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OF

THE SUPREME COURT

MARCH 1 THROUGH MARCH 27, 2017

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CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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Vol. 580 (Pp. 178–472; 1168–1225) UNITED STATES REPORTS Part 2

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

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

OFFICERS OF THE COURT

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JEFFREY B. WALL, ACTING SOLICITOR GENERAL.[2]
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[1] Acting Solicitor General Francisco resigned effective March 10, 2017.
[2] Mr. Wall became Acting Solicitor General effective March 10, 2017.

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 February 25, 2016, 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, CLARENCE THOMAS, 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.

February 25, 2016.

(For next previous allotment, see 577 U. S., Pt. 2, p. II.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2016

Syllabus

BETHUNE-HILL ET AL. *v.* VIRGINIA STATE BOARD OF ELECTIONS ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 15–680. Argued December 5, 2016—Decided March 1, 2017

After the 2010 census, the Virginia State Legislature drew new lines for 12 state legislative districts, with a goal of ensuring that each district would have a black voting-age population (BVAP) of at least 55%. Certain voters filed suit, claiming that the new districts violated the Fourteenth Amendment's Equal Protection Clause. State legislative officials (State) intervened to defend the plan. A three-judge District Court rejected the challenges. As to 11 of the districts, the court concluded that the voters had not shown, as this Court's precedent requires, "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *Miller* v. *Johnson*, 515 U. S. 900, 916. In so doing, the court held that race predominates only where there is an "'*actual* conflict between traditional redistricting criteria and race.'" 141 F. Supp. 3d 505, 524. It thus confined the predominance analysis to the portions of the new lines that appeared to deviate from traditional criteria. As to the remaining district, District 75, the court found that race did predominate, but that the lines were constitutional because the legislature's use of race was narrowly tailored to a compelling state interest. In particular, the court found the legislature had good reasons to believe that a 55% racial target was necessary in District 75 to avoid diminishing the ability of black voters to elect their preferred candidates, which at the time would have violated § 5 of the Voting Rights Act of 1965, see *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 278.

Held:

1. The District Court employed an incorrect legal standard in determining that race did not predominate in 11 of the 12 districts. Pp. 187–193.

(a) The Equal Protection Clause prohibits a State, without sufficient justification, from "separat[ing] its citizens into different voting districts on the basis of race." *Miller*, 515 U. S., at 911. Courts must "exercise extraordinary caution in adjudicating claims" of racial gerrymandering, *id.*, at 916, since a legislature is always "*aware* of race when it draws district lines, just as it is aware of . . . other demographic factors," *Shaw* v. *Reno*, 509 U. S. 630, 646 (*Shaw I*). A plaintiff alleging racial gerrymandering thus bears the burden "to show, either through

circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's [districting] decision," which requires proving "that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller*, *supra*, at 916. Here, the District Court misapplied controlling law in two principal ways. Pp. 187–188.

(b) First, the District Court misunderstood relevant precedents when it required the challengers to establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles. This Court has made clear that parties may show predominance "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose," *Miller*, *supra*, at 916, and that race may predominate even when a plan respects traditional principles, *Shaw* v. *Hunt*, 517 U. S. 899, 907 (*Shaw II*).

The State's theory in this case is irreconcilable with *Miller* and *Shaw II*. The State insists, *e. g.*, that the harm from racial gerrymandering lies not in racial line-drawing *per se* but in grouping voters of the same race together when they otherwise lack shared interests. But "the constitutional violation" in racial gerrymandering cases stems from the "racial purpose of state action, not its stark manifestation." *Miller*, *supra*, at 913. The State also contends that race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria. The proper inquiry, however, concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications that the legislature could have used but did not. A legislature could construct a plethora of potential maps that look consistent with traditional, race-neutral principles, but if race is the overriding reason for choosing one map over others, race still may predominate. A conflict or inconsistency may be persuasive circumstantial evidence tending to show racial predomination, but no rule requires challengers to present this kind of evidence in every case. As a practical matter, this kind of evidence may be necessary in many or even most cases. But there may be cases where challengers can establish racial predominance without evidence of an actual conflict. Pp. 188–191.

(c) The District Court also erred in considering the legislature's racial motive only to the extent that the challengers identified deviations from traditional redistricting criteria attributable to race and not to some other factor. Racial gerrymandering claims proceed "district-by-district," *Alabama*, *supra*, at 262, and courts should not divorce any portion of a district's lines—whatever their relationship to traditional principles—from the rest of the district. Courts may consider evidence

pertaining to an area that is larger or smaller than the district at issue. But the ultimate object of the inquiry is the legislature's predominant motive for the district's design as a whole, and any explanation for a particular portion of the lines must take account of the districtwide context. A holistic analysis is necessary to give the proper weight to districtwide evidence, such as stark splits in the racial composition of populations moved into and out of a district, or the use of a racial target. Pp. 191–192.

(d) The District Court is best positioned to determine on remand the extent to which, under the proper standard, race directed the shape of these 11 districts, and if race did predominate, whether strict scrutiny is satisfied. Pp. 192–193.

2. The District Court's judgment regarding District 75 is consistent with the basic narrow tailoring analysis explained in *Alabama*. Where a challenger succeeds in establishing racial predominance, the burden shifts to the State to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller*, *supra*, at 920. Here, it is assumed that the State's interest in complying with the Voting Rights Act was a compelling interest. When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, "the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama*, 575 U. S., at 278. The State must show not that its action was actually necessary to avoid a statutory violation, but only that the legislature had "'*good reasons* to believe'" its use of race was needed in order to satisfy the Voting Rights Act. *Ibid.* There was no error in the District Court's conclusion that the legislature had sufficient grounds to determine that the race-based calculus it employed in District 75 was necessary to avoid violating § 5. Under the facts found by that court, the legislature performed the kind of functional analysis of District 75 necessary under § 5, and the result reflected the good-faith efforts of legislators to achieve an informed bipartisan consensus. In contesting the sufficiency of that evidence and the evidence justifying the 55% BVAP floor, the challengers ask too much from state officials charged with the sensitive duty of reapportioning legislative districts. As to the claim that the BVAP floor is akin to the "mechanically numerical view" of § 5 rejected in *Alabama*, *supra*, at 277, the record here supports the State's conclusion that this was an instance where a 55% BVAP was necessary for black voters to have a functional working majority. Pp. 193–196.

141 F. Supp. 3d 505, affirmed in part, vacated in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 197. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 197.

Marc E. Elias argued the cause for appellants. With him on the briefs were *Bruce V. Spiva*, *Kevin J. Hamilton*, and *Abha Khanna*.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging vacatur in part and affirmance in part. With him on the brief were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Attorney General Gupta*, *Elizabeth B. Prelogar*, *Tovah R. Calderon*, and *Christine H. Ku*.

Paul D. Clement argued the cause for appellees. With him on the brief were *Erin E. Murphy*, *Efrem M. Braden*, *Katherine L. McKnight*, and *Richard B. Raile*.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case addresses whether the Virginia state legislature's consideration of race in drawing new lines for 12 state legislative districts violated the Equal Protection Clause of the Fourteenth Amendment. After the 2010 census, some

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*Briefs of *amici curiae* urging reversal were filed for the Campaign Legal Center et al. by *Paul M. Smith*, *Jessica Ring Amunson*, *Mark P. Gaber*, *J. Gerald Hebert*, *Aderson B. Francois*, *Lloyd Leonard*, and *Deborah N. Archer*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for the NAACP et al. by *Anita S. Earls* and *Allison J. Riggs*; and for OneVirginia2021: Virginians for Fair Redistricting by *Gregory E. Lucyk*.

Briefs of *amici curiae* urging affirmance were filed for the National Black Chamber of Commerce et al. by *Jason Torchinsky*; and for the Southeastern Legal Foundation et al. by *John J. Park, Jr.*, *Kimberly S. Hermann*, and *Roger Clegg*.

Briefs of *amici curiae* were filed for the Lawyers' Committee for Civil Rights Under Law by *Michael B. de Leeuw*, *Kristen Clarke*, *Jon M. Greenbaum*, and *Ezra D. Rosenberg*; and for Thomas L. Brunell et al. by *Marguerite Mary Leoni* and *Christopher E. Skinnell*.

redistricting was required to ensure proper numerical apportionment for the Virginia House of Delegates. It is undisputed that the boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a black voting-age population (BVAP) of at least 55%.

Certain voters challenged the new districts as unconstitutional racial gerrymanders. The United States District Court for the Eastern District of Virginia, constituted as a three-judge district court, rejected the challenges as to each of the 12 districts. As to 11 of the districts, the District Court concluded that the voters had not shown, as this Court's precedent requires, "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995). The District Court held that race predominates only where there is an "'*actual* conflict between traditional redistricting criteria and race,'" 141 F. Supp. 3d 505, 524 (ED Va. 2015), so it confined the predominance analysis to the portions of the new lines that appeared to deviate from traditional criteria, and found no violation. As to the remaining district, District 75, the District Court found that race did predominate. It concluded, however, that the lines were constitutional because the legislature's use of race was narrowly tailored to a compelling state interest. In particular, the District Court determined that the legislature had "good reasons to believe" that a 55% racial target was necessary in District 75 to avoid diminishing the ability of black voters to elect their preferred candidates, which at the time would have violated § 5 of the Voting Rights Act of 1965. *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 278 (2015) (internal quotation marks omitted; emphasis deleted).

On appeal to this Court, the challengers contend that the District Court employed an incorrect legal standard for racial predominance and that the legislature lacked good reasons for its use of race in District 75. This Court now

affirms as to District 75 and vacates and remands as to the remaining 11 districts.

I

After the 2010 census, the Virginia General Assembly set out to redraw the legislative districts for the State Senate and House of Delegates in time for the 2011 elections. In February 2011, the House Committee on Privileges and Elections adopted a resolution establishing criteria to guide the redistricting process. Among those criteria were traditional redistricting factors such as compactness, contiguity of territory, and respect for communities of interest. But above those traditional objectives, the committee gave priority to two other goals. First, in accordance with the principle of one person, one vote, the committee resolved that "[t]he population of each district shall be as nearly equal to the population of every other district as practicable," with any deviations falling "within plus-or-minus one percent." 141 F. Supp. 3d, at 518. Second, the committee resolved that the new map must comply with the "protections against . . . unwarranted retrogression" contained in § 5 of the Voting Rights Act. *Ibid.* At the time, § 5 required covered jurisdictions, including Virginia, to preclear any change to a voting standard, practice, or procedure by showing federal authorities that the change would not have the purpose or effect of "diminishing the ability of [members of a minority group] to elect their preferred candidates of choice." § 5, 120 Stat. 580–581, 52 U. S. C. § 10304(b). After the redistricting process here was completed, this Court held that the coverage formula in § 4(b) of the Voting Rights Act no longer may be used to require preclearance under § 5. See *Shelby County* v. *Holder*, 570 U. S. 529, 557 (2013).

The committee's criteria presented potential problems for 12 House districts. Under § 5 as Congress amended it in 2006, "[a] plan leads to impermissible retrogression when, compared to the plan currently in effect (typically called a 'benchmark plan'), the new plan diminishes the number of

districts in which minority groups can 'elect their preferred candidates of choice' (often called 'ability-to-elect' districts)." *Harris* v. *Arizona Independent Redistricting Comm'n*, 578 U. S. 253, 260 (2016) (quoting 52 U. S. C. § 10304(b)). The parties agree that the 12 districts at issue here, where minorities had constituted a majority of the voting-age population for many past elections, qualified as "ability-to-elect" districts. Most of the districts were underpopulated, however, so any new plan required moving significant numbers of new voters into these districts in order to comply with the principle of one person, one vote. Under the benchmark plan, the districts had BVAPs ranging from 62.7% down to 46.3%. Three districts had BVAPs below 55%.

Seeking to maintain minority voters' ability to elect their preferred candidates in these districts while complying with the one-person, one-vote criterion, legislators concluded that each of the 12 districts "needed to contain a BVAP of at least 55%." 141 F. Supp. 3d, at 519. At trial, the parties disputed whether the 55% figure "was an aspiration or a target or a rule." *Ibid.* But they did not dispute "the most important question—whether [the 55%] figure was used in drawing the Challenged Districts." *Ibid.* The parties agreed, and the District Court found, "that the 55% BVAP figure was used in structuring the districts." *Ibid.* In the enacted plan all 12 districts contained a BVAP greater than 55%.

Who first suggested the 55% BVAP criterion and how the legislators agreed upon it was less clear from the evidence. See *id.*, at 521 (describing the "[t]estimony on this question" as "a muddle"). In the end, the District Court found that the 55% criterion emerged from discussions among certain members of the House Black Caucus and the leader of the redistricting effort in the House, Delegate Chris Jones, "based largely on concerns pertaining to the re-election of Delegate Tyler in [District] 75." *Id.*, at 522. The 55% figure "was then applied across the board to all twelve" districts. *Ibid.*

In April 2011, the General Assembly passed Delegate Jones' plan with broad support from both parties and members of the Black Caucus. One of only two dissenting members of the Black Caucus was Delegate Tyler of District 75, who objected solely on the ground that the 55.4% BVAP in her district was too low. In June 2011, the U. S. Department of Justice precleared the plan.

Three years later, before this suit was filed, a separate District Court struck down Virginia's third federal congressional district (not at issue here), based in part on the legislature's use of a 55% BVAP threshold. See *Page* v. *Virginia State Bd. of Elections*, 58 F. Supp. 3d 533, 553 (ED Va. 2014), vacated and remanded *sub nom. Cantor* v. *Personhuballah*, 575 U. S. 931 (2015), judgt. entered *sub nom. Page* v. *Virginia State Bd. of Elections*, 2015 WL 3604029 (June 5, 2015), appeal dism'd *sub nom. Wittman* v. *Personhuballah*, 578 U. S. 539 (2016). After that decision, 12 voters registered in the 12 districts here at issue filed this action challenging the district lines under the Equal Protection Clause. Because the claims "challeng[ed] the constitutionality of . . . the apportionment of [a] statewide legislative body," the case was heard by a three-judge District Court. 28 U. S. C. § 2284(a). The Virginia House of Delegates and its Speaker, William Howell (together referred to hereinafter as the State), intervened and assumed responsibility for defending the plan, both before the District Court and now before this Court.

After a 4-day bench trial, a divided District Court ruled for the State. With respect to each challenged district, the court first assessed whether "racial considerations predominated over—or 'subordinated'—traditional redistricting criteria." 141 F. Supp. 3d, at 523. An essential premise of the majority opinion was that race does not predominate unless there is an "*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former." *Id.*, at 524. To implement that standard, moreover,

the court limited its inquiry into racial motive to those portions of the district lines that appeared to deviate from traditional criteria. The court thus "examine[d] those aspects of the [district] that appear[ed] to constitute 'deviations' from neutral criteria" to ascertain whether the deviations were attributable to race or to other considerations, "such as protection of incumbents." *Id.*, at 534. Only if the court found a deviation attributable to race did it proceed to "determine whether racial considerations qualitatively subordinated all other non-racial districting criteria." *Ibid.* Under that analysis, the court found that race did not predominate in 11 of the 12 districts.

When it turned to District 75, the District Court found that race did predominate. The court reasoned that "[a]chieving a 55% BVAP floor required 'drastic maneuvering' that is reflected on the face of the district." *Id.*, at 557. Applying strict scrutiny, the court held that compliance with § 5 was a compelling state interest and that the legislature's consideration of race in District 75 was narrowly tailored. As to narrow tailoring, the court explained that the State had "a strong basis in evidence" to believe that its actions were "reasonably necessary" to avoid retrogression. *Id.*, at 548. In particular, the court found that Delegate Jones had considered "precisely the kinds of evidence that legislators are encouraged to use" in achieving compliance with § 5, including turnout rates, the district's large disenfranchised prison population, and voting patterns in the contested 2005 primary and general elections. *Id.*, at 558.

Judge Keenan dissented as to all 12 districts. She concluded that the majority applied an incorrect understanding of racial predominance and that Delegate Jones' analysis of District 75 was too "general and conclusory." *Id.*, at 578. This appeal followed, and probable jurisdiction was noted. 578 U. S. 1021 (2016); see 28 U. S. C. § 1253.

II

Against the factual and procedural background set out above, it is now appropriate to consider the controlling legal principles in this case. The Equal Protection Clause prohibits a State, without sufficient justification, from "separat[ing] its citizens into different voting districts on the basis of race." *Miller*, 515 U. S., at 911. The harms that flow from racial sorting "include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Alabama*, 575 U. S., at 263 (alterations, citation, and internal quotation marks omitted). At the same time, courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U. S., at 916. "Electoral districting is a most difficult subject for legislatures," requiring a delicate balancing of competing considerations. *Id.*, at 915. And "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of . . . a variety of other demographic factors." *Shaw* v. *Reno*, 509 U. S. 630, 646 (1993) (*Shaw I*).

In light of these considerations, this Court has held that a plaintiff alleging racial gerrymandering bears the burden "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U. S., at 916. To satisfy this burden, the plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Ibid.* The challengers contend that, in finding that race did not predominate in 11 of the 12 districts, the District

Court misapplied controlling law in two principal ways. This Court considers them in turn.

A

The challengers first argue that the District Court misunderstood the relevant precedents when it required the challengers to establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles. The Court agrees with the challengers on this point.

A threshold requirement that the enacted plan must conflict with traditional principles might have been reconcilable with this Court's case law at an earlier time. In *Shaw I*, the Court recognized a claim of racial gerrymandering for the first time. See 509 U. S., at 652. Certain language in *Shaw I* can be read to support requiring a challenger who alleges racial gerrymandering to show an actual conflict with traditional principles. The opinion stated, for example, that strict scrutiny applies to "redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race." *Id.*, at 644 (internal quotation marks omitted). The opinion also stated that "reapportionment is one area in which appearances do matter." *Id.*, at 647.

The Court's opinion in *Miller*, however, clarified the racial predominance inquiry. In particular, it rejected the argument that, "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race." 515 U. S., at 910–911. The Court held to the contrary in language central to the instant case: "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Id.*, at 913. Parties therefore "may rely on evidence other than bizarre-

ness to establish race-based districting," and may show predominance "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." *Id.*, at 913, 916.

The Court addressed racial gerrymandering and traditional redistricting factors again in *Shaw* v. *Hunt*, 517 U. S. 899 (1996) (*Shaw II*). The Court there rejected the view of one of the dissents that "strict scrutiny does not apply where a State 'respects' or 'complies with traditional districting principles.' " *Id.*, at 906 (quoting *id.*, at 931–932 (Stevens, J., dissenting); alteration omitted). Race may predominate even when a reapportionment plan respects traditional principles, the Court explained, if "[r]ace was the criterion that, in the State's view, could not be compromised," and race-neutral considerations "came into play only after the race-based decision had been made." *Id.*, at 907.

The State's theory in this case is irreconcilable with *Miller* and *Shaw II*. The State insists, for example, that the harm from racial gerrymandering lies not in racial line-drawing *per se* but in grouping voters of the same race together when they otherwise lack shared interests. But "the constitutional violation" in racial gerrymandering cases stems from the "racial purpose of state action, not its stark manifestation." *Miller*, *supra*, at 913. The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications.

The State contends further that race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria. That argument parallels the District Court's reasoning that a reapportionment plan is not an express racial classification unless a racial purpose is apparent from the face of the plan based on the irregular nature of the lines themselves. See 141 F. Supp. 3d, at 524–526. This is incorrect. The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post*

hoc justifications the legislature in theory could have used but in reality did not.

Traditional redistricting principles, moreover, are numerous and malleable. The District Court here identified no fewer than 11 race-neutral redistricting factors a legislature could consider, some of which are "surprisingly ethereal" and "admi[t] of degrees." *Id.*, at 535, 537. By deploying those factors in various combinations and permutations, a State could construct a plethora of potential maps that look consistent with traditional, race-neutral principles. But if race for its own sake is the overriding reason for choosing one map over others, race still may predominate.

For these reasons, a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering. Of course, a conflict or inconsistency may be persuasive circumstantial evidence tending to show racial predomination, but there is no rule requiring challengers to present this kind of evidence in every case.

As a practical matter, in many cases, perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria. In general, legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so. And, in the absence of a conflict with traditional principles, it may be difficult for challengers to find other evidence sufficient to show that race was the overriding factor causing neutral considerations to be cast aside. In fact, this Court to date has not affirmed a predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles. See *Alabama*, 575 U. S., at 273; *Hunt* v. *Cromartie*, 526 U. S. 541, 547 (1999); *Bush* v. *Vera*, 517 U. S. 952, 962, 966, 974 (1996) (plurality opinion); *Shaw*

II, *supra*, at 905–906; *Miller*, *supra*, at 917; *Shaw I*, *supra*, at 635–636. Yet the law responds to proper evidence and valid inferences in ever-changing circumstances, as it learns more about ways in which its commands are circumvented. So there may be cases where challengers will be able to establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence.

B

The challengers submit that the District Court erred further when it considered the legislature's racial motive only to the extent that the challengers identified deviations from traditional redistricting criteria that were attributable to race and not to some other factor. In the challengers' view, this approach foreclosed a holistic analysis of each district and led the District Court to give insufficient weight to the 55% BVAP target and other relevant evidence that race predominated. Again, this Court agrees.

As explained, showing a deviation from, or conflict with, traditional redistricting principles is not a necessary prerequisite to establishing racial predominance. *Supra*, at 190. But even where a challenger alleges a conflict, or succeeds in showing one, the court should not confine its analysis to the conflicting portions of the lines. That is because the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district. Racial gerrymandering claims proceed "district-by-district." *Alabama*, 575 U. S., at 262. "We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Id.*, at 262–263. And *Miller*'s basic predominance test scrutinizes the legislature's motivation for placing "a significant number of voters within or without a particular district." 515 U. S., at 916. Courts evaluating racial predominance

therefore should not divorce any portion of the lines—whatever their relationship to traditional principles—from the rest of the district.

This is not to suggest that courts evaluating racial gerrymandering claims may not consider evidence pertaining to an area that is larger or smaller than the district at issue. The Court has recognized that "[v]oters, of course, can present statewide evidence in order to prove racial gerrymandering in a particular district." *Alabama*, *supra*, at 263 (emphasis deleted). Districts share borders, after all, and a legislature may pursue a common redistricting policy toward multiple districts. Likewise, a legislature's race-based decisionmaking may be evident in a notable way in a particular part of a district. It follows that a court may consider evidence regarding certain portions of a district's lines, including portions that conflict with traditional redistricting principles.

The ultimate object of the inquiry, however, is the legislature's predominant motive for the design of the district as a whole. A court faced with a racial gerrymandering claim therefore must consider all of the lines of the district at issue; any explanation for a particular portion of the lines, moreover, must take account of the districtwide context. Concentrating on particular portions in isolation may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target. A holistic analysis is necessary to give that kind of evidence its proper weight.

C

The challengers ask this Court not only to correct the District Court's racial predominance standard but also to apply that standard and conclude that race in fact did predominate in the 11 districts where the District Court held that it did not. For its part, the State asks the Court to hold that,

even if race did predominate in these districts, the State's predominant use of race was narrowly tailored to the compelling interest in complying with § 5.

The Court declines these requests. "[O]urs is a court of final review and not first view." *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 56 (2015) (internal quotation marks omitted). The District Court is best positioned to determine in the first instance the extent to which, under the proper standard, race directed the shape of these 11 districts. And if race did predominate, it is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied. These matters are left for the District Court on remand.

III

The Court now turns to the arguments regarding District 75. Where a challenger succeeds in establishing racial predominance, the burden shifts to the State to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller*, *supra*, at 920. The District Court here determined that the State's predominant use of race in District 75 was narrowly tailored to achieve compliance with § 5. The challengers contest the finding of narrow tailoring, but they do not dispute that compliance with § 5 was a compelling interest at the relevant time. As in previous cases, therefore, the Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act was compelling. *E. g.*, *Alabama*, *supra*, at 275–279; *Shaw II*, 517 U. S., at 915.

Turning to narrow tailoring, the Court explained the contours of that requirement in *Alabama*. When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, "the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." 575 U. S., at 278 (internal quota-

tion marks omitted). That standard does not require the State to show that its action was "actually . . . necessary" to avoid a statutory violation, so that, but for its use of race, the State would have lost in court. *Ibid.* (internal quotation marks omitted). Rather, the requisite strong basis in evidence exists when the legislature has "*good reasons* to believe" it must use race in order to satisfy the Voting Rights Act, "even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (internal quotation marks omitted).

The Court now finds no error in the District Court's conclusion that the State had sufficient grounds to determine that the race-based calculus it employed in District 75 was necessary to avoid violating § 5. As explained, § 5 at the time barred Virginia from adopting any districting change that would "have the effect of diminishing the ability of [members of a minority group] to elect their preferred candidates of choice." 52 U. S. C. § 10304(b). Determining what minority population percentage will satisfy that standard is a difficult task requiring, in the view of the Department of Justice, a "functional analysis of the electoral behavior within the particular . . . election district." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011).

Under the facts found by the District Court, the legislature performed that kind of functional analysis of District 75 when deciding upon the 55% BVAP target. Redrawing this district presented a difficult task, and the result reflected the good-faith efforts of Delegate Jones and his colleagues to achieve an informed bipartisan consensus. Delegate Jones met with Delegate Tyler "probably half a dozen times to configure her district" in order to avoid retrogression. 141 F. Supp. 3d, at 558 (internal quotation marks omitted). He discussed the district with incumbents from other majority-minority districts. He also considered turnout rates, the results of the recent contested primary and general elections

in 2005, and the district's large population of disenfranchised black prisoners. The challengers, moreover, do not dispute that District 75 was an ability-to-elect district, or that white and black voters in the area tend to vote as blocs. See *id.*, at 557–559. In light of Delegate Jones' careful assessment of local conditions and structures, the State had a strong basis in evidence to believe a 55% BVAP floor was required to avoid retrogression.

The challengers' responses ask too much from state officials charged with the sensitive duty of reapportioning legislative districts. First, the challengers contest the sufficiency of the evidence showing that Delegate Jones in fact performed a functional analysis, in part because that analysis was not memorialized in writing. But the District Court's factual findings are reviewed only for clear error. See *Easley* v. *Cromartie*, 532 U. S. 234, 242 (2001). The findings regarding how the legislature arrived at the 55% BVAP target are well supported, and "we do not . . . require States engaged in redistricting to compile a comprehensive administrative record." *Vera*, 517 U. S., at 966 (internal quotation marks omitted).

The challengers argue further that the drafters of the plan had insufficient evidence to justify a 55% BVAP floor. The 2005 elections were idiosyncratic, the challengers contend; moreover, demographic information about the prison in the district is absent from the record, and Delegate Tyler's perspective was influenced by a personal interest in reelection. That may have been so, and for those reasons, it is possible that, if the State had drawn District 75 with a BVAP below 55% and had sought judicial preclearance, a court would have found no § 5 violation. But that is not the question here. "The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands." *Alabama*, 575 U. S., at 278. The question is whether the State had "*good reasons*" to believe a 55% BVAP floor was necessary to avoid liability under § 5.

Ibid. (internal quotation marks omitted). The State did have good reasons under these circumstances. Holding otherwise would afford state legislatures too little breathing room, leaving them "trapped between the competing hazards of liability" under the Voting Rights Act and the Equal Protection Clause. *Vera*, *supra*, at 977 (internal quotation marks omitted).

As a final point, the challengers liken the 55% BVAP floor here to the "mechanically numerical view" of § 5 this Court rejected in *Alabama*. 575 U. S., at 277. But *Alabama* did not condemn the use of BVAP targets to comply with § 5 in every instance. Rather, this Court corrected the "misperception" that § 5 required a State to "maintai[n] the same population percentages in majority-minority districts as in the prior plan." *Id.*, at 275–276. "[I]t would seem highly unlikely," the Court explained, that reducing a district's BVAP "from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate." *Id.*, at 277. Yet reducing the BVAP below 55% well might have that effect in some cases. The record here supports the legislature's conclusion that this was one instance where a 55% BVAP was necessary for black voters to have a functional working majority.

IV

The Court's holding in this case is controlled by precedent. The Court reaffirms the basic racial predominance analysis explained in *Miller* and *Shaw II*, and the basic narrow tailoring analysis explained in *Alabama*. The District Court's judgment as to District 75 is consistent with these principles. Applying these principles to the remaining 11 districts is entrusted to the District Court in the first instance.

The judgment of the District Court is affirmed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I join the opinion of the Court insofar as it upholds the constitutionality of District 75. *Ante*, at 193–196. The districting plan at issue here was adopted prior to our decision in *Shelby County* v. *Holder*, 570 U. S. 529 (2013), and therefore it is appropriate to apply the body of law in effect at that time. What is more, appellants have never contested the District Court's holding that compliance with § 5 of the Voting Rights Act was a compelling government interest for covered jurisdictions before our decision in *Shelby County*. See 141 F. Supp. 3d 505, 545–547 (ED Va. 2015).

I concur in the judgment of the Court insofar as it vacates and remands the judgment below with respect to all the remaining districts. Unlike the Court, however, I would hold that all these districts must satisfy strict scrutiny. See *post*, at 198 (THOMAS, J., concurring in judgment in part and dissenting in part); see also *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 517 (2006) (Scalia, J., concurring in judgment in part and dissenting in part) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered").

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

Appellants contend that 12 of Virginia's state legislative districts are unconstitutional racial gerrymanders. The three-judge District Court rejected their challenge, holding that race was not the legislature's predominant motive in drawing 11 of the districts and that the remaining district survives strict scrutiny. I would reverse the District Court as to all 12 districts. I therefore concur in the judgment in part and dissent in part.

I

I concur in the Court's judgment reversing the District Court's decision to uphold 11 of the 12 districts at issue in this case—House Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95. I do not agree, however, with the Court's decision to leave open the question whether race predominated in those districts and, thus, whether they are subject to strict scrutiny. *Ante,* at 192–193. Appellees (hereinafter State) concede that the legislature intentionally drew all 12 districts as majority-black districts. See, *e. g.*, Brief for Appellees 1 ("[T]he legislature sought to achieve a [black voting-age population] of at least 55% in adjusting the lines of the 12 majority-minority districts"). That concession, in my view, mandates strict scrutiny as to each district. See *Bush* v. *Vera*, 517 U. S. 952, 1000 (1996) (THOMAS, J., concurring in judgment) (A State's "concession that it intentionally created majority-minority districts [i]s sufficient to show that race was a predominant, motivating factor in its redistricting"); *League of United Latin American Citizens* v. *Perry,* 548 U. S. 399, 517 (2006) (*LULAC*) (Scalia, J., concurring in judgment in part and dissenting in part) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered"). I would therefore hold that the District Court must apply strict scrutiny to Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95 on remand.

II

I disagree with the Court's judgment with respect to the remaining district, District 75. The majority affirms the District Court's holding that District 75 is subject to strict scrutiny. With this I agree, because, as with the other 11 districts, the State conceded that it intentionally drew District 75 as a majority-black district.

I disagree, however, with the majority's determination that District 75 satisfies strict scrutiny. This Court has held

that a State may draw distinctions among its citizens based on race only when it "is pursuing a compelling state interest" and has chosen "narrowly tailored" means to accomplish that interest. *Shaw* v. *Hunt*, 517 U. S. 899, 908 (1996) (internal quotation marks omitted). The State asserts that it used race in drawing District 75 to further a "compelling interest in complying with Section 5 of the [Voting Rights Act of 1965]." Brief for Appellees 50.[1] And it argues that, based on its "good-faith functional analysis" of the district, it narrowly tailored its use of race to achieve that interest. *Id.*, at 56. In my view, the State has neither asserted a compelling state interest nor narrowly tailored its use of race.

A

As an initial matter, the majority errs by "assum[ing], without deciding, that the State's interest in complying with the Voting Rights Act was compelling." *Ante*, at 193. To be sure, this Court has previously assumed that a State has a compelling interest in complying with the Voting Rights Act. But it has done so only in cases in which it has not upheld the redistricting plan at issue. See, *e. g.*, *Miller* v. *Johnson*, 515 U. S. 900, 921 (1995) (leaving open the question "[w]hether or not in some cases compliance with the [Voting Rights] Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination").[2] This Court has never, before today, assumed a

[1] It is unclear from the record whether the State sought to justify its use of race on other grounds. I would leave it to the District Court to evaluate in the first instance any other asserted compelling interest, including whether such interest has been forfeited.

[2] See also *Shaw* v. *Hunt*, 517 U. S. 899, 911 (1996) ("In *Miller*, we expressly left open the question whether under the proper circumstances compliance with the Voting Rights Act, on its own, could be a compelling [state] interest. . . . Here once again we do not reach that question because we find that creating an additional majority-black district was not required under a correct reading of § 5"); *id.*, at 915 ("We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 could be a compel-

compelling state interest while upholding a state redistricting plan. Indeed, I know of no other case, in any context, in which the Court has assumed away part of the State's burden to justify its intentional use of race. This should not be the first. I would hold that complying with § 5 of the Voting Rights Act is not a compelling interest.

"[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a *constitutional* reading and application of those laws." *Id.*, at 921 (emphasis added). More than a decade ago, I joined Justice Scalia's opinion in *LULAC*, which noted that this Court had "upheld the constitutionality of § 5 as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote." 548 U. S., at 518. I therefore agreed that, "[i]n the proper case, . . . a covered jurisdiction may have a compelling interest in complying with § 5." *Id.*, at 519.

I have since concluded that § 5 is "unconstitutional." *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 216 (2009) (THOMAS, J., concurring in judgment in part and dissenting in part). "[T]he violence, intimidation, and subterfuge that led Congress to pass § 5 and this Court to uphold it no longer remains," *id.*, at 229, so § 5 "can no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment," *id.*, at 216. Because, in my view, § 5 is unconstitutional, I would hold that

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ling interest" but hold that the remedy "is not narrowly tailored to the asserted end"); *Bush* v. *Vera*, 517 U. S. 952, 977, 979 (1996) (plurality opinion) ("[W]e assume without deciding that compliance with [the Voting Rights Act], as interpreted by our precedents, can be a compelling state interest" but hold that the districts at issue are not "narrowly tailored" to achieve that interest (citation omitted)); *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 279 (2015) ("[W]e do not here decide whether . . . continued compliance with § 5 remains a compelling interest" because "we conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring").

a State does not have a compelling interest in complying with it.

B

Even if compliance with §5 were a compelling interest, the State failed to narrowly tailor its use of race to further that interest.

1

This Court has explained that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination." *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 273 (1986) (plurality opinion) (internal quotation marks omitted); accord, *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 223 (1995); *Grutter* v. *Bollinger*, 539 U. S. 306, 378 (2003) (Rehnquist, C. J., dissenting). This exacting scrutiny makes sense because "[d]iscrimination on the basis of race" is "odious in all aspects." *Rose* v. *Mitchell*, 443 U. S. 545, 555 (1979). Accordingly, a State's use of race must bear "'the most exact connection'" to the compelling state interest. *Wygant*, *supra*, at 280 (opinion of Powell, J.). In the context of redistricting, the redistricting map must, "at a minimum," actually "remedy the anticipated violation" or "achieve compliance" with the Voting Rights Act. *Shaw*, 517 U. S., at 916.

I have serious doubts about the Court's standard for narrow tailoring, as characterized today and in *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254 (2015). Relying on *Alabama*, the majority explains that narrow tailoring in the redistricting context requires "only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." *Ante*, at 193 (internal quotation marks omitted). That standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." *Alabama*, *supra*, at 278 (internal quotation marks omitted); see also *ante*, at 194. Instead, under that standard, a state

legislature needs only "*good reasons* to believe" that the use of race is required, even if the use of race is not "actually . . . necessary." *Alabama*, *supra*, at 278 (internal quotation marks omitted).

That approach to narrow tailoring—deferring to a State's belief that it has good reasons to use race—is "strict" in name only. To the extent the Court applies *Alabama* to dilute the well-settled standard established by our precedents, I demur.

2

Applying the proper narrow-tailoring standard for state classifications based on race, I conclude that the State did not narrowly tailor its use of race to comply with § 5. As the majority recognizes, § 5 requires a state redistricting plan to maintain the black population's ability to elect the candidate of its choice in the district at issue—in other words, the State must "avoid retrogression" in the new district. *Ante*, at 194–195.

The majority observes that the redistricting plan's architect, Delegate Chris Jones, performed a "functional analysis" in deciding that District 75 required a 55% black voting-age population—as opposed to some other percentage—to avoid retrogression. *Ibid.* The Court notes that, in arriving at the 55% threshold, Delegate Jones considered turnout rates, the results of the primary and general elections in 2005, and the district's "large population of disenfranchised black prisoners." *Ante*, at 195. He also met with the incumbent delegate for District 75 "probably half a dozen times" and "discussed the district with incumbents from other majority-minority districts." *Ante*, at 194 (internal quotation marks omitted). Those efforts add up, in the majority's view, to a "careful assessment of local conditions and structures." *Ante*, at 195.

I do not agree that those efforts satisfy narrow tailoring. Delegate Jones admitted that he was "not aware" of "any retrogress[ion] analysis" performed by "h[im] or any persons that worked with him in the development of the [redistrict-

ing] plan." App. 288–289. Instead, he merely "look[ed] at" the "percentage of black population and the percentage of black voting age population," "looked at what had happened over the last 10-year period given the existing population and demographic shifts," and "tried to restore back" the levels of black voting-age population from the previous maps. *Id.*, at 290. That approach was misguided, because § 5 "does not require maintaining the same population percentages in majority-minority districts as in the prior plan." *Alabama*, *supra*, at 276. And in any event, that back-of-the-envelope calculation does not qualify as rigorous analysis. I do not think we would permit so imprecise an approach with regard to any other instance of racial discrimination.

The other evidence cited by the majority is similarly weak. The majority points to the "'half a dozen'" meetings between Delegate Jones and the incumbent delegate for District 75, *ante*, at 194, but it is not apparent from the record whether District 75's incumbent is the current black population's candidate of choice. Moreover, the incumbent delegate may well have wanted her district to be electorally safer than the Voting Rights Act requires. It also is not obvious to me that Delegate Jones was seeking to avoid retrogression in District 75 when he met with incumbent delegates from *other* majority-black districts. *Ibid.* In my view, those efforts fall far short of establishing that a 55% black voting-age population bears a more "'exact connection'" to the State's interest than any alternative percentage. *Wygant*, 476 U. S., at 280 (opinion of Powell, J.). Accordingly, I would hold that the State failed to narrowly tailor its use of race to avoid retrogression in District 75.

* * *

In reaching these conclusions, I recognize that this Court is at least as responsible as the state legislature for these racially gerrymandered districts. As explained above, this Court has repeatedly failed to decide whether compliance with the Voting Rights Act is a compelling governmental

interest. See *supra*, at 199–200, and n. 2. Indeed, this Court has refused even to decide whether § 5 is constitutional, despite having twice taken cases to decide that question. Compare Juris. Statement in *Northwest Austin*, O. T. 2008, No. 08–322, p. i (presenting the question "[w]hether . . . the § 5 preclearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments"), and *Shelby County* v. *Holder*, 568 U. S. 1006 (2012) (granting certiorari on the question "[w]hether Congress' decision in 2006 to reauthorize § 5 of the Voting Rights Act under the pre-existing coverage formula of § 4(b) . . . violated the Tenth Amendment and Article IV of the [United States] Constitution"), with *Northwest Austin*, 557 U. S., at 197 (holding that the district at issue was eligible to seek bailout under the Voting Rights Act and therefore "not reach[ing] the constitutionality of § 5"), and *Shelby County* v. *Holder*, 570 U. S. 529, 557 (2013) (holding only that the coverage formula under § 4(b) was unconstitutional and "issu[ing] no holding on § 5 itself"). As a result, the Court has left the State without clear guidance about its redistricting obligations under § 5.

This Court has put the State in a similar bind with respect to narrow tailoring. To comply with § 5, a State necessarily must make a deliberate and precise effort to sort its citizens on the basis of their race. But that result is fundamentally at odds with our "color-blind" Constitution, which "neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting). That contradiction illustrates the perversity of the Court's jurisprudence in this area as well as the uncomfortable position in which the State might find itself.

Despite my sympathy for the State, I cannot ignore the Constitution's clear prohibition on state-sponsored race discrimination. "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also

because every time the government places citizens on racial registers . . . , it demeans us all." *Grutter*, 539 U. S., at 353 (THOMAS, J., concurring in part and dissenting in part). This prohibition was "[p]urchased at the price of immeasurable human suffering," and it "reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors*, 515 U. S., at 240 (THOMAS, J., concurring in part and concurring in judgment). I respectfully dissent from the Court's judgment as to District 75.

Syllabus

PENA-RODRIGUEZ *v.* COLORADO

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 15–606. Argued October 11, 2016—Decided March 6, 2017

A Colorado jury convicted petitioner Peña-Rodriguez of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H. C. had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements by H. C. The court acknowledged H. C.'s apparent bias but denied petitioner's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The Colorado Court of Appeals affirmed, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b). The Colorado Supreme Court also affirmed, relying on *Tanner* v. *United States*, 483 U. S. 107, and *Warger* v. *Shauers*, 574 U. S. 40, both of which rejected constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias.

Held: Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Pp. 215–219.

(a) At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. Some American jurisdictions adopted a more flexible version of the no-impeachment bar, known as the "Iowa rule," which prevented jurors from testifying only about their own subjective beliefs, thoughts, or motives during deliberations. An alternative approach, later referred to as the federal approach, permitted an exception only for events extraneous to the deliberative process. This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule, appearing open to the Iowa rule in *United States* v. *Reid*, 12 How. 361, and *Mattox* v. *United States*, 146 U. S. 140, but rejecting that approach in *McDonald* v. *Pless*, 238 U. S. 264.

The common-law development of the rule reached a milestone in 1975 when Congress adopted Federal Rule of Evidence 606(b), which sets out

a broad no-impeachment rule, with only limited exceptions. This version of the no-impeachment rule has substantial merit, promoting full and vigorous discussion by jurors and providing considerable assurance that after being discharged they will not be summoned to recount their deliberations or otherwise harassed. The rule gives stability and finality to verdicts. Pp. 215–218.

(b) Some version of the no-impeachment rule is followed in every State and the District of Columbia, most of which follow the Federal Rule. At least 16 jurisdictions have recognized an exception for juror testimony about racial bias in deliberations. Three Federal Courts of Appeals have also held or suggested there is a constitutional exception for evidence of racial bias.

In addressing the common-law no-impeachment rule, this Court noted the possibility of an exception in the "gravest and most important cases." *United States* v. *Reid*, *supra*, at 366; *McDonald* v. *Pless*, *supra*, at 269. The Court has addressed the question whether the Constitution mandates an exception to Rule 606(b) just twice, rejecting an exception each time. In *Tanner*, where the evidence showed that some jurors were under the influence of drugs and alcohol during the trial, the Court identified "long-recognized and very substantial concerns" supporting the no-impeachment rule. 483 U. S., at 127. The Court also outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony: Members of the venire can be examined for impartiality during *voir dire*; juror misconduct may be observed by the court, counsel, and court personnel during the trial; and jurors themselves can report misconduct to the court before a verdict is rendered. In *Warger*, a civil case where the evidence indicated that the jury forewoman failed to disclose a prodefendant bias during *voir dire*, the Court again put substantial reliance on existing safeguards for a fair trial. But the Court also warned, as in *Reid* and *McDonald*, that the no-impeachment rule may admit of exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U. S., at 51, n. 3. *Reid*, *McDonald*, and *Warger* left open the question here: whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt. Pp. 218–221.

(c) The imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. "[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida*, 379 U. S. 184, 192. Time and again, this Court has enforced the Constitution's guarantee

against state-sponsored racial discrimination in the jury system. The Court has interpreted the Fourteenth Amendment to prohibit the exclusion of jurors based on race, *Strauder* v. *West Virginia*, 100 U. S. 303, 305–309; struck down laws and practices that systematically exclude racial minorities from juries, see, *e. g., Neal* v. *Delaware*, 103 U. S. 370; ruled that no litigant may exclude a prospective juror based on race, see, *e. g., Batson* v. *Kentucky*, 476 U. S. 79; and held that defendants may at times be entitled to ask about racial bias during *voir dire,* see, *e. g., Ham* v. *South Carolina*, 409 U. S. 524. The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose* v. *Mitchell*, 443 U. S. 545, 555, damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers* v. *Ohio*, 499 U. S. 400, 411. Pp. 221–223.

(d) This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and those seeking to eliminate racial bias in the jury system. Those lines of precedent need not conflict. Racial bias, unlike the behavior in *McDonald*, *Tanner*, or *Warger*, implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice. It is also distinct in a pragmatic sense, for the *Tanner* safeguards may be less effective in rooting out racial bias. But while all forms of improper bias pose challenges to the trial process, there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right. Pp. 223–225.

(e) Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. The experience of those jurisdictions that have already recognized a racial-bias exception to the no-impeachment rule,

Syllabus

and the experience of courts going forward, will inform the proper exercise of trial judge discretion. The Court need not address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias or the appropriate standard for determining when such evidence is sufficient to require that the verdict be set aside and a new trial be granted. Standard and existing safeguards may also help prevent racial bias in jury deliberations, including careful *voir dire* and a trial court's instructions to jurors about their duty to review the evidence, deliberate together, and reach a verdict in a fair and impartial way, free from bias of any kind. Pp. 225–229.

350 P. 3d 287, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 230. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 235.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *Pamela S. Karlan*, *Brian Wolfman*, and *Jonathan D. Rosen*.

Frederick R. Yarger, Solicitor General of Colorado, argued the cause for respondent. With him on the brief were *Cynthia H. Coffman*, Attorney General, *L. Andrew Cooper*, Deputy Attorney General, *Glenn P. Roper*, Deputy Solicitor General, *Katharine J. Gillespie* and *Stephanie Linquist Scoville*, Senior Assistant Attorneys General, and *Majid Yazdi* and *Molly E. McNab*, Assistant Attorneys General.

Rachel P. Kovner argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Acting Solicitor General Gershengorn*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *William A. Glasner*.*

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*Briefs of *amici curiae* urging reversal were filed for the Center on the Administration of Criminal Law by *David A. Barrett* and *Joshua J. Libling*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for the Hispanic National Bar Association et al. by *Peter Karanjia* and *Robert T. Maldonado*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *John Paul Schnapper-Casteras*, *Sherrilyn Ifill*, *Janai Nelson*, *Christina Swarns*, *Jin Hee Lee*,

JUSTICE KENNEDY delivered the opinion of the Court.

The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

In the era of our Nation's founding, the right to a jury trial already had existed and evolved for centuries, through and alongside the common law. The jury was considered a fundamental safeguard of individual liberty. See The Federalist No. 83, p. 451 (B. Warner ed. 1818) (A. Hamilton). The right to a jury trial in criminal cases was part of the Constitution as first drawn, and it was restated in the Sixth Amendment. Art. III, § 2, cl. 3; Amdt. 6. By operation of

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R. Reeves Anderson, *Barbara Bergman*, and *Steven R. Shapiro*; for the National Association of Federal Defenders by *Matthew S. Hellman*, *Josh M. Parker*, *Michael A. Scodro*, *Donna F. Coltharp*, *Sarah S. Gannett*, *Daniel L. Kaplan*, *David A. Strauss*, and *Sarah M. Konsky*; for Professors of Law by *Marc A. Goldman* and *Lisa Kern Griffin*, *pro se*; for the United Mexican States by *Gregory J. Kuykendall*; and for Cedric Merlin Powell by *Junis L. Baldon* and *Mark A. Flores*.

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Heather Hagar McVeigh*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Leslie Rutledge* of Arkansas, *Sam Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Adam Paul Laxalt* of Nevada, *Bruce R. Beemer* of Pennsylvania, *Marty J. Jackley* of South Dakota, *Ken Paxton* of Texas, and *Peter K. Michael* of Wyoming; for the Colorado District Attorney's Council by *William S. Consovoy* and *Brian K. Weir*; and for the Criminal Justice Legal Foundation by *Kymberlee Stapleton* and *Kent S. Scheidegger*.

the Fourteenth Amendment, it is applicable to the States. *Duncan* v. *Louisiana*, 391 U. S. 145, 149–150 (1968).

Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense. A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule. The instant case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.

I

State prosecutors in Colorado brought criminal charges against petitioner, Miguel Angel Peña-Rodriguez, based on the following allegations. In 2007, in the bathroom of a Colorado horse-racing facility, a man sexually assaulted two teenage sisters. The girls told their father and identified the man as an employee of the racetrack. The police located and arrested petitioner. Each girl separately identified petitioner as the man who had assaulted her.

The State charged petitioner with harassment, unlawful sexual contact, and attempted sexual assault on a child. Before the jury was empaneled, members of the venire were repeatedly asked whether they believed that they could be fair and impartial in the case. A written questionnaire asked if there was "anything about you that you feel would make it difficult for you to be a fair juror." App. 14. The court repeated the question to the panel of prospective ju-

rors and encouraged jurors to speak in private with the court if they had any concerns about their impartiality. Defense counsel likewise asked whether anyone felt that "this is simply not a good case" for them to be a fair juror. *Id.*, at 34. None of the empaneled jurors expressed any reservations based on racial or any other bias. And none asked to speak with the trial judge.

After a 3-day trial, the jury found petitioner guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on the attempted sexual assault charge. When the jury was discharged, the court gave them this instruction, as mandated by Colorado law:

> "The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. . . . If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me." *Id.*, at 85–86.

Following the discharge of the jury, petitioner's counsel entered the jury room to discuss the trial with the jurors. As the room was emptying, two jurors remained to speak with counsel in private. They stated that, during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Petitioner's counsel reported this to the court and, with the court's supervision, obtained sworn affidavits from the two jurors.

The affidavits by the two jurors described a number of biased statements made by another juror, identified as Juror H. C. According to the two jurors, H. C. told the other jurors that he "believed the defendant was guilty because, in [H. C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.*, at 110.

The jurors reported that H. C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "'I think he did it because he's Mexican and Mexican men take whatever they want.'" *Id.*, at 109. According to the jurors, H. C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*, at 110. Finally, the jurors recounted that H. C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was "'an illegal.'" *Ibid.* (In fact, the witness testified during trial that he was a legal resident of the United States.)

After reviewing the affidavits, the trial court acknowledged H. C.'s apparent bias. But the court denied petitioner's motion for a new trial, noting that "[t]he actual deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b)." *Id.*, at 90. Like its federal counterpart, Colorado's Rule 606(b) generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict. See Fed. Rule Evid. 606(b). The Colorado Rule reads as follows:

> "(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the

> verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." Colo. Rule Evid. 606(b) (2016).

The verdict deemed final, petitioner was sentenced to two years' probation and was required to register as a sex offender. A divided panel of the Colorado Court of Appeals affirmed petitioner's conviction, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b) and so were inadmissible to undermine the validity of the verdict. 412 P. 3d 461 (2012).

