ALBERTSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 645 F. 3d 191.

No. 10–10588. FLORES-PRIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 393.

No. 10–10590. RAMOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 629 F. 3d 60.

No. 10–10593. GWATHNEY *v.* ZIEGLER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 733.

No. 10–10594. HERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–10595. GELIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 419 Fed. Appx. 313.

No. 10–10597. Ramos Guizar *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 98.

No. 10–10598. Graziano *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 391 Fed. Appx. 965.

No. 10–10600. Harris *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 391 Fed. Appx. 740.

No. 10–10601. Hines *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 381 Fed. Appx. 306.

No. 10–10602. Gambrell *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 10–10603. Harris *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 10–10609. Walker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 384.

No. 10–10610. Taylor *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 10–10613. Llamas-Gonzales *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 936.

No. 10–10615. Reyes-Bueno, aka Reyes *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 391.

No. 10–10617. Randolph *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 628 F. 3d 1022.

No. 10–10621. Santana Morris *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 758.

No. 10–10628. Cooper *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 12 A. 3d 1172.

No. 10–10635. Carter *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 411 Fed. Appx. 375.

No. 10–10639. Maxwell *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 692.

No. 10–491. L–3 Communications Corp. et al. *v.* Honeywell International Inc. et al. C. A. Fed. Cir. Certiorari

denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 609 F. 3d 1292.

No. 10–1030. DA SILVA NEVES *v.* HOLDER, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 613 F. 3d 30.

No. 10–1059. YANKTON SIOUX TRIBE ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 8th Cir. Motion of Southern Missouri Recycling and Waste Management District for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 606 F. 3d 895.

No. 10–1068. ACORN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 618 F. 3d 125.

No. 10–7085. STROTHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 384 Fed. Appx. 539.

No. 10–9360. COMSTOCK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 627 F. 3d 513.

No. 10–10068. MCPHERRON *v.* DAILING ET AL. C. A. 7th Cir. Certiorari before judgment denied.

No. 10–10133. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 631 F. 3d 1343.

No. 10–10481. CHIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 412 Fed. Appx. 628.

No. 10–10515. REAP *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 391 Fed. Appx. 99.

No. 10–10643. McCall *v.* United States. C. A. 5th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 419 Fed. Appx. 454.

Rehearing Denied

No. 10–941. Mason *v.* Thomas, Interim Commissioner, Alabama Department of Corrections, 563 U. S. 960;

No. 10–1082. Hill *v.* Muwwakkil, 563 U. S. 937;

No. 10–8284. Epps *v.* United States, 562 U. S. 1241;

No. 10–8691. Driver *v.* Virga, Acting Warden, et al., 563 U. S. 909;

No. 10–8950. Hinchliffe *v.* Option One Mortgage Corp., 562 U. S. 1299;

No. 10–9055. Cosco *v.* Lampert, Director, Wyoming Department of Corrections, et al., 563 U. S. 910;

No. 10–9088. Baker *v.* Hardy, Warden, 563 U. S. 923;

No. 10–9113. Antonucci *v.* United States, 563 U. S. 911;

No. 10–9117. Hunt *v.* Smith et al., 563 U. S. 963;

No. 10–9150. Martin *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 563 U. S. 964;

No. 10–9384. Shabazz *v.* Buss, Secretary, Florida Department of Corrections, 563 U. S. 948;

No. 10–9569. Hill *v.* Ohio, 563 U. S. 966; and

No. 10–9581. Flute *v.* United States, 563 U. S. 953. Petitions for rehearing denied.

June 21, 2011

Miscellaneous Orders

No. 10A1246. Mathis *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Application for certificate of appealability, presented to Justice Scalia, and by him referred to the Court, denied.

No. 10–11102 (10A1247). In re Mathis. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 10–11101 (10A1245). MATHIS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JUNE 23, 2011

Certiorari Denied

No. 10–11194 (10A1268). BLANKENSHIP *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. Super. Ct. Fulton County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 10–11195 (10A1269). BLANKENSHIP *v.* HUMPHREY, WARDEN. Super. Ct. Butts County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JUNE 27, 2011

Certiorari Granted—Vacated and Remanded. (See also No. 09–940, *ante*, p. 932.)

No. 10–82. UNITED STATES *v.* GONZALEZ. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *United States*, *ante*, p. 229. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 578 F. 3d 1130.

No. 10–1007. KENTUCKY *v.* VELASQUEZ. Ct. App. Ky. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *United States*, *ante*, p. 229.

No. 10–1087. THOROGOOD ET AL. *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Smith* v. *Bayer Corp.*, *ante*, p. 299. Reported below: 624 F. 3d 842.

No. 10–1091. COLORADO *v.* KEY. Ct. App. Colo. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *United States*, *ante*, p. 229.

Certiorari Dismissed

No. 10–10108. BURNETT *v.* SPERRY 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.

No. 10–10158. WILLIAMS *v.* WRIGHT, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, ET AL. C. A. 8th Cir.;

No. 10–10159. WILLIAMS *v.* JOHNSON ET AL. C. A. 8th Cir.; and

No. 10–10160. WILLIAMS *v.* CROUCH ET AL. C. A. 8th Cir. Motions 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. 10–10181. MCCREARY *v.* WERTANEN ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

No. 10–10699. RAY *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2598. IN RE DISCIPLINE OF BRYANT. Wayne R. Bryant, of Cherry Hill, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days,

requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2599. IN RE DISCIPLINE OF KING. Paul H. King, of La Union, Philippines, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2600. IN RE DISCIPLINE OF KING. Philip M. King, of Mercer Island, Wash., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2601. IN RE DISCIPLINE OF CRAMER. Stephen D. Cramer, of Federal Way, Wash., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2602. IN RE DISCIPLINE OF DROZ. Paul C. Droz, of Mesquite, Nev., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2603. IN RE DISCIPLINE OF LUONGO. Michael R. Luongo, of Margale City, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2604. IN RE DISCIPLINE OF CHAMBERS. William R. Chambers, of Scottsdale, Ariz., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 10M115. CORSON *v.* MATTOX ET AL. Motion for leave to proceed as a seaman denied.

No. 10M116. VERDUGO *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal granted.

No. 10M117. SAVICH *v.* DOMRES; and

No. 10M118. PAYNE *v.* FISCHER, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONS, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 10–768. AFTERMATH RECORDS, DBA AFTERMATH ENTERTAINMENT, ET AL. *v.* F. B. T. PRODUCTIONS, LLC, ET AL., 562 U. S. 1286. Motion of respondents for attorneys' fees and expenses denied.

No. 10–10177. JONES *v.* MERCK & CO., INC. C. A. 5th Cir.; and

No. 10–10485. MATTHEWS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. D. C. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 18, 2011, 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. 10–10822. IN RE ISMAIL; and

No. 10–10843. IN RE HARMON. Petitions for writs of habeas corpus denied.

No. 10–10173. IN RE PARNELL. Petition for writ of mandamus denied.

No. 10–10138. IN RE ROSE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 10–704. MESSERSCHMIDT ET AL. *v.* MILLENDER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 620 F. 3d 1016.

No. 10–844. CARACO PHARMACEUTICAL LABORATORIES, LTD., ET AL. *v.* NOVO NORDISK A/S ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 601 F. 3d 1359.

No. 10–1016. COLEMAN *v.* COURT OF APPEALS OF MARYLAND ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 626 F. 3d 187.

No. 10–1121. KNOX ET AL. *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000. C. A. 9th Cir. Certiorari granted. Reported below: 628 F. 3d 1115.

No. 10–1195. MIMS *v.* ARROW FINANCIAL SERVICES, LLC. C. A. 11th Cir. Certiorari granted. Reported below: 421 Fed. Appx. 920.

No. 10–1219. KAPPOS, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE *v.* HYATT. C. A. Fed. Cir. Certiorari granted. Reported below: 625 F. 3d 1320.

No. 10–224. NATIONAL MEAT ASSN. *v.* HARRIS, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Motion of American Association of Swine Veterinarians et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 599 F. 3d 1093.

No. 10–1259. UNITED STATES *v.* JONES. C. A. D. C. Cir. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent." Reported below: 615 F. 3d 544.

No. 10–1261. CREDIT SUISSE SECURITIES (USA) LLC ET AL. *v.* SIMMONDS. C. A. 9th Cir. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 638 F. 3d 1072.

No. 10–1265. MARTEL, WARDEN *v.* CLAIR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 403 Fed. Appx. 276.

No. 10–1293. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FOX TELEVISION STATIONS, INC., ET AL. (Reported below: 613 F. 3d 317); and FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* ABC, INC., ET AL. (404 Fed. Appx. 530). C. A. 2d Cir. Certiorari granted limited to the following question: "Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution." JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Certiorari Denied

No. 09–1254. Von Saher *v.* Norton Simon Museum of Art at Pasadena et al. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 3d 954.

No. 09–1313. Saleh et al. *v.* Titan Corp. et al. C. A. D. C. Cir. Certiorari denied. Reported below: 580 F. 3d 1.

No. 10–330. Brown, Governor of California, et al. *v.* Rincon Band of Luiseno Mission Indians of the Rincon Reservation, aka Rincon San Luiseno Band of Mission Indians, aka Rincon Band of Luiseno Indians. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 3d 1019.

No. 10–374. Zuress *v.* Donley, Secretary of the Air Force. C. A. 9th Cir. Certiorari denied. Reported below: 606 F. 3d 1249.

No. 10–638. Wetherill *v.* McHugh, Secretary of the Army, et al. C. A. 8th Cir. Certiorari denied. Reported below: 616 F. 3d 789.