The Colorado Supreme Court affirmed by a vote of 4 to 3. 350 P. 3d 287 (2015). The prevailing opinion relied on two decisions of this Court rejecting constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias. See *Tanner* v. *United States*, 483 U. S. 107 (1987); *Warger* v. *Shauers*, 574 U. S. 40 (2014). After reviewing those precedents, the court could find no "dividing line between different *types* of juror bias or misconduct," and thus no basis for permitting impeachment of the verdicts in petitioner's trial, notwithstanding H. C.'s apparent racial bias. 350 P. 3d, at 293. This Court granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias. 578 U. S. 905 (2016).

H. C.'s bias was based on petitioner's Hispanic identity, which the Court in prior cases has referred to as ethnicity, and that may be an instructive term here. See, *e. g.*, *Hernandez* v. *New York*, 500 U. S. 352, 355 (1991) (plurality opinion). Yet we have also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons. See, *e. g.*, *ibid.*; *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297 (2013); *Rosales-Lopez* v. *United States*, 451 U. S. 182, 189–190 (1981) (plurality opinion). Petitioner and respondent both refer to race, or to race and ethnicity, in this more expansive sense in their

briefs to the Court. This opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents.

II

A

At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. This rule originated in *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B. 1785). There, Lord Mansfield excluded juror testimony that the jury had decided the case through a game of chance. The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations.

American courts adopted the Mansfield rule as a matter of common law, though not in every detail. Some jurisdictions adopted a different, more flexible version of the no-impeachment bar known as the "Iowa rule." Under that rule, jurors were prevented only from testifying about their own subjective beliefs, thoughts, or motives during deliberations. See *Wright* v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866). Jurors could, however, testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony.

An alternative approach, later referred to as the federal approach, stayed closer to the original Mansfield rule. See *Warger*, *supra*, at 46. Under this version of the rule, the no-impeachment bar permitted an exception only for testimony about events extraneous to the deliberative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts.

This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule. In *United States* v. *Reid*, 12 How. 361 (1852), the Court appeared open to the admission of juror testimony that the

jurors had consulted newspapers during deliberations, but in the end it barred the evidence because the newspapers "had not the slightest influence" on the verdict. *Id.*, at 366. The *Reid* Court warned that juror testimony "ought always to be received with great caution." *Ibid.* Yet it added an important admonition: "[C]ases might arise in which it would be impossible to refuse" juror testimony "without violating the plainest principles of justice." *Ibid.*

In a following case the Court required the admission of juror affidavits stating that the jury consulted information that was not in evidence, including a prejudicial newspaper article. *Mattox* v. *United States*, 146 U. S. 140, 151 (1892). The Court suggested, furthermore, that the admission of juror testimony might be governed by a more flexible rule, one permitting jury testimony even where it did not involve consultation of prejudicial extraneous information. *Id.*, at 148–149; see also *Hyde* v. *United States*, 225 U. S. 347, 382–384 (1912) (stating that the more flexible Iowa rule "should apply," but excluding evidence that the jury reached the verdict by trading certain defendants' acquittals for others' convictions).

Later, however, the Court rejected the more lenient Iowa rule. In *McDonald* v. *Pless*, 238 U. S. 264 (1915), the Court affirmed the exclusion of juror testimony about objective events in the jury room. There, the jury allegedly had calculated a damages award by averaging the numerical submissions of each member. *Id.*, at 265–266. As the Court explained, admitting that evidence would have "dangerous consequences": "no verdict would be safe" and the practice would "open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268 (internal quotation marks omitted). Yet the Court reiterated its admonition from *Reid*, again cautioning that the no-impeachment rule might recognize exceptions "in the gravest and most important cases" where exclusion of juror affidavits might well violate "the plainest principles of justice." 238 U. S., at 269 (quoting *Reid*, *supra*, at 366; internal quotation marks omitted).

The common-law development of the no-impeachment rule reached a milestone in 1975, when Congress adopted the Federal Rules of Evidence, including Rule 606(b). Congress, like the *McDonald* Court, rejected the Iowa rule. Instead it endorsed a broad no-impeachment rule, with only limited exceptions.

The version of the rule that Congress adopted was "no accident." *Warger*, 574 U. S., at 48. The Advisory Committee at first drafted a rule reflecting the Iowa approach, prohibiting admission of juror testimony only as it related to jurors' mental processes in reaching a verdict. The Department of Justice, however, expressed concern over the preliminary rule. The Advisory Committee then drafted the more stringent version now in effect, prohibiting all juror testimony, with exceptions only where the jury had considered prejudicial extraneous evidence or was subject to other outside influence. Rules of Evidence for United States Courts and Magistrates, 56 F. R. D. 183, 265 (1972). The Court adopted this second version and transmitted it to Congress.

The House favored the Iowa approach, but the Senate expressed concern that it did not sufficiently address the public policy interest in the finality of verdicts. S. Rep. No. 93–1277, pp. 13–14 (1974). Siding with the Senate, the Conference Committee adopted, Congress enacted, and the President signed the Court's proposed rule. The substance of the Rule has not changed since 1975, except for a 2006 modification permitting evidence of a clerical mistake on the verdict form. See 574 U. S., at 48.

The current version of Rule 606(b) states as follows:

> "(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's

affidavit or evidence of a juror's statement on these matters.

"(2) *Exceptions.* A juror may testify about whether:

"(A) extraneous prejudicial information was improperly brought to the jury's attention;

"(B) an outside influence was improperly brought to bear on any juror; or

"(C) a mistake was made in entering the verdict on the verdict form."

This version of the no-impeachment rule has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts.

B

Some version of the no-impeachment rule is followed in every State and the District of Columbia. Variations make classification imprecise, but, as a general matter, it appears that 42 jurisdictions follow the Federal Rule, while 9 follow the Iowa Rule. Within both classifications there is a diversity of approaches. Nine jurisdictions that follow the Federal Rule have codified exceptions other than those listed in Federal Rule 606(b). See Appendix, *infra*. At least 16 jurisdictions, 11 of which follow the Federal Rule, have recognized an exception to the no-impeachment bar under the circumstances the Court faces here: juror testimony that racial bias played a part in deliberations. *Ibid.* According to the parties and *amici*, only one State other than Colorado has addressed this issue and declined to recognize an exception for racial bias. See *Commonwealth* v. *Steele*, 599 Pa. 341, 377–379, 961 A. 2d 786, 807–808 (2012).

The federal courts, for their part, are governed by Federal Rule 606(b), but their interpretations deserve further com-

ment. Various Courts of Appeals have had occasion to consider a racial-bias exception and have reached different conclusions. Three have held or suggested there is a constitutional exception for evidence of racial bias. See *United States* v. *Villar*, 586 F. 3d 76, 87–88 (CA1 2009) (holding the Constitution demands a racial-bias exception); *United States* v. *Henley*, 238 F. 3d 1111, 1119–1121 (CA9 2001) (finding persuasive arguments in favor of an exception but not deciding the issue); *Shillcutt* v. *Gagnon*, 827 F. 2d 1155, 1158–1160 (CA7 1987) (observing that in some cases fundamental fairness could require an exception). One Court of Appeals has declined to find an exception, reasoning that other safeguards inherent in the trial process suffice to protect defendants' constitutional interests. See *United States* v. *Benally*, 546 F. 3d 1230, 1240–1241 (CA10 2008). Another has suggested as much, holding in the habeas context that an exception for racial bias was not clearly established but indicating in dicta that no such exception exists. See *Williams* v. *Price*, 343 F. 3d 223, 237–239 (CA3 2003) (Alito, J.). And one Court of Appeals has held that evidence of racial bias is excluded by Rule 606(b), without addressing whether the Constitution may at times demand an exception. See *Martinez* v. *Food City, Inc.*, 658 F. 2d 369, 373–374 (CA5 1981).

C

In addressing the scope of the common-law no-impeachment rule before Rule 606(b)'s adoption, the *Reid* and *McDonald* Courts noted the possibility of an exception to the rule in the "gravest and most important cases." *Reid*, 12 How., at 366; *McDonald*, 238 U. S., at 269. Yet since the enactment of Rule 606(b), the Court has addressed the precise question whether the Constitution mandates an exception to it in just two instances.

In its first case, *Tanner*, 483 U. S. 107, the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the

trial. *Id.*, at 125. Central to the Court's reasoning were the "long-recognized and very substantial concerns" supporting "the protection of jury deliberations from intrusive inquiry." *Id.*, at 127. The *Tanner* Court echoed *McDonald*'s concern that, if attorneys could use juror testimony to attack verdicts, jurors would be "harassed and beset by the defeated party," thus destroying "all frankness and freedom of discussion and conference." 483 U. S., at 120 (quoting *McDonald*, *supra*, at 267–268). The Court was concerned, moreover, that attempts to impeach a verdict would "disrupt the finality of the process" and undermine both "jurors' willingness to return an unpopular verdict" and "the community's trust in a system that relies on the decisions of laypeople." 483 U. S., at 120–121.

The *Tanner* Court outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony. At the outset of the trial process, *voir dire* provides an opportunity for the court and counsel to examine members of the venire for impartiality. As a trial proceeds, the court, counsel, and court personnel have some opportunity to learn of any juror misconduct. And, before the verdict, jurors themselves can report misconduct to the court. These procedures do not undermine the stability of a verdict once rendered. Even after the trial, evidence of misconduct other than juror testimony can be used to attempt to impeach the verdict. *Id.*, at 127. Balancing these interests and safeguards against the defendant's Sixth Amendment interest in that case, the Court affirmed the exclusion of affidavits pertaining to the jury's inebriated state. *Ibid.*

The second case to consider the general issue presented here was *Warger*, 574 U. S. 40. The Court again rejected the argument that, in the circumstances there, the jury trial right required an exception to the no-impeachment rule. *Warger* involved a civil case where, after the verdict was entered, the losing party sought to proffer evidence that the

jury forewoman had failed to disclose pro-defendant bias during *voir dire*. As in *Tanner*, the Court put substantial reliance on existing safeguards for a fair trial. The Court stated: "Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." 574 U. S., at 51.

In *Warger*, however, the Court did reiterate that the no-impeachment rule may admit exceptions. As in *Reid* and *McDonald*, the Court warned of "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U. S., at 51, n. 3. "If and when such a case arises," the Court indicated it would "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Ibid.*

The recognition in *Warger* that there may be extreme cases where the jury trial right requires an exception to the no-impeachment rule must be interpreted in context as a guarded, cautious statement. This caution is warranted to avoid formulating an exception that might undermine the jury dynamics and finality interests the no-impeachment rule seeks to protect. Today, however, the Court faces the question that *Reid*, *McDonald*, and *Warger* left open. The Court must decide whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.

III

It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.

"[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964). In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. "Almost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans." Forman, Juries and Race in the Nineteenth Century, 113 Yale L. J. 895, 909–910 (2004). To take one example, just in the years 1865 and 1866, all-white juries in Texas decided a total of 500 prosecutions of white defendants charged with killing African-Americans. All 500 were acquitted. *Id.*, at 916. The stark and unapologetic nature of race-motivated outcomes challenged the American belief that "the jury was a bulwark of liberty," *id.*, at 909, and prompted Congress to pass legislation to integrate the jury system and to bar persons from eligibility for jury service if they had conspired to deny the civil rights of African-Americans, *id.*, at 920–930. Members of Congress stressed that the legislation was necessary to preserve the right to a fair trial and to guarantee the equal protection of the laws. *Ibid.*

The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. Beginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race. *Strauder* v. *West Virginia*, 100 U. S. 303, 305–309 (1880). The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from

juries. See, *e. g.*, *Neal* v. *Delaware*, 103 U. S. 370 (1881); *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935) (*per curiam*); *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Castaneda* v. *Partida*, 430 U. S. 482 (1977). To guard against discrimination in jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race. *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991); *Georgia* v. *McCollum*, 505 U. S. 42 (1992). In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*. *Ham* v. *South Carolina*, 409 U. S. 524 (1973); *Rosales-Lopez*, 451 U. S. 182; *Turner* v. *Murray*, 476 U. S. 28 (1986).

The unmistakable principle underlying these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U. S. 545, 555 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' " *McCleskey* v. *Kemp*, 481 U. S. 279, 310 (1987) (quoting *Strauder*, *supra*, at 309). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991); cf. *Aldridge* v. *United States*, 283 U. S. 308, 315 (1931); *Buck* v. *Davis*, *ante*, at 124.

IV

A

This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system. The two lines of precedent, however, need not conflict.

Racial bias of the kind alleged in this case differs in critical ways from the compromise verdict in *McDonald*, the drug

and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*. The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. Jurors are presumed to follow their oath, cf. *Penry* v. *Johnson*, 532 U. S. 782, 799 (2001), and neither history nor common experience shows that the jury system is rife with mischief of these or similar kinds. To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny. "It is not at all clear . . . that the jury system could survive such efforts to perfect it." *Tanner*, 483 U. S., at 120.

The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Racial bias is distinct in a pragmatic sense as well. In past cases this Court has relied on other safeguards to protect the right to an impartial jury. Some of those safeguards, to be sure, can disclose racial bias. *Voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias. Yet their operation may be compromised, or they may prove insufficient. For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire*. See *Rosales-Lopez*, *supra*; *Ristaino* v. *Ross*, 424 U. S. 589 (1976). Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions "could well exacerbate whatever

prejudice might exist without substantially aiding in exposing it." *Rosales-Lopez*, *supra*, at 195 (Rehnquist, J., concurring in result).

The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.

The recognition that certain of the *Tanner* safeguards may be less effective in rooting out racial bias than other kinds of bias is not dispositive. All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

B

For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor

in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. See 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6076, pp. 580–583 (2d ed. 2007) (Wright); see also Variations of ABA Model Rules of Professional Conduct, Rule 3.5 (Sept. 15, 2016) (overview of state ethics rules); 2 Jurywork Systematic Techniques § 13:18 (2016–2017) (overview of Federal District Court rules). These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord.

That is what happened here. In this case the alleged statements by a juror were egregious and unmistakable in their reliance on racial bias. Not only did H. C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis.

Petitioner's counsel did not seek out the two jurors' allegations of racial bias. Pursuant to Colorado's mandatory jury instruction, the trial court had set limits on juror contact and encouraged jurors to inform the court if anyone harassed them about their role in the case. Similar limits on juror contact can be found in other jurisdictions that recognize a racial-bias exception. See, *e. g.*, Fla. Standard Jury Instrs. in Crim. Cases No. 4.2 (West 2016) ("Although you are at liberty to speak with anyone about your deliberations, you are also at liberty to refuse to speak to anyone"); Mass. Office

of Jury Comm'r, Trial Juror's Handbook (Dec. 2015) ("You are not required to speak with anyone once the trial is over. . . . If anyone tries to learn this confidential information from you, or if you feel harassed or embarrassed in any way, you should report it to the court . . . immediately"); N. J. Crim. Model Jury Charges, Non 2C Charges, Dismissal of Jury (2014) ("It will be up to each of you to decide whether to speak about your service as a juror").

With the understanding that they were under no obligation to speak out, the jurors approached petitioner's counsel, within a short time after the verdict, to relay their concerns about H. C.'s statements. App. 77. A similar pattern is common in cases involving juror allegations of racial bias. See, *e. g.*, *Villar*, 586 F. 3d, at 78 (juror e-mailed defense counsel within hours of the verdict); *Kittle* v. *United States*, 65 A. 3d 1144, 1147 (D. C. 2013) (juror wrote a letter to the judge the same day the court discharged the jury); *Benally*, 546 F. 3d, at 1231 (juror approached defense counsel the day after the jury announced its verdict). Pursuant to local court rules, petitioner's counsel then sought and received permission from the court to contact the two jurors and obtain affidavits limited to recounting the exact statements made by H. C. that exhibited racial bias.

While the trial court concluded that Colorado's Rule 606(b) did not permit it even to consider the resulting affidavits, the Court's holding today removes that bar. When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.

C

As the preceding discussion makes clear, the Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations.

The experience of these jurisdictions, and the experience of the courts going forward, will inform the proper exercise of trial judge discretion in these and related matters. This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. See 27 Wright 575–578 (noting a divergence of authority over the necessity and scope of an evidentiary hearing on alleged juror misconduct). The Court also does not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted. Compare, *e. g.*, *Shillcutt*, 827 F. 2d, at 1159 (inquiring whether racial bias "pervaded the jury room"), with, *e. g.*, *Henley*, 238 F. 3d, at 1120 ("One racist juror would be enough").

D

It is proper to observe as well that there are standard and existing processes designed to prevent racial bias in jury deliberations. The advantages of careful *voir dire* have already been noted. And other safeguards deserve mention.

Trial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind. Some instructions are framed by trial judges based on their own learning and experience. Model jury instructions likely take into account these continuing developments and are common across jurisdictions. See, *e. g.*, 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 10:01, p. 22 (6th ed. 2008) ("Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way"). Instructions may emphasize the group dynamic of deliberations by urging jurors to share their questions and conclusions with their colleagues. See, *e. g.*, *id.*, § 20:01,at 841 ("It

is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment").

Probing and thoughtful deliberation improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases, whether racial or otherwise. These dynamics can help ensure that the exception is limited to rare cases.

* * *

The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.

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

It is so ordered.

APPENDIX

Codified Exceptions in Addition to Those Enumerated in Fed. Rule Evid. 606(b)

See Ariz. Rules Crim. Proc. 24.1(c)(3), (d) (2011) (exception for evidence of misconduct, including verdict by game of chance or intoxication); Idaho Rule Evid. 606(b) (2016) (game of chance); Ind. Rule Evid. 606(b)(2)(A) (Burns 2014) (drug

or alcohol use); Minn. Rule Evid. 606(b) (2014) (threats of violence or violent acts); Mont. Rule Evid. 606(b) (2015) (game of chance); N. D. Rule Evid. 606(b)(2)(C) (2016–2017) (same); Tenn. Rule Evid. 606(b) (2016) (quotient verdict or-game of chance); Tex. Rule Evid. 606(b)(2)(B) (West 2016) (rebutting claim juror was unqualified); Vt. Rule Evid. 606(b) (2016 Cum. Supp.) (juror communication with nonjuror); see also 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6071, p. 447, and n. 66 (2d ed. 2007); *id.*, at 451, and n. 70; *id.*, at 452, and n. 72.

Judicially Recognized Exceptions for Evidence of Racial Bias

See *State* v. *Santiago*, 245 Conn. 301, 323–340, 715 A. 2d 1, 14–22 (1998); *Kittle* v. *United States*, 65 A. 3d 1144, 1154–1156 (D. C. 2013); *Fisher* v. *State*, 690 A. 2d 917, 919–921, and n. 4 (Del. 1996) (appendix to opinion); *Powell* v. *Allstate Ins. Co.*, 652 So. 2d 354, 357–358 (Fla. 1995); *Spencer* v. *State*, 260 Ga. 640, 643–644, 398 S. E. 2d 179, 184–185 (1990); *State* v. *Jackson*, 81 Haw. 39, 48–49, 912 P. 2d 71, 80–81 (1996); *Commonwealth* v. *Laguer*, 410 Mass. 89, 97–98, 571 N. E. 2d 371, 376 (1991); *State* v. *Callender*, 297 N. W. 2d 744, 746 (Minn. 1980); *Fleshner* v. *Pepose Vision Inst., P. C.*, 304 S. W. 3d 81, 87–90 (Mo. 2010); *State* v. *Levitt*, 36 N. J. 266, 271–273, 176 A. 2d 465, 467–468 (1961); *People* v. *Rukaj*, 123 App. Div. 2d 277, 280–281, 506 N. Y. S. 2d 677, 679–680 (1986); *State* v. *Hidanovic*, 2008 ND 66, ¶¶21–26, 747 N. W. 2d 463, 472–474; *State* v. *Brown*, 62 A. 3d 1099, 1110 (R. I. 2013); *State* v. *Hunter*, 320 S. C. 85, 88, 463 S. E. 2d 314, 316 (1995); *Seattle* v. *Jackson*, 70 Wash. 2d 733, 738, 425 P. 2d 385, 389 (1967); *After Hour Welding, Inc.* v. *Laneil Management Co.*, 108 Wis. 2d 734, 739–740, 324 N. W. 2d 686, 690 (1982).

JUSTICE THOMAS, dissenting.

The Court today holds that the Sixth Amendment requires the States to provide a criminal defendant the opportunity to impeach a jury's guilty verdict with juror testimony about a juror's alleged racial bias, notwithstanding a state proce-

dural rule forbidding such testimony. I agree with JUSTICE ALITO that the Court's decision is incompatible with the text of the Amendment it purports to interpret and with our precedents. I write separately to explain that the Court's holding also cannot be squared with the original understanding of the Sixth or Fourteenth Amendments.

I

The Sixth Amendment's protection of the right, "[i]n all criminal prosecutions," to a "trial, by an impartial jury," is limited to the protections that existed at common law when the Amendment was ratified. See, *e. g.*, *Apprendi* v. *New Jersey*, 530 U. S. 466, 500, and n. 1 (2000) (THOMAS, J., concurring); 3 J. Story, Commentaries on the Constitution of the United States § 1773, pp. 652–653 (1833) (Story) (explaining that "the trial by jury in criminal cases" protected by the Constitution is the same "great privilege" that was "a part of that admirable common law" of England); cf. 5 St. G. Tucker, Blackstone's Commentaries 349, n. 2 (1803). It is therefore "entirely proper to look to the common law" to ascertain whether the Sixth Amendment requires the result the Court today reaches. *Apprendi*, *supra*, at 500, n. 1.

The Sixth Amendment's specific guarantee of impartiality incorporates the common-law understanding of that term. See, *e. g.*, 3 W. Blackstone, Commentaries on the Laws of England 365 (1769) (Blackstone) (describing English trials as "impartially just" because of their "caution against all partiality and bias" in the jury). The common law required a juror to have "freedome of mind" and to be "indifferent as hee stands unsworne." 1 E. Coke, First Part of the Institutes of the Laws of England § 234, p. 155a (16th ed. 1809); accord, 3 M. Bacon, A New Abridgment of the Law 258 (3d ed. 1768); cf. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 319 (1868) ("The jury must be indifferent between the prisoner and the commonwealth").

Impartial jurors could "have no interest of their own affected, and no personal bias, or pre-possession, in favor [of] or against either party." *Pettis* v. *Warren*, 1 Kirby 426, 427 (Conn. Super. 1788).

II

The common-law right to a jury trial did not, however, guarantee a defendant the right to impeach a jury verdict with juror testimony about juror misconduct, including "a principal species of [juror] misbehaviour"—"notorious partiality." 3 Blackstone 388. Although partiality was a ground for setting aside a jury verdict, *ibid.*, the English common-law rule at the time the Sixth Amendment was ratified did not allow jurors to supply evidence of that misconduct. In 1770, Lord Mansfield refused to receive a juror's affidavit to impeach a verdict, declaring that such an affidavit "can't be read." *Rex* v. *Almon*, 5 Burr. 2687, 98 Eng. Rep. 411 (K. B.). And in 1785, Lord Mansfield solidified the doctrine, holding that "[t]he Court [could not] receive such an affidavit from any of the jurymen" to prove that the jury had cast lots to reach a verdict. *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B.).[1]

At the time of the founding, the States took mixed approaches to this issue. See *Cluggage* v. *Swan*, 4 Binn. 150, 156 (Pa. 1811) (opinion of Yeates, J.) ("The opinions of *American* judges . . . have greatly differed on the point in question"); *Bishop* v. *State*, 9 Ga. 121, 126 (1850) (describing the

[1] Prior to 1770, it appears that juror affidavits were sometimes received to impeach a verdict on the ground of juror misbehavior, although only "with great caution." *McDonald* v. *Pless*, 238 U. S. 264, 268 (1915); see, *e. g.*, *Dent* v. *The Hundred of Hertford*, 2 Salk. 645, 91 Eng. Rep. 546 (K. B. 1696); *Philips* v. *Fowler*, Barnes. 441, 94 Eng. Rep. 994 (K. B. 1735). But "previous to our Revolution, and at least as early as 1770, the doctrine in England was distinctly ruled the other way, and has so stood ever since." 3 T. Waterman, A Treatise on the Principles of Law and Equity Which Govern Courts in the Granting of New Trials in Cases Civil and Criminal 1429 (1855).

common law in 1776 on this question as "in a *transition* state"). Many States followed Lord Mansfield's no-impeachment rule and refused to receive juror affidavits. See, *e. g.*, *Brewster* v. *Thompson*, 1 N. J. L. 32 (1790) (*per curiam*); *Robbins* v. *Windover*, 2 Tyl. 11, 14 (Vt. 1802); *Taylor* v. *Giger*, 3 Ky. 586, 588–589 (1808); *Price* v. *McIlvain*, 2 Tread. 503, 504 (S. C. 1815); *Tyler* v. *Stevens*, 4 N. H. 116, 117 (1827); 1 Z. Swift, A Digest of the Laws of the State of Connecticut 775 (1822) ("In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury . . . and this is, most unquestionably, the correct principle"). Some States, however, permitted juror affidavits about juror misconduct. See, *e. g.*, *Crawford* v. *State*, 10 Tenn. 60, 68 (1821); *Cochran* v. *Street*, 1 Va. 79, 81 (1792). And others initially permitted such evidence but quickly reversed course. Compare, *e. g.*, *Smith* v. *Cheetham*, 3 Cai. 57, 59–60 (N. Y. 1805) (opinion of Livingston, J.) (permitting juror testimony), with *Dana* v. *Tucker*, 4 Johns. 487, 488–489 (N. Y. 1809) (*per curiam*) (overturning *Cheetham*); compare also *Bradley's Lessee* v. *Bradley*, 4 Dall. 112 (Pa. 1792) (permitting juror affidavits), with, *e. g.*, *Cluggage*, *supra*, at 156–158 (opinion of Yeates, J.) (explaining that *Bradley* was incorrectly reported and rejecting affidavits); compare also *Talmadge* v. *Northrop*, 1 Root 522 (Conn. 1793) (admitting juror testimony), with *State* v. *Freeman*, 5 Conn. 348, 352 (1824) ("The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations").

By the time the Fourteenth Amendment was ratified, Lord Mansfield's no-impeachment rule had become firmly entrenched in American law. See Lettow, New Trial for Verdict Against Law: Judge-Jury Relations in Early-Nineteenth Century America, 71 Notre Dame L. Rev. 505, 536 (1996) ("[O]pponents of juror affidavits had largely won out by the middle of the century"); 8 J. Wigmore, Evidence in Trials at

Common Law § 2352, p. 697 (J. McNaughton rev. 1961) (Wigmore) (Lord Mansfield's rule "came to receive in the United States an adherence almost unquestioned"); J. Proffatt, A Treatise on Trial by Jury § 408, p. 467 (1877) ("It is a well established rule of law that no affidavit shall be received from a juror to impeach his verdict"). The vast majority of States adopted the no-impeachment rule as a matter of common law. See, *e. g.*, *Bull* v. *Commonwealth*, 55 Va. 613, 627–628 (1857) ("[T]he practice appears to be now generally settled, to reject the testimony of jurors when offered to impeach their verdict. The cases on the subject are too numerous to be cited"); *Tucker* v. *Town Council of South Kingstown*, 5 R. I. 558, 560 (1859) (collecting cases); *State* v. *Coupenhaver*, 39 Mo. 430 (1867) ("The law is well settled that a traverse juror cannot be a witness to prove misbehavior in the jury in regard to their verdict"); *Peck* v. *Brewer*, 48 Ill. 54, 63 (1868) ("So far back as . . . 1823, the doctrine was held that the affidavits of jurors cannot be heard to impeach their verdict"); *Heffron* v. *Gallupe*, 55 Me. 563, 566 (1868) (ruling inadmissible "depositions of . . . jurors as to what transpired in the jury room"); *Withers* v. *Fiscus*, 40 Ind. 131, 132 (1872) ("In the United States it seems to be settled, notwithstanding a few adjudications to the contrary . . . , that such affidavits cannot be received").[2]

The Court today acknowledges that the States "adopted the Mansfield rule as a matter of common law," *ante*, at 215, but ascribes no significance to that fact. I would hold that it is dispositive. Our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly

[2] Although two States declined to follow the rule in the mid-19th century, see *Wright* v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866); *Perry* v. *Bailey*, 12 Kan. 539, 544–545 (1874), "most of the state courts" had already "committed themselves upon the subject," 8 Wigmore § 2354, at 702.

suggests that such evidence was prohibited. In the absence of a definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that merely "follow[s] out the established course of the common law in all trials for crimes," 3 Story § 1785, at 662, to overturn Colorado's decision to preserve the no-impeachment rule, cf. *Boumediene* v. *Bush*, 553 U. S. 723, 832–833 (2008) (Scalia, J., dissenting).

* * *

Perhaps good reasons exist to curtail or abandon the no-impeachment rule. Some States have done so, see Appendix to majority opinion, *ante*, and others have not. Ultimately, that question is not for us to decide. It should be left to the political process described by JUSTICE ALITO. See *post*, at 239–241 (dissenting opinion). In its attempt to stimulate a "thoughtful, rational dialogue" on race relations, *ante*, at 229, the Court today ends the political process and imposes a uniform, national rule. The Constitution does not require such a rule. Neither should we.

I respectfully dissent.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Our legal system has many rules that restrict the admission of evidence of statements made under circumstances in which confidentiality is thought to be essential. Statements made to an attorney in obtaining legal advice, statements to a treating physician, and statements made to a spouse or member of the clergy are familiar examples. See *Trammel* v. *United States*, 445 U. S. 40, 51 (1980). Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way. The goal of avoiding interference with confidential communications of great value has long been thought to justify the loss of important

evidence and the effect on our justice system that this loss entails.

The present case concerns a rule like those just mentioned, namely, the age-old rule against attempting to overturn or "impeach" a jury's verdict by offering statements made by jurors during the course of deliberations. For centuries, it has been the judgment of experienced judges, trial attorneys, scholars, and lawmakers that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system.

Juries occupy a unique place in our justice system. The other participants in a trial—the presiding judge, the attorneys, the witnesses—function in an arena governed by strict rules of law. Their every word is recorded and may be closely scrutinized for missteps.

When jurors retire to deliberate, however, they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.

Today, with the admirable intention of providing justice for one criminal defendant, the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution. This is a startling development, and although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today's holding.

The Court justifies its decision on the ground that the nature of the confidential communication at issue in this particular case—a clear expression of what the Court terms racial bias[1]—is uniquely harmful to our criminal justice system. And the Court is surely correct that even a tincture of racial bias can inflict great damage on that system, which is dependent on the public's trust. But until today, the argument that the Court now finds convincing has not been thought to be sufficient to overcome confidentiality rules like the one at issue here.

Suppose that a prosecution witness gives devastating but false testimony against a defendant, and suppose that the witness's motivation is racial bias. Suppose that the witness admits this to his attorney, his spouse, and a member of the clergy. Suppose that the defendant, threatened with conviction for a serious crime and a lengthy term of imprisonment, seeks to compel the attorney, the spouse, or the member of the clergy to testify about the witness's admissions. Even though the constitutional rights of the defendant hang in the balance, the defendant's efforts to obtain the testimony would fail. The Court provides no good reason why the result in this case should not be the same.

I

Rules barring the admission of juror testimony to impeach a verdict (so-called "no-impeachment rules") have a long history. Indeed, they predate the ratification of the Constitution. They are typically traced back to *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B. 1785), in which Lord Mansfield declined to consider an affidavit from two jurors who

[1] The bias at issue in this case was a "bias against Mexican men." App. 160. This might be described as bias based on national origin or ethnicity. Cf. *Hernandez* v. *New York*, 500 U. S. 352, 355 (1991) (plurality opinion); *Hernandez* v. *Texas*, 347 U. S. 475, 479 (1954). However, no party has suggested that these distinctions make a substantive difference in this case.

claimed that the jury had reached its verdict by lot. See *Warger* v. *Shauers*, 574 U. S. 40, 45 (2014). Lord Mansfield's approach "soon took root in the United States," *ibid.*, and "[b]y the beginning of [the 20th] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict," *Tanner* v. *United States*, 483 U. S. 107, 117 (1987); see 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6071, p. 431 (2d ed. 2007) (Wright & Gold) (noting that the Mansfield approach "came to be accepted in almost all states").

In *McDonald* v. *Pless*, 238 U. S. 264 (1915), this Court adopted a strict no-impeachment rule for cases in federal court. *McDonald* involved allegations that the jury had entered a quotient verdict—that is, that it had calculated a damages award by taking the average of the jurors' suggestions. *Id.*, at 265–266. The Court held that evidence of this misconduct could not be used. *Id.*, at 269. It applied what it said was "unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict." *Ibid.* The Court recognized that the defendant had a powerful interest in demonstrating that the jury had "adopted an arbitrary and unjust method in arriving at their verdict." *Id.*, at 267. "But," the Court warned, "let it once be established that verdicts . . . can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *Ibid.* This would lead to "harass[ment]" of jurors and "the destruction of all frankness and freedom of discussion and conference." *Id.*, at 267–268. Ultimately, even though the no-impeachment rule "may often exclude the only possible evidence of misconduct," relaxing the rule "would open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268 (internal quotation marks omitted).

The firm no-impeachment approach taken in *McDonald* came to be known as "the federal rule." This approach categorically bars testimony about jury deliberations, except where it is offered to demonstrate that the jury was subjected to an extraneous influence (for example, an attempt to bribe a juror). *Warger*, *supra*, at 46; *Tanner*, *supra*, at 117;[2] see 27 Wright & Gold § 6071, at 432–433.

Some jurisdictions, notably Iowa, adopted a more permissive rule. Under the Iowa rule, jurors were generally permitted to testify about any subject except their "subjective intentions and thought processes in reaching a verdict." *Warger*, *supra*, at 45. Accordingly, the Iowa rule allowed jurors to "testify as to events or conditions which might have improperly influenced the verdict, even if these took place during deliberations within the jury room." 27 Wright & Gold § 6071, at 432.

Debate between proponents of the federal rule and the Iowa rule emerged during the framing and adoption of Federal Rule of Evidence 606(b). Both sides had their supporters. The contending arguments were heard and considered, and in the end the strict federal approach was retained.

An early draft of the Advisory Committee on the Federal Rules of Evidence included a version of the Iowa rule, 51 F. R. D. 315, 387–388 (1971). That draft was forcefully criticized, however,[3] and the Committee ultimately produced a

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[2] As this Court has explained, the extraneous influence exception "do[es] not detract from, but rather harmonize[s] with, the weighty government interest in insulating the jury's deliberative process." *Tanner*, 483 U. S., at 120. The extraneous influence exception, like the no-impeachment rule itself, is directed at protecting jury deliberations against unwarranted interference. *Ibid.*

[3] In particular, the Justice Department observed that "[s]trong policy considerations continue to support" the federal approach and that "[r]ecent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict." Letter from R. Kliendienst, Deputy Attorney General, to Judge A. Maris (Aug. 9,

revised draft that retained the well-established federal approach. *Tanner*, *supra*, at 122; see Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates 73 (Oct. 1971). Expressly repudiating the Iowa rule, the new draft provided that jurors generally could not testify "as to any matter or statement occurring during the course of the jury's deliberations." *Ibid.* This new version was approved by the Judicial Conference and sent to this Court, which adopted the rule and referred it to Congress. 56 F. R. D. 183, 265–266 (1972).

Initially, the House rejected this Court's version of Rule 606(b) and instead reverted to the earlier (and narrower) Advisory Committee draft. *Tanner*, *supra*, at 123; see H. R. Rep. No. 93–650, pp. 9–10 (1973) (criticizing the Supreme Court draft for preventing jurors from testifying about "quotient verdict[s]" and other "irregularities which occurred in the jury room"). In the Senate, however, the Judiciary Committee favored this Court's rule. The Committee Report observed that the House draft broke with "long-accepted Federal law" by allowing verdicts to be "challenge[d] on the basis of what happened during the jury's internal deliberations." S. Rep. No. 93–1277, p. 13 (1974) (S. Rep.). In the view of the Senate Committee, the House rule would have "permit[ted] the harassment of former jurors" as well as "the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Id.*, at 14. This re-

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1971), 117 Cong. Rec. 33648, 33655 (1971). And Senator McClellan, an influential member of the Senate Judiciary Committee, insisted that the "mischief in this Rule ought to be plain for all to see" and that it would be impossible "to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations." Letter from Sen. J. McClellan to Judge A. Maris (Aug. 12, 1971), *id.*, at 33642, 33645.

sult would have undermined the finality of verdicts, violated "common fairness," and prevented jurors from "function[ing] effectively." *Ibid.* The Senate rejected the House version of the rule and returned to the Court's rule. A Conference Committee adopted the Senate version, see H. R. Conf. Rep. No. 93–1597, p. 8 (1974), and this version was passed by both Houses and was signed into law by the President.

As this summary shows, the process that culminated in the adoption of Federal Rule of Evidence 606(b) was the epitome of reasoned democratic rulemaking. The "distinguished, Supreme Court-appointed" members of the Advisory Committee went through a 7-year drafting process, "produced two well-circulated drafts," and "considered numerous comments from persons involved in nearly every area of court-related law." Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L. J. 125 (1973). The work of the Committee was considered and approved by the experienced appellate and trial judges serving on the Judicial Conference and by our predecessors on this Court. After that, the matter went to Congress, which "specifically understood, considered, and rejected a version of [the rule] that would have allowed jurors to testify on juror conduct during deliberations." *Tanner*, 483 U. S., at 125. The judgment of all these participants in the process, which was informed by their assessment of an empirical issue, *i. e.*, the effect that the competing Iowa rule would have had on the jury system, is entitled to great respect.

Colorado considered this same question, made the same judgment as the participants in the federal process, and adopted a very similar rule. In doing so, it joined the overwhelming majority of States. *Ante,* at 218. In the great majority of jurisdictions, strong no-impeachment rules continue to be "viewed as both promoting the finality of verdicts and insulating the jury from outside influences." *Warger*, 574 U. S., at 45.

II

A

Recognizing the importance of Rule 606(b), this Court has twice rebuffed efforts to create a Sixth Amendment exception—first in *Tanner* and then, just two Terms ago, in *Warger*.

The *Tanner* petitioners were convicted of committing mail fraud and conspiring to defraud the United States. 483 U. S., at 109–110, 112–113. After the trial, two jurors came forward with disturbing stories of juror misconduct. One claimed that several jurors "consumed alcohol during lunch breaks . . . causing them to sleep through the afternoons." *Id.*, at 113. The second added that jurors also smoked marijuana and ingested cocaine during the trial. *Id.*, at 115–116. This Court held that evidence of this bacchanalia could properly be excluded under Rule 606(b). *Id.*, at 127.

The Court noted that "[s]ubstantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict." *Id.*, at 119. While there is "little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," the Court observed, it is "not at all clear . . . that the jury system could survive such efforts to perfect it." *Id.*, at 120. Allowing such postverdict inquiries would "seriously disrupt the finality of the process." *Ibid.* It would also undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.*, at 120–121.

The *Tanner* petitioners, of course, had a Sixth Amendment right "to 'a tribunal both impartial and mentally competent to afford a hearing.'" *Id.*, at 126 (quoting *Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912)). The question, however, was whether they also had a right to an evidentiary hearing

featuring "one particular kind of evidence inadmissible under the Federal Rules." 483 U. S., at 126–127. Turning to that question, the Court noted again that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.*, at 127. By contrast, "[p]etitioners' Sixth Amendment interests in an unimpaired jury [were] protected by several aspects of the trial process." *Ibid.*

The Court identified four mechanisms that protect defendants' Sixth Amendment rights. First, jurors can be "examined during *voir dire*." *Ibid.* Second, "during the trial the jury is observable by the court, by counsel, and by court personnel." *Ibid.* Third, "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Ibid.* And fourth, "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." *Ibid.* These "other sources of protection of petitioners' right to a competent jury" convinced the Court that the juror testimony was properly excluded. *Ibid.*

Warger involved a negligence suit arising from a motorcycle crash. 574 U. S., at 42. During *voir dire*, the individual who eventually became the jury's foreperson said that she could decide the case fairly and impartially. *Id.*, at 42–43. After the jury returned a verdict in favor of the defendant, one of the jurors came forward with evidence that called into question the truthfulness of the foreperson's responses during *voir dire*. According to this juror, the foreperson revealed during the deliberations that her daughter had once caused a deadly car crash, and the foreperson expressed the belief that a lawsuit would have ruined her daughter's life. *Id.*, at 43.

In seeking to use this testimony to overturn the jury's verdict, the plaintiff's primary contention was that Rule 606(b) does not apply to evidence concerning a juror's alleged misrepresentations during *voir dire*. If otherwise inter-

preted, the plaintiff maintained, the rule would threaten his right to trial by an impartial jury.[4] The Court disagreed, in part because "any claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*." *Id.*, at 50. The Court explained that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by" two of the other *Tanner* safeguards: preverdict reports by the jurors and nonjuror evidence. 574 U. S., at 51.

Tanner and *Warger* fit neatly into this Court's broader jurisprudence concerning the constitutionality of evidence rules. As the Court has explained, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes* v. *South Carolina*, 547 U. S. 319, 324 (2006) (internal quotation marks and alteration omitted). Thus, evidence rules of this sort have been invalidated only if they "serve no legitimate purpose or . . . are disproportionate to the ends that they are asserted to promote." *Id.*, at 326. *Tanner* and *Warger* recognized that Rule 606(b) serves vital purposes and does not impose a disproportionate burden on the jury trial right.

Today, for the first time, the Court creates a constitutional exception to no-impeachment rules. Specifically, the Court holds that no-impeachment rules violate the Sixth Amendment to the extent that they preclude courts from considering evidence of a juror's racially biased comments. *Ante*, at 225. The Court attempts to distinguish *Tanner* and *Warger*, but its efforts fail.

Tanner and *Warger* rested on two basic propositions. First, no-impeachment rules advance crucial interests. Second, the right to trial by an impartial jury is adequately protected by mechanisms other than the use of juror testimony

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[4] Although *Warger* was a civil case, we wrote that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury." 574 U. S., at 50.

regarding jury deliberations. The first of these propositions applies regardless of the nature of the juror misconduct, and the Court does not argue otherwise. Instead, it contends that, in cases involving racially biased jurors, the *Tanner* safeguards are less effective and the defendant's Sixth Amendment interests are more profound. Neither argument is persuasive.

B

As noted above, *Tanner* identified four "aspects of the trial process" that protect a defendant's Sixth Amendment rights: (1) *voir dire*; (2) observation by the court, counsel, and court personnel; (3) preverdict reports by the jurors; and (4) nonjuror evidence. 483 U. S., at 127.[5] Although the Court insists that these mechanisms "may be compromised" in cases involving allegations of racial bias, it addresses only two of them and fails to make a sustained argument about either. *Ante*, at 224.

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First, the Court contends that the effectiveness of *voir dire* is questionable in cases involving racial bias because pointed questioning about racial attitudes may highlight racial issues and thereby exacerbate prejudice. *Ante*, at 224–225. It is far from clear, however, that careful *voir dire* cannot surmount this problem. Lawyers may use questionnaires or individual questioning of prospective jurors[6] in order to elicit frank answers that a juror might be reluctant to voice in the

[5] The majority opinion in this case identifies a fifth mechanism: jury instructions. It observes that, by explaining the jurors' responsibilities, appropriate jury instructions can promote "[p]robing and thoughtful deliberation," which in turn "improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases." *Ante*, at 229. This mechanism, like those listed in *Tanner*, can help to prevent bias from infecting a verdict.

[6] Both of those techniques were used in this case for other purposes. App. 13–14; Tr. 56–78 (Feb. 23, 2010, morning session).

presence of other prospective jurors.[7] Moreover, practice guides are replete with advice on conducting effective *voir dire* on the subject of race. They outline a variety of subtle and nuanced approaches that avoid pointed questions.[8] And

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[7] See *People* v. *Harlan*, 8 P. 3d 448, 500 (Colo. 2000) ("The trial court took precautions at the outset of the trial to foreclose the injection of improper racial considerations by including questions concerning racial issues in the jury questionnaire"); *Brewer* v. *Marshall*, 119 F. 3d 993, 996 (CA1 1997) ("The judge asked each juror, out of the presence of other jurors, whether they had any bias or prejudice for or against black persons or persons of Hispanic origin"); 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 22.3(a), p. 92 (4th ed. 2015) (noting that "[j]udges commonly allow jurors to approach the bench and discuss sensitive matters there" and are also free to conduct "in chambers discussions").

[8] See, *e. g.*, J. Gobert, E. Kreitzberg, & C. Rose, Jury Selection: The Law, Art, and Science of Selecting a Jury § 7:41, pp. 357–358 (3d ed. 2014) (explaining that "the issue should be approached more indirectly" and suggesting the use of "[o]pen-ended questions" on subjects like "the composition of the neighborhood in which the juror lives, the juror's relationship with co-workers or neighbors of different races, or the juror's past experiences with persons of other races"); W. Jordan, Jury Selection § 8.11, p. 237 (1980) (explaining that "the whole matter of prejudice" should be approached "delicately and cautiously" and giving an example of an indirect question that avoids the word "prejudice"); R. Wenke, The Art of Selecting a Jury 67 (1979) (discussing questions that could identify biased jurors when "your client is a member of a minority group"); *id.*, at 66 (suggesting that instead of "asking a juror if he is 'prejudiced' " the attorney should "inquire about his 'feeling,' 'belief' or 'opinion' "); 2 National Jury Project, Inc., Jurywork: Systematic Techniques § 17.23 (E. Krauss ed., 2d ed. 2010) (listing sample questions about racial prejudice); A. Grine & E. Coward, Raising Issues of Race in North Carolina Criminal Cases, p. 8–14 (2014) (suggesting that attorneys "share a brief example about a judgment shaped by a racial stereotype" to make it easier for jurors to share their own biased views), http://defendermanuals.sog.unc.edu/race/8-addressing-race-trial (as last visited Mar. 3, 2017); *id.*, at 8–15 to 8–17 (suggesting additional strategies and providing sample questions); T. Mauet, Trial Techniques 44 (8th ed. 2010) (suggesting that "likely beliefs and attitudes are more accurately learned through indirection"); J. Lieberman & B. Sales, Scientific Jury Selection 114–115 (2007) (discussing research suggesting that "participants were more likely to admit they were

of course, if an attorney is concerned that a juror is concealing bias, a peremptory strike may be used.[9]

The suggestion that *voir dire* is ineffective in unearthing bias runs counter to decisions of this Court holding that *voir dire* on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it. See *Turner* v. *Murray*, 476 U. S. 28, 36–37 (1986); *Rosales-Lopez* v. *United States*, 451 U. S. 182, 192 (1981) (plurality opinion); *Ristaino* v. *Ross*, 424 U. S. 589, 597, n. 9 (1976). If *voir dire* were not useful in identifying racial prejudice, those decisions would be pointless. Cf. *Turner*, *supra*, at 36 (plurality opinion) (noting "the ease with which [the] risk [of racial bias] could have been minimized" through *voir dire*). Even the majority recognizes the "advantages of careful *voir dire*" as a "proces[s] designed to prevent racial bias in jury deliberations." *Ante*,

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unable to abide by legal due process guarantees when asked open-ended questions that did not direct their responses").

[9] To the extent race does become salient during *voir dire*, there is social science research suggesting that this may actually combat rather than reinforce the jurors' biases. See, *e. g.*, Lee, A New Approach to *Voir Dire* on Racial Bias, 5 U. C. Irvine L. Rev. 843, 861 (2015) ("A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way"). See also Sommers & Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 Psychology, Pub. Pol'y, & L. 201, 222 (2001); Sommers & Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 Chi.-Kent L. Rev. 997, 1013–1014, 1027 (2003); Schuller, Kazoleas, & Kawakami, The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom, 33 Law & Human Behavior 320, 326 (2009); Cohn, Bucolo, Pride, & Somers, Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes, 39 J. Applied Soc. Psychology 1953, 1964–1965 (2009).

at 228. And reported decisions substantiate that *voir dire* can be effective in this regard. *E. g.*, *Brewer* v. *Marshall*, 119 F. 3d 993, 995–996 (CA1 1997); *United States* v. *Hasting*, 739 F. 2d 1269, 1271 (CA7 1984); *People* v. *Harlan*, 8 P. 3d 448, 500 (Colo. 2000); see Brief for Respondent 23–24, n. 7 (listing additional cases). Thus, while *voir dire* is not a magic cure, there are good reasons to think that it is a valuable tool.

In any event, the critical point for present purposes is that the effectiveness of *voir dire* is a debatable empirical proposition. Its assessment should be addressed in the process of developing federal and state evidence rules. Federal and state rulemakers can try a variety of approaches, and they can make changes in response to the insights provided by experience and research. The approach taken by today's majority—imposing a federal constitutional rule on the entire country—prevents experimentation and makes change exceedingly hard.[10]

2

The majority also argues—even more cursorily—that "racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Ante*, at 225. This is so, we are told, because it is difficult to "call [another juror] a bigot." *Ibid.*

Since the Court's decision mandates the admission of the testimony of one juror about a statement made by another juror during deliberations, what the Court must mean in making this argument is that jurors are less willing to report

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[10] It is worth noting that, even if *voir dire* were entirely ineffective at detecting racial bias (a proposition no one defends), that still would not suffice to distinguish this case from *Warger* v. *Shauers*, 574 U. S. 40 (2014). After all, the allegation in *Warger* was that the foreperson had entirely circumvented *voir dire* by lying in order to shield her bias. The Court, nevertheless, concluded that even where "jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured" through other means. *Id.*, at 51.

biased comments by fellow jurors prior to the beginning of deliberations (while they are still sitting with the biased juror) than they are after the verdict is announced and the jurors have gone home. But this is also a questionable empirical assessment, and the Court's seat-of-the-pants judgment is no better than that of those with the responsibility of drafting and adopting federal and state evidence rules. There is no question that jurors *do* report biased comments made by fellow jurors prior to the beginning of deliberations. See, *e. g., United States* v. *McClinton*, 135 F. 3d 1178, 1184–1185 (CA7 1998); *United States* v. *Heller*, 785 F. 2d 1524, 1525–1529 (CA11 1986); *Tavares* v. *Holbrook*, 779 F. 2d 1, 1–3 (CA1 1985) (Breyer, J.); see Brief for Respondent 31–32, n. 10; Brief for United States as *Amicus Curiae* 31. And the Court marshals no evidence that such predeliberation reporting is rarer than the postverdict variety.

Even if there is something to the distinction that the Court makes between preverdict and postverdict reporting, it is debatable whether the difference is significant enough to merit different treatment. This is especially so because postverdict reporting is both more disruptive and may be the result of extraneous influences. A juror who is initially in the minority but is ultimately persuaded by other jurors may have second thoughts after the verdict is announced and may be angry with others on the panel who pressed for unanimity. In addition, if a verdict is unpopular with a particular juror's family, friends, employer, co-workers, or neighbors, the juror may regret his or her vote and may feel pressured to rectify what the jury has done.