No. 10–735. Philip Morris USA Inc. et al. *v.* Jackson, Individually and on Behalf of All Others Similarly Situated. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 36 So. 3d 1046.

No. 10–786. Kingdom of Spain et al. *v.* Estate of Cassirer. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 3d 1019.

No. 10–827. United States ex rel. Summers *v.* LHC Group, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 623 F. 3d 287.

No. 10–885. Witt, on Behalf of the Estate of Witt, Deceased *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 379 Fed. Appx. 559.

No. 10–920. Ochoa *v.* Holder, Attorney General. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 3d 546.

No. 10–940. Gor *v.* Holder, Attorney General. C. A. 6th Cir. Certiorari denied. Reported below: 607 F. 3d 180.

No. 10–1036. ZARNOW, INDEPENDENT ADMINISTRATRIX FOR THE ESTATE OF ZARNOW, DECEASED *v.* CITY OF WICHITA FALLS, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 3d 161.

No. 10–1084. FERGUSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 385 Fed. Appx. 518.

No. 10–1093. SMITH ET UX. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 288 Ga. 348, 703 S. E. 2d 629.

No. 10–1102. ROSARIO *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 627 F. 3d 58.

No. 10–1158. NETTLES *v.* CITY OF LEESBURG, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 116.

No. 10–1166. GROSE, FKA HARRINGTON *v.* CORRECTIONAL MEDICAL SERVICES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 986.

No. 10–1171. THOMAS *v.* LOUISIANA DEPARTMENT OF SOCIAL SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 890.

No. 10–1185. LIGON *v.* LAHOOD, SECRETARY OF TRANSPORTATION. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 3d 150.

No. 10–1299. MILLER *v.* PRAXAIR, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 408 Fed. Appx. 408.

No. 10–1301. BASS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 693.

No. 10–1305. EVANS-MARSHALL *v.* BOARD OF EDUCATION OF THE TIPP CITY EXEMPTED VILLAGE SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 3d 332.

No. 10–1306. COX *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 328 S. W. 3d 358.

No. 10–1308. JAEGER *v.* CELLCO PARTNERSHIP, DBA VERIZON WIRELESS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 402 Fed. Appx. 645.

No. 10–1311. BLUE BELL CREAMERIES, LP *v.* ROBERTS, COMMISSIONER, TENNESSEE DEPARTMENT OF REVENUE. Sup. Ct. Tenn. Certiorari denied. Reported below: 333 S. W. 3d 59.

No. 10–1313. CLELLAN *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 2010-Ohio-3841.

No. 10–1317. MILES CHRISTI RELIGIOUS ORDER ET AL. *v.* TOWNSHIP OF NORTHVILLE, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 629 F. 3d 533.

No. 10–1319. JAKUBOWSKI *v.* CHRIST HOSPITAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 3d 195.

No. 10–1321. REYNOLDS *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 391 Fed. Appx. 45.

No. 10–1330. JONES *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 3d 827.

No. 10–1381. SACKS *v.* SACKS ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 56 So. 3d 23.

No. 10–1397. COX *v.* DESOTO COUNTY, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 848.

No. 10–1406. LEITCH *v.* MERKLEY. Ct. App. Ore. Certiorari denied. Reported below: 238 Ore. App. 580, 245 P. 3d 183.

No. 10–1419. PULLINS *v.* DISCIPLINARY COUNSEL. Sup. Ct. Ohio. Certiorari denied. Reported below: 127 Ohio St. 3d 436, 940 N. E. 2d 952.

No. 10–7013. LITTLEJOHN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 327 Wis. 2d 107, 786 N. W. 2d 123.

No. 10–7057. DEARBORN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 327 Wis. 2d 252, 786 N. W. 2d 97.

No. 10–8321. MELTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 391 Fed. Appx. 799.

No. 10–8434. DAVIS *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied.

No. 10–8448. BOWES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–8800. VOGT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 364 N. C. 425, 700 S. E. 2d 224.

No. 10–8876. JAUHARI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 986.

No. 10–8969. WILSON *v.* UNITED STATES; and
No. 10–9194. HEINRICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 798.

No. 10–9090. PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 823.

No. 10–9299. ARZOLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 361 Fed. Appx. 309.

No. 10–9620. FARMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 627 F. 3d 416.

No. 10–9651. ABU-JIHAAD, AKA HALL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 630 F. 3d 102.

No. 10–9727. HODGE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 128 Ohio St. 3d 1, 941 N. E. 2d 768.

No. 10–9873. STROMAN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 933.

No. 10–10055. LAWLER ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 10 A. 3d 122.

No. 10–10080. RIOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 216.

No. 10–10091. HERNANDEZ *v.* NEOTTI, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 256.

No. 10–10100. MCCALLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 10–10101. McKaughan *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 10–10102. Perkins *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 398 Ill. App. 3d 1103, 988 N. E. 2d 1124.

No. 10–10109. McNeal *v.* Adams, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 3d 1283.

No. 10–10110. McCune *v.* McCune. Ct. App. Ariz. Certiorari denied.

No. 10–10111. Tucker *v.* LaClaire, Warden. C. A. 2d Cir. Certiorari denied.

No. 10–10112. Wade *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 305 Ga. App. 382, 700 S. E. 2d 827.

No. 10–10121. Salinas *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 10–10122. Ramirez *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 10–10124. Rocha *v.* Coffee Creek Correctional Facility Administration et al. C. A. 10th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 141.

No. 10–10125. Robinson *v.* Houston et al. C. A. 1st Cir. Certiorari denied.

No. 10–10137. Reid *v.* Ohio. Ct. App. Ohio, Montgomery County. Certiorari denied. Reported below: 2010-Ohio-1686.

No. 10–10142. Rose *v.* Utah et al. C. A. 10th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 430.

No. 10–10143. Rhodes *v.* Knowles, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 10–10147. Crock *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 996 A. 2d 539.

No. 10–10153. Williams *v.* Martel, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 285.

No. 10–10155. BOOK *v.* MENDOZA ET AL. C. A. 2d Cir. Certiorari denied.

No. 10–10162. ANDREWS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 329 S. W. 3d 369.

No. 10–10164. BROWN, INDIVIDUALLY AND AS STATUTORY HEIR AND WRONGFUL DEATH BENEFICIARY OF BROWN ET AL., DECEASED *v.* ILLINOIS CENTRAL RAILROAD CO., INC., AKA CANADIAN NATIONAL RAILROAD, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 480 Fed. Appx. 753.

No. 10–10167. WHITLOW ET UX. *v.* PORRAS CUBILLO. Sup. Ct. Va. Certiorari denied.

No. 10–10170. CHEESEMAN *v.* GARRISON ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10175. OLIVO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 10–10178. JOHNSON *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 10–10182. MCCREARY *v.* GRANHOLM ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–10186. JAMES *v.* REDNOUR. Sup. Ct. Ill. Certiorari denied.

No. 10–10187. WILLIAMS *v.* HOOKS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 307.

No. 10–10191. OYENIK *v.* SCHAFF ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10193. MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 330 S. W. 3d 891.

No. 10–10199. DUELL *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–10201. RUSSELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 4th 1228, 242 P. 3d 68.

No. 10–10204. ST. JOHN *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied.

No. 10–10205. DENNIS *v.* CITY OF NORTH MIAMI, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 397.

No. 10–10209. WILLIAMS *v.* PRUDDEN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–10211. MCCARTHY *v.* SCOFIELD ET AL. Ct. App. Mich. Certiorari denied.

No. 10–10228. BRESTLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 260.

No. 10–10245. BRADLEY *v.* TERRELL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–10291. HATTON *v.* VIRGINIA EMPLOYMENT COMMISSION ET AL. Sup. Ct. Va. Certiorari denied.

No. 10–10306. KING *v.* SHERRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10328. POWELL *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 96.

No. 10–10365. GRAY *v.* COX ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10385. BEAN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 402 Ill. App. 3d 1211, 1 N. E. 3d 130.

No. 10–10424. WILLARD *v.* HICKSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 288.

No. 10–10461. JARVIS *v.* ENTERPRISE FLEET SERVICES & LEASING CO. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 668.

No. 10–10535. BAHENA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 10–10540. WATSON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 629.

No. 10–10567. SAWYER *v.* STEWARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–10614. SUMPTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 422 Fed. Appx. 235.

No. 10–10618. SMEAD *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 2010-Ohio-4462.

No. 10–10622. DADI ET VIR *v.* DANZIG, TRUSTEE. App. Ct. Conn. Certiorari denied. Reported below: 125 Conn. App. 254, 11 A. 3d 153.

No. 10–10634. CANNON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–10645. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 628 F. 3d 791.

No. 10–10653. JOHNSON *v.* UNITED STATES PAROLE COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 936.

No. 10–10654. KELLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 395 Fed. Appx. 912.

No. 10–10657. DANIELS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 676.

No. 10–10658. CHANDLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 395 Fed. Appx. 908.

No. 10–10660. COCKERHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 944.

No. 10–10661. DELGADO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–10663. MENDOZA-MENDOZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 600.

No. 10–10664. BAHENA-BAHENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 727.

No. 10–10665. BRISENO-MARIN, AKA LOPEZ-LOPEZ, AKA MARIN-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 947.

No. 10–10667. BETEMIT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 787.

No. 10–10669. SCHUETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 792.

No. 10–10671. MCDONALD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–10680. PIERCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 988.

No. 10–10685. ARNOLD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–10687. VAUGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 832.

No. 10–10708. WADDELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 577.

No. 10–10739. POLLARD *v.* YOST, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 406 Fed. Appx. 635.

No. 10–10746. ACREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 722.

No. 10–10759. GLADNEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 3d 1011.

No. 10–10764. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 826.

No. 10–10766. DUCKETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 185.

No. 10–10769. MCCUTCHEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 10 A. 3d 1158.

No. 10–10771. AGUIRRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 420 Fed. Appx. 678.

No. 10–10772. BLOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 10–10773. AGUILAR-ARRAIZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 182.

No. 10–537. Osage Nation *v.* Irby, Secretary-Member, Oklahoma Tax Commission, et al. C. A. 10th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 597 F. 3d 1117.

No. 10–627. City of New York, New York *v.* Permanent Mission of India to the United Nations et al. C. A. 2d Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 618 F. 3d 172.

No. 10–1049. Larson et al. *v.* United States; and
No. 10–1061. Ruble *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of these petitions. Reported below: 407 Fed. Appx. 506.

No. 10–1147. White & Case LLP *v.* United States; and
No. 10–1176. Nossaman LLP et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Justice Alito and Justice Kagan took no part in the consideration or decision of these petitions. Reported below: 627 F. 3d 1143.

No. 10–1173. Sergeants Benevolent Association Health and Welfare Fund, on Behalf of Themselves and All Others Similarly Situated, et al. *v.* Eli Lilly & Co. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 620 F. 3d 121.

No. 10–1218. Simmonds *v.* Credit Suisse Securities (USA) LLC et al. C. A. 9th Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 638 F. 3d 1072.

No. 10–1249. Tropp *v.* Corporation of Lloyd's. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 385 Fed. Appx. 36.

No. 10–1302. Puiatti *v.* Buss, Secretary, Florida Department of Corrections. C. A. 11th Cir. Motions of Center for Constitutional Rights et al. and Florida Capital Resource Center for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 626 F. 3d 1283.

No. 10–1303. HEYDT-BENJAMIN *v.* HEYDT-BENJAMIN. C. A. 2d Cir. Motion of Professor Linda D. Elrod et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 404 Fed. Appx. 527.

No. 10–8373. DERBY *v.* UNITED STATES. C. A. 9th Cir.;
No. 10–8607. JOHNSON *v.* UNITED STATES. C. A. 2d Cir.;
No. 10–8768. SCHMIDT *v.* UNITED STATES. C. A. 5th Cir.; and
No. 10–8885. TURNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of No. 10–8607. Reported below: No. 10–8373, 400 Fed. Appx. 162; No. 10–8607, 616 F. 3d 85; No. 10–8768, 623 F. 3d 257; and No. 10–8885, 402 Fed. Appx. 747.

JUSTICE SCALIA, dissenting.

Before us are petitions for certiorari by criminal defendants asking us to decide whether four more of the "vast variety of . . . criminal offenses" that we have not yet addressed, see *Sykes* v. *United States*, *ante*, at 29–31, 33 (SCALIA, J., dissenting), are crimes of violence under the residual provision of the Armed Career Criminal Act (ACCA). See 18 U. S. C. § 924(e)(2)(B)(ii). They are:

- *Derby* v. *United States*, No. 10–8373. Relying on its decision in *United States* v. *Mayer*, 560 F. 3d 948 (2009), the Ninth Circuit held that Oregon's first-degree burglary statute, Ore. Rev. Stat. § 164.225 (2009), falls within ACCA's residual provision. In *Mayer*, the Ninth Circuit conceded that Oregon's statute does not qualify as the enumerated offense of generic "burglary" under ACCA because it applies to unlawful entries into "booths, vehicles, boats, and aircraft," 560 F. 3d, at 959, and not just buildings and structures. See *Taylor* v. *United States*, 495 U. S. 575, 598 (1990). Nevertheless, it held that Oregon's statute falls within the residual provision, because burglaries under that statute lead to a "risk of a physical confrontation." 560 F. 3d, at 962; but see *id.*, at 952 (Kozinski, C. J., dissenting from denial of rehearing en banc) (noting that "Oregon prosecutes as burglars people who pose *no* risk of injury to anyone," such as an individual who "enter[ed] public telephone booths to steal change from coin boxes").
- *Johnson* v. *United States*, No. 10–8607. The Second Circuit, over a dissent, held that the Connecticut offense of "rioting

at a correctional institution," Conn. Gen. Stat. § 53a–179b(a) (2011), which punishes a defendant who "incites, instigates, organizes, connives at, causes, aids, abets, assists or takes part in any disorder, disturbance, strike, riot or other organized disobedience to the rules and regulations of [a correctional] institution," falls within ACCA's residual provision. In response to the defendant's argument that the statute punishes activities such as "'inciting or participating in a hunger strike'" or "'refusal to work at a prison job,'" the court reasoned that even "hypothetical acts of 'passive disobedience' . . . involve deliberate and purposeful conduct." 616 F. 3d 85, 90 (2010). It also held that such activities were risky because "prisons are like powder kegs, where even the slightest disturbance can have explosive consequences." *Id.*, at 94.

- *Schmidt* v. *United States*, No. 10–8768. The Fifth Circuit held that the federal offense of theft of a firearm from a licensed dealer, 18 U. S. C. § 922(u), falls within ACCA's residual provision. It held that this offense is "inherently dangerous" because it involves "stealing from a person who probably either possesses or has easy access to firearms," and because "stolen firearms are more likely to be used in connection with illegal and inherently harmful activities than are lawfully possessed guns." 623 F. 3d 257, 264 (2010).
- *Turner* v. *United States*, No. 10–8885. Relying on its decision in *United States* v. *Jarmon*, 596 F. 3d 228 (2010), the Fourth Circuit held that ACCA's residual provision covers the Virginia offense of larceny from the person, Va. Code Ann. § 18.2–95(i) (Lexis 2009), defined as theft of over $5 in money or goods from another person—in other words, pickpocketing. In *Jarmon*, the court justified its apparent view that Oliver Twist was a violent felon by noting that larceny "requires the offender to make purposeful, aggressive moves to part the victim from his or her property, creating a . . . risk of violent confrontation" similar to the risk of violent confrontation during burglaries. 596 F. 3d, at 232.

How we would resolve these cases if we granted certiorari would be a fine subject for a law-office betting pool. No one knows for sure. Certainly our most recent decision interpreting

ACCA's residual clause, *Sykes* v. *United States*, *ante*, p. 1, would be of no help. The "rule" we announced there, as far as I can tell, is as follows: A court must compare the degree of risk of the crime in question with the degree of risk of ACCA's enumerated offenses (burglary, extortion, arson, and crimes involving the use of explosives) as a "beginning point," *ante*, at 9; look at the statistical record, which is not "dispositive" but sometimes confirms "commonsense conclusion[s]," *ante*, at 10; and check whether the crime is "purposeful, violent, and aggressive," unless of course the crime is among the unspecified "many cases" in which that test is "redundant with the inquiry into risk," *ante*, at 13. And of course given our track record of adding a new animal to our bestiary of ACCA residual-clause standards in each of the four successive cases we have thus far decided, see *ante*, at 29–31 (SCALIA, J., dissenting), who knows what new beasties our fifth, sixth, seventh, and eighth tries would produce? Surely a perfectly fair wager.

If it is uncertain how this Court will apply *Sykes* and the rest of our ACCA cases going forward, it is even more uncertain how our lower-court colleagues will deal with them. Conceivably, they will simply throw the opinions into the air in frustration, and give free rein to their own feelings as to what offenses should be considered crimes of violence—which, to tell the truth, seems to be what we have done. (Before throwing the opinions into the air, however, they should check whether littering—or littering in a purposeful, violent, and aggressive fashion—is a felony in their jurisdiction. If so, it may be a violent felony under ACCA; or perhaps not.)

Since our ACCA cases are incomprehensible to judges, the statute obviously does not give "person[s] of ordinary intelligence fair notice" of its reach. *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979) (internal quotation marks omitted). I would grant certiorari, declare ACCA's residual provision to be unconstitutionally vague, and ring down the curtain on the ACCA farce playing in federal courts throughout the Nation.

Rehearing Denied

No. 09–10053. MITCHELL *v.* UNITED STATES, 561 U. S. 1028;

No. 10–1098. THREATT *v.* DONOVAN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 563 U. S. 938;

No. 10–9000. LEWIS *v.* RICCI, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL., 563 U. S. 943;

No. 10–9032. GUYTON *v.* HUNT, 563 U. S. 944;

No. 10–9061. LEE *v.* FEDERAL EMERGENCY MANAGEMENT AGENCY ET AL., 563 U. S. 923;

No. 10–9252. TAFARI *v.* WEINSTOCK ET AL., 563 U. S. 977;

No. 10–9277. HAMMER *v.* FOREST HIGHLANDS COMMUNITY ASSN., 563 U. S. 978;

No. 10–9486. PONTON *v.* AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO, ET AL., 563 U. S. 995; and

No. 10–9896. NORWOOD *v.* BOARD OF TRUSTEES OF UNIVERSITY OF ARKANSAS AT LITTLE ROCK, 563 U. S. 1012. Petitions for rehearing denied.

No. 10–9732. HAQUE *v.* IMMIGRATION AND CUSTOMS ENFORCEMENT ET AL., 563 U. S. 1017; and

No. 10–9737. HAQUE *v.* DEPARTMENT OF HOMELAND SECURITY ET AL., 563 U. S. 1017. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

JUNE 28, 2011

Certiorari Granted—Vacated and Remanded

No. 09–1395. BEER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for consideration of the question of preclusion raised by the Acting Solicitor General in his brief for the United States filed July 26, 2010. The Court considers it important that there be a decision on the question, rather than that an answer be deemed unnecessary in light of prior precedent on the merits. Further proceedings after decision of the preclusion question are for the Court of Appeals to determine in the first instance. JUSTICE BREYER would grant the petition for writ of certiorari and set the case for argument. Reported below: 361 Fed. Appx. 150.