In short, the Court provides no good reason to depart from the calculus made in *Tanner* and *Warger*. Indeed, the majority itself uses hedged language and appears to recognize that this "pragmatic" argument is something of a makeweight. *Ante*, at 225 (noting that the argument is "not dispositive"); *ante*, at 224 (stating that the operation of the safeguards "may be compromised, or they may prove insufficient").

III

A

The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner's argument and the Court's holding are based. What the Sixth Amendment protects is the right to an "impartial jury." Nothing in the text or history of the Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided by the Amendment depends on the nature of a jury's partiality or bias. As the Colorado Supreme Court aptly put it, it is hard to "discern a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." 350 P. 3d 287, 293 (2015).[11]

Nor has the Court found any decision of this Court suggesting that the Sixth Amendment recognizes some sort of hierarchy of partiality or bias. The Court points to a line of cases holding that, in some narrow circumstances, the Constitution requires trial courts to conduct *voir dire* on the subject of race. Those decisions, however, were not based on a ranking of types of partiality but on the Court's conclusion that in certain cases racial bias was especially likely. See *Turner*, 476 U. S., at 38, n. 12 (plurality opinion) (requiring *voir dire* on the subject of race where there is "a particularly compelling need to inquire into racial prejudice" because of

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[11] The majority's reliance on footnote 3 of *Warger*, *ante*, at 221, is unavailing. In that footnote, the Court noted that some "cases of juror bias" might be "so extreme" as to prompt the Court to "*consider* whether the usual safeguards are or are not sufficient to protect the integrity of the process." 574 U. S., at 51, n. 3 (emphasis added). Considering this question is very different from adopting a constitutionally based exception to long-established no-impeachment rules.

a qualitatively higher "risk of racial bias"); *Ristaino*, 424 U. S., at 596 (explaining that the requirement applies only if there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial]").[12] Thus, this line of cases does not advance the majority's argument.

It is undoubtedly true that "racial bias implicates unique historical, constitutional, and institutional concerns." *Ante*, at 224. But it is hard to see what that has to do with the scope of an *individual criminal defendant's* Sixth Amendment right to be judged impartially. The Court's efforts to reconcile its decision with *McDonald*, *Tanner*, and *Warger* illustrate the problem. The Court writes that the misconduct in those cases, while "troubling and unacceptable," was "anomalous." *Ante*, at 224. By contrast, racial bias, the Court says, is a "familiar and recurring evil" that causes "systemic injury to the administration of justice." *Ibid.*

Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first prisoner: "You are entitled to introduce the jurors' testimony, because racial bias is damaging to our society." To the second, the Court would say: "Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue."

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[12] In addition, those cases did not involve a challenge to a long-established evidence rule. As such, they offer little guidance in performing the analysis required by this case.

This disparate treatment is unsupportable under the Sixth Amendment. If the Sixth Amendment requires the admission of juror testimony about statements or conduct during deliberations that show one type of juror partiality, then statements or conduct showing any type of partiality should be treated the same way.

B

Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin[13] or religion[14]—would merit equal treatment. So, I think, would bias based on sex, *United States* v. *Virginia*, 518 U. S. 515, 531 (1996), or the exercise of the First Amendment right to freedom of expression or association. See *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 545 (1983). Indeed, convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.

Attempting to limit the damage worked by its decision, the Court says that only "clear" expressions of bias must be admitted, *ante*, at 225, but judging whether a statement is sufficiently "clear" will often not be easy. Suppose that the allegedly biased juror in this case never made reference to Peña-Rodriguez's race or national origin but said that he had a lot of experience with "this macho type" and knew that men of this kind felt that they could get their way with women. Suppose that other jurors testified that they were certain that "this macho type" was meant to refer to Mexican or Hispanic men. Many other similarly suggestive statements can easily be imagined, and under today's decision it will be difficult for judges to discern the dividing line be-

[13] See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440 (1985).

[14] See, *e. g.*, *United States* v. *Armstrong*, 517 U. S. 456, 464 (1996); *Burlington Northern R. Co.* v. *Ford*, 504 U. S. 648, 651 (1992); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*).

tween those that are "clear[ly]" based on racial or ethnic bias and those that are at least somewhat ambiguous.

IV

Today's decision—especially if it is expanded in the ways that seem likely—will invite the harms that no-impeachment rules were designed to prevent.

First, as the Court explained in *Tanner*, "postverdict scrutiny of juror conduct" will inhibit "full and frank discussion in the jury room." 483 U. S., at 120–121; see also *McDonald*, 238 U. S., at 267–268 (warning that the use of juror testimony about misconduct during deliberations would "make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference"). Or, as the Senate Report put it: "[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation." S. Rep., at 14.

Today's ruling will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens' willingness to serve on juries. Many jurisdictions now have rules that prohibit or restrict postverdict contact with jurors, but whether those rules will survive today's decision is an open question—as is the effect of this decision on privilege rules such as those noted at the outset of this opinion.[15]

[15] The majority's emphasis on the unique harms of racial bias will not succeed at cabining the novel exception to no-impeachment rules, but it may succeed at putting other kinds of rules under threat. For example, the majority approvingly refers to the widespread rules limiting attorneys' contact with jurors. *Ante*, at 226. But under the reasoning of the majority opinion, it is not clear why such rules should be enforced when they come into conflict with a defendant's attempt to introduce evidence of racial bias. For instance, what will happen when a lawyer obtains clear

Where postverdict approaches are permitted or occur, there is almost certain to be an increase in harassment, arm twisting, and outright coercion. See *McDonald*, *supra*, at 267; S. Rep., at 14 (explaining that a laxer rule "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors"); 350 P. 3d, at 293. As one treatise explains, "[a] juror who reluctantly joined a verdict is likely to be sympathetic to overtures by the loser, and persuadable to the view that his own consent rested on false or impermissible considerations, and the truth will be hard to know." 3 C. Mueller & L. Kirkpatrick, Federal Evidence § 6:16, p. 75 (4th ed. 2013).

The majority's approach will also undermine the finality of verdicts. "Public policy requires a finality to litigation." S. Rep., at 14. And accusations of juror bias—which may be "raised for the first time days, weeks, or months after the verdict"—can "seriously disrupt the finality of the process." *Tanner*, *supra*, at 120. This threatens to "degrad[e] the prominence of the trial itself" and to send the message that juror misconduct need not be dealt with promptly. *Engle* v. *Isaac*, 456 U. S. 107, 127 (1982). See H. R. Conf. Rep. No. 93–1597, at 8 ("The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations").

The Court itself acknowledges that strict no-impeachment rules "promot[e] full and vigorous discussion," protect jurors from "be[ing] harassed or annoyed by litigants seeking to challenge the verdict," and "giv[e] stability and finality to verdicts." *Ante,* at 218. By the majority's own logic, then,

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evidence of racist statements by contacting jurors in violation of a local rule? (Something similar happened in *Tanner*. 483 U. S., at 126.) It remains to be seen whether rules of this type—or other rules which exclude probative evidence, such as evidentiary privileges—will be allowed to stand in the way of the "imperative to purge racial prejudice from the administration of justice." *Ante*, at 221.

imposing exceptions on no-impeachment rules will tend to defeat full and vigorous discussion, expose jurors to harassment, and deprive verdicts of stability.

The Court's only response is that some jurisdictions already make an exception for racial bias, and the Court detects no signs of "a loss of juror willingness to engage in searching and candid deliberations." *Ante*, at 227. One wonders what sort of outward signs the Court would expect to see if jurors in these jurisdictions do not speak as freely in the jury room as their counterparts in jurisdictions with strict no-impeachment rules. Gathering and assessing evidence regarding the quality of jury deliberations in different jurisdictions would be a daunting enterprise, and the Court offers no indication that anybody has undertaken that task.

In short, the majority barely bothers to engage with the policy issues implicated by no-impeachment rules. But even if it had carefully grappled with those issues, it still would have no basis for exalting its own judgment over that of the many expert policymakers who have endorsed broad no-impeachment rules.

V

The Court's decision is well intentioned. It seeks to remedy a flaw in the jury trial system, but as this Court said some years ago, it is questionable whether our system of trial by jury can endure this attempt to perfect it. *Tanner*, *supra*, at 120.

I respectfully dissent.

Syllabus

BECKLES *v.* UNITED STATES

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

No. 15–8544. Argued November 28, 2016—Decided March 6, 2017

Petitioner Beckles was convicted of possession of a firearm by a convicted felon, 18 U. S. C. § 922(g)(1). His presentence investigation report concluded that he was eligible for a sentencing enhancement as a "career offender" under United States Sentencing Guideline § 4B1.1(a) because his offense qualified as a "crime of violence" under § 4B1.2(a)'s residual clause. The District Court sentenced petitioner as a career offender, and the Eleventh Circuit affirmed. Petitioner then filed a postconviction motion to vacate his sentence, arguing that his offense was not a "crime of violence." The District Court denied the motion, and the Eleventh Circuit affirmed. Petitioner next filed a petition for a writ of certiorari from this Court. While his petition was pending, this Court held that the identically worded residual clause in the Armed Career Criminal Act (ACCA), § 924(e)(2)(B), was unconstitutionally vague, *Johnson* v. *United States*, 576 U. S. 591. The Court vacated and remanded petitioner's case in light of *Johnson*. On remand, the Eleventh Circuit affirmed again, distinguishing the ACCA's unconstitutionally vague residual clause from the residual clause in the Sentencing Guidelines.

Held: The Federal Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to vagueness challenges under the Due Process Clause. Pp. 262–270.

(a) The Due Process Clause prohibits the Government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, *supra*, at 595. Under the void-for-vagueness doctrine, laws that fix the permissible sentences for criminal offenses must specify the range of available sentences with "sufficient clarity." *United States* v. *Batchelder*, 442 U. S. 114, 123. In *Johnson*, this Court held that the ACCA's residual clause fixed—in an impermissibly vague way—a higher range of sentences for certain defendants. But the advisory Guidelines do not fix the permissible range of sentences. They merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Pp. 262–267.

(1) The limited scope of the void-for-vagueness doctrine in this context is rooted in the history of federal sentencing. Congress has long

permitted district courts "wide discretion to decide whether the offender should be incarcerated and for how long." *Mistretta* v. *United States*, 488 U. S. 361, 363. Yet this Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range," *United States* v. *Booker*, 543 U. S. 220, 233, nor suggested that a defendant can successfully challenge as vague a sentencing statute conferring discretion to select an appropriate sentence from within a statutory range, even when that discretion is unfettered, see *Batchelder*, *supra*, at 123, 126. Pp. 263–264.

(2) The Sentencing Reform Act of 1984 departed from this regime by establishing several factors to guide district courts in exercising their sentencing discretion. It also created the United States Sentencing Commission and charged it with establishing the Federal Sentencing Guidelines. Because the Guidelines have been rendered "effectively advisory" by this Court, *Booker*, *supra*, at 245, they guide district courts in exercising their discretion, but do not constrain that discretion. Accordingly, they are not amenable to vagueness challenges: If a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be. Neither do they implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement. The applicable statutory range, which establishes the permissible bounds of the court's sentencing discretion, provides all the notice that is required. Similarly, the Guidelines do not invite arbitrary enforcement within the meaning of this Court's case law, because they do not permit the sentencing court to prohibit behavior or to prescribe the sentencing ranges available. Rather, they advise sentencing courts on how to exercise their discretion within the bounds established by Congress. Pp. 264–267.

(b) The holding in this case does not render the advisory Guidelines immune from constitutional scrutiny, see, *e. g.*, *Peugh* v. *United States*, 569 U. S. 530, or render "sentencing procedure[s]" entirely "immune from scrutiny under the due process clause," *Williams* v. *New York*, 337 U. S. 241, 252, n. 18. This Court holds only that the Sentencing Guidelines are not subject to a challenge under the void-for-vagueness doctrine. Pp. 267–268.

(c) Nor does this holding cast doubt on the validity of the other factors that sentencing courts must consider in exercising their sentencing discretion. See §§ 3553(a)(1)–(3), (5)–(7). A contrary holding, however, would cast serious doubt on those other factors because many of them appear at least as unclear as § 4B1.2(a)'s residual clause. This Court rejects the Government's argument that the individualized sentencing required by those other factors is distinguishable from that required by the Guidelines. It is far from obvious that § 4B1.2(a)'s residual clause

implicates the twin concerns of vagueness more than the other factors do, and neither the Guidelines nor the other factors implicate those concerns more than the absence of any guidance at all, which the Government concedes is constitutional. Pp. 268–270.

616 Fed. Appx. 415, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 270. GINSBURG, J., *post*, p. 271, and SOTOMAYOR, J., *post*, p. 272, filed opinions concurring in the judgment. KAGAN, J., took no part in the consideration or decision of the case.

Janice L. Bergmann argued the cause for petitioner. With her on the briefs were *Michael Caruso* and *Andrew L. Adler*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Acting Solicitor General Gershengorn*, *Assistant Attorney General Caldwell*, *John F. Bash*, and *Nina Goodman*.

Adam K. Mortara, by invitation of the Court, 579 U. S. 965, argued the cause and filed a brief as *amicus curiae* in support of the judgment below on Question 2.*

JUSTICE THOMAS delivered the opinion of the Court.

At the time of petitioner's sentencing, the advisory Sentencing Guidelines included a residual clause defining a "crime of violence" as an offense that "involves conduct that presents a serious potential risk of physical injury to another." United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2006) (USSG). This Court held in *Johnson* v. *United States*, 576 U. S. 591 (2015), that the identically worded residual clause in the Armed Career

*Briefs of *amici curiae* urging reversal were filed for Federal Public and Community Defenders et al. by *Amy Baron-Evans*, *Jennifer Niles Coffin*, *Donna Coltharp*, *Sarah Gannett*, *Daniel Kaplan*, and *Brett Sweitzer*; and for Scholars of Criminal Law, Federal Courts, and Sentencing by *Carissa Byrne Hessick*, *Leah M. Litman*, and *Douglas A. Berman*, all *pro se*.

Criminal Act (ACCA), 18 U. S. C. § 924(e)(2)(B), was unconstitutionally vague. Petitioner contends that the Guidelines' residual clause is also void for vagueness. Because we hold that the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.

I

Petitioner Travis Beckles was convicted in 2007 of possession of a firearm by a convicted felon, § 922(g)(1). According to the presentence investigation report, the firearm was a sawed-off shotgun, and petitioner was therefore eligible for a sentencing enhancement as a "career offender" under the Sentencing Guidelines. The 2006 version of the Guidelines, which were in effect when petitioner was sentenced,[1] provided that "[a] defendant is a career offender if

> "(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." USSG § 4B1.1(a).

The Guidelines defined "crime of violence" as

> "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> "(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct*

[1] With one exception not relevant here, 18 U. S. C. § 3553(a)(4)(A) instructs sentencing courts to consider the Guidelines ranges that "are in effect on the date the defendant is sentenced." Accordingly, references in this opinion to the Guidelines are to the 2006 version.

> *that presents a serious potential risk of physical injury to another*." § 4B1.2(a) (emphasis added).

The clause beginning with "or otherwise" in this definition is known as the residual clause.

The commentary to the career-offender Guideline provided that possession of a sawed-off shotgun was a crime of violence. See § 4B1.2, comment., n. 1 ("Unlawfully possessing a firearm described in 26 U. S. C. § 5845(a) (*e. g.*, a sawed-off shotgun . . .) is a 'crime of violence' "); § 5845(a) ("The term 'firearm' means (1) a shotgun having a barrel or barrels of less than 18 inches in length").

The District Court agreed that petitioner qualified as a career offender under the Guidelines. Petitioner was over 18 years of age at the time of his offense, and his criminal history included multiple prior felony convictions for controlled substance offenses. Furthermore, in the District Court's view, petitioner's § 922(g)(1) conviction qualified as a "crime of violence." Because he qualified as a career offender, petitioner's Guidelines range was 360 months to life imprisonment. The District Court sentenced petitioner to 360 months. The Court of Appeals affirmed petitioner's conviction and sentence, and this Court denied certiorari. *United States* v. *Beckles*, 565 F. 3d 832, 846 (CA11), cert. denied, 558 U. S. 906 (2009).

In September 2010, petitioner filed a motion to vacate his sentence under 28 U. S. C. § 2255, arguing that his conviction for unlawful possession of a firearm was not a "crime of violence," and therefore that he did not qualify as a career offender under the Guidelines. The District Court denied the motion, and the Court of Appeals affirmed.

Petitioner then filed a second petition for certiorari in this Court. While his petition was pending, the Court decided *Johnson*, holding that "imposing an increased sentence under the residual clause of the [ACCA]"—which contained the same language as the Guidelines' residual clause—"violate[d]

the Constitution's guarantee of due process" because the clause was unconstitutionally vague. 576 U. S., at 606. We subsequently granted his petition, vacated the judgment of the Court of Appeals, and remanded for further consideration in light of *Johnson*. *Beckles* v. *United States*, 576 U. S. 1082 (2015).

On remand, petitioner argued that his enhanced sentence was based on § 4B1.2(a)'s residual clause, which he contended was unconstitutionally vague under *Johnson*. The Court of Appeals again affirmed. It noted that petitioner "was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying [his] offense as a 'crime of violence.'" 616 Fed. Appx. 415, 416 (2015) (*per curiam*). "*Johnson*," the Court of Appeals reasoned, "says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying [petitioner]'s status as a career-offender." *Ibid.* The Court of Appeals denied rehearing en banc.

Petitioner filed another petition for certiorari in this Court, again contending that § 4B1.2(a)'s residual clause is void for vagueness. To resolve a conflict among the Courts of Appeals on the question whether *Johnson*'s vagueness holding applies to the residual clause in § 4B1.2(a) of the Guidelines,[2] we granted certiorari. 579 U. S. 927 (2016). Because the United States, as respondent, agrees with petitioner that the Guidelines are subject to vagueness challenges, the Court appointed Adam K. Mortara as *amicus*

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[2] Compare *United States* v. *Matchett*, 802 F. 3d 1185, 1193–1196 (CA11 2015) (holding that the Guidelines are not subject to due process vagueness challenges), with, *e. g.*, *United States* v. *Townsend*, 638 Fed. Appx. 172, 178, n. 14 (CA3 2015) (declining to follow *Matchett*); *United States* v. *Pawlak*, 822 F. 3d 902, 905–911 (CA6 2016) (holding that the Guidelines are subject to due process vagueness challenges); *United States* v. *Hurlburt*, 835 F. 3d 715, 721–725 (CA7 2016) (en banc) (same); *United States* v. *Madrid*, 805 F. 3d 1204, 1210–1211 (CA10 2015) (same).

curiae to argue the contrary position. 579 U. S. 965 (2016). He has ably discharged his responsibilities.

II

This Court has held that the Due Process Clause prohibits the Government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 576 U. S., at 595 (citing *Kolender* v. *Lawson*, 461 U. S. 352, 357–358 (1983)). Applying this standard, the Court has invalidated two kinds of criminal laws as "void for vagueness": laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses.

For the former, the Court has explained that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.*, at 357. For the latter, the Court has explained that "statutes fixing sentences," *Johnson*, *supra*, at 596 (citing *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979)), must specify the range of available sentences with "sufficient clarity," *id.*, at 123; see also *United States* v. *Evans*, 333 U. S. 483 (1948); cf. *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966).

In *Johnson*, we applied the vagueness rule to a statute fixing permissible sentences. The ACCA's residual clause, where applicable, required sentencing courts to increase a defendant's prison term from a statutory maximum of 10 years to a minimum of 15 years. That requirement thus fixed—in an impermissibly vague way—a higher range of sentences for certain defendants. See *Alleyne* v. *United States*, 570 U. S. 99, 112 (2013) (describing the legally prescribed range of available sentences as the penalty fixed to a crime).

Unlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause. The residual clause in § 4B1.2(a)(2) therefore is not void for vagueness.

A

The limited scope of the void-for-vagueness doctrine in this context is rooted in the history of federal sentencing. Instead of enacting specific sentences for particular federal crimes, Congress historically permitted district courts "wide discretion to decide whether the offender should be incarcerated and for how long." *Mistretta* v. *United States*, 488 U. S. 361, 363 (1989). For most crimes, Congress set forth a range of sentences, and sentencing courts had "almost unfettered discretion" to select the actual length of a defendant's sentence "within the customarily wide range" Congress had enacted. *Id.*, at 364; see also, *e. g.*, *Apprendi* v. *New Jersey*, 530 U. S. 466, 481–482 (2000); *Williams* v. *New York*, 337 U. S. 241, 247–248 (1949). That discretion allowed district courts to craft individualized sentences, taking into account the facts of the crime and the history of the defendant. As a result, "[s]erious disparities in sentences . . . were common." *Mistretta*, *supra*, at 365.

Yet in the long history of discretionary sentencing, this Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *United States* v. *Booker*, 543 U. S. 220, 233 (2005); see also, *e. g.*, *Apprendi*, *supra*, at 481 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion . . . in imposing a judgment *within the range* prescribed by statute"); *Giaccio*, *supra*, at 405, n. 8 ("[W]e intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries

finding defendants guilty of a crime the power to fix punishment within legally prescribed limits").

More specifically, our cases have never suggested that a defendant can successfully challenge as vague a sentencing statute conferring discretion to select an appropriate sentence from within a statutory range, even when that discretion is unfettered. In fact, our reasoning in *Batchelder* suggests the opposite. This Court considered in that case the constitutionality of two overlapping criminal provisions that authorized different maximum penalties for the same conduct. 442 U. S., at 115–116. The Court held that the sentencing provisions were not void for vagueness because they specified the "penalties available" and defined the "punishment authorized" upon conviction for each crime. *Id.*, at 123. "Although the statutes create[d] uncertainty as to which crime may be charged and therefore what penalties may be imposed, they d[id] so *to no greater extent than would a single statute authorizing various alternative punishments*." *Ibid.* (emphasis added). By specifying "the *range* of penalties that prosecutors and judges may seek and impose," Congress had "fulfilled its duty." *Id.*, at 126 (citing *Evans*, *supra*, at 486, 492, 495; emphasis added). Indeed, no party to this case suggests that a system of purely discretionary sentencing could be subject to a vagueness challenge.

B

The Sentencing Reform Act of 1984 departed from this regime by establishing several factors to guide district courts in exercising their traditional sentencing discretion. 18 U. S. C. § 3553. Congress in the same Act created the United States Sentencing Commission and charged it with establishing guidelines to be used for sentencing. *Mistretta*, *supra*, at 367. The result of the Commission's work is the Federal Sentencing Guidelines, which are one of the sentencing factors that the Act requires courts to consider. § 3553(a)(4).

The Guidelines were initially binding on district courts, *Booker*, 543 U. S., at 233, but this Court in *Booker* rendered them "effectively advisory," *id.*, at 245. Although the Guidelines remain "the starting point and the initial benchmark" for sentencing, a sentencing court may no longer rely exclusively on the Guidelines range; rather, the court "must make an individualized assessment based on the facts presented" and the other statutory factors. *Gall* v. *United States*, 552 U. S. 38, 49, 50 (2007). The Guidelines thus continue to guide district courts in exercising their discretion by serving as "the framework for sentencing," *Peugh* v. *United States*, 569 U. S. 530, 542 (2013), but they "do not constrain th[at] discretion," *id.*, at 552 (THOMAS, J., dissenting).

Because they merely guide the district courts' discretion, the Guidelines are not amenable to a vagueness challenge. As discussed above, the system of purely discretionary sentencing that predated the Guidelines was constitutionally permissible. If a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be.

The advisory Guidelines also do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement. As to notice, even perfectly clear Guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid particular penalties within the statutory range. See, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972). That is because even if a person behaves so as to avoid an enhanced sentence under the career-offender guideline, the sentencing court retains discretion to impose the enhanced sentence. See, *e. g.*, *Pepper* v. *United States*, 562 U. S. 476, 501 (2011) ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views"). As we held in *Irizarry* v. *United States*, 553 U. S. 708 (2008), "[t]he due process concerns that . . . require notice in a world of

mandatory Guidelines no longer" apply. *Id.*, at 714; see *id.*, at 713 ("Any expectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable Guidelines range did not survive our decision in [*Booker*], which invalidated the mandatory features of the Guidelines"). All of the notice required is provided by the applicable statutory range, which establishes the permissible bounds of the court's sentencing discretion.

The advisory Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement. Laws that "regulate persons or entities," we have explained, must be sufficiently clear "that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC* v. *Fox Television Stations, Inc.*, 567 U. S. 239, 253 (2012); see also *Grayned*, *supra*, at 108–109 ("A vague law impermissibly delegates basic policy matters" to judges "for resolution on an *ad hoc* and subjective basis"). An unconstitutionally vague law invites arbitrary enforcement in this sense if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," *Giaccio*, 382 U. S., at 402–403, or permits them to prescribe the sentences or sentencing range available, cf. *Alleyne*, 570 U. S., at 112 ("[T]he legally prescribed range *is* the penalty affixed to the crime").

The Guidelines, however, do not regulate the public by prohibiting any conduct or by "establishing minimum and maximum penalties for [any] crime." *Mistretta*, 488 U. S., at 396 (Sentencing Guidelines "do not bind or regulate the primary conduct of the public"). Rather, the Guidelines advise sentencing courts how to exercise their discretion within the bounds established by Congress. In this case, for example, the District Court did not "enforce" the career-offender Guideline against petitioner. It enforced 18 U. S. C. § 922(g)(1)'s prohibition on possession of a firearm by a felon—which prohibited petitioner's conduct—and

§ 924(e)(1)'s mandate of a sentence of 15 years to life imprisonment—which fixed the permissible range of petitioner's sentence. The court relied on the career-offender Guideline merely for advice in exercising its discretion to choose a sentence within those statutory limits.

JUSTICE SOTOMAYOR's concurrence suggests that judges interpreting a vague Sentencing Guideline might rely on "statistical analysis," "gut instinct," or the judge's "own feelings" to decide whether a defendant's conviction is a crime of violence. *Post*, at 277 (opinion concurring in judgment) (internal quotation marks omitted). A judge granted unfettered discretion could use those same approaches in determining a defendant's sentence. Indeed, the concurrence notes that federal judges before the Guidelines considered their own "view[s] of proper sentencing policy," among other considerations. *Post,* at 281. Yet we have never suggested that unfettered discretion can be void for vagueness.

Accordingly, we hold that the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness.

III

Our holding today does not render the advisory Guidelines immune from constitutional scrutiny. This Court held in *Peugh*, for example, that a "retrospective increase in the Guidelines range applicable to a defendant" violates the *Ex Post Facto* Clause. 569 U. S., at 544. But the void-for-vagueness and *ex post facto* inquiries are "analytically distinct." See *id.*, at 550 (distinguishing an *ex post facto* inquiry from a Sixth Amendment inquiry). Our *ex post facto* cases "have focused on whether a change in law creates a 'significant risk' of a higher sentence." *Ibid.* A retroactive change in the Guidelines creates such a risk because "sentencing decisions are anchored by the Guidelines," which establish "the framework for sentencing." *Id.*, at 541, 542. In contrast, the void-for-vagueness doctrine requires a dif-

ferent inquiry. The question is whether a law regulating private conduct by fixing permissible sentences provides notice and avoids arbitrary enforcement by clearly specifying the range of penalties available. The Government's rebuttal that both doctrines are concerned with "'fundamental justice,'" Reply Brief for United States 7, ignores the contours of our precedents.

The Court has also recognized "in the *Eighth Amendment* context" that a district court's reliance on a vague sentencing factor in a capital case, even indirectly, "can taint the sentence." Brief for United States 43 (citing *Espinosa* v. *Florida*, 505 U. S. 1079, 1082 (1992) (*per curiam*); emphasis added). But our approach to vagueness under the Due Process Clause is not interchangeable with "the rationale of our cases construing and applying the Eighth Amendment." *Maynard* v. *Cartwright*, 486 U. S. 356, 361 (1988). Our decision in *Espinosa* is thus inapposite, as it did not involve advisory Sentencing Guidelines or the Due Process Clause.

Finally, our holding today also does not render "sentencing procedure[s]" entirely "immune from scrutiny under the due process clause." *Williams*, 337 U. S., at 252, n. 18; see, *e. g.*, *Townsend* v. *Burke*, 334 U. S. 736, 741 (1948) (holding that due process is violated when a court relies on "extensively and materially false" evidence to impose a sentence on an uncounseled defendant). We hold only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine.

IV

In addition to directing sentencing courts to consider the Guidelines, see § 3553(a)(4)(A), Congress has directed them to consider a number of other factors in exercising their sentencing discretion, see §§ 3553(a)(1)–(3), (5)–(7). The Government concedes that "American judges have long made th[e] sorts of judgments" called for by the § 3553(a) factors "in indeterminate-sentencing schemes, and this Court has

never understood such discretionary determinations to raise vagueness concerns." Brief for United States 42. Because the § 3553 factors—like the Guidelines—do not mandate any specific sentences, but rather guide the exercise of a district court's discretion within the applicable statutory range, our holding today casts no doubt on their validity.

Holding that the Guidelines are subject to vagueness challenges under the Due Process Clause, however, would cast serious doubt on their validity. Many of these other factors appear at least as unclear as § 4B1.2(a)'s residual clause. For example, courts must assess "the need for the sentence imposed" to achieve certain goals—such as to "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," "afford adequate deterrence to criminal conduct," and "provide the defendant with needed educational or vocational training . . . in the most effective manner." § 3553(a)(2). If petitioner were correct that § 4B1.2(a)'s residual clause were subject to a vagueness challenge, we would be hard pressed to find these factors sufficiently definite to provide adequate notice and prevent arbitrary enforcement.

The Government tries to have it both ways, arguing that the individualized sentencing required by the other § 3553(a) factors is different in kind from that required by the Guidelines. "An inscrutably vague advisory guideline," it contends, "injects arbitrariness into the sentencing process that is not found in the exercise of unguided discretion in a traditional sentencing system." Reply Brief for United States 10–11. But it is far from obvious that the residual clause implicates the twin concerns of vagueness any more than the statutory command that sentencing courts impose a sentence tailored, for example, "to promote respect for the law." § 3553(a)(2)(A). And neither the Guidelines nor the other § 3553 factors implicate those concerns more than the absence of any guidance at all, which the Government concedes is constitutional.

The Government also suggests that the Guidelines are not like the other § 3553(a) factors "because they require a court to decide whether the facts of the case satisfy a legal standard in order to derive a specific numerical range." *Id.*, at 22. But that does not distinguish the other sentencing factors, which require courts to do the same thing. Section 3553(a) states that district courts "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)]." In fact, the Guidelines generally offer more concrete advice in imposing a particular sentence and make it easier to review whether a court has abused its substantial discretion. There is no sound reason to conclude that the Guidelines—but not § 3553(a)'s other sentencing factors—are amenable to vagueness review.

* * *

Because the advisory Sentencing Guidelines are not subject to a due process vagueness challenge, § 4B1.2(a)'s residual clause is not void for vagueness. The judgment of the Court of Appeals, accordingly, is affirmed.

It is so ordered.

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

JUSTICE KENNEDY, concurring.

As sentencing laws and standards continue to evolve, cases may arise in which the formulation of a sentencing provision leads to a sentence, or a pattern of sentencing, challenged as so arbitrary that it implicates constitutional concerns. In that instance, a litigant might use the word vague in a general sense—that is to say, imprecise or unclear—in trying to establish that the sentencing decision was flawed. That something is vague as a general matter, however, does not necessarily mean that it is vague within the well-established legal meaning of that term. And it seems most unlikely that the definitional structure used to explain vagueness in the

context of fair warning to a transgressor, or of preventing arbitrary enforcement, is, by automatic transference, applicable to the subject of sentencing where judicial discretion is involved as distinct from a statutory command. See *Johnson* v. *United States*, 576 U. S. 591 (2015).

The existing principles for defining vagueness cannot be transported uncritically to the realm of judicial discretion in sentencing. Some other explication of the constitutional limitations likely would be required.

These considerations inform my reading of the Court's opinion, in which I join.

JUSTICE GINSBURG, concurring in the judgment.

This case has a simple solution. When Travis Beckles was convicted in 2007 of violating 18 U. S. C. § 922(g)(1), the official commentary to the career-offender Sentencing Guideline expressly designated his offense of conviction—possessing a sawed-off shotgun as a felon—a "crime of violence." See *ante*, at 259–260; United States Sentencing Commission, Guidelines Manual § 4B1.2(a), comment., n. 1 (Nov. 2006). Harmonious with federal law and the text of § 4B1.2(a), that commentary was "authoritative." *Stinson* v. *United States*, 508 U. S. 36, 38 (1993).*

*Beckles protests that the commentary is "inconsistent with" § 4B1.2(a), and thus inoperative, once the residual clause is stricken from the Guideline as impermissibly vague. Brief for Petitioner 49; see *Stinson*, 508 U. S., at 38. But excising the problematic provision *first* and considering illustrative language *second* "flip[s] the normal order of operations in adjudicating vagueness challenges." Brief for United States 55. This Court has routinely rejected, in a variety of contexts, vagueness claims where a clarifying construction rendered an otherwise enigmatic provision clear as applied to the challenger. See *Bell* v. *Cone*, 543 U. S. 447, 453, 457–458 (2005) (*per curiam*) (capital aggravating factor clarified by state-court precedent); *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 500–502, and n. 18 (1982) (quasi-criminal ordinance clarified by licensing guidelines); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 395 (1969) (federal regulation clarified by agency adjudications).

Beckles therefore cannot, and indeed does not, claim that § 4B1.2(a) was vague as applied to him. And because his conduct was "clearly proscribed," he also "cannot complain of the vagueness of the [guideline] as applied to the conduct of others." *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 18–19 (2010) (internal quotation marks omitted) (rejecting vagueness challenge to terrorism material-support statute, 18 U. S. C. § 2339B). I would accordingly defer any more encompassing ruling until a case we have agreed to take up requires one.

JUSTICE SOTOMAYOR, concurring in the judgment.

JUSTICE GINSBURG explains why the Court's holding today is unnecessary. See *ante*, at 271 and this page (opinion concurring in judgment). Petitioner Travis Beckles was sentenced to 30 years in prison on the basis of commentary promulgated by the U. S. Sentencing Commission interpreting a sentencing provision identical to the "residual clause" we held unconstitutionally vague two years ago in *Johnson* v. *United States*, 576 U. S. 591 (2015). But *Johnson* affords Beckles no relief, because the commentary under which he was sentenced was not unconstitutionally vague. Had the majority limited itself to this conclusion, I would have joined its opinion. Instead, the majority reaches far beyond what is necessary to resolve this case and announces that the U. S. Sentencing Guidelines as a whole are immune from vagueness challenges.

I write separately to explain why that holding is not only unnecessary, but also deeply unsound. The Guidelines anchor every sentence imposed in federal district courts. They are, "'in a real sense[,] a basis for the sentence.'" *Molina-Martinez* v. *United States*, 578 U. S. 189, 199 (2016) (quoting *Peugh* v. *United States*, 569 U. S. 530, 542 (2013); emphasis deleted). The Due Process Clause requires that rules this weighty be drafted "with sufficient definiteness that ordinary people can understand" them, and "in a manner

that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983). Because I cannot agree with the majority's conclusion to the contrary, I respectfully concur in the judgment only.

I

A

The Due Process Clause prohibits the Government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 576 U. S., at 595. The prohibition against vagueness in criminal proceedings is "a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926). The doctrine rests on two justifications. First, it ensures that people receive "fair notice of what is prohibited." *United States* v. *Williams*, 553 U. S. 285, 304 (2008). Second, it safeguards the integrity of the judicial system by ensuring that criminal adjudications are not conducted in an arbitrary manner and that terms of imprisonment are not imposed "on an *ad hoc* and subjective basis." *Grayned* v. *City of Rockford*, 408 U. S. 104, 109 (1972).

"These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Johnson*, 576 U. S., at 596. Just two Terms ago, we struck down a sentencing law—the Armed Career Criminal Act's (ACCA) residual clause, 18 U. S. C. § 924(e)(2)(B)—as unconstitutionally vague. See 576 U. S., at 606. We spent little time on whether the vagueness doctrine applied to such provisions. *Id.*, at 595–596. And for good reason: A statute fixing a sentence imposes no less a deprivation of liberty than does a statute defining a crime, as our Sixth Amendment jurisprudence makes plain. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000). We instead analyzed the resid-

ual clause in light of "[n]ine years' experience trying to derive meaning from" it, 576 U. S., at 601, and declared the experiment a failure. "Invoking so shapeless a provision to condemn someone to prison for 15 years to life," we held, "does not comport with the Constitution's guarantee of due process." *Id.*, at 602.

B

The question before us is how these principles apply to the U. S. Sentencing Guidelines.

Congress established the U. S. Sentencing Commission in 1984 in order to address "[f]undamental and widespread dissatisfaction" with the then-prevailing regime of discretionary sentencing. *Mistretta* v. *United States*, 488 U. S. 361, 365–366 (1989); see Sentencing Reform Act of 1984, § 217(a), 98 Stat. 2017. It charged the Commission with reducing "the great variation among sentences imposed by different judges upon similarly situated offenders" and the resulting "uncertainty as to the time [each] offender would spend in prison." *Mistretta*, 488 U. S., at 366. The Sentencing Guidelines are the product of that mandate. The Guidelines establish a framework "under which a set of inputs specific to a given case (the particular characteristics of the offense and offender) yiel[d] a predetermined output (a range of months within which the defendant [can] be sentenced)." *Peugh*, 569 U. S., at 535. In doing so, the Guidelines ensure "*uniformity* in sentencing . . . imposed by different federal courts for similar criminal conduct" and "*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Rita* v. *United States*, 551 U. S. 338, 349 (2007) (internal quotation marks omitted).

The Guidelines today play a central role in federal sentencing. Although no longer binding on federal courts, see *United States* v. *Booker*, 543 U. S. 220, 245 (2005), the Guidelines nonetheless "provide the framework for the tens of thousands of federal sentencing proceedings that occur each year," *Molina-Martinez*, 578 U. S., at 192. A district court

must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall* v. *United States*, 552 U. S. 38, 49 (2007). The court must entertain the parties' arguments and consider the factors set forth in 18 U. S. C. § 3553(a) as possible grounds for deviation from the Guidelines range, 552 U. S., at 49–50, and "may not presume that the . . . range is reasonable," *id.*, at 50. But it must explain any deviation from the range on the record, and it must "ensure that the justification is sufficiently compelling to support the degree of the variance." *Ibid.*; see *Peugh*, 569 U. S., at 548. A district court that incorrectly calculates the Guidelines range commits reversible procedural error, see *Gall*, 552 U. S., at 51; a district court that imposes a sentence within the correct Guidelines range, by contrast, may be afforded a presumption that the sentence it has imposed is reasonable, see *Rita*, 551 U. S., at 347.

The importance of the Guidelines in this process, as we explained last Term, makes them "not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez*, 578 U. S., at 200. In most cases, it is the range set by the Guidelines, not the minimum or maximum term of imprisonment set by statute, that specifies the number of years a defendant will spend in prison. District courts impose a sentence within the Guidelines (or below the Guidelines based on a Government motion) over 80% of the time. *Id.*, at 199; see 2015 Annual Report and 2015 Sourcebook of Federal Sentencing Statistics (20th ed.) (Figure G), online at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureG.pdf (as last visited Feb. 27, 2017). And when Guidelines ranges change—because the Guidelines themselves change, or because the court is informed of an error it made in applying them—sentences change, too.[1] See

[1] The evidence before us suggests that the same is true of the career-offender Guideline at issue here. Given the near consensus among the lower courts that this Guideline is unconstitutionally vague, see n. 3, *infra*, some courts have proceeded to resentence defendants whose sentences

Molina-Martinez, 578 U. S., at 200; *Peugh*, 569 U. S., at 541. It is therefore no exaggeration to say that the Guidelines are, "'in a real sense[,] a basis for the sentence'" imposed by the district court. *Molina-Martinez*, 578 U. S., at 199 (quoting *Peugh*, 569 U. S., at 542; emphasis deleted).

C

It follows from the central role that the Guidelines play at sentencing that they should be susceptible to vagueness challenges under the Due Process Clause.

Contrary to the majority's conclusion, an inscrutably vague Guideline implicates both of the concerns animating the prohibition on vagueness. First, a district court's reliance on such a Guideline deprives an ordinary person of "fair notice" of the consequences of his actions. See *Johnson*, 576 U. S., at 595. A defendant is entitled to understand the legal rules that will determine his sentence. But a vague Guideline is by definition impossible to understand. Take the career-offender Guideline at issue here. We explained in *Johnson* that the identically worded provision in the ACCA created "pervasive disagreement" among courts imposing sentences as to "the nature of the inquiry" that they were required to conduct. *Id.*, at 601. The result was a law that was "'nearly impossible to apply consistently.'" *Ibid.* (quoting *Chambers* v. *United States*, 555 U. S. 122, 133 (2009) (ALITO, J., concurring in judgment)). An ordinary person cannot be expected to understand the consequences that such a shapeless provision will have on his sentence.[2]

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were originally enhanced under the Guideline. See App. to Reply Brief for Petitioner 1–14. In these resentencings, "every defendant but one received a sentence lower than the sentence originally imposed," and the average defendant received a sentence "more than [three] years lower than the original sentence." Reply Brief for Petitioner 12.

[2] Our decision in *Irizarry* v. *United States*, 553 U. S. 708 (2008), is not to the contrary. In *Irizarry* we held that Federal Rule of Criminal Procedure 32(h) does not require a judge to inform a defendant, in advance of a sentencing proceeding, of his intent to vary above the Guidelines

Second, and more importantly, a district court's reliance on a vague Guideline creates a serious risk of "arbitrary enforcement." *Johnson*, 576 U. S., at 595. As set out above, although the Guidelines do not bind a district court as a *formal* matter, as a *functional* matter they "anchor both the district court's discretion and the appellate review process." *Peugh*, 569 U. S., at 549. It introduces an unacceptable degree of arbitrariness into sentencing proceedings to begin by applying a rule that is so vague that efforts to interpret it boil down to "guesswork and intuition." *Johnson*, 576 U. S., at 600. One judge may conduct a statistical analysis to decide that a defendant's crime of conviction is not a crime of violence. Another may rely on gut instinct to conclude that it is. Still a third may "throw [our] opinions into the air in frustration, and give free rein to [her] own feelings" in making the decision. *Derby* v. *United States*, 564 U. S. 1047, 1049 (2011) (Scalia, J., dissenting from denial of certiorari). Importantly, that decision is the end of the ball game for a criminal defendant. Although he may ask the judge to vary downward from the Guidelines range, he must take the range as the starting point for his request. He may ask for a month here or a month there, but he is negotiating from a baseline he cannot control or predict. The result is a sentencing proceeding hopelessly skewed from the outset by "unpredictability and arbitrariness." *Johnson*, 576 U. S., at 598. The Due Process Clause does not tolerate such a proceeding.

Consider, by way of example, a hypothetical version of Beckles' own sentencing proceeding in which the commentary played no clarifying role. Beckles was convicted of possessing a firearm as a convicted felon, in violation of 18 U. S. C. § 922(g)(1), and sentenced to 360 months in prison. That sentence sat at the bottom end of the applicable Guide-

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range. *Id.*, at 715–716. That narrow decision has no bearing on the broader question whether ordinary people are entitled to fair notice, under the Due Process Clause, of the rules that will dictate their punishment.

lines range, factoring in the career-offender Guideline: 360 months to life. But had the career-offender Guideline *not* applied to Beckles, the Guidelines range calculated by the District Court would have been significantly lower: 262 to 327 months. See *Beckles* v. *United States*, Civ. No. 10–23517 (SD Fla., Mar. 4, 2013), App. 129–130. Absent that Guideline, Beckles would have been sentenced to between 33 and 98 fewer months in prison. The District Court admitted as much, explaining that had the Guideline not applied, she "would not have imprisoned Beckles to 360 months" in prison. *Id.*, at 149 (emphasis deleted). Years of Beckles' life thus turned solely on whether the career-offender Guideline applied. There is no meaningful way in which the Guideline exerted less effect on Beckles' sentence than did the statute setting his minimum and maximum terms of imprisonment; indeed, it was the Guidelines, not just the statute, that "fix[ed]" Beckles' "sentenc[e]" in every meaningful way. *Johnson*, 576 U. S., at 596. Nothing of substance, in other words, distinguishes the Guidelines from the kind of laws we held susceptible to vagueness challenges in *Johnson*; both law and Guideline alike operate to extend the time a person spends in prison. The Due Process Clause should apply equally to each.

II

The majority brushes past this logic in its decision to shield the Guidelines from vagueness challenges. In doing so, it casts our sentencing jurisprudence into doubt and upends the law of nearly every Court of Appeals to have considered this question.[3] None of its explanations justify its novel and sweeping conclusion.

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[3] See *United States* v. *Hurlburt*, 835 F. 3d 715, 721–725 (CA7 2016) (en banc) (the Guidelines are subject to vagueness challenges); *United States* v. *Calabretta*, 831 F. 3d 128, 136–137 (CA3 2016) (same); *United States* v. *Sheffield*, 832 F. 3d 296, 312–313 (CADC 2016) (same); *United States* v. *Pawlak*, 822 F. 3d 902, 905–911 (CA6 2016) (same); *United States* v. *Madrid*, 805 F. 3d 1204, 1210–1211 (CA10 2015) (same). But see *United States* v. *Matchett*, 802 F. 3d 1185, 1193–1196 (CA11 2015) (they are not).

A

The majority first reasons that the Guidelines are not susceptible to vagueness challenges because they "do not fix the permissible range of sentences," *ante*, at 263, but merely "guide district courts in exercising their discretion," *ante*, at 265. But we have not embraced such formalism before, and the majority provides no coherent justification for its decision to do so here.

Indeed, we have refused before to apply exactly the formalistic distinction that the majority now embraces. In *Espinosa* v. *Florida*, 505 U. S. 1079, 1081 (1992) (*per curiam*), we held that a State's capital aggravating factor that was drafted in a manner "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor" violated the Eighth Amendment. The factor was unconstitutional, we explained, notwithstanding the fact that only the jury, not the judge, was instructed on the factor; that the judge, not the jury, made the final decision to sentence the defendant to death; and that the judge, in doing so, was not required to defer to the jury's recommendation. "This kind of indirect weighing of an invalid aggravating factor," we explained, "creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor." *Id.*, at 1082. In doing so, we effectively rejected just the argument the majority now embraces: that advisory guidelines lack the kind of binding legal effect that subject them to constitutional scrutiny.

If there were any doubt that advisory sentencing guidelines are subject to constitutional limits, we dispelled it in *Peugh*, where we held that the Guidelines are amenable to challenges under the *Ex Post Facto* Clause. See 569 U. S., at 533. There, the Government argued that the "advisory" nature of the Guidelines rendered them immune from such claims. *Id.*, at 539. But we rejected such an argument. "The federal system," we explained, "adopts procedural measures intended to make the Guidelines the lodestone of

sentencing," and "considerable empirical evidence indicat[es] that the . . . Guidelines have the intended effect." *Id.*, at 543–544. We declined the Government's invitation to limit our *ex post facto* jurisprudence to rules that, as a formal matter, "increase[d] the maximum sentence for which a defendant is eligible." *Id.*, at 539. And we explained that a rule may exert "'binding legal effect' through . . . procedural rules and standards for appellate review that, in combination, encourag[e] district courts to sentence within the guidelines." *Id.*, at 547. It was not true, we concluded, that "the Guidelines are too much like guideposts and not enough like fences," *ibid.*; instead, the Guidelines were just fencelike enough—just lawlike enough—that they cannot be shielded from the Constitution's reach.

The same principle should dictate the same result in this case. How can the Guidelines carry sufficient legal weight to warrant scrutiny under the Eighth Amendment and the *Ex Post Facto* Clause, but not enough to warrant scrutiny under the Due Process Clause? Cf. *United States* v. *Hurlburt*, 835 F. 3d 715, 724 (CA7 2016) (en banc) ("We see no principled way to distinguish *Peugh* on doctrinal grounds"). The majority offers no convincing answer. It asserts that the Due Process Clause "requires a different inquiry" than these provisions do. *Ante*, at 267–268. But it does not explain why it views this as relevant to the constitutional status of the Guidelines. A court considering a challenge to a criminal statute under the *Ex Post Facto* Clause will apply a different legal standard than will a court considering a vagueness challenge to the same statute; that does not make the statute more or less susceptible to constitutional challenge in one context than the other. Our opinion in *Peugh* is particularly difficult for the majority to escape, given that the *Ex Post Facto* Clause, like the Due Process Clause's prohibition against vagueness, is rooted in concerns about "fair warning" and "'fundamental fairness.'" 569 U. S., at 544 (plurality opinion). The majority musters no persuasive ex-

planation for why those concerns would have less force in this context than in that one. That is because none exists.[4]

B

The majority next posits that because courts have long sentenced defendants under purely discretionary regimes, there can be no vagueness concern with any system that, like the Guidelines regime, sets guideposts on the exercise of discretion. *Ante*, at 263–264. But this argument fundamentally misunderstands the problem caused by a court's reliance on a vague Sentencing Guideline.

True enough, for many years, federal courts relied on "a system of indeterminate sentencing" in criminal cases. *Mistretta*, 488 U. S., at 363; see also K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9–14 (1998). Under such a scheme, a sentencing judge considers the full range of relevant aggravating and mitigating facts and circumstances, as well as his view of proper sentencing policy, and then imposes a sentence in light of those considerations. See *Koon* v. *United States*, 518 U. S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue"). As the majority notes, no party here "suggests that a system of purely discretionary sentencing could be subject to a vagueness challenge." *Ante*, at 264. The ma-

[4] The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States* v. *Booker*, 543 U. S. 220 (2005)—that is, during the period in which the Guidelines *did* "fix the permissible range of sentences," *ante*, at 263—may mount vagueness attacks on their sentences. See Brief for Scholars of Criminal Law, Federal Courts, and Sentencing as *Amici Curiae* 33–34. That question is not presented by this case and I, like the majority, take no position on its appropriate resolution.

jority reasons that the Guidelines—which limit the sentencing judge's discretion from what he otherwise would have enjoyed—must therefore also be immune from vagueness attacks. *Ante*, at 265.