JUSTICE SCALIA, dissenting.

It has been my consistent view, not always shared by the Court, that "we have no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered."

Webster v. *Cooper*, 558 U. S. 1039, 1041–1042 (2009) (dissenting opinion). Today's vacatur resembles that in *Youngblood* v. *West Virginia*, 547 U. S. 867 (2006) *(per curiam)*, from which I dissented, *id.*, at 870. I would grant the petition and set the case for argument.

No. 10–113. RIVERA-MARTINEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Freeman* v. *United States*, *ante*, p. 522. Reported below: 607 F. 3d 283.

No. 10–250. DOW CHEMICAL CANADA ULC *v.* FANDINO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *J. McIntyre Machinery, Ltd.* v. *Nicastro*, *ante*, p. 873.

No. 10–984. IMS HEALTH INC. ET AL. *v.* SCHNEIDER, ATTORNEY GENERAL OF MAINE. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sorrell* v. *IMS Health Inc.*, *ante*, p. 552. Reported below: 616 F. 3d 7.

No. 10–5479. BARBA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.; and

No. 10–6278. DILBOY *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Reported below: 160 N. H. 135, 999 A. 2d 1092. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Bullcoming* v. *New Mexico*, *ante*, p. 647.

No. 10–6258. CARRIGAN *v.* UNITED STATES. C. A. 3d Cir.;

No. 10–7139. CEPEDA *v.* UNITED STATES. C. A. 1st Cir.; and

No. 10–7565. SYLVESTER *v.* UNITED STATES. C. A. 3d Cir. Reported below: 391 Fed. Appx. 205. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Freeman* v. *United States*, *ante*, p. 522.

Certiorari Granted—Remanded

No. 09–10246. GOINS *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. The Court reversed the judgment below in *Freeman* v. *United States*, *ante*, p. 522. Therefore, certiorari granted, and case re-

manded for further proceedings. Reported below: 355 Fed. Appx. 1.

Certiorari Granted

No. 10–1062. SACKETT ET VIR *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 9th Cir. Certiorari granted limited to the following questions: (1) May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U. S. § 704? (2) If not, does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause? Reported below: 622 F. 3d 1139.

No. 10–8505. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 238 Ill. 2d 125, 939 N. E. 2d 268.

Certiorari Denied

No. 09–10755. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 28 So. 3d 838.

No. 10–56. REINAUER TRANSPORTATION COS., LLC, ET AL. *v.* BROWN. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 67 App. Div. 3d 106, 886 N. Y. S. 2d 769.

No. 10–75. CONSOLIDATED RAIL CORPORATION *v.* BATTAGLIA. Ct. App. Ohio, Lucas County. Certiorari denied. Reported below: 2009-Ohio-5505.

No. 10–795. GREEN PARTY OF CONNECTICUT ET AL. *v.* LENGE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 3d 213.

No. 10–966. CLEMENS *v.* MCNAMEE. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 3d 374.

No. 10–1004. PIRELLI PNEUS LTDA *v.* GUNN, INDIVIDUALLY AND AS GUARDIAN OF GUNN, AN INCAPACITATED PERSON. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 64 So. 3d 1272.

No. 10–1012. DUCASSE *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 8 A. 3d 1252.

No. 10–1019. ABBYY PRODUCTION, LLC *v.* NUANCE COMMUNICATIONS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 626 F. 3d 1222.

No. 10–6865. AGUILAR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 280 Va. 322, 699 S. E. 2d 215.

No. 10–8337. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 397 Fed. Appx. 779.

No. 10–617. ROBERTS *v.* KAUFFMAN RACING EQUIPMENT, L. L. C. Sup. Ct. Ohio. Motion of Center for Democracy & Technology for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 126 Ohio St. 3d 81, 930 N. E. 2d 784.

No. 10–925. GRAND TRUNK WESTERN RAILROAD, INC. *v.* SHEPARD. Ct. App. Ohio, Cuyahoga County. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 2010-Ohio-1853.

JUNE 29, 2011

Dismissal Under Rule 46

No. 10–1310. NOREX PETROLEUM LTD. *v.* ACCESS INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 631 F. 3d 29.

Certiorari Denied

No. 10–11153 (10A1253). BIBLE *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

JULY 7, 2011

Miscellaneous Order. (See Nos. 11–5001, 11–5002, and 11–5081, *ante,* p. 940.)

JULY 19, 2011

Certiorari Denied

No. 11–5311 (11A72). WEST *v.* ARIZONA. Super. Ct. Ariz., County of Pima. Application for stay of execution of sentence of

death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

No. 11–5339 (11A79). WEST *v.* BREWER, GOVERNOR OF ARIZONA, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 652 F. 3d 1060.

JULY 20, 2011

Miscellaneous Order

No. 11–5350 (11A81). IN RE STROMAN. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 11–5320 (11A73). STROMAN *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 11–5361 (11A97). DEYOUNG *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 646 F. 3d 1319.

Rehearing Denied

No. 10–9873 (11A74). STROMAN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1040. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for rehearing denied.

JULY 22, 2011

Dismissal Under Rule 46

No. 10–997. NORTH CAROLINA EX REL. COOPER, ATTORNEY GENERAL OF NORTH CAROLINA *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 615 F. 3d 291.

JULY 25, 2011

Rehearing Denied

No. 10–765. YOUNG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* VERIZON'S BELL ATLANTIC CASH BALANCE PLAN ET AL., 563 U. S. 1007;

No. 10–809. MURDOCH *v.* CASTRO, WARDEN, ET AL., 563 U. S. 987;

No. 10–1126. SPRINGER *v.* PERRYMAN, JUDGE, CIRCUIT COURT OF ALABAMA, RANDOLPH COUNTY, ET AL., 563 U. S. 988;

No. 10–1142. SELIG *v.* ROESHMAN, 563 U. S. 975;

No. 10–1206. DOE ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL., 563 U. S. 1022;

No. 10–1284. IN RE FORD, 563 U. S. 986;

No. 10–7867. WINN *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 563 U. S. 990;

No. 10–8349. TIMMONS *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, 562 U. S. 1291;

No. 10–8784. FAYIGA *v.* CASSAGNOL ET AL., 563 U. S. 992;

No. 10–8897. GRAY *v.* LARKINS, WARDEN, 563 U. S. 910;

No. 10–8991. FITZGERALD *v.* KELLY, WARDEN, 563 U. S. 922;

No. 10–9015. LLOYD *v.* NEW HANOVER REGIONAL MEDICAL CENTER, 563 U. S. 944;

No. 10–9043. STUDY *v.* UNITED STATES, 563 U. S. 944;

No. 10–9058. ELLISON *v.* DART, SHERIFF, COOK COUNTY, ILLINOIS, ET AL., 563 U. S. 962;

No. 10–9083. THORNTON *v.* VIRGINIA, 563 U. S. 962;

No. 10–9089. ARMSTRONG *v.* CALIFORNIA, 563 U. S. 962;

No. 10–9159. STRATTON *v.* TEXAS (four judgments), 563 U. S. 964;

No. 10–9232. EICHER *v.* DIODATI, 563 U. S. 977;

No. 10–9319. BARNES *v.* IMS MANAGEMENT, LLC, AS AGENT FOR METROPOLITAN GARDENS DEVELOPERS, LLP, 563 U. S. 992;

No. 10–9337. WATSON *v.* FLORIDA, 563 U. S. 992;

No. 10–9351. MANSEAU ET UX. *v.* CITY OF MIRAMAR, FLORIDA, ET AL., 563 U. S. 993;

No. 10–9365. PAGE *v.* FLORIDA, 563 U. S. 993;

No. 10–9373. MARTIN *v.* VOLUNTEER AUTOMOTIVE, 563 U. S. 993;

No. 10–9378. TIDWELL *v.* FLORIDA, 563 U. S. 979;

No. 10–9430. Cooper *v.* City of Dallas, Texas, 563 U. S. 949;

No. 10–9439. Teague *v.* North Carolina Department of Transportation, 563 U. S. 1002;

No. 10–9444. Pfeiferling *v.* United States, 563 U. S. 949;

No. 10–9462. Jackson *v.* Herndon, Warden, 563 U. S. 994;

No. 10–9493. Jackson *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 563 U. S. 995;

No. 10–9542. Daniels *v.* Bally's Atlantic City et al., 563 U. S. 1010;

No. 10–9602. Monacelli *v.* Ford Motor Co., 563 U. S. 1011;

No. 10–9612. Nelson *v.* Lewis et al., 563 U. S. 1011;

No. 10–9623. Blankenship *v.* Simon, Judge, County Court of Florida, Escambia County, et al., 563 U. S. 1011;

No. 10–9645. McGowan *v.* Merrill, Warden, 563 U. S. 980;

No. 10–9660. Zabriskie *v.* Florida, 563 U. S. 996;

No. 10–9736. Glenn *v.* United States, 563 U. S. 967;

No. 10–9798. Cockerham *v.* United States, 563 U. S. 981;

No. 10–9818. Guzman *v.* United States, 563 U. S. 981;

No. 10–9819. Haywood *v.* Hillman, Chief Magistrate Judge, United States District Court for the Central District of California, et al., 563 U. S. 1012;

No. 10–9890. Hearns *v.* Artus, Superintendent, Clinton Correctional Facility, 563 U. S. 1012;

No. 10–9925. Ruiz Montes *v.* United States, 563 U. S. 999;

No. 10–9930. T. G. *v.* New Jersey Division of Youth and Family Services, 563 U. S. 1013;

No. 10–9952. Brown *v.* United States, 563 U. S. 999;

No. 10–10047. In re Miles, 563 U. S. 986;

No. 10–10084. Armwood *v.* New Jersey, 563 U. S. 1026;

No. 10–10206. In re Ward, 563 U. S. 1007;

No. 10–10324. Cawthon *v.* United States, 563 U. S. 1039; and

No. 10–10571. Davis *v.* House of Representatives, Eleanor Holmes Norton's Office, *ante*, p. 1028. Petitions for rehearing denied.

No. 10–8731. Lyles *v.* Lemmon et al., 563 U. S. 929. Petition for rehearing denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 10–9320. BISSON *v.* MARTIN LUTHER KING, JR. HEALTH CLINIC ET AL., 563 U. S. 1002. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 10–8740. LIGON *v.* ILLINOIS, 562 U. S. 1296;

No. 10–8848. KOCH *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL., 562 U. S. 1297; and

No. 10–9214. KING *v.* UT MEDICAL GROUP, INC., ET AL., 563 U. S. 965. Motions for leave to file petitions for rehearing denied.

JULY 28, 2011

Miscellaneous Order

No. 11–5529 (11A129). IN RE JACKSON. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 11–5506 (11A123). JACKSON *v.* DELAWARE. Sup. Ct. Del. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 21 A. 3d 27.

JULY 29, 2011

Miscellaneous Order

No. 11A117. FLORIDA *v.* VALLE. Application to vacate the stay of execution of sentence of death entered by the Florida Supreme Court on July 25, 2011, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

AUGUST 9, 2011

Dismissal Under Rule 46

No. 10–1384. MAX RACK, INC. *v.* HOIST FITNESS SYSTEMS, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 408 Fed. Appx. 364.

August 15, 2011

Miscellaneous Orders

No. 10A917. Grayson *v.* Thomas, Commissioner, Alabama Department of Corrections. Application for certificate of appealability, addressed to Justice Sotomayor and referred to the Court, denied.

No. 10A1185. In re Dubin. Application for stay, addressed to Justice Thomas and referred to the Court, denied.

No. 10–209. Lafler *v.* Cooper. C. A. 6th Cir. [Certiorari granted, 562 U. S. 1127.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 10–444. Missouri *v.* Frye. Ct. App. Mo., Western Dist. [Certiorari granted, 562 U. S. 1128.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 10–577. Kawashima et ux. *v.* Holder, Attorney General. C. A. 9th Cir. [Certiorari granted, 563 U. S. 1007.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 10–680. Howes, Warden *v.* Fields. C. A. 6th Cir. [Certiorari granted, 562 U. S. 1199.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 10–1001. Martinez *v.* Ryan, Director, Arizona Department of Corrections. C. A. 9th Cir. [Certiorari granted, 563 U. S. 1032.] Motion of petitioner to dispense with printing the joint appendix granted.

Rehearing Denied

No. 09–993. PLIVA, Inc., et al. *v.* Mensing, *ante*, p. 604;

No. 09–1039. Actavis Elizabeth, LLC *v.* Mensing, *ante*, p. 604;

No. 09–1501. Actavis, Inc. *v.* Demahy, *ante*, p. 604;

No. 10–179. Stern, Executor of the Estate of Marshall *v.* Marshall, Executrix of the Estate of Marshall, *ante*, p. 462;

No. 10–1254. PARKER *v.* RICHMOND COUNTY BOARD OF EDUCATION, *ante*, p. 1019;

No. 10–1260. GARD ET UX. *v.* CITY OF OMAHA, NEBRASKA, *ante*, p. 1005;

No. 10–1272. TALLEY *v.* HOUSING AUTHORITY OF COLUMBUS, GEORGIA, ET AL., *ante*, p. 1020;

No. 10–1274. AGNEW *v.* SUSSEX CONDOMINIUM UNIT OWNERS ASSN., 563 U. S. 1022;

No. 10–1275. CONSTANT *v.* CALIFORNIA EX REL. DEPARTMENT OF TRANSPORTATION, *ante*, p. 1020;

No. 10–1277. CAMPBELL *v.* KELLERMYER BUILDING SERVICES, LLC, *ante*, p. 1020;

No. 10–1313. CLELLAN *v.* OHIO, *ante*, p. 1039;

No. 10–1315. EDWARDS *v.* DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY, 563 U. S. 1022;

No. 10–1352. WADSWORTH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 563 U. S. 1034;

No. 10–7592. DOE *v.* UNITED STATES, *ante*, p. 1005;

No. 10–8294. CATO *v.* SWARTHOUT, WARDEN, 563 U. S. 1035;

No. 10–8988. FULLER *v.* SMITH, 563 U. S. 943;

No. 10–9069. MONROE *v.* KRIPPEL ET AL., 563 U. S. 1009;

No. 10–9085. SPENCER *v.* ALABAMA, *ante*, p. 1022;

No. 10–9153. SIMON *v.* CITY OF ATLANTA, GEORGIA, ET AL., 563 U. S. 964;

No. 10–9215. MATSUDA *v.* HAWAII ET AL., 563 U. S. 977;

No. 10–9235. SMITH *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 563 U. S. 977;

No. 10–9314. HENRY *v.* ALABAMA ET AL., 563 U. S. 992;

No. 10–9334. ROSS *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF WASHINGTON MUTUAL BANK, *ante*, p. 1006;

No. 10–9341. QUATTROCCHI *v.* FLORIDA, 563 U. S. 992;

No. 10–9389. VAN ZANT *v.* FLORIDA PAROLE COMMISSION ET AL., 563 U. S. 993;

No. 10–9407. BOCZKOWSKI *v.* JACKSON ET AL., 563 U. S. 994;

No. 10–9428. CRISDON *v.* NEW JERSEY DEPARTMENT OF EDUCATION, 563 U. S. 994;

No. 10–9481. LYTLE *v.* NORTH CAROLINA, 563 U. S. 995;

No. 10–9490. WEINRICH *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 563 U. S. 995;

No. 10–9516. PETTUS *v.* UNITED STATES ET AL., *ante*, p. 1023;

No. 10–9572. HEINONEN *v.* SCOTT, 563 U. S. 1010;

No. 10–9578. SIMON *v.* GEORGIA ET AL., 563 U. S. 1010;

No. 10–9625. HALL *v.* BERGHUIS, WARDEN, 563 U. S. 996;

No. 10–9706. HARRIS *v.* BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY & AGRICULTURAL & MECHANICAL COLLEGE, 563 U. S. 1024;

No. 10–9710. GOODMAN *v.* MERIT SYSTEMS PROTECTION BOARD, 563 U. S. 1012;

No. 10–9720. DIGSBY *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 563 U. S. 1024;

No. 10–9787. KARUPAIYAN ET AL. *v.* BROWN ET AL., 563 U. S. 1036;

No. 10–9813. CRIM *v.* BAYSHORE OF NAPLES, INC., 563 U. S. 1036;

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No. 10–10095. FIGURA TORREFRANCA *v.* HORNE, ATTORNEY GENERAL OF ARIZONA, ET AL.; and FIGURA TORREFRANCA *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1025;

No. 10–10096. WOODWARD *v.* KANSAS, 563 U. S. 1038;

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No. 10–10155. BOOK *v.* MENDOZA ET AL., *ante*, p. 1042;

No. 10–10163. BURGIN *v.* LAHAYE ET AL., 563 U. S. 1038;

No. 10–10166. AKBAR *v.* PADULA, WARDEN, *ante*, p. 1009;

No. 10–10228. BRESTLE *v.* UNITED STATES, *ante*, p. 1043;

No. 10–10243. BREWINGTON *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., 563 U. S. 1039;

No. 10–10327. IN RE POIRIER, 563 U. S. 1020;

No. 10–10461. JARVIS *v.* ENTERPRISE FLEET SERVICES & LEASING CO., *ante*, p. 1043; and

No. 10–10601. HINES *v.* UNITED STATES, *ante*, p. 1029. Petitions for rehearing denied.

No. 10–82. UNITED STATES *v.* GONZALEZ, *ante*, p. 1032;

No. 10–9976. KNIGHT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, 563 U. S. 1002; and

No. 10–10568. IN RE SCHOTZ, *ante*, p. 1003. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

No. 10–10305. VONDETTE *v.* UNITED STATES (two judgments), 563 U. S. 1041. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

AUGUST 18, 2011

Certiorari Denied

No. 11–5705 (11A165). JACKSON *v.* KELLY, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would grant the application for stay of execution. Reported below: 650 F. 3d 477.

AUGUST 23, 2011

Dismissal Under Rule 46

No. 10–1389. BREAKTHROUGH MANAGEMENT GROUP, INC. *v.* CHUKCHANSI GOLD CASINO AND RESORT ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 629 F. 3d 1173.