But the majority misapprehends the nature of the constitutional infirmity that occurs when a sentencing judge relies on an inscrutably vague Guideline. A defendant who is sentenced under a purely discretionary regime does not face the prospect of "arbitrary enforcement" by the sentencing judge, *Kolender*, 461 U. S., at 358; rather, he faces a fact- and context-sensitive determination informed by the exercise of reasoned judgment. A defendant sentenced pursuant to an impossibly vague Guideline, by contrast, is put in an untenable position. The "lodestone" of his sentence—the baseline against which the district court will assess his characteristics and his conduct—is set by a rule that is impossible to understand. Such a proceeding is the antithesis of due process. See *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 403 (1966) ("Implicit in [due process] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce"). It is not reliance on discretion that makes a sentencing regime vague; it is reliance on an impenetrable rule as a baseline for the exercise of that discretion. Reliance on a rule of this kind, whether set out in a statute or in a Guideline, does not comport with "'ordinary notions of fair play.'" *Johnson*, 576 U. S., at 595.

C

The majority ends by speculating that permitting vagueness attacks on the Guidelines would call into question the validity of many Guidelines, and even the factors that Congress has instructed courts to consider in imposing sentences. See *ante*, at 268–269. In doing so, the majority once more resuscitates arguments we have already considered and dismissed.

Johnson confronted and rejected a version of this argument. There, the Government contended that "dozens of

federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" terms that—in its view—were indistinguishable from the residual clause at issue in that case. 576 U. S., at 603. We rejected the argument, explaining that such rules "call[ed] for the application of a qualitative standard such as 'substantial risk' to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Id.*, at 604 (quoting *Nash* v. *United States*, 229 U. S. 373, 377 (1913)). What rendered the ACCA's residual clause unconstitutionally vague, we explained, was not that it required "gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*," but that it required the application of an ambiguous standard "to an idealized ordinary case of the crime." 576 U. S., at 603–604. Holding the residual clause unconstitutionally vague, in other words, cast no doubt on the dozens of laws elsewhere in the U. S. Code requiring the application of general standards to particular conduct.

The same is true here. The sentencing factors described by the majority bear no similarity to the categorical risk analysis that the Court held unconstitutionally vague in *Johnson*, nor to any other statutes it has previously found vague. Congress' instruction to district courts to consider, for instance, "the nature and circumstances of the offense and the history and characteristics of the defendant," § 3553(a)(1), bears little resemblance to statutes requiring subjective determinations as to whether conduct is "annoying" or "unjust." See *Coates* v. *Cincinnati*, 402 U. S. 611, 615–616 (1971); *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921).[5] And to the extent that the majority's

[5] Indeed, the Ninth Circuit has held for decades that the Guidelines are subject to vagueness challenges, see *United States* v. *Helmy*, 951 F. 2d 988, 993 (CA9 1991), yet the Government represents that that court has never found a Guideline unconstitutionally vague. See Reply Brief for United States 20.

concern is that subjecting sentencing factors to the Due Process Clause's prohibition on vagueness would risk the demise of discretionary sentencing regimes, that prospect is unlikely, for the reasons I have already explained.

* * *

It violates the Due Process Clause "to condemn someone to prison" on the basis of a sentencing rule "so shapeless" as to resist interpretation. 576 U. S., at 602. But the Court's decision today permits exactly that result. With respect, I concur only in the judgment.

Per Curiam

RIPPO *v.* BAKER, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 16–6316. Decided March 6, 2017

During petitioner Rippo's trial for first-degree murder, he received information that the judge was the target of a federal bribery probe and surmised that the Clark County District Attorney's Office, which was prosecuting him, was playing a role in the investigation. Rippo moved to disqualify the judge under the Fourteenth Amendment's Due Process Clause. The trial judge declined to recuse himself, and, after his federal indictment, a different judge denied Rippo's new trial motion. Rippo advanced his bias claim again in an application for state postconviction relief, this time pointing to documents from the judge's criminal trial indicating that the district attorney's office had participated in the judge's investigation. The state postconviction court denied relief, and the Nevada Supreme Court affirmed, reasoning that Rippo was not entitled to discovery or an evidentiary hearing because his allegations did not support an assertion of actual bias.

Held: The Nevada Supreme Court applied the wrong legal standard. Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow* v. *Larkin*, 421 U. S. 35, 47. This Court's decision in *Bracy* v. *Gramley*, 520 U. S. 899, is not to the contrary.

Certiorari granted; 132 Nev. 95, 368 P. 3d 729, vacated and remanded.

PER CURIAM.

A Nevada jury convicted petitioner Michael Damon Rippo of first-degree murder and other offenses and sentenced him to death. During his trial, Rippo received information that the judge was the target of a federal bribery probe, and he surmised that the Clark County District Attorney's Office—which was prosecuting him—was playing a role in that investigation. Rippo moved for the judge's disqualification under the Due Process Clause of the Fourteenth Amendment, contending that a judge could not impartially adjudicate a case in which one of the parties was criminally investigating him. But the trial judge declined to recuse himself, and (after that

judge's indictment on federal charges) a different judge later denied Rippo's motion for a new trial. The Nevada Supreme Court affirmed on direct appeal, reasoning in part that Rippo had not introduced evidence that state authorities were involved in the federal investigation. *Rippo* v. *State*, 113 Nev. 1239, 1248–1250, 946 P. 2d 1017, 1023–1024 (1997) (*per curiam*).

In a later application for state postconviction relief, Rippo advanced his bias claim once more, this time pointing to documents from the judge's criminal trial indicating that the district attorney's office had participated in the investigation of the trial judge. See, *e. g.*, App. to Pet. for Cert. 236–237, 397. The state postconviction court denied relief, and the Nevada Supreme Court affirmed. *Rippo* v. *State*, 132 Nev. 95, 115–119, 368 P. 3d 729, 743–745 (2016). It likened Rippo's claim to the "camouflaging bias" theory that this Court discussed in *Bracy* v. *Gramley*, 520 U. S. 899 (1997). The *Bracy* petitioner argued that a judge who accepts bribes to rule in favor of some defendants would seek to disguise that favorable treatment by ruling *against* defendants who did not bribe him. *Id.*, at 905. We explained that despite the "speculative" nature of that theory, the petitioner was entitled to discovery because he had also alleged specific facts suggesting that the judge may have colluded with defense counsel to rush the petitioner's case to trial. See *id.*, at 905–909. The Nevada Supreme Court reasoned that, in contrast, Rippo was not entitled to discovery or an evidentiary hearing because his allegations "d[id] not support the assertion that the trial judge was actually biased in this case." 132 Nev., at 117, 368 P. 3d, at 744.*

*The court further relied on its bias holding to determine that Rippo had not established cause and prejudice to overcome various state procedural bars. 132 Nev., at 118–119, 368 P. 3d, at 745. Because the court below did not invoke any state-law grounds "independent of the merits of [Rippo's] federal constitutional challenge," we have jurisdiction to review its resolution of federal law. *Foster* v. *Chatman*, 578 U. S. 488, 498 (2016).

We vacate the Nevada Supreme Court's judgment because it applied the wrong legal standard. Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge "'ha[s] no actual bias.'" *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 825 (1986). Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975); see *Williams* v. *Pennsylvania*, 579 U. S. 1, 8 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted)). Our decision in *Bracy* is not to the contrary: Although we explained that the petitioner there *had* pointed to facts suggesting actual, subjective bias, we did not hold that a litigant must show as a matter of course that a judge was "actually biased in [the litigant's] case," 132 Nev., at 117, 368 P. 3d, at 744—much less that he must do so when, as here, he does not allege a theory of "camouflaging bias." The Nevada Supreme Court did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable. As a result, we grant the petition for writ of certiorari and the motion for leave to proceed *in forma pauperis*, and we vacate the judgment below and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* SW GENERAL, INC., DBA SOUTHWEST AMBULANCE

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

No. 15–1251. Argued November 7, 2016—Decided March 21, 2017

Article II of the Constitution requires that the President obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States." § 2, cl. 2. Given this provision, the responsibilities of an office requiring Presidential appointment and Senate confirmation (PAS office) may go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement. Congress has accounted for this reality by giving the President limited authority to appoint acting officials to temporarily perform the functions of a vacant PAS office without first obtaining Senate approval.

The current version of that authorization is the Federal Vacancies Reform Act of 1998 (FVRA), 5 U. S. C. § 3345 *et seq.* Section 3345(a) of the FVRA permits three categories of Government officials to perform acting service in a vacant PAS office. Subsection (a)(1) prescribes the general rule that, if a vacancy arises in a PAS office, the first assistant to that office "shall perform" the office's "functions and duties temporarily in an acting capacity." Subsections (a)(2) and (a)(3) provide that, "notwithstanding paragraph (1)," the President "may direct" a person already serving in another PAS office, or a senior employee in the relevant agency, to serve in an acting capacity instead.

Section 3345 also makes certain individuals ineligible for acting service. Subsection (b)(1) states: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if the President nominates him for the vacant PAS office and, during the 365-day period preceding the vacancy, the person "did not serve in the position of first assistant" to that office or "served in [that] position . . . for less than 90 days."

The general counsel of the National Labor Relations Board (NLRB or Board) is a PAS office. In June 2010, a vacancy arose in that office, and the President directed Lafe Solomon to serve as acting general counsel. Solomon qualified for acting service under subsection (a)(3) of the FVRA, because he was a senior employee at the NLRB. In January 2011, the President nominated Solomon to serve as the NLRB's general counsel on a permanent basis. The Senate never took action

on the nomination, and the President ultimately withdrew Solomon's name in favor of a new candidate, whom the Senate confirmed in October 2013. Throughout this entire period Solomon served as the acting general counsel to the NLRB.

In January 2013, an NLRB Regional Director, exercising authority on Solomon's behalf, issued an unfair labor practices complaint against respondent SW General, Inc. An Administrative Law Judge concluded that SW General had committed unfair labor practices, and the NLRB agreed. SW General sought review in the United States Court of Appeals for the District of Columbia Circuit, arguing that the complaint was invalid because, under subsection (b)(1) of the FVRA, Solomon could not perform the duties of general counsel to the NLRB after having been nominated to fill that position. The NLRB countered that subsection (b)(1) applies only to first assistants who automatically assume acting duties under subsection (a)(1), not to acting officers who, like Solomon, serve under (a)(2) or (a)(3). The Court of Appeals vacated the Board's order. It concluded that the prohibition on acting service by nominees contained in subsection (b)(1) applies to all acting officers, regardless of whether they serve pursuant to subsection (a)(1), (a)(2), or (a)(3). As a result, Solomon became ineligible to perform the duties of general counsel in an acting capacity once the President nominated him to fill that post.

Held:

1. Subsection (b)(1) of the FVRA prevents a person who has been nominated to fill a vacant PAS office from performing the duties of that office in an acting capacity. The prohibition applies to anyone performing acting service under the FVRA. It is not limited to first assistants performing acting service under subsection (a)(1). Pp. 299–308.

(a) The text of the FVRA requires this conclusion. Pp. 299–305.

(1) Subsection (b)(1) applies to any "person" and prohibits service "as an acting officer for an office under this section." "Person" has an expansive meaning that can encompass anyone who performs acting duties under the FVRA. See *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 312. And "under this section" clarifies that subsection (b)(1) applies to all of § 3345: The FVRA contains cross-references to specific subsections and paragraphs. But subsection (b)(1) refers to § 3345, which contains all of the ways a person may become an acting officer. The rest of the FVRA also uses the pairing of "person" and "section" to encompass anyone serving as an acting officer under the FVRA, and Congress could readily have used more specific language if it intended subsection (b)(1) to apply only to first assistants acting under (a)(1).

Syllabus

The dependent clause at the beginning of subsection (b)(1)—"[n]otwithstanding subsection (a)(1)"—confirms the breadth of the prohibition on acting service by nominees. In statutes, "notwithstanding" clauses show that one provision prevails over another in the event of a conflict. Here, that means that subsection (b)(1) applies even when it conflicts with the default rule in (a)(1) that first assistants "shall perform" acting duties. Pp. 299–301.

(2) The Board argues that, because the phrase "notwithstanding subsection (a)(1)" does not mention (a)(2) or (a)(3), Congress did not intend the prohibition in subsection (b)(1) to apply to people serving as acting officers under those provisions. The Board relies on the "interpretive canon, *expressio unius est exclusio alterius*, expressing one item of [an] associated group or series excludes another left unmentioned." *Chevron U. S. A. Inc.* v. *Echazabal*, 536 U. S. 73, 80 (internal quotation marks omitted).

This interpretive canon applies, however, only when "circumstances support[ ] a sensible inference that the term left out must have been meant to be excluded." *Id.*, at 81. A "notwithstanding" clause does not naturally give rise to such an inference; it just shows which of two or more provisions prevails in the event of a conflict. Singling out one conflict generally does not suggest that other, unaddressed conflicts should be resolved in the opposite manner. Here, the conflict between (a)(1) and (b)(1) is unique: The former uses mandatory language—the first assistant "shall perform" acting duties—while the latter identifies who "may not" serve as an acting officer. The "notwithstanding" clause clarifies that the mandatory language in subsection (a)(1) does not prevail over subsection (b)(1) in the event of a conflict. Subsections (a)(2) and (a)(3) lack that mandatory language, so the natural inference is that Congress left these provisions out of the "notwithstanding" clause because they differ from subsection (a)(1), not to implicitly exempt them from the prohibition in subsection (b)(1).

Moreover, subsection (b)(2) specifies that (b)(1) "shall not apply" to certain people who are "serving as the first assistant." If (b)(1) applied only to first assistants, stating that limitation would be superfluous. Pp. 301–305.

(b) Because the text is clear, the Board's arguments about legislative history, purpose, and post-enactment practice need not be considered. In any event, its arguments are not compelling.

The original draft of the FVRA contained a prohibition on nominees serving as acting officers, but explicitly limited that prohibition to first assistants. The Board argues that, when Congress revised this original draft, it made changes to give the President more flexibility to appoint acting officers and did not intend to broaden the prohibition on nominees

performing acting service. The glitch in this argument is that Congress did change the prohibition on nominees performing acting service, revising it to clearly apply to all acting officers. The fact that certain Senators stated that they wanted to give the President more flexibility to appoint acting officials does not mean that they got exactly what they wanted. Nor does a statement by one of the sponsors of the FVRA—who said that subsection (b)(1) applies only to first assistants—overcome the clear text, particularly given that the very next Senator to speak offered a contradictory account of the provision.

The Board also argues that, since the FVRA was enacted, Congress has not objected when Presidents have nominated individuals who were serving as acting officers under subsection (a)(2) or (a)(3), and that the Office of Legal Counsel and Government Accountability Office have issued guidance construing subsection (b)(1) to apply only to first assistants. Relying on *NLRB* v. *Noel Canning*, 573 U. S. 513, 524, the Board contends that this "historical practice" is entitled to "significant weight."

"[H]istorical practice" is too grand a title for the Board's evidence. The FVRA was not enacted until 1998, and the evidence the Board cites is not significant enough to warrant the conclusion that Congress's failure to speak up implies that it has acquiesced in the view that subsection (b)(1) applies only to first assistants. By contrast, the Court's decision in *Noel Canning* dealt with the President's constitutional authority under the Recess Appointments Clause, an issue that had attracted intense attention from Presidents, Attorneys General, and the Senate dating back to the beginning of the Republic. Pp. 305–308.

2. Applying the FVRA to this case is straightforward. Subsection (b)(1) prohibited Solomon from continuing his service as acting general counsel once the President nominated him to fill the position permanently. The President could have appointed another person to serve as acting officer in Solomon's place, but did not do so. P. 309.

796 F. 3d 67, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, BREYER, ALITO, and KAGAN, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 311. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 318.

Acting Solicitor General Gershengorn argued the cause for petitioner. With him on the briefs were *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Brinkmann*, *Rachel P. Kovner*, *Douglas N. Letter*, *Scott R.*

McIntosh, *Benjamin M. Shultz*, *Richard F. Griffin, Jr.*, *John H. Ferguson*, and *Linda J. Dreeben.*

Shay Dvoretzky argued the cause for respondent. With him on the brief was *Emily J. Kennedy.**

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Article II of the Constitution requires that the President obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States." §2, cl. 2. Given this provision, the responsibilities of an office requiring Presidential appointment and Senate confirmation—known as a "PAS" office—may go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a re-

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, and *James B. Coppess*; and for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Brian R. Frazelle.*

Briefs of *amici curiae* urging affirmance were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia, *Elbert Lin*, Solicitor General, *Thomas M. Johnson, Jr.*, Deputy Attorney General, and *Erica N. Peterson*, Assistant Attorney General, by *Luther Strange*, Attorney General of Alabama, and *Andrew L. Brasher*, Solicitor General, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Samuel S. Olens* of Georgia, *Derek Schmidt* of Kansas, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Adam Paul Laxalt* of Nevada, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Brad D. Schimel* of Wisconsin; for the Cato Institute by *Ilya Shapiro*; for the Chamber of Commerce of the United States of America by *John P. Elwood*, *Jeremy C. Marwell*, and *Kathryn Comerford Todd*; for the National Federation of Independent Business Small Business Legal Center et al. by *J. Michael Connolly*, *Michael H. Park*, *Karen R. Harned*, and *Luke A. Wake*; for the Southeastern Legal Foundation by *Kimberly S. Hermann*; for the Washington Legal Foundation et al. by *Cory L. Andrews*; for Sen. John McCain et al. by *Justin A. Torres*; and for Morton Rosenberg by *D. John Sauer.*

placement. Congress has long accounted for this reality by authorizing the President to direct certain officials to temporarily carry out the duties of a vacant PAS office in an acting capacity, without Senate confirmation.

The Federal Vacancies Reform Act of 1998 (FVRA), 5 U. S. C. § 3345 *et seq.*, is the latest version of that authorization. Section 3345(a) of the FVRA authorizes three classes of Government officials to become acting officers. The general rule is that the first assistant to a vacant office shall become the acting officer. The President may override that default rule by directing either a person serving in a different PAS office or a senior employee within the relevant agency to become the acting officer instead.

The FVRA, however, prohibits certain persons from serving as acting officers if the President has nominated them to fill the vacant office permanently. The question presented is whether that limitation applies only to first assistants who have automatically assumed acting duties, or whether it also applies to PAS officers and senior employees serving as acting officers at the President's behest. We hold that it applies to all three categories of acting officers.

I

A

The Senate's advice and consent power is a critical "structural safeguard[ ] of the constitutional scheme." *Edmond* v. *United States*, 520 U. S. 651, 659 (1997). The Framers envisioned it as "an excellent check upon a spirit of favoritism in the President" and a guard against "the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity." The Federalist No. 76, p. 457 (C. Rossiter ed. 1961) (A. Hamilton). The constitutional process of Presidential appointment and Senate confirmation, however, can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once

submitted. Yet neither may desire to see the duties of the vacant office go unperformed in the interim.

Since President Washington's first term, Congress has given the President limited authority to appoint acting officials to temporarily perform the functions of a vacant PAS office without first obtaining Senate approval. The earliest statutes authorized the appointment of "any person or persons" to fill specific vacancies in the Departments of State, Treasury, and War. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. Congress at first allowed acting officers to serve until the permanent officeholder could resume his duties or a successor was appointed, *ibid.*, but soon imposed a six-month limit on acting service, Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

Congress revisited the issue in the 1860s, ultimately passing the Vacancies Act of 1868. The Vacancies Act expanded the number of PAS offices that the President could fill with acting officers. Act of July 23, 1868, ch. 227, 15 Stat. 168; see also Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. With that expansion came new constraints. The authority to appoint "any person or persons" as an acting officer gave way to a default rule that the "first or sole assistant . . . shall" perform that function, with an exception allowing the President to instead fill the post with a person already serving in a PAS office. 15 Stat. 168. And rather than six months of acting service, the Vacancies Act generally authorized only ten days. *Ibid.* That narrow window of acting service was later lengthened to 30 days. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733.

During the 1970s and 1980s, interbranch conflict arose over the Vacancies Act. The Department of Justice took the position that, in many instances, the head of an executive agency had independent authority apart from the Vacancies Act to temporarily fill vacant offices. The Comptroller General disagreed, arguing that the Act was the exclusive au-

thority for temporarily filling vacancies in executive agencies. See M. Rosenberg, Congressional Research Service Report for Congress, The New Vacancies Act: Congress Acts To Protect the Senate's Confirmation Prerogative 2–4 (1998) (Rosenberg). Congress then amended the Vacancies Act to clarify that it applies to such agencies, while at the same time lengthening the term of permissible acting service to 120 days, with a tolling period while a nomination is pending. *Id.*, at 3; see Presidential Transitions Effectiveness Act, § 7, 102 Stat. 988.

But tensions did not ease. By 1998, approximately 20 percent of PAS offices in executive agencies were occupied by "temporary designees, most of whom had served beyond the 120-day limitation period . . . without presidential submissions of nominations." Rosenberg 1. These acting officers filled high-level positions, sometimes in obvious contravention of the Senate's wishes. One, for instance, was brought in from outside Government to serve as Acting Assistant Attorney General for the Civil Rights Division of the Justice Department, immediately after the Senate refused to confirm him for that very office. *Ibid.*; see M. Rosenberg, Congressional Research Service, Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights 1–3 (1998). Perceiving a threat to the Senate's advice and consent power, see Rosenberg 6, Congress acted again. In 1998, it replaced the Vacancies Act with the FVRA.

Section 3345(a) of the FVRA permits three categories of Government officials to perform acting service in a vacant PAS office. Subsection (a)(1) prescribes a general rule: If a person serving in a PAS office dies, resigns, or is otherwise unable to perform his duties, the first assistant to that office "shall perform" the office's "functions and duties . . . temporarily in an acting capacity."

The next two paragraphs of § 3345(a) identify alternatives. Subsection (a)(2) provides that "notwithstanding paragraph

(1)," the President "may direct a person" who already serves in a PAS office to "perform the functions and duties of the vacant office temporarily in an acting capacity." Subsection (a)(3) adds that "notwithstanding paragraph (1)," the President "may direct" a person to perform acting duties if the person served in a senior position in the relevant agency for at least 90 days in the 365-day period preceding the vacancy.[1]

Section 3345 also makes certain individuals ineligible for acting service. Subsection (b)(1) states: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if the President nominates him for the vacant PAS office and, during the 365-day period preceding the vacancy, the individual "did not serve in the position of first assistant" to that office or "served in [that] position . . . for less than 90 days." Subsection (b)(2) creates an exception to this prohibition, providing that "[p]aragraph (1) shall not apply to any person" serving in a first assistant position that itself requires the Senate's advice and consent.

Other sections of the FVRA establish time limits on acting service and penalties for noncompliance. In most cases, the statute permits acting service for "210 days beginning on the date the vacancy occurs"; tolls that time limit while a nomination is pending; and starts a new 210-day clock if the nomination is "rejected . . . , withdrawn, or returned." §§ 3346(a)–(b)(1). Upon a second nomination, the time limit tolls once more, and an acting officer can serve an additional 210 days if the second nomination proves unsuccessful. § 3346(b)(2). The FVRA ensures compliance by providing that, in general, "any function or duty of a vacant office" performed by a person not properly serving under the statute "shall have no force or effect." § 3348(d).

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[1] A senior position is one that has a rate of pay equal to or greater than the minimum rate "for a position at GS–15 of the General Schedule." 5 U. S. C. § 3345(a)(3)(B).

B

The National Labor Relations Board (NLRB or Board) is charged with administering the National Labor Relations Act. By statute, its general counsel must be appointed by the President with the advice and consent of the Senate. 29 U. S. C. § 153(d).

In June 2010, the NLRB's general counsel—who had been serving with Senate confirmation—resigned. The President directed Lafe Solomon to serve temporarily as the NLRB's acting general counsel, citing the FVRA as the basis for the appointment. See Memorandum from President Barack Obama to L. Solomon (June 18, 2010). Solomon satisfied the requirements for acting service under subsection (a)(3) of the FVRA because he had spent the previous ten years in the senior position of Director of the NLRB's Office of Representation Appeals.

The President had bigger plans for Solomon than acting service. On January 5, 2011, he nominated Solomon to serve as the NLRB's general counsel on a permanent basis. The Senate had other ideas. That body did not act upon the nomination during the 112th Congress, so it was returned to the President when the legislative session expired. 159 Cong. Rec. 18 (2013). The President resubmitted Solomon's name for consideration in the spring of 2013, *id.*, at 7707, but to no avail. The President ultimately withdrew Solomon's nomination and put forward a new candidate, whom the Senate confirmed on October 29, 2013. *Id.*, at 16357. Throughout this entire period, Solomon served as the NLRB's acting general counsel.

Solomon's responsibilities included exercising "final authority" to issue complaints alleging unfair labor practices. 29 U. S. C. §§ 153(d), 160(b). In January 2013, an NLRB Regional Director, exercising authority on Solomon's behalf, issued a complaint alleging that respondent SW General, Inc.—a company that provides ambulance services—had improperly failed to pay certain bonuses to long-term employ-

ees. An Administrative Law Judge concluded that SW General had committed unfair labor practices, and the NLRB agreed. 360 N. L. R. B. 109 (2014).

SW General filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. It argued that the unfair labor practices complaint was invalid because, under subsection (b)(1) of the FVRA, Solomon could not legally perform the duties of general counsel after having been nominated to fill that position. The NLRB defended Solomon's actions. It contended that subsection (b)(1) applies only to first assistants who automatically assume acting duties under subsection (a)(1), not to acting officers who, like Solomon, serve under (a)(2) or (a)(3).

The Court of Appeals granted SW General's petition for review and vacated the Board's order. It reasoned that "the text of subsection (b)(1) squarely supports" the conclusion that the provision's restriction on nominees serving as acting officers "applies to all acting officers, no matter whether they serve pursuant to subsection (a)(1), (a)(2) or (a)(3)." 796 F. 3d 67, 78 (CADC 2015). As a result, Solomon became "ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel." *Id.*, at 72.[2] We granted certiorari, 579 U. S. 917 (2016), and now affirm.

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[2] The FVRA exempts "the General Counsel of the National Labor Relations Board" from the general rule that actions taken in violation of the FVRA are void *ab initio*. 5 U. S. C. § 3348(e)(1). The Court of Appeals "assume[d] that section 3348(e)(1) renders the actions of an improperly serving Acting General Counsel *voidable*" and rejected the Board's argument against voiding Solomon's actions. 796 F. 3d, at 79–82. The Board did not seek certiorari on this issue, so we do not consider it.

In addition, the unfair labor practice complaint in this case was issued after the Senate had returned Solomon's nomination the first time but before the President had renominated him to the same position. In the proceedings below, the Board did not argue that this timing made any difference, and the court assumed it had no bearing on the proper application of the FVRA to this case. *Id.*, at 72, n. 3. We proceed on the same assumption.

II

Subsection (b)(1) of the FVRA prevents a person who has been nominated for a vacant PAS office from performing the duties of that office in an acting capacity. In full, it states:

> "(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—
>
> (A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—
>
> (i) did not serve in the position of first assistant to the office of such officer; or
>
> (ii) served in the position of first assistant to the office of such officer for less than 90 days; and
>
> (B) the President submits a nomination of such person to the Senate for appointment to such office."

Subsection (b)(2) adds that "[p]aragraph (1) shall not apply" to a person serving in a first assistant position that itself requires the advice and consent of the Senate.

We conclude that the prohibition in subsection (b)(1) applies to anyone performing acting service under the FVRA. It is not, as the Board contends, limited to first assistants performing acting service under subsection (a)(1). The text of the prohibition extends to any "person" who serves "as an acting officer . . . under this section," not just to "first assistants" serving under subsection (a)(1). The phrase "[n]otwithstanding subsection (a)(1)" does not limit the reach of (b)(1), but instead clarifies that the prohibition applies even when it conflicts with the default rule that first assistants shall perform acting duties.

A

1

Our analysis of subsection (b)(1) begins with its text. Subsection (b)(1) applies to any "person" and prohibits service "as an acting officer for an office under this section."

The key words are "person" and "section." They clearly indicate that (b)(1) applies to all acting officers under § 3345, regardless of the means of appointment.

Start with "person." The word has a naturally expansive meaning that can encompass anyone who performs acting duties under the FVRA. See *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 312 (1978). Important as they may be, first assistants are not the only "person[s]" of the bunch.

Now add "under this section." The language clarifies that subsection (b)(1) applies to all persons serving under § 3345. Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line. See *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. 50, 60–61 (2004); L. Filson, The Legislative Drafter's Desk Reference 222 (1992). Congress used that structure in the FVRA and relied on it to make precise cross-references. When Congress wanted to refer only to a particular subsection or paragraph, it said so. See, *e. g.*, § 3346(a)(2) ("subsection (b)"); § 3346(b)(2) ("paragraph (1)"). But in (b)(1) Congress referred to the entire section—§ 3345—which subsumes all of the ways a person may become an acting officer.

The rest of the FVRA uses the pairing of "person" and "section" the same way. Section 3346, for example, specifies how long "the *person* serving as an acting officer as described under *section* 3345 may serve in the office." (Emphasis added.) And § 3348(d)(1) describes the consequences of noncompliance with the FVRA by referring to the actions "taken by any *person* who is not acting under *section* 3345, 3346, or 3347." (Emphasis added.) No one disputes that both provisions apply to anyone serving as an acting officer under the FVRA, not just first assistants serving under subsection (a)(1).

Had Congress intended subsection (b)(1) to apply only to first assistants acting under (a)(1), it could easily have chosen clearer language. Replacing "person" with "first assistant" would have done the trick. So too would replacing "under

this section" with "under subsection (a)(1)." "The fact that [Congress] did not adopt [either] readily available and apparent alternative strongly supports" the conclusion that subsection (b)(1) applies to any acting officer appointed under any provision within § 3345. *Knight* v. *Commissioner*, 552 U. S. 181, 188 (2008).

The dependent clause at the beginning of subsection (b)(1)—"[n]otwithstanding subsection (a)(1)"—confirms that the prohibition on acting service applies even when it conflicts with the default rule that the first assistant shall perform acting duties. The ordinary meaning of "notwithstanding" is "in spite of," or "without prevention or obstruction from or by." Webster's Third New International Dictionary 1545 (1986); Black's Law Dictionary 1091 (7th ed. 1999) ("Despite; in spite of"). In statutes, the word "shows which provision prevails in the event of a clash." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 126–127 (2012). Subsection (a)(1) sets the rule that first assistants "shall perform" the vacant office's "functions and duties . . . in an acting capacity." But the "notwithstanding" clause in subsection (b)(1) means that, even if a first assistant is serving as an acting officer under this statutory mandate, he must cease that service if the President nominates him to fill the vacant PAS office. That subsection (b)(1) also applies to acting officers serving at the President's behest is already clear from the broad text of the independent clause—they are all "person[s]" serving "under this section."

2

The Board takes a different view of the phrase "[n]otwithstanding subsection (a)(1)." It begins by noting that § 3345(a) uses three different subsections to "create three separate paths for becoming an acting official." Reply Brief 2. The prohibition in subsection (b)(1), the Board continues, "applies '[n]otwithstanding' only *one* of these subsections—'subsection (a)(1).'" *Ibid.* In the Board's view, sin-

gling out subsection (a)(1) carries a negative implication: that "Congress did not intend Subsection (b)(1) to override the alternative mechanisms for acting service in Subsections (a)(2) and (a)(3)." *Id.*, at 3.

We disagree. The Board relies on the "interpretive canon, *expressio unius est exclusio alterius*, 'expressing one item of [an] associated group or series excludes another left unmentioned.'" *Chevron U. S. A. Inc.* v. *Echazabal*, 536 U. S. 73, 80 (2002) (quoting *United States* v. *Vonn*, 535 U. S. 55, 65 (2002)). If a sign at the entrance to a zoo says "come see the elephant, lion, hippo, and giraffe," and a temporary sign is added saying "the giraffe is sick," you would reasonably assume that the others are in good health.

"The force of any negative implication, however, depends on context." *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 381 (2013). The *expressio unius* canon applies only when "circumstances support[ ] a sensible inference that the term left out must have been meant to be excluded." *Echazabal*, 536 U. S., at 81. A "notwithstanding" clause does not naturally give rise to such an inference; it just shows which of two or more provisions prevails in the event of a conflict. Such a clause confirms rather than constrains breadth. Singling out one potential conflict might suggest that Congress thought the conflict was particularly difficult to resolve, or was quite likely to arise. But doing so generally does not imply anything about other, unaddressed conflicts, much less that they should be resolved in the *opposite* manner.

Suppose a radio station announces: "We play your favorite hits from the '60s, '70s, and '80s. Notwithstanding the fact that we play hits from the '60s, we do not play music by British bands." You would not tune in expecting to hear the 1970s British band "The Clash" any more than the 1960s "Beatles." The station, after all, has announced that "we do not play music by British bands." The "notwithstanding" clause just establishes that this applies even to music from the '60s, when British bands were prominently featured on

the charts. No one, however, would think the station singled out the '60s to convey implicitly that its categorical statement "we do not play music by British bands" actually did not apply to the '70s and '80s.

Drawing a negative inference from the "notwithstanding" clause in subsection (b)(1) is similarly inapt. Without that clause, subsection (b)(1) plainly would apply to all persons serving as acting officers under § 3345(a). Adding "notwithstanding subsection (a)(1)" makes sense because (a)(1) conflicts with (b)(1) in a unique manner. The former is mandatory and self-executing: The first assistant "*shall* perform" acting duties. The latter, by contrast, speaks to who "may not" be an acting officer. So if a vacancy arises and the President nominates the first assistant to fill the position, (a)(1) says the first assistant "shall perform" the duties of that office in an acting capacity while the nomination is pending, and (b)(1) says he "may not." The "notwithstanding" clause clarifies that the language of (a)(1) does not prevail if that conflict occurs.

Compare the mandatory language of subsection (a)(1) to (a)(2) and (a)(3). People appointed under those provisions are just as much acting officers as first assistants who assume the role. But there is no freestanding directive that they perform acting duties; subsections (a)(2) and (a)(3) just say that the President "may direct" them to do so. The natural inference, then, is that Congress left these provisions out of the "notwithstanding" clause because they are different from subsection (a)(1), not to exempt from the broad prohibition in subsection (b)(1) those officers serving under (a)(2) and (a)(3).

Indeed, "notwithstanding" is used the same way in other parts of § 3345. Subsections (a)(2) and (a)(3) are each preceded by the phrase "notwithstanding paragraph (1)." The phrase recognizes that subsection (a)(1) is unique, and resolves the potential conflict between the mandatory "shall perform" in that provision and the permissive "may direct"

in (a)(2) and (a)(3). But it implies nothing about other potential conflicts that may arise in the statutory scheme. In subsection (b)(1), it works the same way: The "notwithstanding" clause simply shows that (b)(1) overrides (a)(1), and nothing more.

Step back from the Board's focus on "notwithstanding" and another problem appears: Its interpretation of subsection (b)(1) makes a mess of (b)(2). Subsection (b)(2) specifies that (b)(1) "shall not apply to any person" if (A) that person "is serving as the first assistant"; (B) the first assistant position is itself a PAS office; and (C) "the Senate has approved the appointment of such person" to that office.

The Board's interpretation makes the first requirement superfluous, a result we typically try to avoid. *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)). If subsection (b)(1) applied only to first assistants, there would be no need to state the requirement in (b)(2)(A) that "such person is serving as the first assistant." The Board proposes that Congress did so for clarity, but the same could be said of most superfluous language.

The Board and the dissent counter that applying the prohibition in subsection (b)(1) to anyone performing acting service under § 3345(a) has its own problem: Doing so would also require applying it to § 3345(c)(1), which "would nullify" that provision. Reply Brief 9. The dissent deems this "no way to read a statute." *Post*, at 323.

We agree, and it is not the way we read it. Under our reading, subsection (b)(1) has no effect on (c)(1). Subsection (b)(1) addresses nominations *generally*, prohibiting any person who has been nominated to fill any vacant office from performing that office's duties in an acting capacity. Subsection (c)(1) speaks to a *specific* nomination scenario: when a person is "nominated by the President for reappointment for

an additional term to the same office . . . without a break in service." In this particular situation, the FVRA authorizes the nominee "to continue to serve in that office." § 3345(c). "[I]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 645 (2012). The general prohibition on acting service by nominees yields to the more specific authorization allowing officers up for reappointment to remain at their posts. Applying subsection (b)(1) to § 3345(a) hardly compels a different result.

The text of subsection (b)(1) is clear: Subject to one narrow exception, it prohibits anyone who has been nominated to fill a vacant PAS office from performing the duties of that office in an acting capacity, regardless of whether the acting officer was appointed under subsection (a)(1), (a)(2), or (a)(3). It is not limited to first assistants who automatically assume acting duties under (a)(1).

B

The Board contends that legislative history, purpose, and post-enactment practice uniformly show that subsection (b)(1) applies only to first assistants. The text is clear, so we need not consider this extra-textual evidence. See *State Farm Fire & Casualty Co.* v. *United States ex rel. Rigsby*, 580 U. S. 26, 36–37 (2016). In any event, the Board's evidence is not compelling.

The Board argues that subsection (b)(1) was designed to serve a specific purpose: preventing the President from having his nominee serve as an acting officer by making him first assistant after (or right before) a vacancy arises. Brief for Petitioner 38. The original draft of the FVRA authorized first assistants and PAS officers to perform acting service. Subsection (b) of that draft provided that if a first assistant was nominated to fill the vacant office, he could not perform that office's duties in an acting capacity unless he had been the first assistant for at least 180 days before the vacancy. Several Senators thought the FVRA too restric-

tive. They asked to add senior agency officials to the list of potential acting officers and to shorten the 180-day length-of-service requirement in subsection (b). Their requests, the Board says, were granted; the final version of the FVRA included subsection (a)(3) for senior employees and shortened the length-of-service requirement to 90 days. There was no intent to extend the prohibition in subsection (b) beyond first assistants. *Id.*, at 45–46.

The glitch in this argument is of course the text of subsection (b)(1). Congress did amend the statute to allow senior employees to become acting officers under subsection (a)(3). The only substantive change that was requested in (b) was to reduce the length-of-service requirement. Congress could have done that with a few tweaks to the original version of subsection (b). Instead, Congress went further: It also removed language that expressly limited subsection (b) to first assistants. And it added a provision—subsection (b)(2)—that makes sense only if (b)(1) applies to all acting officers. In short, Congress took a provision that explicitly applied only to first assistants and turned it into one that applies to all acting officers.

The Board protests that Congress would not have expanded the prohibition on nominees serving as acting officers after Senators asked to give the President *more* flexibility. See Brief for Petitioner 45–46. That certain Senators made specific demands, however, does not mean that they got exactly what they wanted. Passing a law often requires compromise, where even the most firm public demands bend to competing interests. See *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U. S. 81, 93–94 (2002). What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators. See *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

Compromise is precisely what happened here: "[A] period of intense negotiations" took place after Senators demanded changes to the original draft of the FVRA, and the final bill was "a compromise measure." Rosenberg 9. The legislation as passed *did* expand the pool of individuals the President could appoint as acting officers, by adding senior employees in subsection (a)(3). But it also expanded the scope of the limitation on acting service in (b)(1), by dropping the language making (b)(1) applicable only to first assistants.

The Board contends that this compromise must not have happened because Senator Thompson, one of the sponsors of the FVRA, said that subsection (b)(1) "applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)." 144 Cong. Rec. 27496 (1998). But Senator Byrd—the very next speaker—offered a contradictory account: A nominee may not "serve as an acting officer" if "he is not the first assistant" or "has been the first assistant for less than 90 . . . days, and has not been confirmed for the position." *Id.*, at 27498. This is a good example of why floor statements by individual legislators rank among the least illuminating forms of legislative history. See *Milner* v. *Department of Navy*, 562 U. S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.").

Finally, the Board supports its interpretation with post-enactment practice. It notes that the Office of Legal Counsel and the Government Accountability Office have issued guidance construing subsection (b)(1) to apply only to first assistants. And three Presidents have, without congressional objection, submitted the nominations of 112 individuals who were serving as acting officers under subsections

(a)(2) and (a)(3). The Board contends that this "historical practice" is entitled to "significant weight" because the FVRA "concern[s] the allocation of power between two elected branches of Government." Brief for Petitioner 49 (quoting *NLRB* v. *Noel Canning*, 573 U. S. 513, 524 (2014); internal quotation marks omitted).

"[H]istorical practice" is too grand a title for the Board's evidence. The FVRA was not enacted until 1998, and the 112 nominations that the Board cites make up less than two percent of the thousands of nominations to positions in executive agencies that the Senate has considered in the years since its passage. Even the guidance documents the Board cites paid the matter little attention; both made conclusory statements about subsection (b)(1), with no analysis.

In this context, Congress's failure to speak up does not fairly imply that it has acquiesced in the Board's interpretation. See *Zuber* v. *Allen*, 396 U. S. 168, 185, n. 21 (1969); *Alexander* v. *Sandoval*, 532 U. S. 275, 292 (2001). The Senate may not have noticed that certain nominees were serving as acting officers in violation of the FVRA, or it may have chosen not to reject a qualified candidate just to make a point about compliance with the statute. Either is at least as plausible as the theory that the Legislature's inaction reflects considered acceptance of the Executive's practice.

Our decision in *Noel Canning*—the chief opinion on which the Board relies—is a sharp contrast. That case dealt with the President's constitutional authority under the Recess Appointments Clause, an issue that has attracted intense attention and written analysis from Presidents, Attorneys General, and the Senate. 573 U. S., at 539–549. The voluminous historical record dated back to "the beginning of the Republic," and included "thousands of intra-session recess appointments." *Id.*, at 526, 529. That the chronicle of the Recess Appointments Clause weighed heavily in *Noel Canning* offers no support to the Board here.

III

Applying the FVRA to this case is straightforward. Solomon was appointed as acting general counsel under subsection (a)(3). Once the President submitted his nomination to fill that position in a permanent capacity, subsection (b)(1) prohibited him from continuing his acting service. This does not mean that the duties of general counsel to the NLRB needed to go unperformed; the President could have appointed another person to serve as the acting officer in Solomon's place. And he had a wide array of individuals to choose from: any one of the approximately 250 senior NLRB employees or the hundreds of individuals in PAS positions throughout the Government. The President, however, did not do so, and Solomon's continued service violated the FVRA. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

APPENDIX

Section 3345 of the FVRA provides:

"(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office tempo-

rarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nomi-

nated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office."

JUSTICE THOMAS, concurring.

I join the opinion of the Court because it correctly interprets the Federal Vacancies Reform Act of 1998 (FVRA), 5 U. S. C. §3345 *et seq.* The dissent's conclusion that the FVRA authorized the appointment in this case, however, implicates an important constitutional question that the Court's interpretation does not: Whether directing Lafe Solomon to serve as acting general counsel of the National Labor Relations Board (NLRB or Board), without the advice and consent of the Senate, complied with the Constitution. I write separately to explain my view that the Appointments Clause likely prohibited Solomon's appointment.

I

The Appointments Clause prescribes the exclusive process by which the President may appoint "officers of the United States." *United States* v. *Germaine*, 99 U. S. 508, 510 (1879); accord, *Buckley* v. *Valeo*, 424 U. S. 1, 132 (1976) (*per curiam*) ("*[A]ll* officers of the United States are to be appointed in accordance with the Clause . . . . No class or type of officer is excluded because of its special functions"). It provides that the President

> "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose

> Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U. S. Const., Art. II, § 2, cl. 2.

"[F]or purposes of appointment," the Clause divides all officers into two classes—"inferior officers" and noninferior officers, which we have long denominated "principal" officers. *Germaine*, *supra*, at 509, 511. Principal officers must be appointed by the President by and with the advice and consent of the Senate. See *Edmond* v. *United States*, 520 U. S. 651, 660 (1997). That process "is also the default manner of appointment for inferior officers." *Ibid.* But the Clause provides a limited exception for the appointment of inferior officers: Congress may "by Law" authorize the President, the head of an executive department, or a court of law to appoint inferior officers without the advice and consent of the Senate. *Ibid.*

The FVRA governs the process by which the President may temporarily fill a vacancy in an Executive Branch office normally occupied by an officer of the United States. As relevant in this case, when a vacancy arises, the President may "direct" an official to "perform the functions and duties of the . . . office temporarily." 5 U. S. C. §§ 3345(a)(2), (3). That official may be an officer previously appointed by the President and confirmed by the Senate to any office, or certain high-ranking employees of the agency in which the vacancy arose. *Ibid.* The FVRA does not, however, require the President to seek the advice and consent of the Senate before directing the official to perform the functions of the vacant office.

When the President "direct[s]" someone to serve as an officer pursuant to the FVRA, he is "appoint[ing]" that person as an "officer of the United States" within the meaning of the Appointments Clause. Around the time of the framing, the verb "appoint" meant "[t]o establish any thing by decree," 1 S. Johnson, A Dictionary of the English Language

(def. 3) (6th ed. 1785); T. Sheridan, A Complete Dictionary of the English Language (To Appoint) (6th ed. 1796), or "[t]o allot, assign, or designate," 1 N. Webster, An American Dictionary of the English Language (def. 3) (1828). When the President "direct[s]" a person to serve as an acting officer, he is "assign[ing]" or "designat[ing]" that person to serve as an officer.

The FVRA authorizes the President to appoint both inferior and principal officers without first obtaining the advice and consent of the Senate. Appointing inferior officers in this manner raises no constitutional problems. That is because the Appointments Clause authorizes Congress to enact "Law[s]," like the FVRA, "vest[ing] the Appointment of such inferior Officers . . . in the President alone." Appointing principal officers under the FVRA, however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.

II

Because we interpret the FVRA to forbid Solomon's appointment in this case, we need not confront these concerns. But the dissent's contrary interpretation necessarily raises the question whether that appointment complied with the requirements of the Appointments Clause. That inquiry turns on two considerations: (1) whether the general counsel of the NLRB is an "Office[r] of the United States" within the meaning of the Appointments Clause and, if so, (2) whether he is a principal officer who can be appointed only by and with the advice and consent of the Senate.[1] In my view, the

[1] That Solomon was appointed "temporarily" to serve as *acting* general counsel does not change the analysis. I do not think the structural protections of the Appointments Clause can be avoided based on such trivial distinctions. Solomon served for more than three years in an office limited by statute to a 4-year term, and he exercised all of the statutory duties of that office. 29 U. S. C. §153(d). There was thus nothing "special and temporary" about Solomon's appointment. *United States* v. *Eaton*, 169 U. S. 331, 343 (1898).

general counsel plainly is an officer of the United States. I also think he is likely a principal officer.

A

As an initial matter, the NLRB's general counsel is an "officer of the United States" whose appointment is governed by the Appointments Clause. "Extensive evidence suggests" that, at the time of the framing, this phrase was understood to encompass "all federal officials with responsibility for an ongoing statutory duty." Mascott, Who Are "Officers of the United States"? 70 Stan. L. Rev. 443, 564; see also Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. OLC 73, 77 (2007) (an officer of the United States was originally understood to be an official who "hold[s] a position with delegated sovereign authority" and whose office was "'continuing,'" rather than "'incidental'" or "ad hoc"). And this Court has previously held that an "Officer of the United States" is "any appointee exercising significant authority pursuant to the laws of the United States." *Buckley*, 424 U. S., at 126; see also *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 539–540 (2010) (BREYER, J., dissenting) (collecting cases addressing who counts as an officer).

The general counsel is an officer of the United States under both the probable original meaning of the Clause and this Court's precedents. He is charged by statute with carrying out significant duties. He "exercise[s] general supervision over all attorneys employed by the Board . . . and over the officers and employees in the regional offices." 29 U. S. C. §153(d). He has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board." *Ibid.* The general counsel is effectively the Nation's labor-law prosecutor and is therefore an officer of the United States. See *Edmond*, 520 U. S.,

at 666 (treating the general counsel of the Department of Transportation as an officer).

B

Although a closer question, the general counsel also is likely a principal officer. In *Edmond*, we explained that an "'inferior'" officer is one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.*, at 663. That view is consistent with the original meaning of the term and with the practices of the early Congresses. See *id.*, at 663–664; *Morrison* v. *Olson*, 487 U. S. 654, 719–721 (1988) (Scalia, J., dissenting); see also, *e. g.*, Sheridan, *supra* (Inferiour); 1 Johnson, *supra* (Inferiour (def. 2)); 1 Webster, *supra* (Inferior).[2] By contrast, a principal officer is one who has no superior other than the President.

The general counsel of the NLRB appears to satisfy that definition. Before 1947, the Board "controlled not only the filing of complaints, but their prosecution and adjudication" as well. *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 117 (1987). The Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136, however, "effected an important change" in the NLRB's structure by "separat[ing] the prosecuting from the adjudicating function, to place the former in the General Counsel, and to make him an independent official appointed by the President." *Lewis* v. *NLRB*, 357 U. S. 10,

[2] In *Morrison*, the Court used a multifactor test to determine whether an independent counsel under the Ethics in Government Act of 1978, 28 U. S. C. §§ 49, 591 (1982 ed., Supp. V), was an "inferior officer." 487 U. S., at 671–672. Although we did not explicitly overrule *Morrison* in *Edmond*, it is difficult to see how *Morrison*'s nebulous approach survived our opinion in *Edmond*. *Edmond* is also consistent with the Constitution's original meaning and therefore should guide our view of the principal-inferior distinction. See Calabresi & Lawson, The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia, 107 Colum. L. Rev. 1002, 1018–1019 (2007).

16, n. 10 (1958). Congress thus separated the NLRB into "two independent branches," *Food & Commercial Workers*, 484 U. S., at 129, and made the general counsel "independent of the Board's supervision and review," *id.*, at 118; see also *id.*, at 129 (Congress "decided to place the General Counsel within the agency, but to make the office independent of the Board's authority"). Moreover, the general counsel's prosecutorial decisions are unreviewable by either the Board or the Judiciary. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 138 (1975); *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967).

Although the Board has power to define some of the general counsel's duties, see 29 U. S. C. § 153(d), and the general counsel represents the Board in certain judicial proceedings, see Higgins, Labor Czars—Commissars—Keeping Women in the Kitchen—The Purpose and Effects of the Administrative Changes Made by Taft-Hartley, 47 Cath. U. L. Rev. 941, 967 (1998), the statute does not give the Board the power to remove him or otherwise generally to control his activities, see *Edmond*, *supra*, at 664 ("The power to remove officers, we have recognized, is a powerful tool for control"); see also *Free Enterprise Fund*, *supra*, at 510 (holding that executive officials were inferior officers in large part because they were subject to a superior's removal). Because it appears that the general counsel answers to no officer inferior to the President, he is likely a principal officer.[3] Accordingly, the President likely could not lawfully have appointed Solomon to serve in that role without first obtaining the advice and consent of the Senate.

III

I recognize that the "burdens on governmental processes" that the Appointments Clause imposes may "often seem clumsy, inefficient, even unworkable." *INS* v. *Chadha*, 462 U. S. 919, 959 (1983). Granting the President unilateral

[3] I think the general counsel would likely qualify as a principal officer even under *Morrison* v. *Olson*, 487 U. S. 654 (1988). See *id.*, at 671–672.

power to fill vacancies in high offices might contribute to more efficient Government. But the Appointments Clause is not an empty formality. Although the Framers recognized the potential value of leaving the selection of officers to "one man of discernment" rather than to a fractious, multimember body, see The Federalist No. 76, p. 510 (J. Cooke ed. 1961), they also recognized the serious risk for abuse and corruption posed by permitting one person to fill every office in the Government, see *id.*, at 513; 3 J. Story, Commentaries on the Constitution of the United States § 1524, p. 376 (1833). The Framers "had lived under a form of government that permitted arbitrary governmental acts to go unchecked," *Chadha*, *supra*, at 959, and they knew that liberty could be preserved only by ensuring that the powers of Government would never be consolidated in one body, see The Federalist No. 51, p. 348. They thus empowered the Senate to confirm principal officers on the view that "the necessity of its cooperation in the business of appointments will be a considerable and salutary restraint upon the conduct of" the President. The Federalist No. 76, at 514; 3 Story, *supra*, § 1525, at 376–377. We cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of administrative convenience or efficiency. See *Bowsher* v. *Synar*, 478 U. S. 714, 736 (1986).

That the Senate voluntarily relinquished its advice-and-consent power in the FVRA does not make this end-run around the Appointments Clause constitutional. The Clause, like all of the Constitution's structural provisions, "is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." *NLRB* v. *Noel Canning*, 573 U. S. 513, 571 (2014) (Scalia, J., concurring in judgment) (internal quotation marks and bracket omitted). It is therefore irrelevant that "the encroached-upon branch approves the encroachment." *Free Enterprise Fund*, *supra*, at 497 (internal quotation marks omitted). "Neither Congress nor the Executive can agree

to waive" the structural provisions of the Constitution any more than they could agree to disregard an enumerated right. *Freytag* v. *Commissioner*, 501 U. S. 868, 880 (1991). The Judicial Branch must be most vigilant in guarding the separation between the political powers precisely when those powers collude to avoid the structural constraints of our Constitution.

* * *

Courts inevitably will be called upon to determine whether the Constitution permits the appointment of principal officers pursuant to the FVRA without Senate confirmation. But here, the proper interpretation of the FVRA bars the appointment.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Many high-level offices in the Executive Branch may be filled only by a person who has been nominated to the position by the President and confirmed by the Senate. The Federal Vacancies Reform Act of 1998 (FVRA) cedes the Senate's confirmation authority, partially and on a temporary basis, to allow executive agencies to continue to function when one of those high-level offices becomes vacant. It authorizes certain categories of officials to perform the duties of vacant offices on an acting basis. One of its provisions pulls back that authorization when an official has been nominated to fill the vacant office on a permanent basis. The scope of that provision is at issue here. I agree with the Court that the provision applies to first assistants to a vacant office who serve as acting officials automatically, by operation of the FVRA. I disagree with the Court's conclusion that the provision also applies to other officials who may serve as acting officials if the President directs them to serve in that capacity. The Court gives the provision a broader reach than the text can bear with no support from the

history of, or practice under, the FVRA. I respectfully dissent.

I

As the Court explains, the FVRA governs vacancies in offices held by persons "whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate." 5 U. S. C. § 3345(a). These are known as PAS offices. When an official in a PAS office "dies, resigns, or is otherwise unable to perform the functions and duties of the office" the FVRA steps in. *Ibid.*; see also § 3345(c)(2) (an "expiration of a term of office" makes an official unable "to perform the functions and duties" of the office).

Section 3345 of the FVRA authorizes four categories of officials to perform the duties of a vacant office. Subsection (a)(1) contains a default rule: The "first assistant to the office" automatically assumes the vacant office and performs "the functions and duties of the office temporarily in an acting capacity." § 3345(a)(1). Subsections (a)(2), (a)(3), and (c)(1) authorize the President to override that default rule. The President may direct a person already confirmed by the Senate to a PAS office to serve as the acting officer. See § 3345(a)(2). The President may direct certain senior officials in the same agency to serve as the acting officer. See § 3345(a)(3). Or the President may direct a person whose Senate-confirmed term in the office has expired and who has been nominated to a subsequent term in that same office to serve as the acting officer until the Senate acts on the nomination. See § 3345(c)(1).

Subsection (b)(1) takes away this authorization in a specific situation. It provides that, "[n]otwithstanding subsection (a)(1)"—the first assistant default rule—a person may not serve as an acting official while nominated to fill the office if the person was not the first assistant to the office for at least 90 of the 365 days preceding the vacancy. § 3345(b)(1). The prohibition in subsection (b)(1) does not apply to a person

serving as the Senate-confirmed first assistant to the vacant office. See § 3345(b)(2).

II

In my view, the text, purpose, and history of the FVRA make clear that the prohibition in subsection (b)(1) applies only to a first assistant who performs the duties of a vacant office under subsection (a)(1).

A

As the Court observes, subsection (b)(1) contains some potentially broad language. The provision specifies when "a person may not serve as an acting officer for an office under this section"—that is, § 3345. The words "person" and "this section," taken in isolation, could signal that the prohibition applies to subsections (a)(1), (a)(2), (a)(3), and (c)(1) and thus covers all acting officials. But context matters. And here, the context cabins those words and gives subsection (b)(1) a more limited reach.

The text of subsection (b)(1) contains a clear signal that its prohibition applies only to first assistants who automatically assume a vacant office under subsection (a)(1): It begins with the clause "[n]otwithstanding subsection (a)(1)." A notwithstanding clause identifies a potential conflict between two or more provisions and specifies which provision will prevail. Under the familiar *expressio unius est exclusio alterius* interpretive canon, the choice to single out subsection (a)(1)—and only subsection (a)(1)—in this notwithstanding clause strongly suggests that the prohibition reaches, and conflicts with, subsection (a)(1), and only subsection (a)(1).

The rest of § 3345 confirms this conclusion. The prohibition in subsection (b)(1) establishes who *may not* perform the duties of a vacant office. In doing so, it introduces a potential conflict with subsections (a)(1), (a)(2), (a)(3), and (c)(1), which identify four categories of persons who *may* perform the duties of a vacant office. By stating that its prohibition applies "[n]otwithstanding subsection (a)(1)," subsec-

tion (b)(1) expressly states that its prohibition takes precedence over the default rule set out in subsection (a)(1). The omission of any reference to subsections (a)(2), (a)(3), and (c)(1), in spite of the parallel potential for conflict with those subsections, suggests that the omission was a "'deliberate choice, not inadvertence.'" *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 232–233 (2011) (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U. S. 149, 168 (2003)). That choice means that subsection (b)(1) trumps subsection (a)(1) but not subsections (a)(2), (a)(3), and (c)(1).

Nothing about a notwithstanding clause renders it impervious to this established rule of statutory interpretation. The Court says that the rule has less force in the context of a notwithstanding clause because such a clause "confirms rather than constrains" the breadth of the provision to which it is attached. *Ante*, at 302. But the breadth of the attached provision is precisely the question here, and the clause's specific reference to subsection (a)(1) and only subsection (a)(1) strongly supports reading the attached prohibition to limit only subsection (a)(1). See *Preseault* v. *ICC*, 494 U. S. 1, 13–14 (1990) (a reference to "'this Act'" in a notwithstanding clause limited the scope of the attached provision (emphasis deleted)).

The Court claims that the reference to subsection (a)(1) may serve a different purpose. In its view, the reference might instead demonstrate a congressional concern that a conflict between subsection (b)(1) and subsection (a)(1) would be "quite likely to arise" or "particularly difficult to resolve." *Ante*, at 302. A closer examination does not bear out this hypothesis.

The text itself refutes the theory that subsection (b)(1) is more likely to conflict with subsection (a)(1) than the other subsections. The prohibition in subsection (b)(1) does not apply to a person who served as the first assistant to the vacant office for more than 90 days in the year before the vacancy arose, §3345(b)(1)(A), or who serves as a Senate-

confirmed first assistant to the office, § 3345(b)(2). A person serving under subsection (a)(1)—by definition, only a first assistant—has a leg up in meeting those conditions and avoiding subsection (b)(1)'s prohibition altogether. Those serving under subsections (a)(2), (a)(3), and (c)(1)—PAS officials, senior agency officials, or officials whose terms in the vacant office have expired—do not. The prohibition in subsection (b)(1) is thus more likely, not less likely, to conflict with subsections (a)(2), (a)(3), and (c)(1).

And true enough, subsection (a)(1) sets out an automatic rule under which the first assistant assumes acting status upon a vacancy, whereas subsections (a)(2), (a)(3), and (c)(1) set out conditional rules, under which the President may choose to direct other officials to assume acting status. But that distinction makes no difference when asking whether a conflict between subsections (b)(1) and (a)(1) would be harder to resolve without guidance than a conflict between subsection (b)(1) and the other subsections. In stating who may not assume acting status, subsection (b)(1) conflicts equally with the rules about who may assume acting status set out in subsections (a)(1), (a)(2), (a)(3), and (c)(1). The reference to subsection (a)(1) in subsection (b)(1)'s notwithstanding clause thus cannot be understood as a means to resolve a particularly vexing conflict. The same conflict exists for all four categories.

Indeed, the Court's explanations make the notwithstanding clause in subsection (b)(1) superfluous. If the notwithstanding clause serves only to confirm the breadth of subsection (b)(1) and singles out subsection (a)(1) to address a conflict shared equally by other subsections, then it does no real work. The clause could be deleted without changing the meaning of subsection (b)(1), as the Court all but admits. See *ante*, at 303.

Worse still, a broad interpretation of subsection (b)(1) renders subsection (c)(1) superfluous. Under subsection (c)(1),

the President may designate a person whose term in an office has expired and who has been nominated to a subsequent term to serve as the acting official. It is unlikely, even implausible, that a person who serves out a set term will have served as the first assistant to her own office during the year before her term expired. Yet subsection (b)(1) requires such service before a person can serve as both an acting official and a nominee.[1] As a result, if subsection (b)(1) applies to all acting officials, it would prohibit what subsection (c)(1) expressly permits: acting service by a person nominated by the President to serve out a consecutive Senate-confirmed term in the vacant office. That is no way to read a statute.

Not a problem, the Court says. "[S]ubsection (b)(1) has no effect on (c)(1)" because subsection (c)(1) contains a specific rule about acting service by a nominee for a second term that, under ordinary principles of statutory interpretation, controls over the general rule governing acting service by a nominee in subsection (b)(1). *Ante*, at 304. The Court's reasoning on this point undercuts its opening claim that the words "person" and "under this section" in subsection (b)(1) must refer to "anyone who performs acting duties under the FVRA." *Ante*, at 300. And it underscores why the "[n]otwithstanding subsection (a)(1)" clause in subsection (b)(1) is superfluous under the Court's reading. The general authorization of acting service by a first assistant in subsection (a)(1) would yield to the specific prohibition on acting service by certain nominees in subsection (b)(1) even without the notwithstanding clause.[2]

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[1] Subsection (b)(2)'s exception would not apply, as a person "nominated . . . for reappointment for an additional term to the same office . . . without a break in service," 5 U. S. C. §3345(c)(1), will of course not be a Senate-confirmed first assistant to that office.

[2] SW General offers a different response that a person directed to perform the duties of a vacant office under subsection (c)(1) does not "serve as an acting officer," §3345(b)(1). See Tr. of Oral Arg. 30. This also misses the mark. Like subsections (a)(1), (a)(2), and (a)(3), subsection

In contrast, reading subsection (b)(1) to apply only to a first assistant serving as an acting official under subsection (a)(1) renders no other provision superfluous. The Court reasons that subsection (b)(2)(A)'s reference to a person "serving as the first assistant to the office" would be superfluous if subsection (b)(1) applies only to first assistants serving under subsection (a)(1). See *ante*, at 304. But recall that subsection (b)(2) creates an exception to subsection (b)(1). Subsection (b)(1) provides that a person cannot serve as an acting official while nominated if that person was not the first assistant to the vacant office for at least 90 of the 365 days before the vacancy arose. Subsection (b)(2) states that those requirements do "not apply to" current Senate-confirmed first assistants. Put another way, subsection (b)(1) imposes requirements based on a person's past service, and subsection (b)(2) lifts those requirements based on a person's current service. The reference in subsection (b)(2)(A) to a person "serving as the first assistant to the office" is thus necessary to convey the relevant time period of the service that triggers the exception to subsection (b)(1).

B

The events leading up to and following the enactment of the FVRA further support interpreting subsection (b)(1) to apply only to first assistants serving under subsection (a)(1).

(c)(1) is located in § 3345, titled, "Acting officer." Div. C, § 151(b), 112 Stat. 2681–611. Like those subsections, it addresses who may fill a vacant office. See 5 U. S. C. § 3345(c)(2). And like those subsections, it expressly subjects service to the time limits in § 3346, which apply to "the person serving as an acting officer as described under section 3345." § 3346(a). Moreover, relegating officials directed to serve under subsection (c)(1) to some statutorily unnamed, non-acting official status would muddle other provisions of the FVRA. See § 3347(a) (making §§ 3345 and 3346 "the exclusive means for temporarily authorizing an acting official" to serve in a PAS office); § 3349(a)(2) (requiring reporting of "the name of any person serving in an acting capacity and the date such service began immediately upon the designation").

First, nothing in the legislative history of the FVRA indicates that subsection (b)(1) was enacted as a broad prohibition on acting service by all nominees. Under the Vacancies Act of 1868, the FVRA's predecessor, the first assistant to a vacant office served as the acting official unless the President directed another PAS official to do so. See Act of July 23, 1868, ch. 227, 15 Stat. 168–169. The Act did not prohibit any person, first assistant or otherwise, from serving as an acting official while nominated to fill the office. This structure remained in place for over a century.

The events that prompted the FVRA's enactment confirm, in line with the reading above, that the Act altered this preexisting structure to prohibit certain first assistants from serving in an acting capacity while nominated to the vacant office. The service of one acting official, Bill Lann Lee, was the turning point in a broader, long-running dispute between the political branches over Executive Branch compliance with the Vacancies Act of 1868. In 1997, Lee was brought into the Department of Justice to serve as the Acting Assistant Attorney General for the Civil Rights Division after his nomination to the position failed. He continued to serve in an acting capacity after he was renominated to the position. The decision to bring Lee in to serve in the Department of Justice after his failed nomination led to strong congressional criticism. See, *e. g.*, Letter from A. Fois, Assistant Attorney General, Office of Legislative Affairs, to Sen. S. Thurmond, pp. 3–4 (Feb. 24, 1998). Subsection (b)(1) addresses the Lee incident and prevents its recurrence. See S. Rep. No. 105–250, p. 13 (1998) (explaining that an earlier version of subsection (b)(1) "prevent[s] manipulation of first assistants to include persons highly unlikely to be career officials"). It bars a first assistant from serving under subsection (a)(1) while nominated unless the person was the first assistant for a significant period of time before the vacancy arose (90 of the previous 365 days) or the person is the Senate-confirmed first assistant to the vacant office.

In contrast, there is no indication of an intent to depart further from the century-old practice under the Vacancies Act of 1868 and prohibit acting service by other officials nominated to a vacant office. No one has identified congressional statements expressing concern with such service or calling for a broader prohibition. Indeed, an earlier version of subsection (b)(1) unquestionably applied only to first assistants serving under subsection (a)(1), even though the bill permitted the President to designate a PAS official as the acting official instead of the first assistant. See *id.*, at 25. The legislative history does not document the reason for the changes to this subsection. The Court suggests that an unspoken congressional compromise led to an expanded subsection (b)(1). *Ante*, at 306–307. While the compromise it hypothesizes is possible, no evidence supports it, and the absence of any hint that the compromise was hoped for during the development of or debate on the FVRA means that it is not probable.

Second, under the Court's reading of subsection (b)(1), the Executive Branch began violating the FVRA almost immediately after its enactment. Within months, the Department of Justice's Office of Legal Counsel (OLC) advised Executive Branch agencies that the prohibition in subsection (b)(1) "applies only to persons who serve as acting officers by virtue of having been the first assistant to the office." Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. OLC 60, 64 (1999). The Government Accountability Office, tasked with aiding congressional enforcement of the FVRA, later reached the same conclusion. See Letter from C. Joyner, Dir., Strategic Issues, to F. Thompson, Chairman, U. S. Senate Committee on Governmental Affairs, Subject: Eligibility Criteria for Individuals To Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998, pp. 3–4 (GAO–01–468R, Feb. 23, 2001). Since the enactment of the FVRA, the Senate has received over 100 nominations of persons who continued to serve in an acting capacity after their nomination but had not satisfied the con-

ditions in subsection (b)(1) for acting service by a nominee. See App. A to Brief for United States.

And yet, this legion of would-be violations prompted no response. No evidence suggests that the Senate reacted by requiring any of those nominees to cease their acting service. Cf. Pet. for Cert. 28–29 (citing objections raised after the decision below). The failure to object is all the more glaring in light of the enforcement mechanism written into the FVRA. Section 3349 requires each Executive Branch agency to "immediately" notify the Comptroller General, who heads the Government Accountability Office, and both Houses of Congress of "a vacancy . . . and the date such vacancy occurred," "the name of any person serving in an acting capacity and the date such service began," "the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted," and the date a nomination is acted upon. This provision leaves no doubt that Congress had all the information it needed to object to any FVRA violations it perceived.

Congressional silence in the face of a decade-plus practice of giving subsection (b)(1) a narrow reach casts serious doubt on the broader interpretation. It indicates that Congress, like the Executive Branch, interpreted subsection (b)(1) in line with its text to reach only first assistants to the vacant office serving pursuant to subsection (a)(1).

* * *

The FVRA prohibits a limited set of acting officials—non-Senate-confirmed first assistants who serve under subsection (a)(1) and did not serve as the first assistant to the vacant office for at least 90 of the 365 days before the vacancy arose—from performing the duties of a vacant office while also serving as the President's nominee to fill that office. Reading the provision more broadly to apply to all acting officials disregards the full text of the FVRA and finds no support in its purpose or history. The Court prefers that reading. I respectfully dissent.

Syllabus

SCA HYGIENE PRODUCTS AKTIEBOLAG ET AL. *v.* FIRST QUALITY BABY PRODUCTS, LLC, ET AL.

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

No. 15–927. Argued November 1, 2016—Decided March 21, 2017

In 2003, petitioners (collectively, SCA) notified respondents (collectively, First Quality) that their adult incontinence products infringed an SCA patent. First Quality responded that its own patent antedated SCA's patent and made it invalid. In 2004, SCA sought reexamination of its patent in light of First Quality's patent, and in 2007, the Patent and Trademark Office confirmed the SCA patent's validity. SCA sued First Quality for patent infringement in 2010. The District Court granted summary judgment to First Quality on the grounds of equitable estoppel and laches. While SCA's appeal was pending, this Court held that laches could not preclude a claim for damages incurred within the Copyright Act's 3-year limitations period. *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663, 667. A Federal Circuit panel nevertheless affirmed the District Court's laches holding based on Circuit precedent, which permitted laches to be asserted against a claim for damages incurred within the Patent Act's 6-year limitations period, 35 U. S. C. § 286. The en banc court reheard the case in light of *Petrella* and reaffirmed the original panel's laches holding.

Held: Laches cannot be invoked as a defense against a claim for damages brought within § 286's 6-year limitations period. Pp. 333–346.

(a) *Petrella*'s holding rested on both separation-of-powers principles and the traditional role of laches in equity. A statute of limitations reflects a congressional decision that timeliness is better judged by a hard and fast rule instead of a case-specific judicial determination. Applying laches within a limitations period specified by Congress would give judges a "legislation-overriding" role that exceeds the Judiciary's power. 572 U. S., at 680. Moreover, applying laches within a limitations period would clash with the gap-filling purpose for which the defense developed in the equity courts. Pp. 333–335.

(b) *Petrella*'s reasoning easily fits § 286. There, the Court found in the Copyright Act's language a congressional judgment that a claim filed within three years of accrual cannot be dismissed on timeliness grounds. 572 U. S., at 677. By that same logic, § 286 of the Patent Act represents

Congress's judgment that a patentee may recover damages for any infringement committed within six years of the filing of the claim.

First Quality contends that this case differs from *Petrella* because a true statute of limitations runs forward from the date a cause of action accrues, whereas § 286's limitations period runs backward from the filing of the complaint. However, *Petrella* repeatedly characterized the Copyright Act's limitations period as running backward from the date the suit was filed. First Quality also contends that a true statute of limitations begins to run when the plaintiff discovers a cause of action, which is not the case with § 286's limitations period, but ordinarily, a statute of limitations begins to run on the date that the claim accrues, not when the cause of action is discovered. Pp. 336–338.

(c) The Federal Circuit based its decision on the idea that § 282 of the Patent Act, which provides for "defenses in any action involving the validity or infringement of a patent," creates an exception to § 286 by codifying laches as such a defense, and First Quality argues that laches is a defense within § 282(b)(1) based on "unenforceability." Even assuming that § 282(b)(1) incorporates a laches defense *of some dimension*, it does not necessarily follow that the defense may be invoked to bar a claim for damages incurred within the period set out in § 286. Indeed, it would be exceedingly unusual, if not unprecedented, if Congress chose to include in the Patent Act both a statute of limitations for damages and a laches provision applicable to a damages claim. Neither the Federal Circuit, nor any party, has identified a single federal statute that provides such dual protection against untimely claims. Pp. 338–339.

(d) The Federal Circuit and First Quality rely on lower court patent cases decided before the 1952 Patent Act to argue that § 282 codified a pre-1952 practice of permitting laches to be asserted against damages claims. But the most prominent feature of the relevant legal landscape at that time was the well-established rule that laches cannot be invoked to bar a claim for damages incurred within a limitations period specified by Congress. In light of this rule, which *Petrella* confirmed and restated, 572 U. S., at 678, nothing less than a broad and unambiguous consensus of lower court decisions could support the inference that § 282(b)(1) codifies a very different patent-law-specific rule. Pp. 339–340.

(e) The Federal Circuit and First Quality rely on three types of cases: (1) pre-1938 equity cases; (2) pre-1938 claims at law; and (3) cases decided after the merger of law and equity in 1938. None of these establishes a broad, unambiguous consensus in favor of applying laches to damages claims in the patent context.

Syllabus

Many of the pre-1938 equity cases do not even reveal whether the plaintiff asked for damages, and of the cases in which damages were sought, many merely suggest in dicta that laches might limit damages. The handful of cases that apply laches against a damages claim are too few to establish a settled, national consensus. In any event, the most that can possibly be gathered from a pre-1938 equity case is that laches could defeat a damages claim *in an equity court*, not that the defense could entirely prevent a patentee from recovering damages.

Similarly, even if all three pre-1938 cases at law cited by First Quality squarely held that laches could be applied to a damages claim within the limitations period, that number would be insufficient to overcome the presumption that Congress legislates against the background of general common-law principles. First Quality argues that the small number of cases at law should not count against its position because there were few patent cases brought at law after 1870, but it is First Quality's burden to show that Congress departed from the traditional common-law rule.

As for the post-1938 patent case law, there is scant evidence supporting First Quality's claim that courts continued to apply laches to damages claims after the merger of law and equity. Only two Courts of Appeals held that laches could bar a damages claim, and that does not constitute a settled, uniform practice of applying laches to damages claims. Pp. 341–345.

(f) First Quality's additional arguments are unconvincing and do not require extended discussion. It points to post-1952 Court of Appeals decisions holding that laches can be invoked as a defense against a damages claim, but nothing that Congress has done since 1952 has altered § 282's meaning. As for the various policy arguments presented here, this Court cannot overrule Congress's judgment based on its own policy views. Pp. 345–346.

807 F. 3d 1311, vacated in part and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a dissenting opinion, *post*, p. 346.

Martin J. Black argued the cause for petitioners. With him on the briefs were *Kevin M. Flannery*, *Teri-Lynn A. Evans*, *Sharon K. Gagliardi*, *G. Eric Brunstad, Jr.*, and *Stephanos Bibas*.

Seth P. Waxman argued the cause for respondents. With him on the brief were *Thomas G. Saunders*, *Matthew Guar-*

nieri, *Jason D. Hirsch*, *Hanna A. Baek*, *Mark C. Fleming*, *Kenneth P. George*, *Charles R. Macedo*, and *Mark Berkowitz*.*

JUSTICE ALITO delivered the opinion of the Court.

We return to a subject that we addressed in *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663 (2014): the relationship between the equitable defense of laches and claims for damages that are brought within the time allowed by a statute of limitations. In *Petrella*, we held that laches cannot preclude a claim for damages incurred within the Copyright Act's 3-year limitations period. *Id.*, at 667. "[L]aches," we explained, "cannot be invoked to bar legal relief" "in [the] face of a statute of limitations enacted by Congress." *Id.*, at 679. The question in this case

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*Briefs of *amici curiae* urging reversal were filed for Alliance of Inventor Groups by *John R. Hutchins*, *Erik C. Kane*, and *Mark A. Chapman*; for the American Intellectual Property Law Association by *Nancy J. Mertzel* and *Denise W. DeFranco*; for ART+COM Innovationpool GmbH by *Rosemary J. Piergiovanni*; for Medinol Ltd. by *Richard H. Pildes*, *E. Joshua Rosenkranz*, and *Monte Cooper*; and for Law Professors by *Ariel N. Lavinbuk*.

Briefs of *amici curiae* urging affirmance were filed for Cook Medical LLC by *Dominic P. Zanfardino* and *Danielle C. Gillen*; for Dell et al. by *John Thorne*, *Gregory G. Rapawy*, *Ariela M. Migdal*, *Thomas C. Power*, *Krishnendu Gupta*, *Anthony Peterman*, *Thomas A. Brown*, and *Michele K. Connors*; for the Electronic Frontier Foundation et al. by *Vera Ranieri* and *Charles Duan*; for the Intellectual Property Owners Association by *Gregory A. Castanias*, *Sasha Mayergoyz*, *Kevin H. Rhodes*, and *Steven W. Miller*; for Johnson & Johnson et al. by *Gregory L. Diskant* and *Eugene M. Gelernter*; for Roche Molecular Systems, Inc., by *Kevin E. Noonan* and *Kevin A. Marks*; and for the Washington Legal Foundation by *Richard A. Samp*.

Briefs of *amici curiae* were filed for the American Bar Association by *Paulette Brown*, *Donika P. Pentcheva*, and *Thomas L. Stoll*; for Askeladden LLC by *Kevin J. Culligan* and *Brian T. Burgess*; for Briggs & Stratton Corp. et al. by *Matthew M. Wolf*; for the Intellectual Property Law Association of Chicago by *Margaret M. Duncan*, *Michael V. O'Shaughnessy*, and *Charles W. Shifley*; and for Universal Remote Control, Inc., by *Alan Federbush* and *Douglas A. Miro*.

is whether *Petrella*'s reasoning applies to a similar provision of the Patent Act, 35 U. S. C. § 286. We hold that it does.

I

Petitioners SCA Hygiene Products Aktiebolag and SCA Personal Care, Inc. (collectively, SCA), manufacture and sell adult incontinence products. In October 2003, SCA sent a letter to respondents (collectively, First Quality), alleging that First Quality was making and selling products that infringed SCA's rights under U. S. Patent No. 6,375,646 B1 ('646 patent). App. 54a. First Quality responded that one of *its* patents—U. S. Patent No. 5,415,649 (Watanabe patent)—antedated the '646 patent and revealed "the same diaper construction." *Id.*, at 53a. As a result, First Quality maintained, the '646 patent was invalid and could not support an infringement claim. *Ibid.* SCA sent First Quality no further correspondence regarding the '646 patent, and First Quality proceeded to develop and market its products.

In July 2004, without notifying First Quality, SCA asked the Patent and Trademark Office (PTO) to initiate a reexamination proceeding to determine whether the '646 patent was valid in light of the Watanabe patent. *Id.*, at 49a–51a. Three years later, in March 2007, the PTO issued a certificate confirming the validity of the '646 patent.

In August 2010, SCA filed this patent-infringement action against First Quality. First Quality moved for summary judgment based on laches and equitable estoppel, and the District Court granted that motion on both grounds. 2013 WL 3776173, *12 (WD Ky., July 16, 2013).

SCA appealed to the Federal Circuit, but before the Federal Circuit panel issued its decision, this Court decided *Petrella.* The panel nevertheless held, based on a Federal Circuit precedent, *A. C. Aukerman Co.* v. *R. L. Chaides Constr.*

Co., 960 F. 2d 1020 (1992) (en banc), that SCA's claims were barred by laches.[1]

The Federal Circuit then reheard the case en banc in order to reconsider *Aukerman* in light of *Petrella*. But in a 6-to-5 decision, the en banc court reaffirmed *Aukerman*'s holding that laches can be asserted to defeat a claim for damages incurred within the 6-year period set out in the Patent Act. As it had in *Aukerman*, the en banc court concluded that Congress, in enacting the Patent Act, had "codified a laches defense" that "barred recovery of legal remedies." 807 F. 3d 1311, 1323–1329 (2015). Judge Hughes, joined by four other judges, dissented.[2] *Id.*, at 1333–1342 (opinion concurring in part and dissenting in part). We granted certiorari. 578 U. S. 959 (2016).

II

Laches is "a defense developed by courts of equity" to protect defendants against "unreasonable, prejudicial delay in commencing suit." *Petrella*, *supra*, at 678, 667. See also 1 D. Dobbs, Law of Remedies §2.3(5), p. 89 (2d ed. 1993) (Dobbs) ("The equitable doctrine of laches bars the plaintiff whose unreasonable delay in prosecuting a claim or protecting a right has worked a prejudice to the defendant"). Before the separate systems of law and equity were merged in 1938, the ordinary rule was that laches was available only

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[1] The panel reversed the District Court's holding on equitable estoppel, concluding that there are genuine disputes of material fact relating to that defense. 767 F. 3d 1339, 1351 (2014).

[2] The dissenting judges concurred in the portion of the majority opinion relating to the application of laches to equitable relief. 807 F. 3d, at 1334, n. 1 (opinion of Hughes, J.); see also *id.*, at 1331–1333 (majority opinion). We do not address that aspect of the Federal Circuit's judgment. Nor do we address the Federal Circuit's reversal of the District Court's equitable estoppel holding. *Id.*, at 1333 (reinstating original panel holding on equitable estoppel).

in equity courts.[3] See *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 244, n. 16 (1985). This case turns on the application of the defense to a claim for damages, a quintessential legal remedy. We discussed this subject at length in *Petrella*.

Petrella arose out of a copyright dispute relating to the film Raging Bull. 572 U. S., at 673. The Copyright Act's statute of limitations requires a copyright holder claiming infringement to file suit "within three years after the claim accrued." 17 U. S. C. § 507(b). In *Petrella*, the plaintiff sought relief for alleged acts of infringement that accrued within that 3-year period, but the lower courts nevertheless held that laches barred her claims. See *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 695 F. 3d 946 (CA9 2012). We reversed, holding that laches cannot defeat a damages claim brought within the period prescribed by the Copyright Act's statute of limitations. *Petrella*, 572 U. S., at 677–680. And in so holding, we spoke in broad terms. See *id.*, at 679 ("[I]n [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief").

Petrella's holding rested on both separation-of-powers principles and the traditional role of laches in equity. Laches provides a shield against untimely claims, *id.*, at 685, and statutes of limitations serve a similar function. When Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief. *Id.*, at 677. The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard

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[3] "The federal courts always had equity powers as well as law power, but they operated, until the Federal Rules of Civil Procedure, by distinctly separating equity cases and even had separate equity rules." 1 Dobbs § 2.6(1), at 148, n. 2; see also *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 279 (1988). It is in this sense that we refer in this opinion to federal courts as equity or law courts.

and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted. Therefore, applying laches within a limitations period specified by Congress would give judges a "legislation-overriding" role that is beyond the Judiciary's power. *Id.*, at 680. As we stressed in *Petrella*, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit." *Id.*, at 667.

Applying laches within the limitations period would also clash with the purpose for which the defense developed in the equity courts. As *Petrella* recounted, the "principal application" of laches "was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation." *Id.*, at 678; see also R. Weaver, E. Shoben, & M. Kelly, Principles of Remedies Law 21 (2d ed. 2011); 1 Dobbs § 2.4(4), at 104; 1 J. Story, Commentaries on Equity Jurisprudence § 55(*a*), p. 73 (2d ed. 1839). Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill.[4] *Petrella*, *supra*, at 680–681; see also 1 Dobbs § 2.4(4), at 108 ("[I]f the plaintiff has done only what she is permitted to do by statute, and has not misled the defendant [so as to trigger equitable estoppel], the basis for barring the plaintiff seems to have disappeared").

With *Petrella*'s principles in mind, we turn to the present dispute.

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[4] The dissent argues that there is a "gap" in the statutory scheme because the Patent Act's statute of limitations might permit a patentee to wait until an infringing product has become successful before suing for infringement. *Post*, at 347–348 (opinion of Breyer, J.). We rejected a version of this argument in *Petrella*, 572 U. S., at 682–683, and we do so here. The dissent's argument implies that, insofar as the lack of a laches defense could produce policy outcomes judges deem undesirable, there is a "gap" for laches to fill, notwithstanding the presence of a statute of limitations. That is precisely the kind of "legislation-overriding" judicial role that *Petrella* rightly disclaimed. *Id.*, at 680.

III

A

Although the relevant statutory provisions in *Petrella* and this case are worded differently, *Petrella*'s reasoning easily fits the provision at issue here. As noted, the statute in *Petrella* precludes a civil action for copyright infringement "unless it is commenced within three years after the claim accrued." 17 U. S. C. § 507(b). We saw in this language a congressional judgment that a claim filed within three years of accrual cannot be dismissed on timeliness grounds. 572 U. S., at 677; see also *id.*, at 680–681.

The same reasoning applies in this case. Section 286 of the Patent Act provides: "Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." By the logic of *Petrella*, we infer that this provision represents a judgment by Congress that a patentee may recover damages for any infringement committed within six years of the filing of the claim.

B

First Quality contends that this case differs from *Petrella* because § 286 of the Patent Act is not a *true* statute of limitations. A true statute of limitations, we are told, "runs forward from the date a cause of action accrues," but § 286 "runs backward from the time of suit." Brief for Respondents 41.

Petrella cannot reasonably be distinguished on this ground. First Quality thinks it critical that § 286 "runs backward from the time of suit," Brief for Respondents 41, but *Petrella* described the Copyright Act's statute of limitations in almost identical terms. We said that this provision "allows plaintiffs . . . to gain retrospective relief *running only three years back from the date the complaint was filed.*" 572 U. S., at 672 (emphasis added). See also *id.*, at 677 ("[A]

successful plaintiff can gain retrospective relief only three years back from the time of suit"). And we described the Copyright Act's statute of limitations as "a three-year look-back limitations period." *Id.*, at 670.

First Quality contends that the application of a true statute of limitations, like the defense of laches (but unlike § 286), takes into account the fairness of permitting the adjudication of a *particular* plaintiff's claim. First Quality argues as follows: "When Congress enacts [a true statute of limitations], it can be viewed as having made a considered judgment about how much delay may occur after a plaintiff knows of a cause of action (*i. e.*, after accrual) before the plaintiff must bring suit—thus potentially leaving no room for judges to evaluate the reasonableness of a plaintiff's delay on a case-by-case basis under laches." Brief for Respondents 42. According to First Quality, § 286 of the Patent Act is different because it "turns only on when the infringer is sued, regardless of when the patentee learned of the infringement." *Ibid.*

This argument misunderstands the way in which statutes of limitations generally work. First Quality says that the accrual of a claim, the event that triggers the running of a statute of limitations, occurs when "a plaintiff knows of a cause of action," *ibid.*, but that is not ordinarily true. As we wrote in *Petrella*, "[a] claim ordinarily accrues 'when [a] plaintiff has a complete and present cause of action.'" 572 U. S., at 670; see *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418–419 (2005). While some claims are subject to a "discovery rule" under which the limitations period begins when the plaintiff discovers or should have discovered the injury giving rise to the claim, that is not a universal feature of statutes of limitations. See, *e. g.*, *ibid.* (limitations period in 31 U. S. C. § 3731(b)(1) begins to run when the cause of action accrues); *TRW Inc.* v. *Andrews*, 534 U. S. 19, 28 (2001) (same with regard to 15 U. S. C. § 1681p). And in *Petrella*, we spe-

cifically noted that "we have not passed on the question" whether the Copyright Act's statute of limitations is governed by such a rule. 572 U. S., at 670, n. 4.

For these reasons, *Petrella* cannot be dismissed as applicable only to what First Quality regards as true statutes of limitations. At least for present purposes, nothing depends on this debatable taxonomy. Compare *Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 704 (1966) (describing § 286 as "enacting a uniform period of limitations"); 1 Dobbs § 2.4(4), at 107, and n. 33 (same), with *A. Stucki Co.* v. *Buckeye Steel Castings Co.*, 963 F. 2d 360, 363, n. 3 (CA Fed. 1992) (Section 286 "is not, strictly speaking, a statute of limitations"); *Standard Oil Co.* v. *Nippon Shokubai Kagaku Co., Ltd.*, 754 F. 2d 345, 348 (CA Fed. 1985) ("[Section] 286 cannot properly be called a 'statute of limitations' in the sense that it defeats the right to bring suit").

C

The Federal Circuit based its decision on a different footing. Section 286 of the Patent Act begins with the phrase "[e]xcept as otherwise provided by law," and according to the Federal Circuit, § 282 of the Act is a provision that provides otherwise. In its view, § 282 creates an exception to § 286 by codifying laches as a defense to all patent-infringement claims, including claims for damages suffered within § 286's 6-year period. 807 F. 3d, at 1329–1330. Section 282(b), which does not specifically mention laches, provides in relevant part as follows:

> "The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:
>
> "(1) Noninfringement, absence of liability for infringement or unenforceability."

The en banc majority below never identified which word or phrase in § 282 codifies laches as a defense, but First Qual-

ity argues that laches falls within § 282(b)(1) because laches is a defense based on "unenforceability." Brief for Respondents 28–33.

SCA disputes this interpretation of § 282(b)(1), arguing that laches does not make a patent categorically unenforceable. Reply Brief 6–8; see *Aukerman*, 960 F. 2d, at 1030 ("Recognition of laches as a defense . . . does not affect the general enforceability of the patent against others"). We need not decide this question. Even if we assume for the sake of argument that § 282(b)(1) incorporates a laches defense *of some dimension*, it does not necessarily follow that this defense may be invoked to bar a claim for damages incurred within the period set out in § 286. Indeed, it would be exceedingly unusual, if not unprecedented, if Congress chose to include in the Patent Act both a statute of limitations for damages and a laches provision applicable to a damages claim. Neither the Federal Circuit, nor First Quality, nor any of First Quality's *amici* has identified a single federal statute that provides such dual protection against untimely claims.

D

In holding that Congress codified a damages-limiting laches defense, the Federal Circuit relied on patent cases decided by the lower courts prior to the enactment of the Patent Act. After surveying these cases, the Federal Circuit concluded that by 1952 there was a well-established practice of applying laches to such damages claims and that Congress, in adopting § 282, must have chosen to codify such a defense in § 282(b)(1). 807 F. 3d, at 1321–1329. First Quality now presses a similar argument. We have closely examined the cases on which the Federal Circuit and First Quality rely, and we find that they are insufficient to support the suggested interpretation of the Patent Act. The most prominent feature of the relevant legal landscape at the time of enactment of the Patent Act was the well-established general rule, often repeated by this Court, that laches cannot be

invoked to bar a claim for damages incurred within a limitations period specified by Congress. See *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter"); *United States* v. *Mack*, 295 U. S. 480, 489 (1935) ("Laches within the term of the statute of limitations is no defense at law"); *Wehrman* v. *Conklin*, 155 U. S. 314, 326 (1894) ("Though a good defense in equity, laches is no defense at law. If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed"); *Cross* v. *Allen*, 141 U. S. 528, 537 (1891) ("So long as the demands secured were not barred by the statute of limitations, there could be no laches in prosecuting a suit"). *Petrella* confirmed and restated this longstanding rule. 572 U. S., at 678 ("[T]his Court has cautioned against invoking laches to bar legal relief"). If Congress examined the relevant legal landscape when it adopted 35 U. S. C. § 282, it could not have missed our cases endorsing this general rule.

The Federal Circuit and First Quality dismiss the significance of this Court's many reiterations of the general rule because they were not made in patent cases. But as the dissenters below noted, "[p]atent law is governed by the same common-law principles, methods of statutory interpretation, and procedural rules as other areas of civil litigation." 807 F. 3d, at 1333 (opinion of Hughes, J.).

In light of the general rule regarding the relationship between laches and statutes of limitations, nothing less than a broad and unambiguous consensus of lower court decisions could support the inference that § 282(b)(1) codifies a very different patent-law-specific rule. No such consensus is to be found.[5]

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[5] Because we conclude that First Quality fails to show that there was a special laches rule in the patent context, we need not address whether it is ever reasonable to assume that Congress legislated against the background of a lower court consensus rather than the contrary decisions of

IV

The pre-1952 cases on which First Quality relies fall into three groups: (1) cases decided by equity courts before 1938; (2) cases decided by law courts before 1938; and (3) cases decided after the merger of equity and law in 1938. We will discuss each group separately.

A

Pre-1938 Equity Cases

The pre-1938 equity cases are unpersuasive for several, often overlapping reasons. Many do not even reveal whether the plaintiff asked for damages. Indeed, some say nothing at all about the form of relief that was sought, see, *e. g.*, *Cummings* v. *Wilson & Willard Mfg. Co.*, 4 F. 2d 453 (CA9 1925), and others state only that the plaintiff wanted an accounting of profits, *e. g.*, *Westco-Chippewa Pump Co.* v. *Delaware Elec. & Supply Co.*, 64 F. 2d 185, 186 (CA3 1933); *Wolf Mineral Process Corp.* v. *Minerals Separation North Am. Corp.*, 18 F. 2d 483, 484 (CA4 1927). The equitable remedy of an accounting, however, was not the same as damages. The remedy of damages seeks to compensate the victim for its loss, whereas the remedy of an accounting, which Congress abolished in the patent context in 1946,[6] sought disgorgement of ill-gotten profits. See *Birdsall* v. *Coolidge*, 93 U. S. 64, 68–69 (1876); 1 Dobbs § 4.3(5), at 611 ("Accounting holds the defendant liable for his profits, not for damages"); A. Walker, Patent Laws § 573, p. 401 (1886) (distinguishing between the two remedies); G. Curtis, Law of Patents

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this Court. Cf. 807 F. 3d, at 1338 (opinion of Hughes, J.) ("For even if there were differing views in the lower [federal] courts, it would be nearly impossible to conclude that there was a uniform understanding of the common law that was inconsistent with Supreme Court precedent. In our judicial system, the Supreme Court's understanding is controlling").

[6] See 60 Stat. 778; see also *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 505 (1964).

§ 341(*a*), p. 461 (4th ed. 1873); 2 J. Pomeroy, Equitable Remedies § 568, p. 977 (1905).

First Quality argues that courts sometimes used the term "accounting" imprecisely to refer to both an accounting of profits and a calculation of damages, Brief for Respondents 19–20, but even if that is true, this loose usage shows only that a reference to "accounting" *might* refer to damages. For that reason, the Federal Circuit did not rely on cases seeking only an accounting, 807 F. 3d, at 1326, n. 7, and we likewise exclude such cases from our analysis.

Turning to the cases that actually refer to damages, we note that many of the cases merely suggest in dicta that laches might limit recovery of damages. See, *e. g.*, *Hartford-Empire Co.* v. *Swindell Bros.*, 96 F. 2d 227, 233, modified on reh'g, 99 F. 2d 61 (CA4 1938). Such dicta "settles nothing." *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 351, n. 12 (2005). See also *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 9–10 (2000); *Metropolitan Stevedore Co.* v. *Rambo*, 515 U. S. 291, 300 (1995).

As for the cases in which laches was actually held to bar a claim for damages, *e. g.*, *Wolf, Sayer & Heller* v. *United States Slicing Mach. Co.*, 261 F. 195, 197–198 (CA7 1919); *A. R. Mosler & Co.* v. *Lurie*, 209 F. 364, 369–370 (CA2 1913), these cases are too few to establish a settled, national consensus. See *Hartford Underwriters*, *supra*, at 10.

Moreover, the most that can possibly be gathered from a pre-1938 equity case is that laches could defeat a damages claim *in an equity court*, not that the defense could entirely prevent a patentee from recovering damages. Before 1870, a patentee wishing to obtain both an injunction against future infringement and damages for past infringement was required to bring two suits, one in an equity court (where injunctive relief but not damages was available), and one in a court of law (where damages but not injunctive relief could be sought). See Beauchamp, The First Patent Litigation Explosion, 125 Yale L. J. 848, 913–914 (2016). To rectify this

situation, Congress enacted a law in 1870 authorizing equity courts to award damages in patent-infringement actions. Rev. Stat. § 4921. And although statutes of limitations did not generally apply in equity, Congress in 1897 enacted a statute that, like the current § 286, imposed a 6-year limitations period for damages claims and made that statute applicable in both law and equity. § 6, 29 Stat. 694. Pointing to cases decided between 1897 and 1938 in which an equity court permitted a defendant in an infringement case to invoke the defense of laches, First Quality contends that Congress, aware of these cases, assumed that the 1952 Act would likewise allow a defendant in an infringement case to claim laches with respect to a claim for damages occurring within a limitations period.

This argument overlooks the fact that a patentee, during the period in question, could always sue for damages in law, where the equitable doctrine of laches did not apply, and could thus avoid any possible laches defense. Thus, accepting First Quality's argument would not return patentees to the position they held from 1897 to 1938. Instead, it would go much further and permit laches entirely to defeat claims like SCA's.[7]

B

Pre-1938 Claims at Law

First Quality cites three Court of Appeals cases in which laches was raised in a proceeding at law and in which, according to First Quality, the defense was held to bar a damages claim. See *Universal Coin Lock Co.* v. *American Sanitary Lock Co.*, 104 F. 2d 781 (CA7 1939); *Banker* v. *Ford Motor Co.*, 69 F. 2d 665 (CA3 1934); *Ford* v. *Huff*, 296 F. 652 (CA5 1924). But even if all of these cases squarely held that

[7] The dissent misunderstands this point and thinks that we dismiss the relevance of the equity cases because they applied laches "to equitable claims without statutes of limitations." *Post*, at 350. But we are well aware that a statute of limitations applied in equity when these cases arose. See *supra* this page.

laches could be applied to a damages claim at law within the limitations period, they would still constitute only a handful of decisions out of the corpus of pre-1952 patent cases, and that would not be enough to overcome the presumption that Congress legislates against the background of general common-law principles. See H. McClintock, Handbook of the Principles of Equity § 28, p. 75 (2d ed. 1948) ("The majority of the courts which have considered the question have refused to enjoin an action at law on the ground of the laches of the plaintiff at law").

In any event, these cases, like the equity cases, offer minimal support for First Quality's position. Not one of these cases even mentions the statute of limitations. One of the three, *Ford*, is not even a patent-infringement case; it is a breach-of-contract case arising out of a patent dispute, 296 F., at 654, and it is unclear whether the ground for decision was laches or equitable estoppel. See 807 F. 3d, at 1340 (opinion of Hughes, J.). Another, *Universal Coin*, applied laches to a legal damages claim without any analysis of the propriety of doing so. 104 F. 2d, at 783.

First Quality protests that the paucity of supporting cases at law should not count against its argument since very few patent-infringement cases were brought at law after 1870. Brief for Respondents 25–26. But the fact remains that it is First Quality's burden to show that Congress departed from the traditional common-law rule highlighted in our cases.[8]

C

Post-Merger Cases

First Quality claims that courts continued to apply laches to damages claims after the merger of law and equity in 1938,

[8] For the same reason, the dissent misses the mark when it demands that we cite cases "holding that laches could *not* bar a patent claim for damages." *Post*, at 352.

but First Quality's evidence is scant. During this period, two Courts of Appeals stated in dicta that laches could bar legal damages claims. See *Chicago Pneumatic Tool Co.* v. *Hughes Tool Co.*, 192 F. 2d 620, 625 (CA10 1951); *Shaffer* v. *Rector Well Equip. Co.*, 155 F. 2d 344, 347 (CA5 1946). And two others actually held that laches could bar a damages claim. See, *e. g.*, *Brennan* v. *Hawley Prods. Co.*, 182 F. 2d 945, 948 (CA7 1950); *Lukens Steel Co.* v. *American Locomotive Co.*, 197 F. 2d 939, 941 (CA2 1952) (alternative holding). This does not constitute a settled, uniform practice of applying laches to damages claims.

After surveying the pre-1952 case law, we are not convinced that Congress, in enacting § 282 of the Patent Act, departed from the general rule regarding the application of laches to damages suffered within the time for filing suit set out in a statute of limitations.

V

First Quality's additional arguments do not require extended discussion. First Quality points to post-1952 Court of Appeals decisions holding that laches can be invoked as a defense against a damages claim. Noting that Congress has amended § 282 without altering the "'unenforceability'" language that is said to incorporate a laches defense, First Quality contends that Congress has implicitly ratified these decisions. Brief for Respondents 35–36.

We reject this argument. Nothing that Congress has done since 1952 has altered the meaning of § 282. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 186 (1994); *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 100, 101, and n. 7 (1991).

First Quality and its supporting *amici* also make various policy arguments, but we cannot overrule Congress's judgment based on our own policy views. We note, however, as we did in *Petrella*, that the doctrine of equitable estoppel provides protection against some of the problems that First

Quality highlights, namely, unscrupulous patentees inducing potential targets of infringement suits to invest in the production of arguably infringing products. 572 U. S., at 684–685. Indeed, the Federal Circuit held that there are genuine disputes of material fact as to whether equitable estoppel bars First Quality's claims in this very case. See 807 F. 3d, at 1333.

* * *

Laches cannot be interposed as a defense against damages where the infringement occurred within the period prescribed by § 286. The judgment of the Court of Appeals is vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, dissenting.

Laches is a doctrine that bars a plaintiff's claim when there has been unreasonable, prejudicial delay in commencing suit. See 1 D. Dobbs, Law of Remedies § 2.3(5), p. 89 (2d ed. 1993). The question before us is whether a court can apply this doctrine in a patent infringement action for damages brought within the statute of limitations. The Court holds that a court cannot. Laches, it says, is a "gap-filling doctrine," generally applicable where there is no statute of limitations. But the 1952 Patent Act contains a statute of limitations. Hence there is "no gap to fill." *Ante*, at 335.

In my view, however, the majority has ignored the fact that, despite the 1952 Act's statute of limitations, there remains a "gap" to fill. See *infra*, at 347–348. Laches fills this gap. And for more than a century courts with virtual unanimity have applied laches in patent damages cases. Congress, when it wrote the 1952 statute, was aware of and intended to codify that judicial practice. I fear that the majority, in ignoring this legal history, opens a new "gap" in the patent law, threatening harmful and unfair legal consequences.