SEPTEMBER 2, 2011

Miscellaneous Orders

No. 10A995 (11–5520). RAMIREZ *v.* PEOPLE OF THE UNITED STATES ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 11A7 (11–146). MOSS *v.* FAIRBORN CITY SCHOOLS. C. A. 6th Cir. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 11A85. ZANGARA *v.* SOMERSET MEDICAL CENTER. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 11A160 (11–198). NIETO *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

Rehearing Denied

No. 10–1084. FERGUSON *v.* UNITED STATES, *ante*, p. 1038;

No. 10–1280. WIDTFELDT *v.* NEBRASKA EQUAL OPPORTUNITY COMMISSION ET AL., *ante*, p. 1020;

No. 10–1301. BASS *v.* NEVADA, *ante*, p. 1038;

No. 10–6370. IN RE STARLING, 562 U. S. 1177;

No. 10–9793. QUIRE *v.* FLORIDA, 563 U. S. 1036;

No. 10–9843. CENTENO *v.* HARDY, WARDEN, 563 U. S. 1012;

No. 10–9900. B. J. G. *v.* ST. CHARLES COUNTY SHERIFF ET AL., *ante*, p. 1006;

No. 10–9988. S. G. *v.* J. H., *ante*, p. 1008;

No. 10–10013. PARKS *v.* LOWE ET AL., *ante*, p. 1023;

No. 10–10015. MARCOS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1023;

No. 10–10101. MCKAUGHAN *v.* TENNESSEE, *ante*, p. 1041;

No. 10–10121. SALINAS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1041;

No. 10–10127. PARTOVI *v.* UNITED STATES, *ante*, p. 1009;

No. 10–10139. PARTOVI *v.* UNKNOWN OFFICER ET AL., *ante*, p. 1009;

No. 10–10164. BROWN, INDIVIDUALLY AND AS STATUTORY HEIR AND WRONGFUL DEATH BENEFICIARY OF BROWN ET AL., DECEASED *v.* ILLINOIS CENTRAL RAILROAD CO., INC., AKA CANADIAN NATIONAL RAILROAD, ET AL., *ante*, p. 1042;

No. 10–10205. DENNIS *v.* CITY OF NORTH MIAMI, FLORIDA, ET AL., *ante*, p. 1043;

No. 10–10211. MCCARTHY *v.* SCOFIELD ET AL., *ante*, p. 1043;

No. 10–10226. WILLIAMS *v.* ILLINOIS, 563 U. S. 1039;

No. 10–10268. LAMB *v.* PALMER, WARDEN, *ante*, p. 1026;

No. 10–10389. AUSSICKER *v.* CURTIN, WARDEN, *ante*, p. 1026;

No. 10–10439. SALAZAR *v.* UNITED STATES, *ante*, p. 1010; and

No. 10–10551. CUMMINGS, AKA DAVILA *v.* UNITED STATES, *ante,* p. 1027. Petitions for rehearing denied.

No. 10–10336. MINCEY *v.* UNITED STATES, 563 U. S. 1042. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9361. CUNNINGHAM *v.* PALMER, WARDEN, 563 U. S. 993. Motion for leave to file petition for rehearing denied.

SEPTEMBER 9, 2011

Dismissal Under Rule 46

No. 11–22. JENKINS, WARDEN *v.* SUSSMAN. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 636 F. 3d 329.

SEPTEMBER 13, 2011

Certiorari Denied

No. 11–6194 (11A258). WOODS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 15, 2011

Miscellaneous Orders

No. 11–6372 (11A295). IN RE BUCK. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 11–6391 (11A297). BUCK *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

SEPTEMBER 20, 2011

Dismissal Under Rule 46

No. 11–5794. IN RE PEARSON. Petition for writ of mandamus dismissed under this Court's Rule 46.

Miscellaneous Order

No. 11A302 (11–6427). FOSTER *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

SEPTEMBER 21, 2011

Miscellaneous Order

No. 11A317. DAVIS *v.* HUMPHREY, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

SEPTEMBER 22, 2011

Certiorari Denied

No. 11–6529 (11A321). MASON *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.

SEPTEMBER 26, 2011

Dismissal Under Rule 46

No. 10–1558. IN RE RICCI ET AL. Petition for writ of mandamus dismissed under this Court's Rule 46.

SEPTEMBER 27, 2011

Miscellaneous Orders

No. 09–958. DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES *v.* INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., ET AL. (two judgments);

No. 09–1158. Douglas, Director, California Department of Health Care Services *v.* California Pharmacists Assn. et al.; Douglas, Director, California Department of Health Care Services *v.* California Hospital Assn. et al.; Douglas, Director, California Department of Health Care Services *v.* Independent Living Center of Southern California, Inc., et al.; Douglas, Director, California Department of Health Care Services *v.* Dominguez, By and Through Her Mother and Next Friend Brown, et al.; and

No. 10–283. Douglas, Director, California Department of Health Care Services *v.* Santa Rosa Memorial Hospital et al. C. A. 9th Cir. [Certiorari granted *sub nom.* in No. 09–958, *Maxwell-Jolly* v. *Independent Living Center of Southern Cal., Inc.;* in No. 09–1158, *Maxwell-Jolly* v. *California Pharmacists Assn.; Maxwell-Jolly* v. *California Hospital Assn.; Maxwell-Jolly* v. *Independent Living Center of Southern Cal., Inc.; Maxwell-Jolly* v. *Dominguez;* in No. 10–283, *Maxwell-Jolly* v. *Santa Rosa Memorial Hospital,* 562 U. S. 1177.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 10–507. Pacific Operators Offshore, LLP, et al. *v.* Valladolid et al. C. A. 9th Cir. [Certiorari granted, 562 U. S. 1215.] Motion of the Solicitor General for divided argument granted.

No. 10–553. Hosanna-Tabor Evangelical Lutheran Church and School *v.* Equal Employment Opportunity Commission et al. C. A. 6th Cir. [Certiorari granted, 563 U. S. 903.] Motion of the Solicitor General for divided argument granted.

No. 10–945. Florence *v.* Board of Chosen Freeholders of the County of Burlington et al. C. A. 3d Cir. [Certiorari granted, 563 U. S. 917.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondents for divided argument denied.

No. 10–1001. Martinez *v.* Ryan, Director, Arizona Department of Corrections. C. A. 9th Cir. [Certiorari granted, 563 U. S. 1032.] Motion of the Solicitor General for leave

to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 10–1024. FEDERAL AVIATION ADMINISTRATION ET AL. *v.* COOPER. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1018.] Motion of the Solicitor General to dispense with printing the joint appendix granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

Certiorari Granted

No. 10–1018. FILARSKY *v.* DELIA. C. A. 9th Cir. Certiorari granted. Reported below: 621 F. 3d 1069.

No. 10–1211. VARTELAS *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari granted. Reported below: 620 F. 3d 108.

No. 10–1472. TANIGUCHI *v.* KAN PACIFIC SAIPAN, LTD., DBA MARIANAS RESORT AND SPA. C. A. 9th Cir. Certiorari granted. Reported below: 633 F. 3d 1218.

No. 10–1399. ROBERTS *v.* SEA-LAND SERVICES, INC., ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 625 F. 3d 1204.

No. 10–1542. HOLDER, ATTORNEY GENERAL *v.* MARTINEZ GUTIERREZ; and

No. 10–1543. HOLDER, ATTORNEY GENERAL *v.* SAWYERS. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 10–1542, 411 Fed. Appx. 121; No. 10–1543, 399 Fed. Appx. 313.

No. 10–9995. WOOD *v.* MILYARD, WARDEN, ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following questions: (1) Does an appellate court have the authority to raise *sua sponte* a 28 U. S. C. § 2244(d) statute of limitations defense? (2) Does the State's declaration before the District Court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had? Reported below: 403 Fed. Appx. 335.

No. 11–139. UNITED STATES *v.* HOME CONCRETE & SUPPLY, LLC, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 634 F. 3d 249.

SEPTEMBER 28, 2011

Dismissal Under Rule 46

No. 11–226. REYNOLDS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari dismissed under this Court's Rule 46.1.

Certiorari Denied

No. 11–6029 (11A229). VALLE *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Motion of Bar Human Rights Committee of England and Wales et al. for leave to file a brief as *amici curiae* granted Certiorari denied. Reported below: 70 So. 3d 530.

JUSTICE BREYER, dissenting from denial of stay.

The State of Florida seeks to execute Manuel Valle for a crime for which he was initially sentenced to death more than 33 years ago. Valle asks us to consider whether that execution following decades of incarceration on death row violates the Constitution's prohibition of "cruel and unusual punishments." U. S. Const., Amdt. 8. I would consider the claim. See *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (Stevens, J., respecting denial of certiorari); *Knight* v. *Florida*, 528 U. S. 990, 993 (1999) (BREYER, J., dissenting from denial of certiorari).

I have little doubt about the cruelty of so long a period of incarceration under sentence of death. In *Lackey* and in *Knight* Justice Stevens and I referred to the legal sources, in addition to studies of attempted suicides, that buttress the commonsense conclusion that 33 years in prison under threat of execution is cruel. See *In re Medley*, 134 U. S. 160, 172 (1890) (describing as "horrible" the "feelings" that accompany uncertainty about whether, or when, the execution will take place); *Solesbee* v. *Balkcom*, 339 U. S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); Strafer, Volunteering for Execution, 74 J. Crim. L. & C. 860, 872, n. 44 (1983) (a study of Florida inmates showed that 35% of those confined on death row attempted suicide; 42% seriously considered suicide); *id.*, at 869–871 ("Recent studies and law suits document both the barbaric conditions pervading death rows and the debilitating and life-negating effects of these conditions").

So long a confinement followed by execution would also seem unusual. The average period of time that an individual sentenced to death spends on death row is almost 15 years. Thirty-three years is more than twice as long. And, such delays are uncommon. See Dept. of Justice, Bureau of Justice Statistics, T. Snell, Statistical Tables, Capital Punishment, 2009, p. 19 (Dec. 2010) (Table 18) (approximately 113 prisoners have been under a sentence of death for more than 29 years out of 3,173 death row prisoners in total; 33 of those 113 are in Florida). Cf. *Knight*, 528 U. S., at 993–994 (BREYER, J., dissenting from denial of certiorari) (noting that 24 prisoners had been on death row for more than 20 years). See also *id.*, at 995 ("A growing number of courts outside the United States—*courts that accept or assume the lawfulness of the death penalty*—have held that lengthy delay in administering a *lawful* death penalty renders the ultimate execution inhuman, degrading, or unusually cruel").