I

Consider the relevant statutory language. Section 286 of the Patent Act says: "*Except as otherwise provided by law*, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." 35 U. S. C. § 286 (emphasis added). Section 282 says what the word "otherwise" means. It tells us that "unenforceability" shall be a defense "in *any* action involving the validity or infringement of a patent." § 282(b) (emphasis added).

Two features of this statutory language are important. First, the limitations provision, unlike those in many other statutes, does *not* set forth a period of time in which to sue, beginning when a claim accrues and then expiring some time later. (The False Claims Act, for example, gives a plaintiff six years from the date of the violation or three years from the date of discovery to file his suit, 31 U. S. C. § 3731(b).) Rather, it permits a patentee to sue at any time after an infringement takes place. It simply limits damages to those caused within the preceding six years. That means that a patentee, after learning of a possible infringement in year 1, might wait until year 10 or year 15 or year 20 to bring a lawsuit. And if he wins, he can collect damages for the preceding six years of infringement.

This fact creates a gap. Why? Because a patentee might wait for a decade or more while the infringer (who perhaps does not know or believe he is an infringer) invests heavily in the development of the infringing product (of which the patentee's invention could be only a small component), while evidence that the infringer might use to, say, show the patent is invalid disappears with time. Then, if the product is a success, the patentee can bring his lawsuit, hoping to collect a significant recovery. And if business-related circumstances make it difficult or impossible for the infringer to abandon its use of the patented invention (*i. e.*, if the infringer is "locked in"), then the patentee can keep bringing

lawsuits, say, in year 10 (collecting damages from years 4 through 10), in year 16 (collecting damages from years 10 through 16), and in year 20 (collecting any remaining damages). The possibility of this type of outcome reveals a "gap." Laches works to fill the gap by barring recovery when the patentee unreasonably and prejudicially delays suit.

Second, the Patent Act's language strongly suggests that Congress, when writing the statutory provisions before us, intended to permit courts to continue to use laches to fill this gap. The statute says that there are "except[ions]" to its 6-year damages limitation rule. It lists "unenforceability" as one of those exceptions. At common law, the word "unenforceability" had a meaning that encompassed laches. See, *e. g.*, *United States* v. *New Orleans Pacific R. Co.*, 248 U. S. 507, 511 (1919) (considering whether an agreement "had become unenforceable by reason of inexcusable laches"). We often read statutes as incorporating common-law meanings. See *Neder* v. *United States*, 527 U. S. 1, 21 (1999). And here there are good reasons for doing so. For one thing, the principal technical drafter of the Patent Act (in a commentary upon which this Court has previously relied, *e. g.*, *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U. S. 17, 28 (1997)) stated that § 282 was meant to codify "equitable defenses such as laches." P. Federico, Commentary on the New Patent Act, 35 U. S. C. A. 1, 55 (West 1954). For another thing, there is a long history of prior case law that shows with crystal clarity that Congress intended the statute to keep laches as a defense.

II

The pre-1952 case law that I shall discuss is directly relevant because, as this Court has recognized, the 1952 Patent Act was primarily intended to codify existing law. See *Halo Electronics* v. *Pulse Electronics, Inc.*, 579 U. S. 93, 100 (2016); accord, H. R. Rep. No. 1923, 82d Cong., 2d Sess., 3

(1952) (stating that the "main purpose" of the Patent Act was "codification and enactment" of existing law); 98 Cong. Rec. 9323 (1952) (drafter of the Act stating that it was generally intended to "codif[y] the present patent laws").

Now consider the existing law that the Patent Act's drafters intended the Act to reflect. The decisions that find or say or hold that laches can bar monetary relief in patent infringement actions stretch in a virtually unbroken chain from the late 19th century through the Patent Act's enactment in 1952. They number in the dozens and include every federal appeals court to have considered the matter. (We have found only two contrary decisions, both from the same District Court: *Thorpe* v. *Wm. Filene's Sons Co.*, 40 F. 2d 269 (Mass. 1930); and *Concord* v. *Norton*, 16 F. 477 (CC Mass. 1883).)

Here are the cases from the Federal Courts of Appeals alone: *Lukens Steel Co.* v. *American Locomotive Co.*, 197 F. 2d 939, 941 (CA2 1952); *Chicago Pneumatic Tool Co.* v. *Hughes Tool Co.*, 192 F. 2d 620, 625 (CA10 1951); *Brennan* v. *Hawley Prods. Co.*, 182 F. 2d 945, 948 (CA7 1950); *Shaffer* v. *Rector Well Equip. Co.*, 155 F. 2d 344, 345–347 (CA5 1946); *Rome Grader & Mach. Corp.* v. *J. D. Adams Mfg. Co.*, 135 F. 2d 617, 619–620 (CA7 1943); *France Mfg. Co.* v. *Jefferson Elec. Co.*, 106 F. 2d 605, 609–610 (CA6 1939); *Universal Coin Lock Co.* v. *American Sanitary Lock Co.*, 104 F. 2d 781, 781–783 (CA7 1939); *Union Shipbuilding Co.* v. *Boston Iron & Metal Co.*, 93 F. 2d 781, 783 (CA4 1938); *Gillons* v. *Shell Oil Co. of Cal.*, 86 F. 2d 600, 608–610 (CA9 1936); *Holman* v. *Oil Well Supply Co.*, 83 F. 2d 538 (CA2 1936) (*per curiam*); *Dock & Term. Eng. Co.* v. *Pennsylvania R. Co.*, 82 F. 2d 19, 19–20 (CA3 1936); *Banker* v. *Ford Motor Co.*, 69 F. 2d 665, 666 (CA3 1934); *Westco-Chippewa Pump Co.* v. *Delaware Elec. & Supply Co.*, 64 F. 2d 185, 186–188 (CA3 1933); *Window Glass Mach. Co.* v. *Pittsburgh Plate Glass Co.*, 284 F. 645, 650–651 (CA3 1933); *Dwight & Lloyd Sintering Co.* v. *Greenawalt*, 27 F. 2d 823, 827 (CA2 1928); *George J. Meyer*

Mfg. Co. v. *Miller Mfg. Co.*, 24 F. 2d 505, 507–508 (CA7 1928); *Wolf Mineral Process Corp.* v. *Minerals Separation N. Am. Corp.*, 18 F. 2d 483, 490 (CA4 1927); *Cummings* v. *Wilson & Willard Mfg. Co.*, 4 F. 2d 453, 455 (CA9 1925); *Ford* v. *Huff*, 296 F. 652, 654–655 (CA5 1924); *Wolf, Sayer & Heller, Inc.* v. *United States Slicing Mach. Co.*, 261 F. 195, 197–198 (CA7 1919); *A. R. Mosler & Co.* v. *Lurie*, 209 F. 364, 371 (CA2 1913); *Safety Car Heating & Lighting Co.* v. *Consolidated Car Heating Co.*, 174 F. 658, 662 (CA2 1909) (*per curiam*); *Richardson* v. *D. M. Osborne & Co.*, 93 F. 828, 830–831 (CA2 1899); and *Woodmanse & Hewitt Mfg. Co.* v. *Williams*, 68 F. 489, 493–494 (CA6 1895).

The majority replies that this list proves nothing. After all, it says, nearly all of these decisions come from courts of equity. Courts of equity ordinarily applied laches "'to claims of an equitable cast for which the Legislature ha[d] provided no fixed time limitation,'" *ante*, at 335 (quoting *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663, 678 (2014)), not to requests for damages, "a quintessential legal remedy," *ante*, at 334. Since "laches is a gap-filling doctrine," the fact that it was applied to equitable claims without statutes of limitations says little about whether it should apply to legal damages claims when "there is a statute of limitations," and therefore "no gap to fill." *Ante*, at 335.

Good reply. But no cigar. Why not? (1) Because in 1897 Congress *enacted a statute of limitations*—very much like the one before us now—for patent claims *brought in courts of equity*. Ch. 391, § 6, 29 Stat. 694 ("[I]n any suit or action . . . there shall be no recovery of profits or damages for any infringement committed more than six years before" filing). Thus, after 1897, *there was no statute of limitations gap for equity courts to fill*, and yet they continued to hold that laches applied. See, *e. g.*, *France Mfg.*, *supra*, at 609 ("[N]otwithstanding the statute of limitations, relief may be denied on the ground of laches . . . "); *Dwight & Lloyd*, *supra*, at 827 (Hand, J.) (explaining how laches operates in conjunc-

tion with the statute of limitations to allow an infringer to "garne[r] the harvest of even the earliest of the 6 years to which recovery is in any event limited, with just confidence that he will not be disturbed").

(2) Because in 1870 Congress enacted a statute that gave courts of equity the power to award legal relief, namely, damages, in patent cases. Act of July 8, 1870, § 55, 16 Stat. 206. Congress did not give law courts an equivalent power to grant injunctive relief in patent suits. As a result, from the late 19th century until the merger of law and equity in 1938, nearly all patent litigation—including suits for damages—took place in courts of equity that were applying laches in conjunction with a statute of limitations. See Lemley, Why Do Juries Decide If Patents Are Valid? 99 Va. L. Rev. 1673, 1704 (2013) (discussing the predominance of equity litigation).

(3) Because Congress recognized that damages suits for patent infringement took place almost exclusively in equity courts, not law courts. Whenever Congress wished to modify patent damages law, it rewrote the statutory provisions governing damages in equity, not law. See, *e. g.*, § 8, 42 Stat. 392 (modifying the equity damages statute to allow equity courts to award a "reasonable sum" even if a patentee had difficulty proving actual damages, but making no change to the legal damages provision). The 1952 Congress, seeking to understand whether, or how, laches applied in patent damages cases, would almost certainly have looked to equity practice.

(4) Because, in any event, in those few pre-law/equity-merger cases in which courts of *law* considered whether laches could bar a patent damages action, they, like their equity counterparts, held that it could. See *Universal Coin*, *supra*, at 781–783; *Banker*, *supra*, at 666; *Ford*, *supra*, at 658. As the majority points out, these cases brought in law courts constitute "only a handful of decisions." *Ante*, at 344. But that is simply because, as I just noted, almost all patent dam-

ages litigation took place in courts of equity. Regardless, before the merger of law and equity both law courts and equity courts recognized laches as a defense. And, after the merger of law and equity in 1938, federal courts *still* applied laches to patent damages claims. *E. g.*, *Brennan*, 182 F. 2d, at 948 (holding that "laches on the part of the plaintiff" can "bar his right to recover damages"). This, of course, would make no sense if laches for patent damages was really an equity-only rule.

Does the majority have any other good reason to ignore the mountain of authority recognizing laches as a defense? It refers to many general statements in opinions and treatises that say that laches is "no defense at law." *United States* v. *Mack*, 295 U. S. 480, 489 (1935). But these statements are not about patent damages cases. They do not claim to encompass the problem at issue here. And they do not prevent Congress from enacting a statute that, recognizing patent litigation's history, combines a statute of limitations with a laches defense. And that is what Congress has done in the Patent Act.

The majority also tries to discredit the persuasiveness of the pre-Patent Act case law authority. It goes through the lengthy list of decisions, finding some judicial statements too vague, others just dicta, and still others having confused an equitable claim for "accounting" with a legal claim for "damages." I agree that it has found weaknesses in the reasoning of some individual cases. But those weaknesses were not sufficient to prevent a 1951 treatise writer from concluding, on the basis of the great weight of authority, that in patent cases, "[l]aches . . . may be interposed in an action at law." 3 A. Deller, Walker on Patents 106 (Cum. Supp. 1951).

In any event, with all its efforts, the majority is unable to identify a single case—not one—from any court of appeals sitting in law or in equity before the merger, or sitting after the merger but before 1952, holding that laches could *not* bar a patent claim for damages. Furthermore, the majority

concedes that it is unable to distinguish, by my count, at least six Court of Appeals cases directly holding that laches *could* bar a patent claim for damages. See *Wolf, Sayer & Heller*, 261 F. 195; *Lurie*, 209 F. 364; *Universal Coin*, 104 F. 2d 781; *Banker*, 69 F. 2d 665; *Brennan*, *supra*; *Lukens*, 197 F. 2d 939. And that is the case law situation that Congress faced when it wrote a statute that, as we have said, sought primarily to codify existing patent law. See *supra*, at 348–349.

The majority tries to minimize the overall thrust of this case law by dividing the cases into subgroups and then concluding that the number of undistinguishable precedents in each subgroup is "too few to establish a settled, national consensus." *Ante,* at 342. The problem with this approach is that, once we look at the body of case law as a whole, rather than in subgroups, we find what I have said and repeated, namely, that *all the cases say the same thing*: Laches applies. The majority's insistence on subdivision makes it sound a little like a Phillies fan who announces that a 9–0 loss to the Red Sox was a "close one." Why close? Because, says the fan, the Phillies lost each inning by only one run.

For the sake of completeness I add that, since 1952, every Federal Court of Appeals to consider the question has held that laches remains available for damages claims brought under the Patent Act. See *A. C. Aukerman Co.* v. *R. L. Chaides Constr. Co.*, 960 F. 2d 1020, 1030 (CA Fed. 1992) (en banc). Yet, Congress has repeatedly reenacted 35 U. S. C. § 282's "unenforceability" language without material change. See, *e. g.*, §§ 15(a), 20(g)(2)(B), 125 Stat. 328, 334. See also *Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U. S. 519, 536 (2015) (holding that congressional reenactment provides "convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals"); *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U. S. 91, 113–114 (2011) (when Congress has "often amended § 282" while "le[aving]

the Federal Circuit's interpretation of § 282 in place," any further "recalibration" should be left to the Legislature).

III

The majority's strongest argument is *Petrella*. There, the Court held that laches could not bar a damages claim brought within the Copyright Act's limitations period. The present case holds roughly the same in respect to the Patent Act, providing a degree of consistency.

There are relevant differences, however, between patent law and copyright law. For one thing, copyright law, unlike patent law, does not contain a century and a half of history during which courts held that laches and a statute of limitations could coexist. When Congress enacted the Patent Act in 1952, patent statutes had already contained a 6-year statute of limitations for 55 years (since 1897), during which time courts had continued to apply laches to patent damages cases. Copyright law, on the other hand, contained no federal statute of limitations until 1957. See *Petrella*, 572 U. S., at 669.

For another thing, the Copyright Act, unlike the Patent Act, has express provisions that mitigate the unfairness of a copyright holder waiting for decades to bring his lawsuit. A copyright holder who tries to lie in wait to see if a defendant's investment will prove successful will discover that the Copyright Act allows that defendant to "prove and offset against profits . . . 'deductible expenses' incurred in generating those profits." *Id.*, at 677 (quoting 17 U. S. C. § 504(b)). Thus, if the defendant invests, say, $50 million in a film, a copyright holder who waits until year 15 (when the film begins to earn a profit) to bring a lawsuit may be limited to recovering the defendant's profits less an apportioned amount of the defendant's initial $50 million investment. But the Patent Act has no such deduction provision.

Further, the Court, in *Petrella*, pointed out that the evidentiary loss that occurs while a copyright holder waits to

bring suit is "at least as likely to affect plaintiffs as it is to disadvantage defendants." 572 U. S., at 684. But that symmetry does not exist to the same degree in patent law. To win a copyright suit the copyright holder must show that the defendant copied his work. The death of witnesses and loss of documents from the time of the alleged infringement can therefore significantly impair the copyright holder's ability to prove his case. There is no such requirement in a patent suit. Patent infringement is a strict-liability offense: There need not be any copying, only an end product (or process) that invades the area the patentee has carved out in his patent.

At the same time, the passage of time may well harm patent *defendants* who wish to show a patent invalid by raising defenses of anticipation, obviousness, or insufficiency. These kinds of defenses can depend upon contemporaneous evidence that may be lost over time, and they arise far more frequently in patent cases than any of their counterparts do in copyright cases. See Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 23 (reporting that of all copyright cases pending as of January 2009, only 2.7% of judgment events resulted in a finding of a lack of ownership or validity of the copyright at issue); Allison, Lemley, & Schwartz, Understanding the Realities of Modern Patent Litigation, 92 Texas L. Rev. 1769, 1778, 1784–1785 (2014) (finding that 70% of summary judgment motions in patent cases filed in 2008–2009 related to anticipation or obviousness). The upshot is an absence here of the symmetrical effect of delay upon which the Court relied in *Petrella*.

Finally, there is a "lock-in" problem that is likely to be more serious where patents are at issue. Once a business chooses to rely on a particular technology, it can become expensive to switch, even if it would have been cheap to do so earlier. See Lee & Melamed, Breaking the Vicious Cycle of Patent Damages, 101 Cornell L. Rev. 385, 409–410 (2016). As a result, a patentee has considerable incentive to delay

suit until the costs of switching—and accordingly the settlement value of a claim—are high. The practical consequences of such delay can be significant, as the facts of this case illustrate: First Quality invested hundreds of millions of dollars in its allegedly infringing technologies during the years that SCA waited to bring its suit. App. to Pet. for Cert. 107a–108a. And *amici* have provided numerous other examples that suggest this fact pattern is far from uncommon. See Brief for Dell et al. 11–19.

I recognize the majority's suggestion that the doctrine of "equitable estoppel" might help alleviate some of these problems. See *ante*, at 344. I certainly hope so. But I would be more "cautious before adopting changes that disrupt the settled expectations of the inventing community." *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U. S. 722, 739 (2002).

I add or confess that I believe that *Petrella* too was wrongly decided. Today's case helps illustrate why I think that *Petrella* started this Court down the wrong track. I would stop, finding adequate grounds to distinguish *Petrella.* But the majority remains "determined to stay the course and continue on, traveling even further away," *Mathis* v. *United States*, 579 U. S. 500, 544 (2016) (ALITO, J., dissenting), from Congress' efforts, in the Patent Act, to promote the "Progress of Science and useful Arts," U. S. Const., Art. I, § 8, cl. 8. Trite but true: Two wrongs don't make a right.

With respect, I dissent.

Syllabus

MANUEL *v.* CITY OF JOLIET, ILLINOIS, ET AL.

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

No. 14–9496. Argued October 5, 2016—Decided March 21, 2017

During a traffic stop, police officers in Joliet, Illinois, searched petitioner Elijah Manuel and found a vitamin bottle containing pills. Suspecting the pills to be illegal drugs, the officers conducted a field test, which came back negative for any controlled substance. Still, they arrested Manuel and took him to the police station. There, an evidence technician tested the pills and got the same negative result, but claimed in his report that one of the pills tested "positive for the probable presence of ecstasy." App. 92. An arresting officer also reported that, based on his "training and experience," he "knew the pills to be ecstasy." *Id.*, at 91. On the basis of those false statements, another officer filed a sworn complaint charging Manuel with unlawful possession of a controlled substance. Relying exclusively on that complaint, a county court judge found probable cause to detain Manuel pending trial.

While Manuel was in jail, the Illinois police laboratory tested the seized pills and reported that they contained no controlled substances. But Manuel remained in custody, spending a total of 48 days in pretrial detention. More than two years after his arrest, but less than two years after his criminal case was dismissed, Manuel filed a 42 U. S. C. § 1983 lawsuit against Joliet and several of its police officers (collectively, the City), alleging that his arrest and detention violated the Fourth Amendment. The District Court dismissed Manuel's suit, holding, first, that the applicable two-year statute of limitations barred his unlawful arrest claim, and, second, that under binding Circuit precedent, pretrial detention following the start of legal process (here, the judge's probable-cause determination) could not give rise to a Fourth Amendment claim. Manuel appealed the dismissal of his unlawful detention claim; the Seventh Circuit affirmed.

Held:

1. Manuel may challenge his pretrial detention on Fourth Amendment grounds. This conclusion follows from the Court's settled precedent. In *Gerstein* v. *Pugh*, 420 U. S. 103, the Court decided that a pretrial detention challenge was governed by the Fourth Amendment, noting that the Fourth Amendment establishes the minimum constitutional "standards and procedures" not just for arrest but also for "detention," *id.*, at 111, and "always has been thought to define" the appropriate

process "for seizures of person[s] . . . in criminal cases, including the detention of suspects pending trial," *id.*, at 125, n. 27. And in *Albright* v. *Oliver*, 510 U. S. 266, a majority of the Court again looked to the Fourth Amendment to assess pretrial restraints on liberty. Relying on *Gerstein*, the plurality reiterated that the Fourth Amendment is the "relevan[t]" constitutional provision to assess the "deprivations of liberty that go hand in hand with criminal prosecutions." *Id.*, at 274; see *id.*, at 290 (Souter, J., concurring in judgment) ("[R]ules of recovery for such harms have naturally coalesced under the Fourth Amendment"). That the pretrial restraints in *Albright* arose pursuant to legal process made no difference, given that they were allegedly unsupported by probable cause.

As reflected in those cases, pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process. The Fourth Amendment prohibits government officials from detaining a person absent probable cause. And where legal process has gone forward, but has done nothing to satisfy the probable-cause requirement, it cannot extinguish a detainee's Fourth Amendment claim. That was the case here: Because the judge's determination of probable cause was based solely on fabricated evidence, it did not expunge Manuel's Fourth Amendment claim. For that reason, Manuel stated a Fourth Amendment claim when he sought relief not merely for his arrest, but also for his pretrial detention. Pp. 364–369.

2. On remand, the Seventh Circuit should determine the claim's accrual date, unless it finds that the City has previously waived its timeliness argument. In doing so, the court should look to the common law of torts for guidance, *Carey* v. *Piphus*, 435 U. S. 247, 257–258, while also closely attending to the values and purposes of the constitutional right at issue. The court may also consider any other still-live issues relating to the elements of and rules applicable to Manuel's Fourth Amendment claim. Pp. 369–373.

590 Fed. Appx. 641, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 373. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 374.

Stanley B. Eisenhammer, by appointment of the Court, 577 U. S. 1191, argued the cause for petitioner. With him on the briefs were *Pamela E. Simaga*, *Jeffrey L. Fisher*, *Pamela S. Karlan*, and *Brian Wolfman*.

Ilana H. Eisenstein argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Gershengorn*, *Douglas N. Letter*, *Barbara L. Herwig*, *Richard Montague*, and *Siegmund F. Fuchs*.

Michael A. Scodro argued the cause for respondents. With him on the brief were *Christopher M. Sheehan*, *Martin J. Shanahan, Jr.*, *Matthew S. Hellman*, *Erica L. Ross*, *David A. Strauss*, and *Sarah M. Konsky*.*

JUSTICE KAGAN delivered the opinion of the Court.

Petitioner Elijah Manuel was held in jail for some seven weeks after a judge relied on allegedly fabricated evidence to find probable cause that he had committed a crime. The primary question in this case is whether Manuel may bring

*Briefs of *amici curiae* urging reversal were filed for the Innocence Network by *Peter D. Isakoff*; for the National Association for Public Defense by *Timothy P. O'Toole* and *Dawn E. Murphy-Johnson*; for the National Association of Criminal Defense Lawyers et al. by *John P. Elwood*, *Joshua S. Johnson*, *David T. Goldberg*, *Jeffrey T. Green*, and *David R. Ortiz*; for the National Police Accountability Project by *Anna Benvenutti Hoffman* and *Alexandra Lampert*; for the U. S. Justice Foundation et al. by *Herbert W. Titus*, *Robert J. Olson*, *William J. Olson*, *Jeremiah L. Morgan*, and *John S. Miller*; and for Albert W. Alschuler by *Mr. Alschuler*, *pro se*, and *Jon Loevy*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Carolyn E. Shapiro*, Solicitor General, and *Brett E. Legner*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Cynthia Coffman* of Colorado, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Derek Schmidt* of Kansas, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Michael DeWine* of Ohio, and *Alan Wilson* of South Carolina; for DRI–The Voice of the Defense Bar by *Tillman J. Breckenridge* and *Laura E. Proctor*; for the National Association of Counties et al. by *Lawrence Rosenthal* and *Lisa Soronen*; for the National District Attorney's Association by *Brian J. Murphy* and *Jeffrey R. Johnson*; and for Sheldon H. Nahmod by *Mr. Nahmod*, *pro se*, and *Joshua D. Yount*.

a claim based on the Fourth Amendment to contest the legality of his pretrial confinement. Our answer follows from settled precedent. The Fourth Amendment, this Court has recognized, establishes "the standards and procedures" governing pretrial detention. See, *e. g.*, *Gerstein* v. *Pugh*, 420 U. S. 103, 111 (1975). And those constitutional protections apply even after the start of "legal process" in a criminal case—here, that is, after the judge's determination of probable cause. See *Albright* v. *Oliver*, 510 U. S. 266, 274 (1994) (plurality opinion); *id.*, at 290 (Souter, J., concurring in judgment). Accordingly, we hold today that Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment (while we leave all other issues, including one about that claim's timeliness, to the court below).

I

Shortly after midnight on March 18, 2011, Manuel was riding through Joliet, Illinois, in the passenger seat of a Dodge Charger, with his brother at the wheel. A pair of Joliet police officers pulled the car over when the driver failed to signal a turn. See App. 90. According to the complaint in this case, one of the officers dragged Manuel from the car, called him a racial slur, and kicked and punched him as he lay on the ground. See *id.*, at 31–32, 63.[1] The policeman then searched Manuel and found a vitamin bottle containing pills. See *id.*, at 64. Suspecting that the pills were actually illegal drugs, the officers conducted a field test of the bottle's contents. The test came back negative for any controlled substance, leaving the officers with no evidence that Manuel had committed a crime. See *id.*, at 69. Still, the officers arrested Manuel and took him to the Joliet police station. See *id.*, at 70.

[1] Because we here review an order dismissing Manuel's suit, we accept as true all the factual allegations in his complaint. See, *e. g.*, *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993).

There, an evidence technician tested the pills once again, and got the same (negative) result. See *ibid.* But the technician lied in his report, claiming that one of the pills was "found to be . . . positive for the probable presence of ecstasy." *Id.*, at 92. Similarly, one of the arresting officers wrote in his report that "[f]rom [his] training and experience, [he] knew the pills to be ecstasy." *Id.*, at 91. On the basis of those statements, another officer swore out a criminal complaint against Manuel, charging him with unlawful possession of a controlled substance. See *id.*, at 52–53.

Manuel was brought before a county court judge later that day for a determination of whether there was probable cause for the charge, as necessary for further detention. See *Gerstein*, 420 U. S., at 114 (requiring a judicial finding of probable cause following a warrantless arrest to impose any significant pretrial restraint on liberty); Ill. Comp. Stat., ch. 725, § 5/109–1 (West 2010) (implementing that constitutional rule). The judge relied exclusively on the criminal complaint—which in turn relied exclusively on the police department's fabrications—to support a finding of probable cause. Based on that determination, he sent Manuel to the county jail to await trial. In the somewhat obscure legal lingo of this case, Manuel's subsequent detention was thus pursuant to "legal process"—because it followed from, and was authorized by, the judge's probable-cause determination.[2]

While Manuel sat in jail, the Illinois police laboratory reexamined the seized pills, and on April 1, it issued a report concluding (just as the prior two tests had) that they contained no controlled substances. See App. 51. But for unknown reasons, the prosecution—and, critically for this case,

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[2] Although not addressed in Manuel's complaint, the police department's alleged fabrications did not stop at this initial hearing on probable cause. About two weeks later, on March 30, a grand jury indicted Manuel based on similar false evidence: testimony from one of the arresting officers that "[t]he pills field tested positive" for ecstasy. App. 96 (grand jury minutes).

Manuel's detention—continued for more than another month. Only on May 4 did an assistant state's attorney seek dismissal of the drug charge. See *id.*, at 48, 101. The County Court immediately granted the request, and Manuel was released the next day. In all, he had spent 48 days in pretrial detention.

On April 22, 2013, Manuel brought this lawsuit under 42 U. S. C. § 1983 against the City of Joliet and several of its police officers (collectively, the City). Section 1983 creates a "species of tort liability," *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976), for "the deprivation of any rights, privileges, or immunities secured by the Constitution," § 1983. Manuel's complaint alleged that the City violated his Fourth Amendment rights in two ways—first by arresting him at the roadside without any reason, and next by "detaining him in police custody" for almost seven weeks based entirely on made-up evidence. See App. 79–80.[3]

The District Court dismissed Manuel's suit. See 2014 WL 551626 (ND Ill., Feb. 12, 2014). The court first held that the applicable two-year statute of limitations barred Manuel's claim for unlawful arrest, because more than two years had elapsed between the date of his arrest (March 18, 2011) and the filing of his complaint (April 22, 2013). But the court relied on another basis in rejecting Manuel's challenge to his subsequent detention (which stretched from March 18 to May 5, 2011). Binding Circuit precedent, the District Court explained, made clear that pretrial detention following the start of legal process could not give rise to a Fourth Amendment claim. See *id.*, at *1 (citing, *e. g.*, *Newsome* v. *McCabe*,

[3] Manuel's allegation of unlawful detention concerns only the period after the onset of legal process—here meaning, again, after the County Court found probable cause that he had committed a crime. See *supra*, at 361. The police also held Manuel in custody for several hours between his warrantless arrest and his first appearance in court. But throughout this litigation, Manuel has treated that short period as part and parcel of the initial unlawful arrest. See, *e. g.*, Reply Brief 1.

256 F. 3d 747, 750 (CA7 2001)). According to that line of decisions, a § 1983 plaintiff challenging such detention must allege a breach of the Due Process Clause—and must show, to recover on that theory, that state law fails to provide an adequate remedy. See 2014 WL 551626, *1–*2. Because Manuel's complaint rested solely on the Fourth Amendment—and because, in any event, Illinois's remedies were robust enough to preclude the due process avenue—the District Court found that Manuel had no way to proceed. See *ibid.*

The Court of Appeals for the Seventh Circuit affirmed the dismissal of Manuel's claim for unlawful detention (the only part of the District Court's decision Manuel appealed). See 590 Fed. Appx. 641 (2015). Invoking its prior caselaw, the Court of Appeals reiterated that such claims could not be brought under the Fourth Amendment. Once a person is detained pursuant to legal process, the court stated, "the Fourth Amendment falls out of the picture and the detainee's claim that the detention is improper becomes [one of] due process." *Id.*, at 643–644 (quoting *Llovet* v. *Chicago*, 761 F. 3d 759, 763 (CA7 2014)). And again: "When, after the arrest[,] a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention." 590 Fed. Appx., at 643 (quoting *Llovet*, 761 F. 3d, at 764). So the Seventh Circuit held that Manuel's complaint, in alleging only a Fourth Amendment violation, rested on the wrong part of the Constitution: A person detained following the onset of legal process could at most (although, the court agreed, *not* in Illinois) challenge his pretrial confinement via the Due Process Clause. See 590 Fed. Appx., at 643–644.

The Seventh Circuit recognized that its position makes it an outlier among the Courts of Appeals, with ten others taking the opposite view. See *id.*, at 643; *Hernandez-Cuevas* v. *Taylor*, 723 F. 3d 91, 99 (CA1 2013) ("[T]here is now broad consensus among the circuits that the Fourth Amendment

right to be free from seizure but upon probable cause extends through the pretrial period").[4] Still, the court decided, Manuel had failed to offer a sufficient reason for overturning settled Circuit precedent; his argument, albeit "strong," was "better left for the Supreme Court." 590 Fed. Appx., at 643.

On cue, we granted certiorari. 577 U. S. 1098 (2016).

II

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures." Manuel's complaint seeks just that protection. Government officials, it recounts, detained—which is to say, "seiz[ed]"—Manuel for 48 days following his arrest. See App. 79–80; *Brendlin* v. *California*, 551 U. S. 249, 254 (2007) ("A person is seized" whenever officials "restrain[ ] his freedom of movement" such that he is "not free to leave"). And that detention was "unreasonable," the complaint continues, because it was based solely on false evidence, rather than supported by probable cause. See App. 79–80; *Bailey* v. *United States*, 568 U. S. 186, 192 (2013) ("[T]he general rule [is] that Fourth Amendment seizures are 'reasonable' only if based on probable cause to believe that the individual has committed a crime"). By their respective terms, then, Manuel's claim fits the Fourth Amendment, and the Fourth Amendment fits Manuel's claim, as hand in glove.

This Court decided some four decades ago that a claim challenging pretrial detention fell within the scope of the

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[4] See also *Singer* v. *Fulton County Sheriff*, 63 F. 3d 110, 114–118 (CA2 1995); *McKenna* v. *Philadelphia*, 582 F. 3d 447, 461 (CA3 2009); *Lambert* v. *Williams*, 223 F. 3d 257, 260–262 (CA4 2000); *Castellano* v. *Fragozo*, 352 F. 3d 939, 953–954, 959–960 (CA5 2003) (en banc); *Sykes* v. *Anderson*, 625 F. 3d 294, 308–309 (CA6 2010); *Galbraith* v. *County of Santa Clara*, 307 F. 3d 1119, 1126–1127 (CA9 2002); *Wilkins* v. *DeReyes*, 528 F. 3d 790, 797–799 (CA10 2008); *Whiting* v. *Traylor*, 85 F. 3d 581, 584–586 (CA11 1996); *Pitt* v. *District of Columbia*, 491 F. 3d 494, 510–511 (CADC 2007).

Fourth Amendment. In *Gerstein*, two persons arrested without a warrant brought a § 1983 suit complaining that they had been held in custody for "a substantial period solely on the decision of a prosecutor." 420 U. S., at 106. The Court looked to the Fourth Amendment to analyze—and uphold—their claim that such a pretrial restraint on liberty is unlawful unless a judge (or grand jury) first makes a reliable finding of probable cause. See *id.*, at 114, 117, n. 19. The Fourth Amendment, we began, establishes the minimum constitutional "standards and procedures" not just for arrest but also for ensuing "detention." *Id.*, at 111. In choosing that Amendment "as the rationale for decision," the Court responded to a concurring Justice's view that the Due Process Clause offered the better framework: The Fourth Amendment, the majority countered, was "tailored explicitly for the criminal justice system, and it[ ] always has been thought to define" the appropriate process "for seizures of person[s] . . . in criminal cases, including the detention of suspects pending trial." *Id.*, at 125, n. 27. That Amendment, standing alone, guaranteed "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint." *Id.*, at 125. Accordingly, those detained prior to trial without such a finding could appeal to "the Fourth Amendment's protection against unfounded invasions of liberty." *Id.*, at 112; see *id.*, at 114.[5]

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[5] The Court repeated the same idea in a follow-on decision to *Gerstein*. In *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 47 (1991), we considered how quickly a jurisdiction must provide the probable-cause determination that *Gerstein* demanded "as a prerequisite to an extended pretrial detention." In holding that the decision should occur within 48 hours of an arrest, the majority understood its "task [as] articulat[ing] more clearly the boundaries of what is permissible under the Fourth Amendment." 500 U. S., at 56. In arguing for still greater speed, the principal dissent invoked the original meaning of "the Fourth Amendment's prohibition of 'unreasonable seizures,' insofar as it applies to seizure of the person." *Id.*, at 60 (Scalia, J., dissenting). The difference between the two opinions was significant, but the commonality still more so: All Justices agreed that the

And so too, a later decision indicates, those objecting to a pretrial deprivation of liberty may invoke the Fourth Amendment when (as here) that deprivation occurs after legal process commences. The § 1983 plaintiff in *Albright* complained of various pretrial restraints imposed after a court found probable cause to issue an arrest warrant, and then bind him over for trial, based on a policeman's unfounded charges. See 510 U. S., at 268–269 (plurality opinion). For uncertain reasons, Albright ignored the Fourth Amendment in drafting his complaint; instead, he alleged that the defendant officer had infringed his substantive due process rights. This Court rejected that claim, with five Justices in two opinions remitting Albright to the Fourth Amendment. See *id.*, at 271 (plurality opinion) ("We hold that it is the Fourth Amendment . . . under which [his] claim must be judged"); *id.*, at 290 (Souter, J., concurring in judgment) ("[I]njuries like those [he] alleges are cognizable in § 1983 claims founded upon . . . the Fourth Amendment"). "The Framers," the plurality wrote, "considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Id.*, at 274. That the deprivations at issue were pursuant to legal process made no difference, given that they were (allegedly) unsupported by probable cause; indeed, neither of the two opinions so much as mentioned that procedural circumstance. Relying on *Gerstein*, the plurality stated that the Fourth Amendment remained the "relevan[t]" constitutional provision to assess the "deprivations of liberty"—most notably, pretrial detention—"that go hand in hand with criminal prosecutions." 510 U. S., at 274; see *id.*, at 290 (Souter, J., concurring in judgment) ("[R]ules of recovery for such harms have naturally coalesced under the Fourth Amendment").

As reflected in *Albright*'s tracking of *Gerstein*'s analysis, pretrial detention can violate the Fourth Amendment not

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Fourth Amendment provides the appropriate lens through which to view a claim involving pretrial detention.

only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. See *supra*, at 365. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause. See 590 Fed. Appx., at 643–644. If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.[6]

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[6] The opposite view would suggest an untenable result: that a person arrested pursuant to a warrant could not bring a Fourth Amendment claim challenging the reasonableness of even his arrest, let alone any subsequent detention. An arrest warrant, after all, is a way of initiating legal process, in which a magistrate finds probable cause that a person committed a crime. See *Wallace* v. *Kato*, 549 U. S. 384, 389 (2007) (explaining that the seizure of a person was "without legal process" because police officers "did not have a warrant for his arrest"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 119, pp. 871, 886 (5th ed. 1984) (similar). If legal process is the cut-off point for the Fourth Amendment, then someone arrested (as well as later held) under a warrant procured through false testimony would have to look to the Due Process Clause for relief. But that runs counter to our caselaw. See, *e. g.*, *Whiteley* v. *Warden, Wyo. State Penitentiary*, 401 U. S. 560, 568–569 (1971) (holding that an arrest violated the Fourth Amendment because a magistrate's warrant was not backed by probable cause). And if the Seventh Circuit would reply that arrest warrants are somehow different—that there is legal process and then again there is *legal process*—the next (and in our view unanswerable) question would be why.

For that reason, and contrary to the Seventh Circuit's view, Manuel stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention.[7] Consider again the facts alleged in this case. Police officers initially arrested Manuel without probable cause, based solely on his possession of pills that had field tested negative for an illegal substance. So (putting timeliness issues aside) Manuel could bring a claim for wrongful arrest under the Fourth Amendment. And the same is true (again, disregarding timeliness) as to a claim for wrongful detention—because Manuel's subsequent weeks in custody were *also* unsupported by probable cause, and so *also* constitutionally unreasonable. No evidence of Manuel's criminality had come to light in between the roadside arrest and the County Court proceeding initiating legal process; to the contrary, yet another test of Manuel's pills had come back negative in that period. All that the judge had before him were police fabrications about the pills' content. The judge's order holding Manuel for trial therefore lacked any proper basis. And that means Manuel's ensuing pretrial detention, no less than his original arrest, violated his Fourth Amendment rights. Or put just a bit differently: Legal process did not expunge Manuel's Fourth Amendment claim because the process he received failed to establish what that Amendment makes es-

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[7] Even the City no longer appears to contest that conclusion. On multiple occasions during oral argument in this Court, the City agreed that "a Fourth Amendment right . . . survive[d] the initiation of process" at the hearing in which the county judge found probable cause and ordered detention. Tr. of Oral Arg. 31; see *id.*, at 33 (concurring with the statement that "once [an] individual is brought . . . before a magistrate, and the magistrate using the same bad evidence says, stay here in jail . . . until we get to trial, that that period is a violation of the Fourth Amendment"); *id.*, at 51 (stating that a detainee has "a Fourth Amendment claim" if "misstatements at [such a probable-cause hearing] led to ongoing pretrial seizure").

sential for pretrial detention—probable cause to believe he committed a crime.[8]

III

Our holding—that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process—does not exhaust the disputed legal issues in this

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[8] The dissent goes some way toward claiming that a different kind of pretrial legal process—a grand jury indictment or preliminary examination—does expunge such a Fourth Amendment claim. See *post*, at 382, n. 4 (opinion of ALITO, J.) (raising but "not decid[ing] that question"); *post*, at 383 (suggesting an answer nonetheless). The effect of that view would be to cut off Manuel's claim on the date of his grand jury indictment (March 30)—even though that indictment (like the County Court's probable-cause proceeding) was entirely based on false testimony and even though Manuel remained in detention for 36 days longer. See n. 2, *supra*. Or said otherwise—even though the legal process he received failed to establish the probable cause necessary for his continued confinement. We can see no principled reason to draw that line. Nothing in the nature of the legal proceeding establishing probable cause makes a difference for purposes of the Fourth Amendment: Whatever its precise form, if the proceeding is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights, for all the reasons we have stated. By contrast (and contrary to the dissent's suggestion, see *post*, at 382, n. 3), once a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment. See *Jackson* v. *Virginia*, 443 U. S. 307, 318 (1979) (invalidating a conviction under the Due Process Clause when "the record evidence could [not] reasonably support a finding of guilt beyond a reasonable doubt"); *Thompson* v. *Louisville*, 362 U. S. 199, 204 (1960) (striking a conviction under the same provision when "the record [wa]s entirely lacking in evidence" of guilt—such that it could not even establish probable cause). *Gerstein* and *Albright*, as already suggested, both reflected and recognized that constitutional division of labor. See *supra*, at 365–366. In their words, the Framers "drafted the Fourth Amendment" to address "the matter of *pretrial* deprivations of liberty," *Albright*, 510 U. S., at 274 (emphasis added), and the Amendment thus provides "standards and procedures" for "the detention of suspects *pending trial*," *Gerstein*, 420 U. S., at 125, n. 27 (emphasis added).

case. It addresses only the threshold inquiry in a § 1983 suit, which requires courts to "identify the specific constitutional right" at issue. *Albright*, 510 U. S., at 271. After pinpointing that right, courts still must determine the elements of, and rules associated with, an action seeking damages for its violation. See, *e. g.*, *Carey* v. *Piphus*, 435 U. S. 247, 257–258 (1978). Here, the parties particularly disagree over the accrual date of Manuel's Fourth Amendment claim—that is, the date on which the applicable two-year statute of limitations began to run. The timeliness of Manuel's suit hinges on the choice between their proposed dates. But with the following brief comments, we remand that issue to the court below.

In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts. See *ibid.* (explaining that tort principles "provide the appropriate starting point" in specifying the conditions for recovery under § 1983); *Wallace* v. *Kato*, 549 U. S. 384, 388–390 (2007) (same for accrual dates in particular). Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. See *id.*, at 388–390; *Heck* v. *Humphrey*, 512 U. S. 477, 483–487 (1994). But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving "more as a source of inspired examples than of prefabricated components." *Hartman* v. *Moore*, 547 U. S. 250, 258 (2006); see *Rehberg* v. *Paulk*, 566 U. S. 356, 366 (2012) (noting that "§ 1983 is [not] simply a federalized amalgamation of pre-existing common-law claims"). In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue.

With these precepts as backdrop, Manuel and the City offer competing views about what accrual rule should govern a § 1983 suit challenging post-legal-process pretrial deten-

tion. According to Manuel, that Fourth Amendment claim accrues only upon the dismissal of criminal charges—here, on May 4, 2011, less than two years before he brought his suit. See Reply Brief 2; Brief for United States as *Amicus Curiae* 24–25, n. 16 (taking the same position). Relying on this Court's caselaw, Manuel analogizes his claim to the common-law tort of malicious prosecution. See Reply Brief 9; *Wallace*, 549 U. S., at 389–390. An element of that tort is the "termination of the . . . proceeding in favor of the accused"; and accordingly, the statute of limitations does not start to run until that termination takes place. *Heck*, 512 U. S., at 484, 489. Manuel argues that following the same rule in suits like his will avoid "conflicting resolutions" in § 1983 litigation and criminal proceedings by "preclud[ing] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id.*, at 484, 486; see Reply Brief 10–11; Brief for United States as *Amicus Curiae* 24–25, n. 16. In support of Manuel's position, all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a "favorable termination" element and so pegged the statute of limitations to the dismissal of the criminal case. See n. 4, *supra*.[9] That means in the great majority of Circuits, Manuel's claim would be timely.

The City, however, contends that any such Fourth Amendment claim accrues (and the limitations period starts to run) on the date of the initiation of legal process—here, on March 18, 2011, *more* than two years before Manuel filed suit. See Brief for Respondents 33. According to the City, the most analogous tort to Manuel's constitutional claim is not malicious prosecution but false arrest, which accrues when legal process commences. See Tr. of Oral Arg. 47; *Wallace*, 549 U. S., at 389 (noting accrual rule for false arrest suits). And

[9] The two exceptions—the Ninth and D. C. Circuits—have not yet weighed in on whether a Fourth Amendment claim like Manuel's includes a "favorable termination" element.

even if malicious prosecution were the better comparison, the City continues, a court should decline to adopt that tort's favorable-termination element and associated accrual rule in adjudicating a § 1983 claim involving pretrial detention. That element, the City argues, "make[s] little sense" in this context because "the Fourth Amendment is concerned not with the outcome of a prosecution, but with the legality of searches and seizures." Brief for Respondents 16. And finally, the City contends that Manuel forfeited an alternative theory for treating his date of release as the date of accrual: to wit, that his pretrial detention "constitute[d] a continuing Fourth Amendment violation," each day of which triggered the statute of limitations anew. *Id.*, at 29, and n. 6; see Tr. of Oral Arg. 36; see also *Albright*, 510 U. S., at 280 (GINSBURG, J., concurring) (propounding a similar view). So Manuel, the City concludes, lost the opportunity to recover for his pretrial detention by waiting too long to file suit.

We leave consideration of this dispute to the Court of Appeals. "[W]e are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). Because the Seventh Circuit wrongly held that Manuel lacked any Fourth Amendment claim once legal process began, the court never addressed the elements of, or rules applicable to, such a claim. And in particular, the court never confronted the accrual issue that the parties contest here.[10] On remand, the

[10] The dissent would have us address these questions anyway, on the ground that "the conflict on the malicious prosecution question was the centerpiece of Manuel's argument in favor of certiorari." *Post*, at 375 (opinion of ALITO, J.). But the decision below did not implicate a "conflict on the malicious prosecution question"—because the Seventh Circuit, in holding that detainees like Manuel could not bring a Fourth Amendment claim at all, never considered whether (and, if so, how) that claim should resemble the malicious prosecution tort. Nor did Manuel's petition for certiorari suggest otherwise. The principal part of his question presented—mirroring the one and only Circuit split involving the decision below—

Court of Appeals should decide that question, unless it finds that the City has previously waived its timeliness argument. See Reply to Brief in Opposition 1–2 (addressing the possibility of waiver); Tr. of Oral Arg. 40–44 (same). And so too, the court may consider any other still-live issues relating to the contours of Manuel's Fourth Amendment claim for unlawful pretrial detention.

* * *

For the reasons stated, we reverse the judgment of the Seventh Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

I join JUSTICE ALITO's opinion in full but write separately regarding the accrual date for a Fourth Amendment unreasonable-seizure claim. JUSTICE ALITO suggests that a claim for unreasonable seizure based on a warrantless arrest might not accrue until the "first appearance" under Illinois law (or the "initial appearance" under federal law)—which ordinarily represents the first judicial determination of probable cause for that kind of arrest—rather than at the time of the arrest. See *post*, at 374, 383 (dissenting opinion); see also *Wallace* v. *Kato*, 549 U. S. 384 (2007) (taking a similar approach). Which of those events is the correct one for pur-

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reads as follows: "[W]hether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process." Pet. for Cert. i. That is exactly the issue we have resolved. The rest of Manuel's question did indeed express a view as to what would follow from an affirmative answer ("so as to allow a malicious prosecution claim"). *Ibid.* (And as the dissent notes, the Seventh Circuit recounted that he made the same argument in that court. See *post*, at 375–376, n. 1.) But as to that secondary issue, we think (for all the reasons just stated) that Manuel jumped the gun. See *supra*, at 370–372 and this page. And contra the dissent, his doing so provides no warrant for our doing so too.

poses of accrual makes no difference in this case, because both the arrest and the first appearance occurred more than two years before petitioner filed suit. See *ante*, at 362, and n. 3; see also *Wallace*, *supra*, at 387 (petitioner's claim was untimely regardless of whether it accrued on day of arrest or first appearance).

I would leave for another case (one where the question is dispositive) whether an unreasonable-seizure claim would accrue on the date of the first appearance if that appearance occurred on some day after the arrest. I think the answer to that question might turn on the meaning of "seizure," rather than on the presence or absence of any form of legal process. See *post*, at 381–382 (describing the ordinary meaning of "seizure").

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

I agree with the Court's holding up to a point: The protection provided by the Fourth Amendment continues to apply after "the start of legal process," *ante*, at 360, if legal process is understood to mean the issuance of an arrest warrant or what is called a "first appearance" under Illinois law and an "initial appearance" under federal law. Ill. Comp. Stat., ch. 725, §§ 5/109–1(a), (e) (West Supp. 2015); Fed. Rule Crim. Proc. 5. But if the Court means more—specifically, that new Fourth Amendment claims continue to accrue as long as pretrial detention lasts—the Court stretches the concept of a seizure much too far.

What is perhaps most remarkable about the Court's approach is that it entirely ignores the question that we agreed to decide, *i. e.*, whether a claim of malicious prosecution may be brought under the Fourth Amendment. I would decide that question and hold that the Fourth Amendment cannot house any such claim. If a malicious prosecution claim may be brought under the Constitution, it must find some other home, presumably the Due Process Clause.

I

The question that was set out in Manuel's petition for a writ of certiorari and that we agreed to decide is as follows:

> "[W]hether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process *so as to allow a malicious prosecution claim based upon the Fourth Amendment.* This question was raised, but left unanswered, by this Court in *Albright* v. *Oliver*, 510 U. S. 266 (1994). Since then, the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D. C. Circuits have all held that a Fourth Amendment malicious prosecution claim is cognizable through 42 U. S. C. § 1983 ("Section 1983"). Only the Seventh Circuit holds that a Fourth Amendment Section 1983 malicious prosecution claim is not cognizable." Pet. for Cert. i (emphasis added).

The question's reference to "a malicious prosecution claim" was surely no accident. First, the conflict on the malicious prosecution question was the centerpiece of Manuel's argument in favor of certiorari.[1] Second, unless Manuel is given

[1] The Court defends this evasion on the ground that it is resolving "the one and only Circuit split involving the decision below." *Ante*, at 372, n. 10. That is flatly wrong. As the Seventh Circuit acknowledged, its decision in this case and an earlier case on which the decision here relied, *Newsome* v. *McCabe*, 256 F. 3d 747 (2001), conflict with decisions of other Circuits holding that a malicious prosecution claim may be brought under the Fourth Amendment. The decision below states: "Manuel argues that we should reconsider our holding in *Newsome* and recognize a federal claim for malicious prosecution under the Fourth Amendment regardless of the available state remedy. By his count, 10 other Circuits have recognized federal malicious-prosecution claims under the Fourth Amendment." 590 Fed. Appx. 641, 643 (2015). The court refused to overrule *Newsome* and said that "Manuel's argument is better left for the Supreme Court." 590 Fed. Appx., at 643.