The commonly accepted justifications for the death penalty are close to nonexistent in a case such as this one. It is difficult to imagine how an execution following so long a period of incarceration could add significantly to that punishment's deterrent value. It seems yet more unlikely that the execution, coming after what is close to a lifetime of imprisonment, matters in respect to incapacitation. Thus, I would focus upon the "moral sensibility" of a community that finds in the death sentence an appropriate public reaction to a terrible crime. See *Spaziano* v. *Florida*, 468 U. S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part). And, I would ask how often that community's sense of retribution would forcefully insist upon a death that comes only several decades after the crime was committed.

It might be argued that Valle, not the State, is responsible for the long delay. But Valle replies that more than two decades of delay reflect the State's failure to provide the kind of trial and penalty procedures that the law requires. Regardless, one cannot realistically expect a defendant condemned to death to refrain from fighting for his life by seeking to use whatever procedures the law allows.

It might also be argued that it is not so much the State as it is the numerous procedures that the law demands that produce decades of delay. But this kind of an argument does not automatically justify execution in this case. Rather, the argument may point instead to a more basic difficulty, namely, the difficulty

of reconciling the imposition of the death penalty as currently administered with procedures necessary to ensure that the wrong person is not executed.

Because this case may well raise these questions and because I believe the Court should consider them, I vote to grant the application for stay.

No. 11–6239 (11A289). VALLE *v.* SINGER, WARDEN, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 655 F. 3d 1223.

No. 11–6341 (11A290). VALLE *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 654 F. 3d 1266.

No. 11–6528 (11A320). VALLE *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 72 So. 3d 748.

No. 11–6628 (11A333). VALLE *v.* SCOTT, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 441 Fed. Appx. 688.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1069 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

GRAY *v.* KELLY, WARDEN

ON APPLICATION FOR STAY

No. 11A210 (11–5545). Decided August 25, 2011

Gray's application to stay a Federal District Court order setting a federal habeas briefing schedule pending this Court's disposition of his petition for a writ of certiorari to the Virginia Supreme Court is denied. The familiar standard for securing a stay of a judgment subject to this Court's review is inapplicable here because Gray is not seeking to stay the Virginia Supreme Court's judgment. Nor does this Court's "supervisory authority" over the District Court, which implicates an even more daunting standard, entitle Gray to relief. See *Ehrlichman* v. *Sirica*, 419 U. S. 1310, 1311–1312 (Burger, C. J., in chambers).

CHIEF JUSTICE ROBERTS, Circuit Justice.

Ricky Gray was convicted of five counts of capital murder in Virginia. He was sentenced to death on two of the counts and life imprisonment on the remaining three. After his convictions and sentences were affirmed on direct appeal, Gray filed a petition for state postconviction relief. The Virginia Supreme Court granted the petition in part, ordering vacatur of one of the convictions for which Gray was sentenced to life imprisonment. *Gray* v. *Warden of Sussex I State Prison*, 281 Va. 303, 304, 707 S. E. 2d 275, 280–281 (2011). But the court denied relief in all other respects, *ibid.*, and the Commonwealth of Virginia set a date of execution of June 16, 2011.

Meanwhile, Gray applied for appointment of counsel in the United States District Court for the Eastern District of Virginia, where he planned to file a petition for a writ of habeas corpus under 28 U. S. C. § 2254. On June 14, 2011, the Dis-

trict Court appointed counsel for Gray and stayed the execution of his death sentence for 90 days pursuant to § 2251(a)(3). In a separate order issued the same day, the District Court set a briefing schedule requiring Gray to file his federal habeas petition within 45 days, no later than July 29. In a subsequent order on June 29, the District Court extended Gray's deadline for filing a habeas petition to August 29.

On July 25, Gray filed with this Court a petition for a writ of certiorari, seeking review of the decision of the Virginia Supreme Court. He claimed that the procedures followed by that court in adjudicating his postconviction claims violated his federal constitutional rights to due process and equal protection of the laws. Gray then asked the District Court to stay its June 29 scheduling order pending this Court's disposition of his petition for certiorari to the Virginia Supreme Court. After the District Court denied the request, Gray did not seek a stay from the Court of Appeals for the Fourth Circuit, but rather filed an application for a stay with me as Circuit Justice.

Gray's application accompanies his petition for certiorari to the Virginia Supreme Court, but does not seek a stay of that court's judgment. Nor does his application seek a stay of his date of execution, which has not been reset. His application instead requests only a stay of the District Court's order requiring him to file a federal habeas petition by August 29.*

Although Gray's application invokes the familiar standard for securing a stay of a judgment subject to this Court's re-

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*Gray's application specifically requests a stay of the District Court's June 29 scheduling order. Application for Stay 14. That order *extended* the deadline for filing a federal habeas petition to August 29. A stay of that order would therefore serve only to restore the original deadline of July 29. The substance of Gray's application makes clear, however, that the relief he actually seeks is a stay of the District Court's briefing schedule in its entirety until this Court acts on his petition for a writ of certiorari to the Virginia Supreme Court.

view, see Application for Stay 4 (citing *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983)), that standard is inapplicable here because Gray does not seek a stay of such a judgment. Gray's request that this Court exercise its "supervisory authority" over the District Court, Reply to Opposition to Application for Stay 2, implicates a standard even more daunting than that applicable to a stay of a judgment subject to this Court's review. See *Ehrlichman* v. *Sirica*, 419 U. S. 1310, 1311–1312 (1974) (Burger, C. J., in chambers). Gray clearly has not established his entitlement to relief from the District Court's scheduling order.

The application for a stay is denied.

It is so ordered.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2008, 2009, AND 2010

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2008	**2009**	**2010**	**2008**	**2009**	**2010**	**2008**	**2009**	**2010**	**2008**	**2009**	**2010**
Number of cases on dockets	4	6	4	1,941	1,908	1,895	7,021	7,388	7,167	8,966	9,302	9,066
Number disposed of during term	1	2	2	1,612	1,572	1,580	6,209	6,520	6,245	7,822	8,093	7,827
Number remaining on dockets	3	4	2	329	337	315	812	868	922	1,144	1,209	1,239

	TERMS		
	2008	**2009**	**2010**
Cases argued during term	87	[2] 82	86
Number disposed of by full opinions	83	77	83
Number disposed of by per curiam opinions	3	4	3
Number set for reargument	1	0	0
Cases granted review this term	87	77	90
Cases reviewed and decided without oral argument	95	95	84
Total cases to be available for argument at outset of following term	[1] 48	40	43

[1] Includes No. 08–205 which was scheduled to be reargued on September 9, 2009.

[2] Includes No. 08–205 which was reargued on September 9, 2009.

JUNE 29, 2011

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CIVIL RIGHTS ACT OF 1964.

Employment discrimination—Class certification.—In this Title VII employment discrimination case, certification of a nationwide class of 1.5 million women was not consistent with Federal Rule of Civil Procedure 23(a)'s commonality requirement, and respondents' backpay claims—which were for individualized monetary relief—were improperly certified under Rule 23(b)(2). Wal-Mart Stores, Inc. v. Dukes, p. 338.

CLASS ACTIONS. See **Anti-Injunction Act; Civil Rights Act of 1964.**

CLEAN AIR ACT.

Carbon-dioxide emissions from power plants—Displacement of federal common-law right of abatement.—Act and Environmental Protection Agency action authorized by Act displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. American Elec. Power Co. v. Connecticut, p. 410.

COMPULSORY SELF-INCRIMINATION. See **Constitutional Law,** IV.

CONFRONTATION CLAUSE. See **Constitutional Law,** I.

CONSTITUTIONAL LAW. See also **Bankruptcy; Jurisdiction,** 2; **Standing.**

I. Confrontation of Witnesses.

Forensic evidence—Testimonial certification of laboratory report.—Sixth Amendment's Confrontation Clause does not permit prosecution to introduce forensic laboratory report containing a testimonial certification, made to prove a fact at a criminal trial, through in-court testimony of analyst who did not sign certification or personally perform or observe performance of test reported in certification. Accused has right to be confronted with analyst who performed test and made certification, unless that analyst is unavailable at trial and accused had pretrial cross-examination opportunity. Bullcoming v. New Mexico, p. 647.

II. Due Process.

Indigent noncustodial parent—Child support order—Counsel for civil contempt proceedings.—Fourteenth Amendment's Due Process Clause

CONSTITUTIONAL LAW—Continued.
does not automatically require State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration for up to a year. In particular, that Clause does not require that counsel be provided where opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and State provides alternative procedural safeguards equivalent to adequate notice of importance of ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court findings as to supporting parent's ability to comply with support order. Turner v. Rogers, p. 431.

III. Freedom of Speech.

1. *Arizona Citizens Clean Elections Act—Public funding of campaigns—Matching funds scheme.*—Act's matching funds scheme—which permits candidates opting to take public funding for their campaigns to receive additional funds when privately funded candidates' expenditures, combined with expenditures of specified independent groups, exceed publicly financed candidate's allotment—substantially burdens political speech and is not sufficiently justified by a compelling state interest to survive First Amendment scrutiny. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, p. 721.

2. *Nevada's Ethics in Government Law—Public officials' conflicts of interest.*—Nevada's Ethics in Government Law—which requires public officials who have a conflict of interest to recuse themselves from voting on a proposal or advocating its passage or failure—does not violate First Amendment. Nevada Comm'n on Ethics v. Carrigan, p. 117.

3. *Sale or rental of violent video games to minors.*—California law restricting sale or rental of violent video games to minors does not comport with First Amendment. Brown v. Entertainment Merchants Assn., p. 786.

4. *Vermont's Prescription Confidentiality Law—Sale, disclosure, and use of prescriber-identifying information.*—Vermont law—which restricts sale, disclosure, and use of prescriber-identifying information by pharmacies and similar entities—imposes content- and speaker-based burdens on expression protected by First Amendment and is thus subject to heightened judicial scrutiny, which State's justifications do not withstand. Sorrell v. IMS Health Inc., p. 552.