Manuel's petition for a writ of certiorari repeatedly made the same point. See Pet. for Cert. 2 ("The Seventh Circuit stands alone among circuits in not allowing a federal malicious prosecution claim grounded on

the benefit of the unique accrual rule for malicious prosecution claims, his claim is untimely, and he is not entitled to relief.

A

I would first consider what I take to be the core of the question presented—whether a "malicious prosecution claim may be brought under the Fourth Amendment." See *ibid.* Manuel asked us to decide that question because it may be critical to his ultimate success in this lawsuit. Why is that so?

The statute of limitations for Manuel's claim is Illinois's general statute of limitations for personal-injury torts, see *Wallace* v. *Kato*, 549 U. S. 384, 387 (2007), which requires suit to be brought within two years of the accrual of the claim,

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the Fourth Amendment"); *id.*, at 10 ("Ten Federal Circuits Correctly Hold That Malicious Prosecution is Actionable as a Fourth Amendment, Section 1983 Claim"); *ibid.* ("[E]ight circuits have held that malicious prosecution is cognizable through a Section 1983 Fourth Amendment claim"). All of the decisions that are cited as being in conflict with the decision below involved malicious prosecution claims and are described as such. See *id.*, at 10–11.

It is certainly true that the question whether a malicious prosecution claim may be brought under the Fourth Amendment subsumes the question whether a Fourth Amendment seizure continues past a first or initial appearance, but answering the latter question does not by any means resolve the Circuit split that Manuel cited and that we took this case to resolve. Suppose that the Seventh Circuit were to hold on remand that a Fourth Amendment seizure may continue up to the date when trial begins but no further. Such a holding would be consistent with the Court's holding in this case, but there would still be a conflict between Seventh Circuit case law and the decisions of other Circuits (on which Manuel relied, see *ibid.*), holding that a standard malicious prosecution claim (which requires a termination favorable to the defendant) may be brought under the Fourth Amendment. See, *e. g.*, *Hernandez-Cuevas* v. *Taylor*, 723 F. 3d 91, 99 (CA1 2013); *Manganiello* v. *New York*, 612 F. 3d 149, 160–161 (CA2 2010); *McKenna* v. *Philadelphia*, 582 F. 3d 447, 461 (CA3 2009); *Evans* v. *Chalmers*, 703 F. 3d 636, 647 (CA4 2012); *Sykes* v. *Anderson*, 625 F. 3d 294, 308 (CA6 2010); *Grider* v. *Auburn*, 618 F. 3d 1240, 1256 (CA11 2010).

see Ill. Comp. Stat., ch. 735, § 5/13–202 (West 2010). Here is the chronology of relevant events in this case:

- March 18, 2011: Manuel is arrested and brought before a State Circuit Court Judge, who makes the required probable-cause finding because Manuel was arrested without a warrant.
- March 31, 2011: Manuel is indicted by a grand jury.
- April 8, 2011: Manuel is arraigned.
- May 4, 2011: An assistant state's attorney moves to dismiss the charges, and the motion is granted.
- May 5, 2011: Manuel is released from jail.
- April 22, 2013: Manuel files his complaint.

Since the statute of limitations requires the commencement of suit within two years of accrual, Manuel's claim is untimely unless it accrued on or after April 22, 2011. And the only events in the above chronology that occurred within that timeframe are the dismissal of the charge against him and his release from custody. A claim of malicious prosecution "does not accrue until the criminal proceedings have terminated in the plaintiff's favor." *Heck* v. *Humphrey*, 512 U. S. 477, 489 (1994); see 3 Restatement (Second) of Torts § 653 (1976). None of the other common-law torts to which Manuel's claim might be compared—such as false arrest or false imprisonment—has such an accrual date. See *Wallace*, *supra*, at 397 (holding that a claim for false imprisonment under the Fourth Amendment accrues when "the claimant becomes detained pursuant to legal process"). Therefore, if Manuel's case is to go forward, it is essential that his claim be treated like a malicious prosecution claim.

B

Although the Court refuses to decide whether Manuel's claim should be so treated, the answer to that question—the

one that the Court actually agreed to review—is straightforward: A malicious prosecution claim cannot be based on the Fourth Amendment.

"The first inquiry in any § 1983 suit," the Court has explained, is "to isolate the precise constitutional violation with which [the defendant] is charged." *Baker* v. *McCollan*, 443 U. S. 137, 140 (1979). In this case, Manuel charges that he was seized without probable cause in violation of the Fourth Amendment. In order to flesh out the elements of this constitutional tort, we must look for "tort analogies." *Wilson* v. *Garcia*, 471 U. S. 261, 277 (1985). Manuel says that the appropriate analog is the tort of malicious prosecution, so we should look to the elements of that tort.

To make out a claim for malicious prosecution, a plaintiff generally must show three things: (1) "that the criminal proceeding was initiated or continued *by the defendant* without 'probable cause,'" W. Keeton, D. Dobbs, P. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 876 (5th ed. 1984) (Prosser and Keeton) (emphasis added); (2) "that the defendant instituted the proceeding 'maliciously,'" *id.*, at 882; and (3) that "the proceedings have terminated in favor of the accused," 3 Restatement (Second) of Torts § 653(b); see also *Heck*, *supra*, at 489.

There is a severe mismatch between these elements and the Fourth Amendment. First, the defendants typically named in Fourth Amendment seizure cases—namely, law enforcement officers—lack the authority to initiate or dismiss a prosecution. See Prosser and Keeton 876. That authority lies in the hands of prosecutors. A law enforcement officer, including the officer responsible for the defendant's arrest, may testify before a grand jury, at a preliminary examination, see Ill. Comp. Stat., ch. 725, §§ 5/109–3(b), 5/109–3.1(b) (West 2010), or hearing, see Fed. Rule Crim. Proc. 5.1, and at trial. But when that occurs, the officer is simply a witness and is not responsible for "the decision to press criminal charges." *Rehberg* v. *Paulk*, 566 U. S. 356, 371 (2012).

Second, while subjective bad faith, *i. e.*, malice, is the core element of a malicious prosecution claim, it is firmly established that the Fourth Amendment standard of reasonableness is fundamentally objective. See *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 736 (2011). These two standards—one subjective and the other objective—cannot coexist. In some instances, importing a malice requirement into the Fourth Amendment would leave culpable conduct unpunished. An officer could act unreasonably, thereby violating the Fourth Amendment, without even a hint of bad faith. In other cases, the malice requirement would cast too wide a net. An officer could harbor intense personal ill will toward an arrestee but still act in an objectively reasonable manner in carrying out an arrest.

Finally, malicious prosecution's favorable-termination element makes no sense when the claim is that a seizure violated the Fourth Amendment. The Fourth Amendment, after all, prohibits *all* unreasonable seizures—regardless of whether a prosecution is ever brought or how a prosecution ends. A "Fourth Amendment wrong" "is fully accomplished," *United States* v. *Calandra*, 414 U. S. 338, 354 (1974), when an impermissible seizure occurs. The Amendment is violated and the injury is inflicted no matter what happens in any later proceedings.

Our cases concerning Fourth Amendment claims brought under 42 U. S. C. § 1983 prove the point. For example, we have recognized that there is no favorable-termination element for a Fourth Amendment false imprisonment claim. See *Wallace*, 549 U. S., at 389–392.[2] An arrestee can file such a claim while his prosecution is pending—and, in at least some situations—will need to do so to ensure that the claim is not time barred. See *id.*, at 392–395. By the same token, an individual may seek damages for pretrial Fourth

[2] In *Wallace*, the Court noted that "[f]alse arrest and false imprisonment overlap" and decided to "refer to the two torts together as false imprisonment." 549 U. S., at 388–389.

Amendment violations *even after a valid conviction*. For example, in *Haring* v. *Prosise*, 462 U. S. 306, 308 (1983), the respondent pleaded guilty to a drug crime without raising any Fourth Amendment issues. He then brought a § 1983 suit, challenging the constitutionality of the search that led to the discovery of the drugs on which his criminal charge was based. The Court held that respondent's suit could proceed—despite his valid conviction. *Id.*, at 323; see also *Heck*, 512 U. S., at 487, n. 7 ("[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction").

The favorable-termination element is similarly irrelevant to claims like Manuel's. Manuel alleges that he was arrested and held based entirely on falsified evidence. In such a case, it makes no difference whether the prosecution was eventually able to gather and introduce legitimate evidence and to obtain a conviction at trial. The unlawful arrest and detention would still provide grounds for recovery. Accordingly, there is no good reason why the accrual of a claim like Manuel's should have to await a favorable termination of the prosecution.

For all these reasons, malicious prosecution is a strikingly inapt "tort analog[y]," *Wilson*, 471 U. S., at 277, for Fourth Amendment violations. So the answer to the question presented in Manuel's certiorari petition is that the Fourth Amendment does *not* give rise to a malicious prosecution claim, and this means that Manuel's suit is untimely. I would affirm the Seventh Circuit on that basis.

II

Instead of deciding the question on which we granted review, the Court ventures in a different direction. The Court purports to refrain from deciding any issue of timeliness, see *ante*, at 368, but the Court's opinion is certain to be read by some to mean that every moment of pretrial confinement

without probable cause constitutes a violation of the Fourth Amendment. And if that is so, it would seem to follow that new Fourth Amendment claims continue to accrue as long as the pretrial detention lasts.

A

That proposition—that every moment in pretrial detention constitutes a "seizure"—is hard to square with the ordinary meaning of the term. The term "seizure" applies most directly to the act of taking a person into custody or otherwise depriving the person of liberty. It is not generally used to refer to a prolonged detention. Dictionary definitions from around the time of the adoption of the Fourth Amendment define the term "seizure" as a single event—and not a continuing condition. See, *e. g.*, 2 N. Webster, An American Dictionary of the English Language 67 (1828) (Webster) (defining "seizure" as "the act of laying hold on suddenly"); 1 S. Johnson, A Dictionary of the English Language (6th ed. 1785) (defining "seizure" as "the act of taking forcible possession"); 1 T. Dyche & W. Pardon, A New General English Dictionary (14th ed. 1771) (defining "seize" as "to lay or take hold of violently or at unawares, wrongfully, or by force"). As the Court has explained before, "[f]rom the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'" *California* v. *Hodari D.*, 499 U. S. 621, 624 (1991) (quoting 2 Webster 67). And we have cautioned against "stretch[ing] the Fourth Amendment beyond its words and beyond the meaning of arrest." 499 U. S., at 627. The Members of Congress who proposed the Fourth Amendment and the state legislatures that ratified the Amendment would have expected to see a more expansive term, such as "detention" or "confinement," if a Fourth Amendment seizure could be a long event that continued throughout the entirety of the pretrial period.

In my view, a period of detention spanning weeks or months cannot be viewed as one long, continuing seizure, and a pretrial detainee is not "seized" over and over again as

long as he remains in custody.[3] Of course, the damages resulting from an unlawful seizure may continue to mount during the period of confinement caused by the seizure, but no new Fourth Amendment seizure claims accrue after that date.[4] Thus, any possible Fourth Amendment claim that Manuel could bring is time barred.

B

The Court is mistaken in saying that its decision "follows from settled precedent." *Ante*, at 360. The Court reads *Albright* v. *Oliver*, 510 U. S. 266 (1994), and *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), to mean that the Fourth Amendment can be violated "when legal process itself goes wrong," *ante*, at 367, but the accuracy of that interpretation depends on the meaning of "legal process." The Court's reading is correct

[3] By the Court's logic, there is no apparent reason why even a judgment of conviction should cut off the accrual of new Fourth Amendment claims based on the use of fabricated evidence. The Court writes that "[n]othing in the nature of the legal proceeding establishing probable cause makes a difference for purposes of the Fourth Amendment." *Ante*, at 369, n. 8. "[I]f the proceeding is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking," the Court continues, "then the ensuing pretrial detention violates the confined person's Fourth Amendment rights, for all the reasons we have stated." *Ibid.* Although the Court inserts the word "pretrial" in this sentence, its logic provides no reason for that limitation. If a Fourth Amendment seizure continues as long as a person is detained, there is no reason why incarceration after conviction cannot be regarded as a continuing seizure. The Court asserts that the Fourth Amendment "drops out" of the picture after trial, *ibid.*, but it does not explain why this is so. There are facilities that house both pretrial detainees and prisoners serving sentences. If a detainee is transferred following conviction from the section for detainees to the section for prisoners, does the transfer render this person "unseized"?

[4] There is authority for the proposition that a grand jury indictment or a determination of probable cause after an adversary proceeding may be an intervening cause that cuts off liability for an unlawful arrest. See *Wallace* v. *Kato*, 549 U. S. 384, 390 (2007); Prosser and Keeton 885. I would not decide that question here.

if by "legal process" the Court means a determination of probable cause at a first or initial appearance. See Ill. Comp. Stat., ch. 725, § 5/109–1 (West Supp. 2015); Fed. Rule Crim. Proc. 5(b). When an arrest warrant is obtained, the probable-cause determination is made at that time, and there is thus no need for a repeat determination at the first or initial appearance. But when an arrest is made without a warrant, the arrestee, generally within 48 hours, must be brought before a judicial officer, *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 56 (1991), who then completes the arrest process by making the same determination that would have been made as part of the warrant application process. See Ill. Comp. Stat., ch. 725, §§ 5/109–1(a), (b); Fed. Rules Crim. Proc. 4(a), 5(b). Thus, this appearance is an integral part of the process of taking the arrestee into custody and easily falls within the meaning of the term "seizure." But other forms of "legal process," for example, a grand jury indictment or a determination of probable cause at a preliminary examination or hearing, do not fit within the concept of a "seizure," and the cases cited by the Court do not suggest otherwise.

Take *Albright* first. A detective named Oliver procured a warrant for the arrest of Albright for distributing a "look-alike" substance. See *Albright* v. *Oliver*, 975 F. 2d 343, 344 (CA7 1992). The warrant was based on information given to Oliver by the purchaser of the substance. *Ibid.* After learning of the warrant, Albright turned himself in, was booked, and was released on bond. *Ibid.* Oliver testified at what Illinois calls a preliminary examination and apparently related the information provided by the alleged purchaser. *Ibid.* The judge found probable cause, but the charges were later dismissed. *Ibid.* According to the Seventh Circuit, probable cause was sorely lacking, *id.*, at 345, and Albright sued Oliver under 42 U. S. C. § 1983, claiming that Oliver had violated his substantive due process right not to be prosecuted without probable cause. All that this Court held was

that Albright's claim had to be analyzed under the Fourth Amendment, not substantive due process.

The Court now reads *Albright* to mean that a Fourth Amendment seizure continues "after the start of 'legal process,' " *ante*, at 360, but three forms of what might be termed "legal process" were issued in *Albright*: the arrest warrant, the order releasing him on bond after his first appearance, and the order holding him over for trial after the preliminary examination. I agree that Albright's seizure did not end with the issuance of the warrant (that would be ridiculous since he had not even been arrested at that point) or the first appearance, see *ante*, at 366–367, and n. 6, but it is impossible to read anything more into the holding in *Albright*. The terse plurality opinion joined by four Justices said no more; the opinion of Justice Scalia, who joined the plurality opinion, referred only to Albright's "arrest," 510 U. S., at 275 (concurring opinion); and JUSTICES KENNEDY and THOMAS, who concurred in the judgment, did so only because Albright's "allegation of arrest without probable cause must be analyzed under the Fourth Amendment." *Id.*, at 281 (KENNEDY, J., concurring in judgment). To read anything more into *Albright* is to adopt the position taken by just one Member of the plurality, see *id.*, at 279 (GINSBURG, J., concurring) (seizure continues throughout the period of pretrial detention), and the two Justices in dissent, see *id.*, at 307 (Stevens, J., dissenting) (same).

The other precedent on which the Court relies, *Gerstein*, goes no further than *Albright*. All that the Court held in *Gerstein* was that *if* there is no probable-cause finding by a neutral magistrate *before* an arrest, there must be one *after* the arrest. 420 U. S., at 111–116. The Court reasoned that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.*, at 114. The Court said nothing about whether a claim for a seizure in violation of the Fourth Amendment could accrue after an initial appearance.

The Court thus is forced to rely on dicta—taken out of context—from *Gerstein*. For example, the Court cites *Gerstein*'s statement that "[t]he Fourth Amendment was tailored explicitly for the criminal justice system" and that it "always has been thought to define the 'process that is due' for seizures of person[s] . . . in criminal cases, including the detention of suspects pending trial." *Id.*, at 125, n. 27. This statement hardly shows that a Fourth Amendment seizure continues throughout a period of pretrial detention, and the Court does not mention the very next sentence in *Gerstein*—which suggests that the Fourth Amendment might govern "only the first stage" of a prosecution, eventually giving way to other protections that are also part of our "elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." *Ibid.* (emphasis deleted). In the end, *Gerstein* stands for the proposition that the Fourth Amendment requires a post-arrest probable-cause finding by a neutral magistrate; it says nothing about whether the Fourth Amendment extends beyond that or any other "legal process."

* * *

A well-known medical maxim—"first, do no harm"—is a good rule of thumb for courts as well. The Court's decision today violates that rule by avoiding the question presented in order to reach an unnecessary and tricky issue. The resulting opinion will, I fear, inject much confusion into Fourth Amendment law. And it has the potential to do much harm—by dramatically expanding Fourth Amendment liability under § 1983 in a way that does violence to the text of the Fourth Amendment. I respectfully dissent.

Syllabus

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. ET AL. *v.* DOUGLAS COUNTY SCHOOL DISTRICT RE–1

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

No. 15–827. Argued January 11, 2017—Decided March 22, 2017

The Individuals with Disabilities Education Act (IDEA) offers States federal funds to assist in educating children with disabilities. The Act conditions that funding on compliance with certain statutory requirements, including the requirement that States provide every eligible child a "free appropriate public education," or FAPE, by means of a uniquely tailored "individualized education program," or IEP. 20 U. S. C. §§ 1401(9)(D), 1412(a)(1).

This Court first addressed the FAPE requirement in *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176. The Court held that the Act guarantees a substantively adequate program of education to all eligible children, and that this requirement is satisfied if the child's IEP sets out an educational program that is "reasonably calculated to enable the child to receive educational benefits." *Id.*, at 207. For children fully integrated in the regular classroom, this would typically require an IEP "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.*, at 204. Because the IEP challenged in *Rowley* plainly met this standard, the Court declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act," instead "confin[ing] its analysis" to the facts of the case before it. *Id.*, at 202.

Petitioner Endrew F., a child with autism, received annual IEPs in respondent Douglas County School District from preschool through fourth grade. By fourth grade, Endrew's parents believed his academic and functional progress had stalled. When the school district proposed a fifth grade IEP that resembled those from past years, Endrew's parents removed him from public school and enrolled him in a specialized private school, where he made significant progress. School district representatives later presented Endrew's parents with a new fifth grade IEP, but they considered it no more adequate than the original plan. They then sought reimbursement for Endrew's private school tuition by filing a complaint under the IDEA with the Colorado Department of Education. Their claim was denied, and a Federal District Court af-

firmed that determination. The Tenth Circuit also affirmed. That court interpreted *Rowley* to establish a rule that a child's IEP is adequate as long as it is calculated to confer an "educational benefit [that is] merely . . . more than *de minimis*," 798 F. 3d 1329, 1338 (internal quotation marks omitted), and concluded that Endrew's IEP had been "reasonably calculated to enable [him] to make *some* progress," *id.*, at 1342 (internal quotation marks omitted). The court accordingly held that Endrew had received a FAPE.

Held: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Pp. 397–404.

(a) *Rowley* and the language of the IDEA point to the approach adopted here. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. An IEP must aim to enable the child to make progress; the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. And the degree of progress contemplated by the IEP must be appropriate in light of the child's circumstances, which should come as no surprise. This reflects the focus on the particular child that is at the core of the IDEA, and the directive that States offer instruction "*specially* designed" to meet a child's "*unique* needs" through an "[*i*]*ndividualized* education program." §§ 1401(29), (14) (emphasis added).

Rowley sheds light on what appropriate progress will look like in many cases: For a child fully integrated in the regular classroom, an IEP typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." 458 U. S., at 204. This guidance is grounded in the statutory definition of a FAPE. One component of a FAPE is "special education," defined as "specially designed instruction . . . to meet the unique needs of a child with a disability." §§ 1401(9), (29). In determining what it means to "meet the unique needs" of a child with a disability, the provisions of the IDEA governing the IEP development process provide guidance. These provisions reflect what the Court said in *Rowley* by focusing on "progress in the general education curriculum." §§ 1414(d)(1)(A)(i)(I)(aa), (II)(aa), (IV)(bb).

Rowley did not provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. A child's IEP need not aim for grade-level advancement

if that is not a reasonable prospect. But that child's educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

This standard is more demanding than the "merely more than *de minimis*" test applied by the Tenth Circuit. It cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than *de minimis* progress for children who are not. Pp. 397–403.

(b) Endrew's parents argue that the Act goes even further and requires States to provide children with disabilities educational opportunities that are "substantially equal to the opportunities afforded children without disabilities." Brief for Petitioner 40. But the lower courts in *Rowley* adopted a strikingly similar standard, and this Court rejected it in clear terms. Mindful that Congress has not materially changed the statutory definition of a FAPE since *Rowley* was decided, this Court declines to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case. P. 403.

(c) The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U. S., at 206. At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The nature of the IEP process ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue; thus, by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement. See §§ 1414, 1415; *Rowley*, 458 U. S., at 208–209. At that point, a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. Pp. 403–404.

798 F. 3d 1329, vacated and remanded.

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

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *David T. Goldberg*, *Pamela S. Kar-*

lan, *Jack D. Robinson*, *Brian Wolfman*, and *Wyatt G. Sassman*.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Attorney General Gupta*, *Roman Martinez*, *Sharon M. McGowan*, *Jennifer Levin Eichhorn*, *James Cole, Jr.*, *Francisco Lopez*, and *Eric Moll*.

Neal Kumar Katyal argued the cause for respondent. With him on the brief were *Frederick Liu*, *Eugene A. Sokoloff*, *W. Stuart Stuller*, *Daniel D. Domenico*, and *William E. Trachman*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Delaware et al. by *Matthew P. Denn*, Attorney General of Delaware, *Aaron R. Goldstein*, State Solicitor, and *Patricia A. Davis* and *Laura B. Makransky*, Deputy Attorneys General, *Maura Healy*, Attorney General of Massachusetts, and *Hector H. Balderas*, Attorney General of New Mexico; for Advocates for Children of New York et al. by *Alan E. Schoenfeld* and *Daniel Winik*; for the Coalition of Texans with Disabilities et al. by *Andrew K. Cuddy* and *Sonja D. Kerr*; for the Council of Parent Attorneys and Advocates et al. by *Caroline J. Heller*, *Selene Almazan-Altobelli*, *Alexis Casillas*, *Catherine Merino Reisman*, and *Ellen Saideman*; for Disability Rights Organizations et al. by *Gregory J. Wallance*, *Michael Churchill*, *Daniel R. Unumb*, *Gary S. Mayerson*, and *Maria C. McGinley*; for Former Officials of the U. S. Department of Education by *Aaron M. Panner* and *Ira A. Burnim*; for the National Center for Special Education in Charter Schools et al. by *William P. Bethke* and *Lisa T. Scruggs*; for the National Disability Rights Network et al. by *Marc A. Hearron*, *Linda A. Arnsbarger*, *Bryan J. Leitch*, *Samuel R. Bagenstos*, *Arlene B. Mayerson*, and *Ronald M. Hager*; for the National Education Association by *Alice O'Brien*, *Jason Walta*, and *Lubna A. Alam*; and for 118 Members of Congress by *Matthew S. Hellman*, *David A. Strauss*, *Sarah M. Konsky*, and *Michael A. Scodro*.

Briefs of *amici curiae* urging affirmance were filed for the Colorado State Board of Education et al. by *Cynthia H. Coffman*, Attorney General of Colorado, *Frederick R. Yarger*, Solicitor General, *Glenn E. Roper*, Deputy Solicitor General, and *Julie C. Tolleson*, First Assistant Attorney General; for AASA, The School Superintendents Association et al. by *Ruthanne M. Deutsch*, *Hyland Hunt*, and *Christopher P. Borreca*; for the Council of the Great City Schools by *John W. Borkowski*, *Julie Wright*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Thirty-five years ago, this Court held that the Individuals with Disabilities Education Act establishes a substantive right to a "free appropriate public education" for certain children with disabilities. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176 (1982). We declined, however, to endorse any one standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Id.*, at 202. That "more difficult problem" is before us today. *Ibid.*

I

A

The Individuals with Disabilities Education Act (IDEA or Act) offers States federal funds to assist in educating children with disabilities. 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.*; see *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 295 (2006). In exchange for the funds, a State pledges to comply with a number of statutory conditions. Among them, the State must provide a free appropriate public education—a FAPE, for short—to all eligible children. § 1412(a)(1).

A FAPE, as the Act defines it, includes both "special education" and "related services." § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. §§ 1401(26), (29). A State covered by the IDEA must provide a disabled child with such

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Halbert, *Derek T. Teeter*, and *Michael T. Raupp*; and for the National School Boards Association et al. by *Francisco M. Negrón, Jr.*, and *Emily E. Sugrue.*

Stephen A. Miller filed a brief for the National Association of State Directors of Special Education as *amicus curiae.*

special education and related services "in conformity with the [child's] individualized education program," or IEP. § 1401(9)(D).

The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig* v. *Doe*, 484 U. S. 305, 311 (1988). A comprehensive plan prepared by a child's "IEP Team" (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. § 1414(d)(1)(B) (internal quotation marks omitted). These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. § 1414. The IEP is the means by which special education and related services are "tailored to the unique needs" of a particular child. *Rowley*, 458 U. S., at 181.

The IDEA requires that every IEP include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be gauged. §§ 1414(d)(1)(A)(i)(I)–(III). The IEP must also describe the "special education and related services . . . that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." § 1414(d)(1)(A)(i)(IV).

Parents and educators often agree about what a child's IEP should contain. But not always. When disagreement arises, parents may turn to dispute resolution procedures established by the IDEA. The parties may resolve their differences informally, through a "[p]reliminary meeting," or, somewhat more formally, through mediation. §§ 1415(e), (f)(1)(B)(i). If these measures fail to produce accord, the parties may proceed to what the Act calls a "due process

hearing" before a state or local educational agency. §§ 1415(f)(1)(A), (g). And at the conclusion of the administrative process, the losing party may seek redress in state or federal court. § 1415(i)(2)(A).

B

This Court first addressed the FAPE requirement in *Rowley*.[1] Plaintiff Amy Rowley was a first grader with impaired hearing. Her school district offered an IEP under which Amy would receive instruction in the regular classroom and spend time each week with a special tutor and a speech therapist. The district proposed that Amy's classroom teacher speak into a wireless transmitter and that Amy use an FM hearing aid designed to amplify her teacher's words; the district offered to supply both components of this system. But Amy's parents argued that the IEP should go further and provide a sign-language interpreter in all of her classes. Contending that the school district's refusal to furnish an interpreter denied Amy a FAPE, Amy's parents initiated administrative proceedings, then filed a lawsuit under the Act. *Rowley*, 458 U. S., at 184–185.

The District Court agreed that Amy had been denied a FAPE. The court acknowledged that Amy was making excellent progress in school: She was "perform[ing] better than the average child in her class" and "advancing easily from grade to grade." *Id.*, at 185 (internal quotation marks omitted). At the same time, Amy "under[stood] considerably less of what goes on in class than she could if she were not deaf." *Ibid.* (internal quotation marks omitted). Concluding that "it has been left entirely to the courts and the hearing officers to give content to the requirement of an 'ap-

[1] The requirement was initially set out in the Education of the Handicapped Act, which was later amended and renamed the IDEA. See Pub. L. 101–476, § 901(a), 104 Stat. 1141. For simplicity's sake—and to avoid "acronym overload"—we use the latter title throughout this opinion. *Fry* v. *Napoleon Community Schools*, 580 U. S. 154, 160, n. 1 (2017).

propriate education,'" 483 F. Supp. 528, 533 (SDNY 1980), the District Court ruled that Amy's education was not "appropriate" unless it provided her "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." *Rowley*, 458 U. S., at 185–186 (internal quotation marks omitted). The Second Circuit agreed with this analysis and affirmed.

In this Court, the parties advanced starkly different understandings of the FAPE requirement. Amy's parents defended the approach of the lower courts, arguing that the school district was required to provide instruction and services that would provide Amy an "equal educational opportunity" relative to children without disabilities. *Id.*, at 198 (internal quotation marks omitted). The school district, for its part, contended that the IDEA "did not create substantive individual rights"; the FAPE provision was instead merely aspirational. Brief for Petitioners in *Rowley*, O. T. 1981, No. 80–1002, pp. 28, 41.

Neither position carried the day. On the one hand, this Court rejected the view that the IDEA gives "courts *carte blanche* to impose upon the States whatever burden their various judgments indicate should be imposed." *Rowley*, 458 U. S., at 190, n. 11. After all, the statutory phrase "free appropriate public education" was expressly defined in the Act, even if the definition "tend[ed] toward the cryptic rather than the comprehensive." *Id.*, at 188. This Court went on to reject the "equal opportunity" standard adopted by the lower courts, concluding that "free appropriate public education" was a phrase "too complex to be captured by the word 'equal' whether one is speaking of opportunities or services." *Id.*, at 199. The Court also viewed the standard as "entirely unworkable," apt to require "impossible measurements and comparisons" that courts were ill suited to make. *Id.*, at 198.

On the other hand, the Court also rejected the school district's argument that the FAPE requirement was actually no

requirement at all. *Id.*, at 200. Instead, the Court carefully charted a middle path. Even though "Congress was rather sketchy in establishing substantive requirements" under the Act, *id.*, at 206, the Court nonetheless made clear that the Act guarantees a substantively adequate program of education to all eligible children, *id.*, at 200–202, 207; see *id.*, at 193, n. 15 (describing the "substantive standard . . . implicit in the Act"). We explained that this requirement is satisfied, and a child has received a FAPE, if the child's IEP sets out an educational program that is "reasonably calculated to enable the child to receive educational benefits." *Id.*, at 207. For children receiving instruction in the regular classroom, this would generally require an IEP "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.*, at 204; see also *id.*, at 203, n. 25.

In view of Amy Rowley's excellent progress and the "substantial" suite of specialized instruction and services offered in her IEP, we concluded that her program satisfied the FAPE requirement. *Id.*, at 202. But we went no further. Instead, we expressly "confine[d] our analysis" to the facts of the case before us. *Ibid.* Observing that the Act requires States to "educate a wide spectrum" of children with disabilities and that "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end," we declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.*

C

Petitioner Endrew F. was diagnosed with autism at age two. Autism is a neurodevelopmental disorder generally marked by impaired social and communicative skills, "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."

34 CFR §300.8(c)(1)(i) (2016); see Brief for Petitioner 8. A child with autism qualifies as a "[c]hild with a disability" under the IDEA, and Colorado (where Endrew resides) accepts IDEA funding. §1401(3)(A). Endrew is therefore entitled to the benefits of the Act, including a FAPE provided by the State.

Endrew attended school in respondent Douglas County School District from preschool through fourth grade. Each year, his IEP Team drafted an IEP addressed to his educational and functional needs. By Endrew's fourth grade year, however, his parents had become dissatisfied with his progress. Although Endrew displayed a number of strengths—his teachers described him as a humorous child with a "sweet disposition" who "show[ed] concern[] for friends"—he still "exhibited multiple behaviors that inhibited his ability to access learning in the classroom." Supp. App. 182a; 798 F. 3d 1329, 1336 (CA10 2015). Endrew would scream in class, climb over furniture and other students, and occasionally run away from school. *Id.*, at 1336. He was afflicted by severe fears of commonplace things like flies, spills, and public restrooms. As Endrew's parents saw it, his academic and functional progress had essentially stalled: Endrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims. His parents believed that only a thorough overhaul of the school district's approach to Endrew's behavioral problems could reverse the trend. But in April 2010, the school district presented Endrew's parents with a proposed fifth grade IEP that was, in their view, pretty much the same as his past ones. So his parents removed Endrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism.

Endrew did much better at Firefly. The school developed a "behavioral intervention plan" that identified Endrew's most problematic behaviors and set out particular strategies

for addressing them. See Supp. App. 198a–201a. Firefly also added heft to Endrew's academic goals. Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.

In November 2010, some six months after Endrew started classes at Firefly, his parents again met with representatives of the Douglas County School District. The district presented a new IEP. Endrew's parents considered the IEP no more adequate than the one proposed in April, and rejected it. They were particularly concerned that the stated plan for addressing Endrew's behavior did not differ meaningfully from the plan in his fourth grade IEP, despite the fact that his experience at Firefly suggested that he would benefit from a different approach.

In February 2012, Endrew's parents filed a complaint with the Colorado Department of Education seeking reimbursement for Endrew's tuition at Firefly. To qualify for such relief, they were required to show that the school district had not provided Endrew a FAPE in a timely manner prior to his enrollment at the private school. See § 1412(a)(10)(C)(ii). Endrew's parents contended that the final IEP proposed by the school district was not "reasonably calculated to enable [Endrew] to receive educational benefits" and that Endrew had therefore been denied a FAPE. *Rowley*, 458 U. S., at 207. An Administrative Law Judge (ALJ) disagreed and denied relief.

Endrew's parents sought review in Federal District Court. Giving "due weight" to the decision of the ALJ, the District Court affirmed. 2014 WL 4548439, *5 (D Colo., Sept. 15, 2014) (quoting *Rowley*, 458 U. S., at 206). The court acknowledged that Endrew's performance under past IEPs "did not reveal immense educational growth." 2014 WL 4548439, *9. But it concluded that annual modifications to Endrew's IEP objectives were "sufficient to show a pattern of, at the least, minimal progress." *Ibid.* Because En-

drew's previous IEPs had enabled him to make this sort of progress, the court reasoned, his latest, similar IEP was reasonably calculated to do the same thing. In the court's view, that was all *Rowley* demanded. 2014 WL 4548439, *9.

The Tenth Circuit affirmed. The Court of Appeals recited language from *Rowley* stating that the instruction and services furnished to children with disabilities must be calculated to confer "*some* educational benefit." 798 F. 3d, at 1338 (quoting *Rowley*, 458 U. S., at 200; emphasis added by Tenth Circuit). The court noted that it had long interpreted this language to mean that a child's IEP is adequate as long as it is calculated to confer an "educational benefit [that is] merely . . . more than *de minimis*." 798 F. 3d, at 1338 (internal quotation marks omitted). Applying this standard, the Tenth Circuit held that Endrew's IEP had been "reasonably calculated to enable [him] to make *some* progress." *Id.*, at 1342 (internal quotation marks omitted). Accordingly, he had not been denied a FAPE.

We granted certiorari. 579 U. S. 969 (2016).

II

A

The Court in *Rowley* declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U. S., at 202. The school district, however, contends that *Rowley* nonetheless established that "an IEP need not promise any particular *level* of benefit," so long as it is " 'reasonably calculated' to provide *some* benefit, as opposed to *none*." Brief for Respondent 15.

The district relies on several passages from *Rowley* to make its case. It points to our observation that "any substantive standard prescribing the level of education to be accorded" children with disabilities was "[n]oticeably absent from the language of the statute." 458 U. S., at 189; see Brief for Respondent 14. The district also emphasizes the

Court's statement that the Act requires States to provide access to instruction "sufficient to confer *some* educational benefit," reasoning that any benefit, however minimal, satisfies this mandate. Brief for Respondent 15 (quoting *Rowley*, 458 U. S., at 200). Finally, the district urges that the Court conclusively adopted a "some educational benefit" standard when it wrote that "the intent of the Act was more to open the door of public education to handicapped children . . . than to guarantee any particular level of education." *Id.*, at 192; see Brief for Respondent 14.

These statements in isolation do support the school district's argument. But the district makes too much of them. Our statement that the face of the IDEA imposed no explicit substantive standard must be evaluated alongside our statement that a substantive standard was "implicit in the Act." *Rowley*, 458 U. S., at 193, n. 15. Similarly, we find little significance in the Court's language concerning the requirement that States provide instruction calculated to "confer some educational benefit." *Id.*, at 200. The Court had no need to say anything more particular, since the case before it involved a child whose progress plainly demonstrated that her IEP was designed to deliver more than adequate educational benefits. See *id.*, at 202, 209–210. The Court's principal concern was to correct what it viewed as the surprising rulings below: that the IDEA effectively empowers judges to elaborate a federal common law of public education, and that a child performing *better* than most in her class had been denied a FAPE. The Court was not concerned with precisely articulating a governing standard for closer cases. See *id.*, at 202. And the statement that the Act did not "guarantee any particular level of education" simply reflects the unobjectionable proposition that the IDEA cannot and does not promise "any particular [educational] outcome." *Id.*, at 192 (internal quotation marks omitted). No law could do that—for any child.

More important, the school district's reading of these isolated statements runs headlong into several points on which

Rowley is crystal clear. For instance—just after saying that the Act requires instruction that is "sufficient to confer some educational benefit"—we noted that "[t]he determination of when handicapped children are receiving *sufficient* educational benefits . . . presents a . . . difficult problem." *Id.*, at 200, 202 (emphasis added). And then we expressly declined "to establish any one test for determining the *adequacy* of educational benefits" under the Act. *Id.*, at 202 (emphasis added). It would not have been "difficult" for us to say when educational benefits are sufficient if we had just said that *any* educational benefit was enough. And it would have been strange to refuse to set out a test for the adequacy of educational benefits if we had just done exactly that. We cannot accept the school district's reading of *Rowley*.

B

While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.*, at 207. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. *Id.*, at 208–209. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.*, at 206–207.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. See §§ 1414(d)(1)(A)(i)(I)–(IV). This reflects the broad purpose of the IDEA, an "ambitious" piece of legislation enacted "in

response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" *Rowley*, 458 U. S., at 179 (quoting H. R. Rep. No. 94–332, p. 2 (1975)). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be "*specially* designed" to meet a child's "*unique* needs" through an "[*i*]*ndividualized* education program." §§ 1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)–(IV), (d)(3)(A)(i)–(iv). As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." 458 U. S., at 202.

Rowley sheds light on what appropriate progress will look like in many cases. There, the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom "whenever possible." *Ibid.* (citing § 1412(a)(5)). When this preference is met, "the system itself monitors the educational progress of the child." *Id.*, at 202–203. "Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material." *Id.*, at 203. Progress through this system is what our society generally

means by an "education." And access to an "education" is what the IDEA promises. *Ibid.* Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.*, at 203–204.

This guidance is grounded in the statutory definition of a FAPE. One of the components of a FAPE is "special education," defined as "specially designed instruction . . . to meet the unique needs of a child with a disability." §§ 1401(9), (29). In determining what it means to "meet the unique needs" of a child with a disability, the provisions governing the IEP development process are a natural source of guidance: It is through the IEP that "[t]he 'free appropriate public education' required by the Act is tailored to the unique needs of" a particular child. *Id.*, at 181.

The IEP provisions reflect *Rowley*'s expectation that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade. Every IEP begins by describing a child's present level of achievement, including explaining "how the child's disability affects the child's involvement and progress in the general education curriculum." § 1414(d)(1)(A)(i)(I)(aa). It then sets out "a statement of measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general education curriculum," along with a description of specialized instruction and services that the child will receive. §§ 1414(d)(1)(A)(i)(II), (IV). The instruction and services must likewise be provided with an eye toward "progress in the general education curriculum." § 1414(d)(1)(A)(i)(IV)(bb). Similar IEP requirements have been in place since the time the States began accepting funding under the IDEA.

The school district protests that these provisions impose only procedural requirements—a checklist of items the IEP

must address—not a substantive standard enforceable in court. Tr. of Oral Arg. 50–51. But the procedures are there for a reason, and their focus provides insight into what it means, for purposes of the FAPE definition, to "meet the unique needs" of a child with a disability. §§ 1401(9), (29). When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum.[2]

Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the "merely more than *de minimis*" test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.

When all is said and done, a student offered an educational program providing "merely more than *de minimis*" progress from year to year can hardly be said to have been offered

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[2] This guidance should not be interpreted as an inflexible rule. We declined to hold in *Rowley*, and do not hold today, that "every handicapped child who is advancing from grade to grade . . . is automatically receiving a [FAPE]." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 203, n. 25 (1982).

an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to "sitting idly . . . awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U. S., at 179 (some internal quotation marks omitted). The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

C

Endrew's parents argue that the Act goes even further. In their view, a FAPE is "an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities." Brief for Petitioner 40.

This standard is strikingly similar to the one the lower courts adopted in *Rowley*, and it is virtually identical to the formulation advanced by Justice Blackmun in his separate writing in that case. See 458 U. S., at 185–186; *id.*, at 211 (opinion concurring in judgment) ("[T]he question is whether Amy's program . . . offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her non-handicapped classmates"). But the majority rejected any such standard in clear terms. *Id.*, at 198 ("The requirement that States provide 'equal' educational opportunities would . . . seem to present an entirely unworkable standard requiring impossible measurements and comparisons"). Mindful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case. Compare § 1401(18) (1976 ed.) with § 1401(9) (2012 ed.).

D

We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature

of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U. S., at 206.

At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. See §§ 1414, 1415; *id.*, at 208–209. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

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

It is so ordered.

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STAR ATHLETICA, L. L. C. *v.* VARSITY BRANDS, INC., ET AL.

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

No. 15–866. Argued October 31, 2016—Decided March 22, 2017

The Copyright Act of 1976 makes "pictorial, graphic, or sculptural features" of the "design of a useful article" eligible for copyright protection as artistic works if those features "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U. S. C. § 101.

Respondents have more than 200 copyright registrations for two-dimensional designs—consisting of various lines, chevrons, and colorful shapes—appearing on the surface of the cheerleading uniforms that they design, make, and sell. They sued petitioner, who also markets cheerleading uniforms, for copyright infringement. The District Court granted petitioner summary judgment, holding that the designs could not be conceptually or physically separated from the uniforms and were therefore ineligible for copyright protection. In reversing, the Sixth Circuit concluded that the graphics could be "identified separately" and were "capable of existing independently" of the uniforms under § 101.

Held: A feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated. That test is satisfied here. Pp. 410–424.

(a) Separability analysis is necessary in this case. Respondents claim that two-dimensional surface decorations are always separable, even without resorting to a § 101 analysis, because they are "*on* a useful article" rather than "*designs of* a useful article." But this argument is inconsistent with § 101's text. "[P]ictorial" and "graphic" denote two-dimensional features such as pictures, paintings, or drawings. Thus, by providing protection for "pictorial, graphical, and sculptural works" incorporated into the "design of a useful article," § 101 necessarily contemplates that such a design can include two-dimensional features. This Court will not adjudicate in the first instance the Government's distinct argument against applying separability analysis, which was neither raised below nor advanced here by any party. Pp. 412–413.

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(b) Whether a feature incorporated into a useful article "can be identified separately from," and is "capable of existing independently of," the article's "utilitarian aspects" is a matter of "statutory interpretation." *Mazer* v. *Stein*, 347 U. S. 201, 214. Pp. 413–417.

(1) Section 101's separate-identification requirement is met if the decisionmaker is able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities. To satisfy the independent-existence requirement, the feature must be able to exist as its own pictorial, graphic, or sculptural work once it is imagined apart from the useful article. If the feature could not exist as a pictorial, graphic, or sculptural work on its own, it is simply one of the article's utilitarian aspects. And to qualify as a pictorial, graphic, or sculptural work on its own, the feature cannot be a useful article or "[a]n article that is normally a part of a useful article," § 101. Neither could one claim a copyright in a useful article by creating a replica of it in another medium. Pp. 414–415.

(2) The statute as a whole confirms this interpretation. Section 101, which protects art first fixed in the medium of a useful article, is essentially the mirror image of § 113(a), which protects art first fixed in a medium other than a useful article and subsequently applied to a useful article. Together, these provisions make clear that copyright protection extends to pictorial, graphic, and sculptural works regardless of whether they were created as freestanding art or as features of useful articles. P. 415.

(3) This interpretation is also consistent with the Copyright Act's history. In *Mazer*, a case decided under the 1909 Copyright Act, the Court held that respondents owned a copyright in a statuette created for use as a lamp base. In so holding, the Court approved a Copyright Office regulation extending protection to works of art that might also serve a useful purpose and held that it was irrelevant to the copyright inquiry whether the statuette was initially created as a freestanding sculpture or as a lamp base. Soon after, the Copyright Office enacted a regulation implementing *Mazer*'s holding that anticipated the language of § 101, thereby introducing the modern separability test to copyright law. Congress essentially lifted the language from those post-*Mazer* regulations and placed it in § 101 of the 1976 Act. Pp. 415–417.

(c) Applying the proper test here, the surface decorations on the cheerleading uniforms are separable and therefore eligible for copyright protection. First, the decorations can be identified as features having pictorial, graphic, or sculptural qualities. Second, if those decorations were separated from the uniforms and applied in another medium, they would qualify as two-dimensional works of art under § 101. Imagina-

tively removing the decorations from the uniforms and applying them in another medium also would not replicate the uniform itself.

The dissent argues that the decorations are ineligible for copyright protection because, when imaginatively extracted, they form a picture of a cheerleading uniform. Petitioner similarly claims that the decorations cannot be copyrighted because, even when extracted from the useful article, they retain the outline of a cheerleading uniform. But this is not a bar to copyright. Just as two-dimensional fine art correlates to the shape of the canvas on which it is painted, two-dimensional applied art correlates to the contours of the article on which it is applied. The only feature of respondents' cheerleading uniform eligible for a copyright is the two-dimensional applied art on the surface of the uniforms. Respondents may prohibit the reproduction only of the surface designs on a uniform or in any other medium of expression. Respondents have no right to prevent anyone from manufacturing a cheerleading uniform that is identical in shape, cut, or dimensions to the uniforms at issue here. Pp. 417–419.

(d) None of the objections raised by petitioner or the Government is meritorious. Pp. 419–424.

(1) Petitioner and the Government focus on the relative utility of the plain white uniform that would remain if the designs were physically removed from the uniform. But the separability inquiry focuses on the extracted feature and not on any aspects of the useful article remaining after the imaginary extraction. The statute does not require the imagined remainder to be a fully functioning useful article at all. Nor can an artistic feature that would be eligible for copyright protection on its own lose that protection simply because it was first created as a feature of the design of a useful article, even if it makes that article more useful. This has been the rule since *Mazer*, and it is consistent with the statute's explicit protection of "applied art." In rejecting petitioner's view, the Court necessarily abandons the distinction between "physical" and "conceptual" separability adopted by some courts and commentators. Pp. 419–422.

(2) Petitioner also suggests incorporating two "objective" components into the test—one requiring consideration of evidence of the creator's design methods, purposes, and reasons, and one looking to the feature's marketability. The Court declines to incorporate these components because neither is grounded in the statute's text. Pp. 422–423.

(3) Finally, petitioner claims that protecting surface decorations is inconsistent with Congress' intent to entirely exclude industrial design from copyright. But Congress has given limited copyright protection to certain features of industrial design. Approaching the statute with presumptive hostility toward protection for industrial design would un-

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dermine that choice. In any event, the test adopted here does not render the underlying uniform eligible for copyright protection. Pp. 423–424.

799 F. 3d 468, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 425. BREYER, J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 439.

John J. Bursch argued the cause for petitioner. With him on the briefs were *Matthew T. Nelson*, *Conor B. Dugan*, *Steven M. Crosby*, *Stephen E. Feldman*, *Michael F. Rafferty*, and *Emily Hamm Huseth*.

William M. Jay argued the cause for respondents. With him on the brief were *Brian T. Burgess*, *Grady M. Garrison*, *Adam S. Baldridge*, *Thomas Kjellberg*, and *Robert D. Carroll*.

Eric J. Feigin argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, and *Sarang Vijay Damle*.*

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*Briefs of *amici curiae* urging reversal were filed for Public Knowledge et al. by *Charles Duan*; for the Royal Manticorn Navy: The Official Honor Harrington Fan Association, Inc., by *Judith S. Sherwin*; and for Christopher Buccafusco et al. by *Meir Feder* and *Jeanne C. Fromer*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for Chosun International, Inc., by *Anthony H. Handal*; for the Council of Fashion Designers of America, Inc., by *Charles E. Boulbol*; for the Fashion Law Institute et al. by *Michelle Mancino Marsh*; for the Intellectual Property Owners Association by *Kevin Rhodes*, *Steven W. Miller*, *David Leichtman*, and *Sherli Furst*; and for Jeannie Suk Gersen et al. by *Scott B. Wilkens*, *Matthew S. Hellman*, and *C. Scott Hemphill*, *pro se*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Denise W. DeFranco*, *Amie Peele Carter*, and *Nicholas J. Nelson*; for the Intellectual Property Law Association of Chicago by *David L. Applegate*, *Jeffrey B. Burgan*, and *Charles W. Shifley*; for Intellectual Property Professors by *Mark Lemley*; and for the New York Intellectual Property Law Association by *Lauren B. Emerson*, *Walter*

JUSTICE THOMAS delivered the opinion of the Court.

Congress has provided copyright protection for original works of art, but not for industrial designs. The line between art and industrial design, however, is often difficult to draw. This is particularly true when an industrial design incorporates artistic elements. Congress has afforded limited protection for these artistic elements by providing that "pictorial, graphic, or sculptural features" of the "design of a useful article" are eligible for copyright protection as artistic works if those features "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U. S. C. § 101.

We granted certiorari to resolve widespread disagreement over the proper test for implementing § 101's separate-identification and independent-existence requirements. 578 U. S. 959 (2016). We hold that a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated. Because that test is satisfied in this case, we affirm.

I

Respondents Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc., design, make, and sell cheerleading uniforms. Respondents have obtained or acquired more than 200 U. S. copyright registrations for two-dimensional designs appearing on the surface of their uniforms and other garments. These designs are primarily "combinations, positionings, and arrangements of

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E. Hanley, Jr., *Charles R. Macedo*, *David P. Goldberg*, *Mitchell C. Stein*, and *Joseph Farco.*

elements" that include "chevrons . . . , lines, curves, stripes, angles, diagonals, inverted [chevrons], coloring, and shapes." App. 237. At issue in this case are Designs 299A, 299B, 074, 078, and 0815. See Appendix, *infra*.

Petitioner Star Athletica, L. L. C., also markets and sells cheerleading uniforms. Respondents sued petitioner for infringing their copyrights in the five designs. The District Court entered summary judgment for petitioner on respondents' copyright claims on the ground that the designs did not qualify as protectable pictorial, graphic, or sculptural works. It reasoned that the designs served the useful, or "utilitarian," function of identifying the garments as "cheerleading uniforms" and therefore could not be "physically or conceptually" separated under § 101 "from the utilitarian function" of the uniform. 2014 WL 819422, *8–*9 (WD Tenn., Mar. 1, 2014).