IV. Privilege Against Self-incrimination.

Custodial interrogation of a child—Relevance of child's age.—A child's age is relevant to determination whether child was in police custody for purposes of *Miranda* v. *Arizona*, 384 U. S. 436. J. D. B. v. North Carolina, p. 261.

CONSTITUTIONAL LAW—Continued.

V. Right to Petition Government.

Government's retaliatory actions against employee—Petition Clause liability—Matter of public concern.—A government employer's allegedly retaliatory actions against an employee do not give rise to liability under First Amendment's Petition Clause unless employee's petition related to a matter of public concern. Borough of Duryea v. Guarnieri, p. 379.

VI. Searches and Seizures.

Reliance on binding appellate precedent—Exclusionary rule.—Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to exclusionary rule. Davis v. United States, p. 229.

CREDITORS AND DEBTORS. See **Bankruptcy.**

CRIMINAL LAW. See **Anti-Drug Abuse Act of 1986; Armed Career Criminal Act; Constitutional Law** I, IV, VI; **Sentencing Reform Act of 1984; Standing; Stays.**

DEBTORS AND CREDITORS. See **Bankruptcy.**

DISCRIMINATION BASED ON SEX. See **Civil Rights of 1964.**

DRUG LABELING. See **Pre-Emption.**

DUE PROCESS. See **Constitutional Law,** II; **Jurisdiction,** 2.

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

ENVIRONMENTAL LAW. See **Clean Air Act.**

EVIDENCE. See **Constitutional Law** I, VI; **Patent Act of 1952.**

FEDERAL COURTS. See **Anti-Injunction Act.**

FEDERAL EMPLOYERS' LIABILITY ACT.

Railroad negligence—Proximate-cause standard—Jury instruction.—Act does not incorporate "proximate cause" standards developed in non-statutory common-law tort actions; rather, proper charge in FELA case tracks Act's language, informing jury that defendant railroad "caused or contributed to" railroad worker's injury "if [railroad's] negligence played a part—no matter how small—in bringing about the injury." CSX Transp., Inc. v. McBride, p. 685.

FEDERAL RULES OF CIVIL PROCEDURE. See **Civil Rights Act of 1964.**

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Sentencing Reform Act of 1984,** 1.

FEDERAL SENTENCING GUIDELINES. See **Sentencing Reform Act of 1984.**

FEDERAL-STATE RELATIONS. See **Anti-Injunction Act; Pre-Emption; Standing.**

FIFTH AMENDMENT. See **Constitutional Law,** IV.

FIRST AMENDMENT. See **Constitutional Law,** III, V.

FOURTEENTH AMENDMENT. See **Constitutional Law,** II; **Jurisdiction,** 2.

FOURTH AMENDMENT. See **Constitutional Law,** VI.

FREEDOM OF SPEECH. See **Constitutional Law,** III.

HABEAS CORPUS. See **Stays.**

INDIANA. See **Armed Career Criminal Act.**

INDIANS. See **Attorney-Client Privilege.**

JURISDICTION.

1. *Foreign corporations—Minimum contacts.*—Petitioners, three foreign subsidiaries of Goodyear USA, were not amenable to suit in North Carolina on claims unrelated to any activity of petitioners in forum State. Goodyear Dunlop Tires Operations, S. A. v. Brown, p. 915.

2. *Products liability—Foreign manufacturer—Minimum contacts—Stream-of-commerce doctrine.*—Judgment of New Jersey Supreme Court—which held that Federal Constitution permits state courts to assert jurisdiction over foreign manufacturer in products-liability suit as long as manufacturer knew, or reasonably should have known, that its products are distributed through a nationwide distribution system that *might* lead to their being sold in any State—is reversed. J. McIntyre Machinery, Ltd. v. Nicastro, p. 873.

JUVENILE DELINQUENTS. See **Mootness.**

LABELING REQUIREMENTS. See **Pre-emption.**

MOOTNESS.

Expired juvenile supervision order—Sex offender registration.—Because at time of Ninth Circuit decision, District Court's juvenile supervision order had expired and respondent was no longer subject to sex-offender-registration conditions that he sought to challenge on appeal, and because he cannot show that a decision invalidating District Court's order would likely redress some collateral consequence of registration conditions, his appeal was moot and Ninth Circuit lacked authority to decide his case on merits. United States v. Juvenile Male, p. 932.

NEVADA. See **Constitutional Law,** III, 2.

NEW JERSEY. See **Jurisdiction,** 2.

NORTH CAROLINA. See **Jurisdiction,** 1.

PATENT ACT OF 1952.

Presumption of patent validity—Burden of establishing invalidity—Clear and convincing evidence.—Section 282 of Act, which provides that "[a] patent shall be presumed valid" and that "burden of establishing invalidity of a patent or any claim thereof shall rest on party asserting such invalidity," requires an invalidity defense to be proved by clear and convincing evidence. Microsoft Corp. v. i4i Ltd. Partnership, p. 91.

PERSONAL JURISDICTION. See **Jurisdiction,** 1.

PRE-EMPTION.

Federal regulation of generic drug manufacturers—State tort suits for inadequate warning labels.—Federal drug regulations applicable to generic drug manufacturers directly conflict with, and thus pre-empt, respondents' state tort-law suits against petitioner drug manufacturers for their alleged failure to provide adequate warning labels for generic metoclopramide. PLIVA, Inc. v. Mensing, p. 604.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** IV.

PRODUCTS LIABILITY. See **Jurisdiction,** 2.

PUBLIC EMPLOYERS AND EMPLOYEES. See **Constitutional Law,** V.

RAILROADS. See **Federal Employers' Liability Act.**

REGISTRATION OF SEX OFFENDERS. See **Mootness.**

RIGHT TO PETITION GOVERNMENT. See **Constitutional Law,** V.

RIGHT TO REMAIN SILENT. See **Constitutional Law,** IV.

SECURITIES LAW.

Private right of action—False statements in mutual fund prospectuses.—Petitioners Janus Capital Group, Inc., and its wholly owned subsidiary Janus Capital Management LLC—a mutual fund investment adviser—cannot be held liable in a private action under Securities and Exchange Commission Rule 10b–5 for false statements made in prospectuses of their client Janus Investment Fund. Janus Capital Group, Inc. v. First Derivative Traders, p. 135.

SELF-INCRIMINATION. See **Constitutional Law,** IV.

SENTENCES. See **Anti-Drug Abuse Act of 1986; Armed Career Criminal Act; Sentencing Reform Act of 1984; Stays,** 2.

SENTENCING REFORM ACT OF 1984.

1. *Binding plea agreement—Reduction of Sentencing Guidelines prison term.*—Sixth Circuit's judgment—which held that, barring a miscarriage of justice or mutual mistake, defendant who enters into binding plea bargain under Federal Rule of Criminal Procedure 11(c)(1)(C) cannot benefit from retroactive reduction of Sentencing Guidelines prison term under 18 U. S. C. § 3582(c)(2)—is reversed. Freeman v. United States, p. 522.

2. *Imposing or lengthening prison term for rehabilitation.*—Title 18 U. S. C. § 3582(a) does not permit a sentencing court to impose or lengthen a prison term in order to foster a defendant's rehabilitation. Tapia v. United States, p. 319.

SEX DISCRIMINATION. See **Civil Rights Act of 1964.**

SEX OFFENDER REGISTRY. See **Mootness.**

SIXTH AMENDMENT. See **Constitutional Law,** I.

STANDING.

Constitutional challenge to federal statute criminalizing possession or use of specified chemicals.—Bond, who was charged with violating 18 U. S. C. § 229—which forbids knowing possession or use, for nonpeaceful purposes, of a chemical that "can cause death, temporary incapacitation or permanent harm to humans"—for injuring someone with chemicals during a domestic dispute, has standing to challenge § 229 on grounds that measure interferes with powers reserved to States. Bond v. United States, p. 211.

STATES' POWERS. See **Standing.**

STAYS.

1. *Federal habeas briefing schedule.*—Gray's application to stay a Federal District Court order setting a federal habeas briefing schedule pending this Court's disposition of his petition for a writ of certiorari to Virginia Supreme Court is denied. Gray v. Kelly (ROBERTS, C. J., in chambers), p. 1301.

2. *Stay of execution—Vienna Convention on Consular Relations—Habeas corpus.*—Petitioner's applications for stay of execution on ground that his conviction was obtained in violation of Vienna Convention on Consular Relations, as well as his petition for a writ of habeas corpus, are denied. Leal Garcia v. Texas, p. 940.

SUPREME COURT.

1. Presentation of Solicitor General, p. VII.
2. Retirement of Judith A. Gaskell as Librarian, p. IX.
3. Term Statistics, p. 1304.

TELECOMMUNICATIONS ACT OF 1996.

Federal Communications Commission interpretation of regulations—Incumbent local telephone service provider's "entrance facilities"—Availability to competitor for interconnection.—This Court defers to FCC's reasonable interpretation of its regulations: To satisfy its duty under 47 U. S. C. § 251(c)(2), an incumbent local telephone service provider must make its existing "entrance facilities," *i. e.*, connective transmission cables, available to a competitor at cost-based rates if facilities are to be used for interconnection of two providers' networks. Talk America, Inc. v. Michigan Bell Telephone Co., p. 50.

TENTH AMENDMENT. See **Standing.**

UNITED STATES SENTENCING GUIDELINES. See **Sentencing Reform Act of 1984.**

VERMONT. See **Constitutional Law,** III, 4.

WITNESSES. See **Constitutional Law,** I.