The Court of Appeals for the Sixth Circuit reversed. 799 F. 3d 468, 471 (2015). In its view, the "graphic designs" were "separately identifiable" because the designs "and a blank cheerleading uniform can appear 'side by side'—one as a graphic design, and one as a cheerleading uniform." *Id.*, at 491 (quoting Compendium of U. S. Copyright Office Practices § 924.2(B) (3d ed. 2014) (Compendium)). And it determined that the designs were "'capable of existing independently'" because they could be incorporated onto the surface of different types of garments, or hung on the wall and framed as art. 799 F. 3d, at 491, 492.

Judge McKeague dissented. He would have held that, because "identifying the wearer as a cheerleader" is a utilitarian function of a cheerleading uniform and the surface designs were "integral to" achieving that function, the designs were inseparable from the uniforms. *Id.*, at 495–496.

II

The first element of a copyright-infringement claim is "ownership of a valid copyright." *Feist Publications, Inc.*

v. *Rural Telephone Service Co.*, 499 U. S. 340, 361 (1991). A valid copyright extends only to copyrightable subject matter. See 4 M. Nimmer & D. Nimmer, Copyright § 13.01[A] (2010) (Nimmer). The Copyright Act of 1976 defines copyrightable subject matter as "original works of authorship fixed in any tangible medium of expression." 17 U. S. C. § 102(a).

"Works of authorship" include "pictorial, graphic, and sculptural works," § 102(a)(5), which the statute defines to include "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans," § 101. And a work of authorship is "'fixed' in a tangible medium of expression when it[is] embodi[ed] in a" "material objec[t] . . . from which the work can be perceived, reproduced, or otherwise communicated." *Ibid.* (definitions of "fixed" and "copies").

The Copyright Act also establishes a special rule for copyrighting a pictorial, graphic, or sculptural work incorporated into a "useful article," which is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." *Ibid.* The statute does not protect useful articles as such. Rather, "the design of a useful article" is "considered a pictorial, graphical, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Ibid.*

Courts, the Copyright Office, and commentators have described the analysis undertaken to determine whether a feature can be separately identified from, and exist independently of, a useful article as "separability." In this case, our task is to determine whether the arrangements of lines, chevrons, and colorful shapes appearing on the surface of respondents' cheerleading uniforms are eligible for copyright

protection as separable features of the design of those cheerleading uniforms.

A

As an initial matter, we must address whether separability analysis is necessary in this case.

1

Respondents argue that "[s]eparability is only implicated when a [pictorial, graphic, or sculptural] work is the 'design of a useful article.'" Brief for Respondents 25. They contend that the surface decorations in this case are "two-dimensional graphic designs that appear *on* useful articles," but are not themselves designs *of* useful articles. *Id.*, at 52. Consequently, the surface decorations are protected two-dimensional works of graphic art without regard to any separability analysis under § 101. *Ibid.*; see 2 W. Patry, Copyright § 3:151, p. 3–485 (2016) (Patry) ("Courts looking at two-dimensional design claims should not apply the separability analysis regardless of the three-dimensional form that design is embodied in"). Under this theory, two-dimensional artistic features on the surface of useful articles are "inherently separable." Brief for Respondents 26.

This argument is inconsistent with the text of § 101. The statute requires separability analysis for any "pictorial, graphic, or sculptural features" incorporated into the "design of a useful article." "Design" refers here to "the combination" of "details" or "features" that "go to make up" the useful article. 3 Oxford English Dictionary 244 (def. 7, first listing) (1933) (OED). Furthermore, the words "pictorial" and "graphic" include, in this context, two-dimensional features such as pictures, paintings, or drawings. See 4 *id.*, at 359 (defining "[g]raphic" to mean "[o]f or pertaining to drawing or painting"); 7 *id.*, at 830 (defining "[p]ictorial" to mean "of or pertaining to painting or drawing"). And the statute expressly defines "[p]ictorial, graphical, and sculptural works" to include "two-dimensional . . . works of . . . art." § 101.

The statute thus provides that the "design of a useful article" can include two-dimensional "pictorial" and "graphic" features, and separability analysis applies to those features just as it does to three-dimensional "sculptural" features.

2

The United States makes a related but distinct argument against applying separability analysis in this case, which respondents do not and have not advanced. As part of their copyright registrations for the designs in this case, respondents deposited with the Copyright Office drawings and photographs depicting the designs incorporated onto cheerleading uniforms. App. 213–219; Appendix, *infra*. The Government argues that, assuming the other statutory requirements were met, respondents obtained a copyright in the deposited drawings and photographs and have simply reproduced those copyrighted works on the surface of a useful article, as they would have the exclusive right to do under the Copyright Act. See Brief for United States as *Amicus Curiae* 14–15, 17–22. Accordingly, the Government urges, separability analysis is unnecessary on the record in this case. We generally do not entertain arguments that were not raised below and that are not advanced in this Court by any party, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 721 (2014), because "[i]t is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance," *CRST Van Expedited, Inc.* v. *EEOC*, 578 U. S. 419, 435 (2016). We decline to depart from our usual practice here.

B

We must now decide when a feature incorporated into a useful article "can be identified separately from" and is "capable of existing independently of" "the utilitarian aspects" of the article. This is not a free-ranging search for the best copyright policy, but rather "depends solely on statutory interpretation." *Mazer* v. *Stein*, 347 U. S. 201, 214 (1954).

"The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 476 (1992). We thus begin and end our inquiry with the text, giving each word its "ordinary, contemporary, common meaning." *Walters* v. *Metropolitan Ed. Enterprises, Inc.*, 519 U. S. 202, 207 (1997) (internal quotation marks omitted). We do not, however, limit this inquiry to the text of § 101 in isolation. "[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Maracich* v. *Spears*, 570 U. S. 48, 65 (2013). We thus "look to the provisions of the whole law" to determine § 101's meaning. *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849).

1

The statute provides that a "pictorial, graphic, or sculptural featur[e]" incorporated into the "design of a useful article" is eligible for copyright protection if it (1) "can be identified separately from," and (2) is "capable of existing independently of, the utilitarian aspects of the article." § 101. The first requirement—separate identification—is not onerous. The decisionmaker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities. See 2 Patry § 3:146, at 3–474 to 3–475.

The independent-existence requirement is ordinarily more difficult to satisfy. The decisionmaker must determine that the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article. See 2 OED 88 (def. 5) (defining "[c]apable" of as "[h]aving the needful capacity, power, or fitness for"). In other words, the feature must be able to exist as its own pictorial, graphic, or sculptural work as defined in § 101 once it is imagined apart from the useful article. If the feature is not capable of existing as a pictorial, graphic, or sculptural work once separated from the useful article, then it was not a pictorial, graphic,

or sculptural feature of that article, but rather one of its utilitarian aspects.

Of course, to qualify as a pictorial, graphic, or sculptural work on its own, the feature cannot itself be a useful article or "[a]n article that is normally a part of a useful article" (which is itself considered a useful article). § 101. Nor could someone claim a copyright in a useful article merely by creating a replica of that article in some other medium—for example, a cardboard model of a car. Although the replica could itself be copyrightable, it would not give rise to any rights in the useful article that inspired it.

2

The statute as a whole confirms our interpretation. The Copyright Act provides "the owner of [a] copyright" with the "exclusive righ[t] . . . to reproduce the copyrighted work in copies." § 106(1). The statute clarifies that this right "includes the right to reproduce the [copyrighted] work in or on any kind of article, whether useful or otherwise." § 113(a). Section 101 is, in essence, the mirror image of § 113(a). Whereas § 113(a) protects a work of authorship first fixed in some tangible medium other than a useful article and subsequently applied to a useful article, § 101 protects art first fixed in the medium of a useful article. The two provisions make clear that copyright protection extends to pictorial, graphic, and sculptural works regardless of whether they were created as freestanding art or as features of useful articles. The ultimate separability question, then, is whether the feature for which copyright protection is claimed would have been eligible for copyright protection as a pictorial, graphic, or sculptural work had it originally been fixed in some tangible medium other than a useful article before being applied to a useful article.

3

This interpretation is also consistent with the history of the Copyright Act. In *Mazer*, a case decided under the 1909

Copyright Act, the respondents copyrighted a statuette depicting a dancer. The statuette was intended for use as a lamp base, "with electric wiring, sockets and lamp shades attached." 347 U. S., at 202. Copies of the statuette were sold both as lamp bases and separately as statuettes. *Id.*, at 203. The petitioners copied the statuette and sold lamps with the statuette as the base. They defended against the respondents' infringement suit by arguing that the respondents did not have a copyright in a statuette intended for use as a lamp base. *Id.*, at 204–205.

Two of *Mazer*'s holdings are relevant here. First, the Court held that the respondents owned a copyright in the statuette even though it was intended for use as a lamp base. See *id.*, at 214. In doing so, the Court approved the Copyright Office's regulation extending copyright protection to works of art that might also serve a useful purpose. See *ibid.* (approving 37 CFR § 202.8(a) (1949) (protecting "works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned")).

Second, the Court held that it was irrelevant to the copyright inquiry whether the statuette was initially created as a freestanding sculpture or as a lamp base. 347 U. S., at 218–219 ("Nor do we think the subsequent registration of a work of art published as an element in a manufactured article, is a misuse of copyright. This is not different from the registration of a statuette and its later embodiment in an industrial article"). *Mazer* thus interpreted the 1909 Act consistently with the rule discussed above: If a design would have been copyrightable as a standalone pictorial, graphic, or sculptural work, it is copyrightable if created first as part of a useful article.

Shortly thereafter, the Copyright Office enacted a regulation implementing the holdings of *Mazer*. See 1 Nimmer § 2A.08[B][1][b] (2016). As amended, the regulation introduced the modern separability test to copyright law:

> "If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped

> will not qualify it as a work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for registration." 37 CFR § 202.10(c) (1960) (punctuation altered).

Congress essentially lifted the language governing protection for the design of a useful article directly from the post-*Mazer* regulations and placed it into § 101 of the 1976 Act. Consistent with *Mazer*, the approach we outline today interprets §§ 101 and 113 in a way that would afford copyright protection to the statuette in *Mazer* regardless of whether it was first created as a standalone sculptural work or as the base of the lamp. See 347 U. S., at 218–219.

C

In sum, a feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.

Applying this test to the surface decorations on the cheerleading uniforms is straightforward. First, one can identify the decorations as features having pictorial, graphic, or sculptural qualities. Second, if the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms were separated from the uniform and applied in another medium—for example, on a painter's canvas—they would qualify as "two-dimensional . . . works of . . . art," § 101. And imaginatively removing the surface decorations from the uniforms and applying them in another medium would not replicate the uniform itself. Indeed, respondents have applied the designs in this case to other media of expression—different types of clothing—without replicating the uniform. See App. 273–279. The decorations are

therefore separable from the uniforms and eligible for copyright protection.[1]

The dissent argues that the designs are not separable because imaginatively removing them from the uniforms and placing them in some other medium of expression—a canvas, for example—would create "pictures of cheerleader uniforms." *Post,* at 447 (opinion of BREYER, J.). Petitioner similarly argues that the decorations cannot be copyrighted because, even when extracted from the useful article, they retain the outline of a cheerleading uniform. Brief for Petitioner 48–49.

This is not a bar to copyright. Just as two-dimensional fine art corresponds to the shape of the canvas on which it is painted, two-dimensional applied art correlates to the contours of the article on which it is applied. A fresco painted on a wall, ceiling panel, or dome would not lose copyright protection, for example, simply because it was designed to track the dimensions of the surface on which it was painted. Or consider, for example, a design etched or painted on the surface of a guitar. If that entire design is imaginatively removed from the guitar's surface and placed on an album cover, it would still resemble the shape of a guitar. But the image on the cover does not "replicate" the guitar as a useful article. Rather, the design is a two-dimensional work of art that corresponds to the shape of the useful article to which it was applied. The statute protects that work of art whether it is first drawn on the album cover and then applied to the guitar's surface, or vice versa. Failing to protect that art would create an anomaly: It would extend protection to two-dimensional designs that cover a part of a useful article but would not protect the same design if it covered the entire

[1] We do not today hold that the surface decorations are copyrightable. We express no opinion on whether these works are sufficiently original to qualify for copyright protection, see *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U. S. 340, 358–359 (1991), or on whether any other prerequisite of a valid copyright has been satisfied.

article. The statute does not support that distinction, nor can it be reconciled with the dissent's recognition that "artwork printed on a t-shirt" could be protected. *Post*, at 442 (brackets and internal quotation marks omitted).

To be clear, the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric. Even if respondents ultimately succeed in establishing a valid copyright in the surface decorations at issue here, respondents have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut, and dimensions to the ones on which the decorations in this case appear. They may prohibit only the reproduction of the surface designs in any tangible medium of expression—a uniform or otherwise.[2]

D

Petitioner and the Government raise several objections to the approach we announce today. None is meritorious.

1

Petitioner first argues that our reading of the statute is missing an important step. It contends that a feature may exist independently only if it can stand alone as a copyrightable work *and* if the useful article from which it was extracted would remain equally useful. In other words, copy-

[2] The dissent suggests that our test would lead to the copyrighting of shovels. *Post*, at 444; Appendix to opinion of BREYER, J., fig. 4, *post*. But a shovel, like a cheerleading uniform, even if displayed in an art gallery, is "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U. S. C. § 101. It therefore cannot be copyrighted. A drawing of a shovel could, of course, be copyrighted. And, if the shovel included any artistic features that could be perceived as art apart from the shovel, and which would qualify as protectable pictorial, graphic, or sculptural works on their own or in another medium, they too could be copyrighted. But a shovel as a shovel cannot.

right extends only to "solely artistic" features of useful articles. Brief for Petitioner 33. According to petitioner, if a feature of a useful article "advance[s] the utility of the article," *id.*, at 38, then it is categorically beyond the scope of copyright, *id.*, at 33. The designs here are not protected, it argues, because they are necessary to two of the uniforms' "inherent, essential, or natural functions"—identifying the wearer as a cheerleader and enhancing the wearer's physical appearance. *Id.*, at 38, 48; Reply Brief 2, 16. Because the uniforms would not be equally useful without the designs, petitioner contends that the designs are inseparable from the "utilitarian aspects" of the uniform. Brief for Petitioner 50.

The Government raises a similar argument, although it reaches a different result. It suggests that the appropriate test is whether the useful article with the artistic feature removed would "remai[n] *similarly* useful." Brief for United States as *Amicus Curiae* 29 (emphasis added). In the view of the United States, however, a plain white cheerleading uniform is "similarly useful" to uniforms with respondents' designs. *Id.*, at 27–28.

The debate over the relative utility of a plain white cheerleading uniform is unnecessary. The focus of the separability inquiry is on the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction. The statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature. Instead, it requires that the separated feature qualify as a nonuseful pictorial, graphic, or sculptural work on its own.

Of course, because the removed feature may not be a useful article—as it would then not qualify as a pictorial, graphic, or sculptural work—there necessarily would be some aspects of the original useful article "left behind" if the feature were conceptually removed. But the statute does not require the imagined remainder to be a fully functioning useful article at all, much less an equally useful one. In-

deed, such a requirement would deprive the *Mazer* statuette of protection had it been created first as a lamp base rather than as a statuette. Without the base, the "lamp" would be just a shade, bulb, and wires. The statute does not require that we imagine a nonartistic replacement for the removed feature to determine whether that *feature* is capable of an independent existence.

Petitioner's argument follows from its flawed view that the statute protects only "solely artistic" features that have no effect whatsoever on a useful article's utilitarian function. This view is inconsistent with the statutory text. The statute expressly protects two- and three-dimensional "applied art." § 101. "Applied art" is art "employed in the decoration, design, *or execution* of useful objects," Webster's Third New International Dictionary 105 (1976) (emphasis added), or "those arts or crafts that have a *primarily utilitarian function*, or . . . the designs and decorations used in these arts," Random House Dictionary 73 (1966) (emphasis added); see also 1 OED 576 (2d ed. 1989) (defining "applied" as "[p]ut to practical use"). An artistic feature that would be eligible for copyright protection on its own cannot lose that protection simply because it was first created as a feature of the design of a useful article, even if it makes that article more useful.

Indeed, this has been the rule since *Mazer*. In holding that the statuette was protected, the Court emphasized that the 1909 Act abandoned any "distinctions between purely aesthetic articles and useful works of art." 347 U. S., at 211. Congress did not enact such a distinction in the 1976 Act. Were we to accept petitioner's argument that the only protectable features are those that play absolutely no role in an article's function, we would effectively abrogate the rule of *Mazer* and read "applied art" out of the statute.

Because we reject the view that a useful article must remain after the artistic feature has been imaginatively separated from the article, we necessarily abandon the distinction

between "physical" and "conceptual" separability, which some courts and commentators have adopted based on the Copyright Act's legislative history. See H. R. Rep. No. 94–1476, p. 55 (1976). According to this view, a feature is *physically* separable from the underlying useful article if it can "be physically separated from the article by ordinary means while leaving the utilitarian aspects of the article completely intact." Compendium § 924.2(A); see also *Chosun Int'l, Inc.* v. *Chrisha Creations, Ltd.*, 413 F. 3d 324, 329 (CA2 2005). *Conceptual* separability applies if the feature physically could not be removed from the useful article by ordinary means. See Compendium § 924.2(B); but see 1 P. Goldstein, Copyright § 2.5.3, p. 2:77 (3d ed. 2016) (explaining that the lower courts have been unable to agree on a single conceptual separability test); 2 Patry §§ 3:140–3:144.40 (surveying the various approaches in the lower courts).

The statutory text indicates that separability is a conceptual undertaking. Because separability does not require the underlying useful article to remain, the physical-conceptual distinction is unnecessary.

2

Petitioner next argues that we should incorporate two "objective" components, Reply Brief 9, into our test to provide guidance to the lower courts: (1) "whether the design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influence," Brief for Petitioner 34 (emphasis deleted; internal quotation marks omitted), and (2) whether "there is [a] substantial likelihood that the pictorial, graphic, or sculptural feature would still be marketable to some significant segment of the community without its utilitarian function," *id.*, at 35 (emphasis deleted; internal quotation marks omitted).

We reject this argument because neither consideration is grounded in the text of the statute. The first would require the decisionmaker to consider evidence of the creator's design methods, purposes, and reasons. *Id.*, at 48. The stat-

ute's text makes clear, however, that our inquiry is limited to how the article and feature are perceived, not how or why they were designed. See *Brandir Int'l, Inc.* v. *Cascade Pacific Lumber Co.*, 834 F. 2d 1142, 1152 (CA2 1987) (Winter, J., concurring in part and dissenting in part) (The statute "expressly states that the legal test is how the final article is perceived, not how it was developed through various stages").

The same is true of marketability. Nothing in the statute suggests that copyrightability depends on market surveys. Moreover, asking whether some segment of the market would be interested in a given work threatens to prize popular art over other forms, or to substitute judicial aesthetic preferences for the policy choices embodied in the Copyright Act. See *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits").

3

Finally, petitioner argues that allowing the surface decorations to qualify as a "work of authorship" is inconsistent with Congress' intent to entirely exclude industrial design from copyright. Petitioner notes that Congress refused to pass a provision that would have provided limited copyright protection for industrial designs, including clothing, when it enacted the 1976 Act, see Brief for Petitioner 9–11 (citing S. 22, Tit. II, 94th Cong., 2d Sess., 122 Cong. Rec. 3856–3859 (1976)), and that it has enacted laws protecting designs for specific useful articles—semiconductor chips and boat hulls, see 17 U. S. C. §§ 901–914, 1301–1332—while declining to enact other industrial design statutes, Brief for Petitioner 29, 43. From this history of failed legislation petitioner reasons that Congress intends to channel intellectual property claims for industrial design into design patents. It there-

fore urges us to approach this question with a presumption against copyrightability. *Id.*, at 27.

We do not share petitioner's concern. As an initial matter, "[c]ongressional inaction lacks persuasive significance" in most circumstances. *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990) (internal quotation marks omitted). Moreover, we have long held that design patent and copyright are not mutually exclusive. See *Mazer*, 347 U. S., at 217. Congress has provided for limited copyright protection for certain features of industrial design, and approaching the statute with presumptive hostility toward protection for industrial design would undermine Congress' choice. In any event, as explained above, our test does not render the shape, cut, and physical dimensions of the cheerleading uniforms eligible for copyright protection.

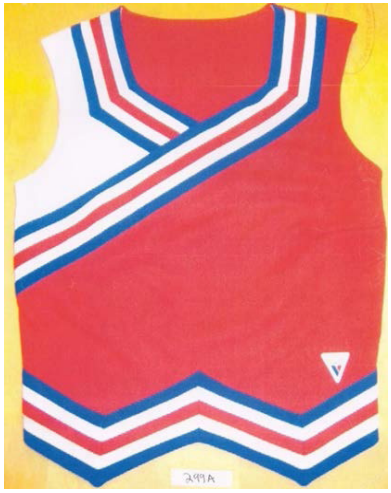
III

We hold that an artistic feature of the design of a useful article is eligible for copyright protection if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imagined separately from the useful article. Because the designs on the surface of respondents' cheerleading uniforms in this case satisfy these requirements, the judgment of the Court of Appeals is affirmed.

It is so ordered.

[Appendix to opinion of the Court follows this page.]

APPENDIX TO OPINION OF THE COURT



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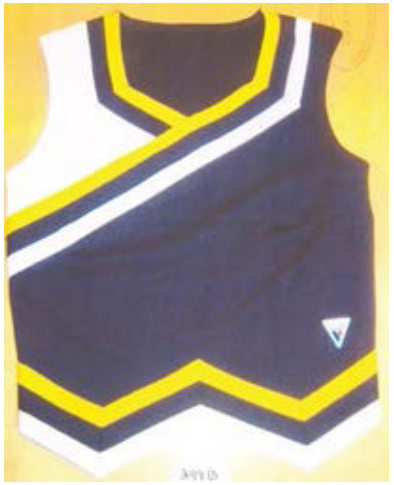

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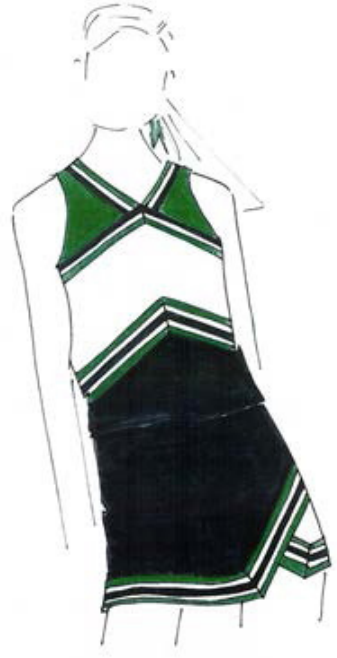

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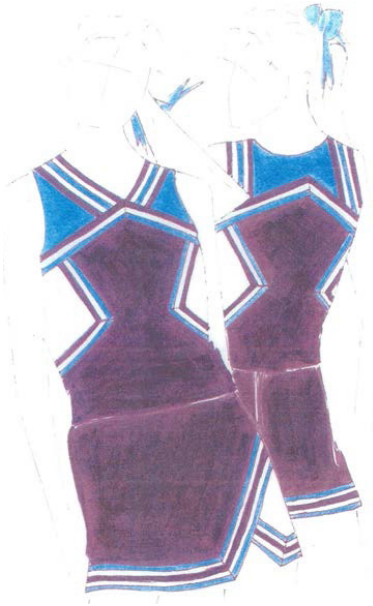

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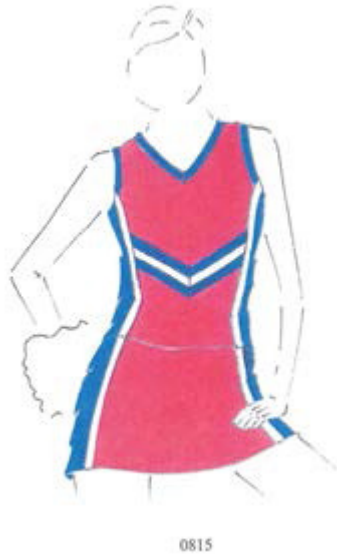

Design 0815

JUSTICE GINSBURG, concurring in the judgment.

I concur in the Court's judgment but not in its opinion. Unlike the majority, I would not take up in this case the separability test appropriate under 17 U. S. C. § 101.[1] Consideration of that test is unwarranted because the designs at issue are not designs *of* useful articles. Instead, the designs are themselves copyrightable pictorial or graphic works *reproduced on* useful articles.[2]

A pictorial, graphic, or sculptural work (PGS work) is copyrightable. § 102(a)(5). PGS works include "two-dimensional and three-dimensional works of fine, graphic, and applied art." § 101. Key to this case, a copyright in a standalone PGS work "includes the right to reproduce the work in or on any kind of article, whether useful or otherwise." § 113(a). Because the owner of a copyright in a preexisting PGS work may exclude a would-be infringer from reproducing that work on a useful article, there is no need

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[1] Courts "have struggled mightily to formulate a test" for the separability analysis. 799 F. 3d 468, 484 (CA6 2015); see 2 W. Patry, Copyright § 3:136, p. 3–420 (2016) (noting "widespread interpretative disarray" over the separability test); Ginsburg, "Courts Have Twisted Themselves into Knots": U. S. Copyright Protection for Applied Art, 40 Colum. J. L. & Arts 1, 2 (2016) ("The 'separability' test . . . has resisted coherent application . . . ."); 1 M. Nimmer & D. Nimmer, Copyright § 2A.08[B][6], p. 2A–84 (2016) (separability is a "perennially tangled aspect of copyright doctrine").

[2] Like the Court, I express no opinion on whether the designs otherwise meet the requirements for copyrightable subject matter. See *ante*, at 418, n. 1; 17 U. S. C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated."). In view of the dissent's assertion that Varsity's designs are "plainly unoriginal," *post*, at 448, however, I note this Court's recognition that "the requisite level of creativity [for copyrightability] is extremely low; even a slight amount will suffice," *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U. S. 340, 345 (1991); see *Atari Games Corp.* v. *Oman*, 979 F. 2d 242 (CADC 1992).

to engage in any separability inquiry to resolve the instant petition.

The designs here in controversy are standalone pictorial and graphic works that respondents Varsity Brands, Inc., et al. (Varsity) reproduce on cheerleading uniforms. Varsity's designs first appeared as pictorial and graphic works that Varsity's design team sketched on paper. App. 281. Varsity then sought copyright protection for those two-dimensional designs, not for cheerleading uniforms; its registration statements claimed "2-Dimensional artwork" and "fabric design (artwork)." Appendix, *infra*, at 428–431, 433–434, 436–438. Varsity next reproduced its two-dimensional graphic designs on cheerleading uniforms, also on other garments, including T-shirts and jackets. See, *e. g.*, App. 274, 276.[3]

In short, Varsity's designs are not themselves useful articles meet for separability determination under § 101; they

[3] That Varsity's designs can be placed on jackets or T-shirts without replicating a cheerleader's uniform supports their qualification as fabric designs. The dissent acknowledges that fabric designs are copyrightable, but maintains that Varsity's designs do not count because Varsity's submissions depict clothing, not fabric designs. *Post*, at 448–449. But registrants claiming copyrightable designs may submit drawings or photos of those designs as they appear on useful articles. See Compendium of U. S. Copyright Office Practices § 1506 (3d ed. 2014) ("To register a copyrightable design that has been applied to the back of a useful article, such as a chair, the applicant may submit drawings of the design as it appears on the chair."), online at https://www.copyright.gov/comp3/docs/compendium.pdf (as last visited Mar. 8, 2017). And, as noted in text, Varsity's registration statements claimed "2-Dimensional artwork" and "fabric design (artwork)." Appendix, *infra*, at 428–431, 433–434, 436–438.

The dissent also acknowledges that artwork printed on a T-shirt is copyrightable. *Post*, at 441–442. Varsity's colored shapes and patterns can be, and indeed are, printed on T-shirts. See, *e. g.*, App. 274. Assuming Varsity's designs meet the other requirements for copyrightable subject matter, they would fit comfortably within the Copyright Office guidance featured by the dissent. See *post*, at 441–442 (citing Compendium of U. S. Copyright Office Practices, *supra*, § 924.2(B).

are standalone PGS works that may gain copyright protection as such, including the exclusive right to reproduce the designs on useful articles.[4]

[4] The majority declines to address this route to decision because, it says, Varsity has not advanced it. *Ante*, at 413. I read Varsity's brief differently. See Brief for Respondents 25 (explaining that the Copyright Act "expressly provides that PGS designs do not lose their protection when they appear 'in or on' a useful article," quoting § 113(a)); *id.*, at 52 (disclaiming the need for separability analysis because the designs are themselves PGS works).

APPENDIX

EXHIBIT 15

Certificate of Registration
Additional certificate
(17 U.S.C. 706)

[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Form VA

For a Work of the Visual Arts

UNITED STATES COPYRIGHT OFFICE

RE VA 1-417-427

EFFECTIVE DATE OF REGISTRATION

5 21 07
Month Day Year

Maria A. Pallante

Acting Register of Copyrights, United States of America

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

1 **Title of This Work**
Design Number 078

NATURE OF THIS WORK See instructions
2-dimensional artwork

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. **Title of Collective Work**

If published in a periodical or serial give:
Volume Number Issue Date On Pages

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2 NOTE Under the law the "author" of a "**work made for hire**" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

a **NAME OF AUTHOR**
Varsity Brands, Inc.

DATES OF BIRTH AND DEATH
Year Born Year Died

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled in United States

Was this Author's Contribution to the Work
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3-Dimensional sculpture
☒ 2-Dimensional artwork

EXHIBIT 16

Certificate of Registration
Additional certificate (17 U.S.C. 706)

[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Registration Number:
VA 1-675-905

Effective date of registration:
May 12, 2008

Maria A. Pallante
Acting Register of Copyrights, United States of America

Title _____

Title of Work: 0815
Nature of Work: 2-dimensional artwork

Completion/Publication _____

Year of Completion: 2007
Date of 1st Publication: January 2, 2008
Nation of 1st Publication: United States

Author _____

Author: Varsity Brands, Inc.
Author Created: 2-dimensional artwork
Work made for hire: Yes
Domiciled in: United States
Anonymous: No
Pseudonymous: No

Copyright claimant _____

Copyright Claimant: Varsity Brands, Inc.

EXHIBIT 17

Certificate of Registration
Additional certificate (17 U.S.C. 706)
[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Form VA
For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE
RE VA 1-319-228
EFFECTIVE DATE OF REGISTRATION
April 29 2005
Month Day Year

Maria A. Pallante
Acting Register of Copyrights, United States of America

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

---

1 **Title of This Work**
299A

NATURE OF THIS WORK See instructions
FABRIC DESIGN (ARTWORK)

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. **Title of Collective Work**

If published in a periodical or serial give:
Volume Number Issue Date On Pages

---

2 NOTE Under the law the "author" of a "**work made for hire**" is generally the employer not the employee (see instructions) For any part of this work that was *made for hire* check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part and leave the space for dates of birth and death blank.

a **NAME OF AUTHOR**
VARSITY SPIRIT FASHIONS & SUPPLIES INC

DATES OF BIRTH AND DEATH
Year Born _____ Year Died _____

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled in United States

Was this Author's Contribution to the Work
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3 Dimensional sculpture

☒ 2 Dimensional artwork

☐ Reproduction of work of art

☐ Map

☐ Photograph

☐ Jewelry design

☐ Technical drawing

☐ Text

☐ Architectural work

b **Name of Author**

_____

Dates of Birth and Death
Year Born Year Died

_____ _____

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled at _____

Was this Author's Contribution to the Work

Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3 Dimensional sculpture

EXHIBIT 18

Certificate of Registration
Additional certificate (17 U.S.C. 706)

[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Form VA
For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE

RE VA 1-319-226
EFFECTIVE DATE OF REGISTRATION
Month Day Year
April 29 2005

Maria A. Pallante
Acting Register of Copyrights, United States of America

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

---

1 **Title of This Work**
299B

NATURE OF THIS WORK See instructions
FABRIC DESIGN (ARTWORK)

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared.

Title of Collective Work

If published in a periodical or serial give: **Volume Number Issue Date On Pages**

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2 NOTE Under the law the "author" of a "**work made for hire**" is generally the employer not the employee (see Instructions) For any part of this work that was made for hire, check Yes in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part and leave the space for dates of birth and death blank.

a **NAME OF AUTHOR**
VARSITY SPIRIT FASHIONS & SUPPLIES INC

DATES OF BIRTH AND DEATH
Year Born Year Died

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled in USA

Was this Author's Contribution to the Work:
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3 Dimensional sculpture
☒ 2 Dimensional artwork
☐ Reproduction of work of art
☐ Map
☐ Photograph
☐ Jewelry design
☐ Technical drawing
☐ Text
☐ Architectural work

---

b **Name of Author**

_____

Dates of Birth and Death
Year Born Year Died

_____ _____

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled in _____

Was this Author's Contribution to the Work
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

AMENDED EXHIBIT 19

Certificate of Registration
[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

[Marybeth Peters]
Register of Copyrights, United States of America

Form VA

For a Work of the Visual Arts

UNITED STATES COPYRIGHT OFFICE

RE VA 1-411-535

[BARCODE]

EFFECTIVE DATE OF REGISTRATION

May 09 2007
Month Day Year

RATE CONTINUATION SHEET:

---

1 Title of This Work
Design Number 074

NATURE OF THIS WORK See instructions
2-dimensional artwork

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work

---

If published in a periodical or serial give:
Volume Number Issue Date On Pages

---

2 NOTE Under the law the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the "work" was prepared) as "Author" of that part and leave the space for dates of birth and death blank

a NAME OF AUTHOR
Varsity Brands, Inc.

DATES OF BIRTH AND DEATH
Year Born _____ Year Died _____

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

Author & Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled at United States

Was this Author a Contribution to the Work
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3 Dimensional sculpture
☒ 2 Dimensional artwork
☐ Reproduction of work of art

Justice Breyer, with whom Justice Kennedy joins, dissenting.

I agree with much in the Court's opinion. But I do not agree that the designs that Varsity Brands, Inc., submitted to the Copyright Office are eligible for copyright protection. Even applying the majority's test, the designs *cannot* "be perceived as . . . two- or three-dimensional work[s] of art separate from the useful article." *Ante*, at 409.

Look at the designs that Varsity submitted to the Copyright Office. See Appendix to opinion of the Court, *ante*. You will see only pictures of cheerleader uniforms. And cheerleader uniforms are useful articles. A picture of the relevant design features, whether separately "perceived" on paper or in the imagination, is a picture of, and thereby "replicate[s]," the underlying useful article of which they are a part. *Ante*, at 409, 417. Hence the design features that Varsity seeks to protect are not "capable of existing independently o[f] the utilitarian aspects of the article." 17 U. S. C. § 101.

I

The relevant statutory provision says that the "design of a useful article" is copyrightable "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Ibid.* But what, we must ask, do the words "identified separately" mean? Just when is a design separate from the "utilitarian aspect of the [useful] article?" The most direct, helpful aspect of the Court's opinion answers this question by stating:

> "Nor could someone claim a copyright in a useful article merely by creating a replica of that article in some other medium—for example, a cardboard model of a car. Although the replica could itself be copyrightable, it would not give rise to any rights in the useful article that inspired it." *Ante*, at 415.

Exactly so. These words help explain the Court's statement that a copyrightable work of art must be "perceived as a two- or three-dimensional work of art separate from the useful article." *Ante*, at 409, 424. They help clarify the concept of separateness. Cf. 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 2A.08[A][1] (2016) (Nimmer) (describing courts' difficulty in applying that concept). They are consistent with Congress' own expressed intent. 17 U. S. C. § 101; H. R. Rep. No. 94–1476, pp. 55, 105 (1976) (H. R. Rep.). And they reflect long held views of the Copyright Office. See Compendium of U. S. Copyright Office Practices § 924.2(B) (3d ed. 2014), online at http://www.copyright.gov/comp3/docs/compendium.pdf (as last visited Mar. 7, 2017) (Compendium).

Consider, for example, the explanation that the House Report for the Copyright Act of 1976 provides. It says:

> "Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, *physically or conceptually*, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted . . . ." H. R. Rep., at 55 (emphasis added).

These words suggest two exercises, one physical, one mental. Can the design features (the picture, the graphic, the sculpture) be physically removed from the article (and considered separately), all the while leaving the fully functioning utilitarian object in place? If not, can one nonetheless conceive of the design features separately without replicating a picture of the utilitarian object? If the answer to either of these questions is "yes," then the design is eligible for copyright protection. Otherwise, it is not. The abstract nature of these questions makes them sound difficult to apply. But with the Court's words in mind, the difficulty tends to disappear.

An example will help. Imagine a lamp with a circular marble base, a vertical 10-inch tall brass rod (containing wires) inserted off center on the base, a light bulb fixture emerging from the top of the brass rod, and a lampshade sitting on top. In front of the brass rod a porcelain Siamese cat sits on the base facing outward. Obviously, the Siamese cat is *physically separate* from the lamp, as it could be easily removed while leaving both cat and lamp intact. And, assuming it otherwise qualifies, the designed cat is eligible for copyright protection.

Now suppose there is no long brass rod; instead the cat sits in the middle of the base and the wires run up through the cat to the bulbs. The cat is not physically separate from the lamp, as the reality of the lamp's construction is such that an effort to physically separate the cat and lamp will destroy both cat and lamp. The two are integrated into a single functional object, like the similar configuration of the ballet dancer statuettes that formed the lamp bases at issue in *Mazer* v. *Stein*, 347 U. S. 201 (1954). But we can easily imagine the cat on its own, as did Congress when conceptualizing the ballet dancer. See H. R. Rep., at 55 (the statuette in *Mazer* was "incorporated into a product without losing its ability to exist independently as a work of art"). In doing so, we do not create a mental picture of a lamp (or, in the Court's words, a "replica" of the lamp), which is a useful article. We simply perceive the cat separately, as a small cat figurine that could be a copyrightable design work standing alone that does not replicate the lamp. Hence the cat is *conceptually separate* from the utilitarian article that is the lamp. The pair of lamps pictured at figures 1 and 2 in the appendix to this opinion illustrate this principle.

Case law, particularly case law that Congress and the Copyright Office have considered, reflects the same approach. Congress cited examples of copyrightable design works, including "a carving on the back of a chair" and "a floral relief design on silver flatware." H. R. Rep., at 55.

Copyright Office guidance on copyrightable designs in useful articles include "an engraving on a vase," "[a]rtwork printed on a t-shirt," "[a] colorful pattern decorating the surface of a shopping bag," "[a] drawing on the surface of wallpaper," and "[a] floral relief decorating the handle of a spoon." Compendium § 924.2(B). Courts have found copyrightable matter in a plaster ballet dancer statuette encasing the lamp's electric cords and forming its base, see *Mazer*, *supra*, as well as carvings engraved onto furniture, see *Universal Furniture Int'l*, *Inc.* v. *Collezione Europa USA*, *Inc.*, 618 F. 3d 417, 431–435 (CA4 2010) (*per curiam*), and designs on laminated floor tiles, see *Home Legend*, *LLC* v. *Mannington Mills*, *Inc.*, 784 F. 3d 1404, 1412–1413 (CA11 2015). See generally Brief for Intellectual Property Professors as *Amici Curiae*.

By way of contrast, Van Gogh's painting of a pair of old shoes, though beautifully executed and copyrightable as a painting, would not qualify for a shoe design copyright. See Appendix, fig. 3, *infra*; 17 U. S. C. §§ 113(a)–(b). Courts have similarly denied copyright protection to objects that begin as three-dimensional designs, such as measuring spoons shaped like heart-tipped arrows, *Bonazoli* v. *R. S. V. P. Int'l*, *Inc.*, 353 F. Supp. 2d 218, 226–227 (RI 2005); candleholders shaped like sailboats, *Design Ideas*, *Ltd.* v. *Yankee Candle Co.*, 889 F. Supp. 2d 1119, 1128 (CD Ill. 2012); and wire spokes on a wheel cover, *Norris Industries*, *Inc.* v. *International Tel. & Tel. Corp.*, 696 F. 2d 918, 922–924 (CA11 1983). None of these designs could qualify for copyright protection that would prevent others from selling spoons, candleholders, or wheel covers with the same design. Why not? Because in each case the design is not separable from the utilitarian aspects of the object to which it relates. The designs cannot be physically separated because they themselves make up the shape of the spoon, candleholders, or wheel covers of which they are a part. And spoons, candleholders, and wheel covers are useful objects, as are the old shoes depicted in Van Gogh's painting. More importantly,

one cannot easily imagine or otherwise conceptualize the design of the spoons or the candleholders or the shoes *without that picture, or image, or replica being a picture of spoons, or candleholders, or wheel covers, or shoes*. The designs necessarily bring along the underlying utilitarian object. Hence each design is not conceptually separable from the physical useful object.

The upshot is that one could copyright the floral design on a soupspoon but one could not copyright the shape of the spoon itself, no matter how beautiful, artistic, or esthetically pleasing that shape might be: A picture of the shape of the spoon is also a picture of a spoon; the picture of a floral design is not. See Compendium § 924.2(B).

To repeat: A separable design feature must be "capable of existing independently" of the useful article as a separate artistic work that is not itself the useful article. If the claimed feature could be extracted without replicating the useful article of which it is a part, and the result would be a copyrightable artistic work standing alone, then there is a separable design. But if extracting the claimed features would necessarily bring along the underlying useful article, the design is not separable from the useful article. In many or most cases, to decide whether a design or artistic feature of a useful article is conceptually separate from the article itself, it is enough to imagine the feature on its own and ask, "Have I created a picture of a (useful part of a) useful article?" If so, the design is not separable from the useful article. If not, it is.

In referring to imagined pictures and the like, I am not speaking technically. I am simply trying to explain an intuitive idea of what separation is about, as well as how I understand the majority's opinion. So understood, the opinion puts design copyrights in their rightful place. The law has long recognized that drawings or photographs of real world objects are copyrightable as drawings or photographs, but the copyright does not give protection against others making

the underlying useful objects. See, *e. g.*, *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53 (1884). That is why a copyright on Van Gogh's painting would prevent others from reproducing that painting, but it would not prevent others from reproducing and selling the comfortable old shoes that the painting depicts. Indeed, the purpose of § 113(b) was to ensure that "'copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself.'" H. R. Rep., at 105.

II

To ask this kind of simple question—does the design picture the useful article?—will not provide an answer in every case, for there will be cases where it is difficult to say whether a picture of the design is, or is not, also a picture of the useful article. But the question will avoid courts focusing primarily upon what I believe is an unhelpful feature of the inquiry, namely, whether the design can be imagined as a "two- or three-dimensional work of art." *Ante*, at 409, 424. That is because virtually any industrial design can be thought of separately as a "work of art": Just imagine a frame surrounding the design, or its being placed in a gallery. Consider Marcel Duchamp's "readymades" series, the functional mass-produced objects he designated as art. See Appendix, fig. 4, *infra*. What is there in the world that, viewed through an esthetic lens, cannot be seen as a good, bad, or indifferent work of art? What design features could not be imaginatively reproduced on a painter's canvas? Indeed, great industrial design may well include design that is inseparable from the useful article—where, as Frank Lloyd Wright put it, "form and function are one." F. Wright, An Autobiography 146 (1943) (reprint 2005). Where they are one, the designer may be able to obtain 15 years of protection through a design patent. 35 U. S. C. §§ 171, 173; see also McKenna & Strandburg, Progress and Competition in Design, 17 Stan. Tech. L. Rev. 1, 48–51 (2013). But, if they are one,

Congress did not intend a century or more of copyright protection.

III

The conceptual approach that I have described reflects Congress' answer to a problem that is primarily practical and economic. Years ago Lord Macaulay drew attention to the problem when he described copyright in books as a "tax on readers for the purpose of giving a bounty to writers." 56 Parl. Deb. (3d Ser.) (1841) 341, 350. He called attention to the main benefit of copyright protection, which is to provide an incentive to produce copyrightable works and thereby "promote the Progress of Science and useful Arts." U. S. Const., Art. I, § 8, cl. 8. But Macaulay also made clear that copyright protection imposes costs. Those costs include the higher prices that can accompany the grant of a copyright monopoly. They also can include (for those wishing to display, sell, or perform a design, film, work of art, or piece of music, for example) the costs of discovering whether there are previous copyrights, of contacting copyright holders, and of securing permission to copy. *Eldred* v. *Ashcroft*, 537 U. S. 186, 248–252 (2003) (BREYER, J., dissenting). Sometimes, as Thomas Jefferson wrote to James Madison, costs can outweigh "the benefit even of limited monopolies." Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 Papers of Thomas Jefferson 443 (J. Boyd ed. 1956) (Jefferson Letter). And that is particularly true in light of the fact that Congress has extended the "limited Times" of protection, U. S. Const., Art. I, § 8, cl. 8, from the "14 years" of Jefferson's day to potentially more than a century today. Jefferson Letter 443; see also *Eldred*, *supra*, at 246–252 (opinion of BREYER, J.).

The Constitution grants Congress primary responsibility for assessing comparative costs and benefits and drawing copyright's statutory lines. Courts must respect those lines and not grant copyright protection where Congress has decided not to do so. And it is clear that Congress has not

extended broad copyright protection to the fashion design industry. See, *e. g.*, 1 Nimmer § 2A.08[H][3][c] (describing how Congress rejected proposals for fashion design protection within the 1976 Act and has rejected every proposed bill to this effect since then); *Esquire, Inc.* v. *Ringer*, 591 F. 2d 796, 800, n. 12 (CADC 1978) (observing that at the time of the 1976 Copyright Act, Congress had rejected every one of the approximately 70 design protection bills that had been introduced since 1914); *e. g.*, H. R. 5055, 109th Cong., 2d Sess.: "To Amend title 17, United States Code, to provide protection for fashion design" (introduced Mar. 30, 2006; unenacted). Congress has left "statutory . . . protection . . . largely unavailable for dress designs." 1 Nimmer § 2A.08[H][3][a]; Raustiala & Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92 Va. L. Rev. 1687, 1698–1705 (2006).

Congress' decision not to grant full copyright protection to the fashion industry has not left the industry without protection. Patent design protection is available. 35 U. S. C. §§ 171, 173. A maker of clothing can obtain trademark protection under the Lanham Act for signature features of the clothing. 15 U. S. C. § 1051 *et seq.* And a designer who creates an original textile design can receive copyright protection for that pattern as placed, for example, on a bolt of cloth, or anything made with that cloth. *E. g.*, Compendium § 924.3(A)(1). "[T]his [type of] claim . . . is generally made by the fabric producer rather than the garment or costume designer," and is "ordinarily made when the two-dimensional design is applied to the textile fabric and before the garment is cut from the fabric." 56 Fed. Reg. 56531 (1991).

The fashion industry has thrived against this backdrop, and designers have contributed immeasurably to artistic and personal self-expression through clothing. But a decision by this Court to grant protection to the design of a garment would grant the designer protection that Congress refused to provide. It would risk increased prices and unforesee-

able disruption in the clothing industry, which in the United States alone encompasses nearly $370 billion in annual spending and 1.8 million jobs. Brief for Council of Fashion Designers of America, Inc., as *Amicus Curiae* 3–4 (citing U. S. Congress, Joint Economic Committee, The New Economy of Fashion 1 (2016)). That is why I believe it important to emphasize those parts of the Court's opinion that limit the scope of its interpretation. That language, as I have said, makes clear that one may not "claim a copyright in a useful article merely by creating a replica of that article in some other medium," which "would not give rise to any rights in the useful article that inspired it." *Ante*, at 415.

IV

If we ask the "separateness" question correctly, the answer here is not difficult to find. The majority's opinion, in its appendix, depicts the cheerleader dress designs that Varsity submitted to the Copyright Office. Can the design features in Varsity's pictures exist separately from the utilitarian aspects of a dress? Can we extract those features as copyrightable design works standing alone, without bringing along, via picture or design, the dresses of which they constitute a part?

Consider designs 074, 078, and 0815. They certainly look like cheerleader uniforms. That is to say, they look like pictures of cheerleader uniforms, just like Van Gogh's old shoes look like shoes. I do not see how one could see them otherwise. Designs 299A and 299B present slightly closer questions. They omit some of the dresslike context that the other designs possess. But the necklines, the sleeves, and the cut of the skirt suggest that they too are pictures of dresses. Looking at all five of Varsity's pictures, I do not see how one could conceptualize the design features in a way that does not picture, not just artistic designs, but dresses as well.

Were I to accept the majority's invitation to "imaginatively remov[e]" the chevrons and stripes *as they are arranged* on the neckline, waistline, sleeves, and skirt of each uniform, and apply them on a "painter's canvas," *ante*, at 417, that painting would be of a cheerleader's dress. The esthetic elements on which Varsity seeks protection exist only as part of the uniform design—there is nothing to separate out but for dress-shaped lines that replicate the cut and style of the uniforms. Hence, each design is not physically separate, nor is it conceptually separate, from the useful article it depicts, namely, a cheerleader's dress. They cannot be copyrighted.

Varsity, of course, could have sought a design patent for its designs. Or, it could have sought a copyright on a textile design, even one with a similar theme of chevrons and lines.

But that is not the nature of Varsity's copyright claim. It has instead claimed ownership of the particular "'treatment and arrangement'" of the chevrons and lines of the design as they appear at the neckline, waist, skirt, sleeves, and overall cut of each uniform. Brief for Respondents 50. The majority imagines that Varsity submitted something different—that is, only the surface decorations of chevrons and stripes, as in a textile design. As the majority sees it, Varsity's copyright claim would be the same had it submitted a plain rectangular space depicting chevrons and stripes, like swaths from a bolt of fabric. But considered on their own, the simple stripes are plainly unoriginal. Varsity, then, seeks to do indirectly what it cannot do directly: bring along the design and cut of the dresses by seeking to protect surface decorations whose "treatment and arrangement" are *coextensive with that design and cut.* As Varsity would have it, it would prevent its competitors from making useful three-dimensional cheerleader uniforms by submitting plainly unoriginal chevrons and stripes as cut and arranged on a useful article. But with that cut and arrangement, the resulting pictures on which Varsity seeks protection do not

simply depict designs. They depict clothing. They depict the useful articles of which the designs are inextricable parts. And Varsity cannot obtain copyright protection that would give them the power to prevent others from making those useful uniforms, any more than Van Gogh can copyright comfortable old shoes by painting their likeness.

I fear that, in looking past the three-dimensional design inherent in Varsity's claim by treating it as if it were no more than a design for a bolt of cloth, the majority has lost sight of its own important limiting principle. One may not "claim a copyright in a useful article merely by creating a replica of that article in some other medium," such as in a picture. *Ante*, at 415. That is to say, one cannot obtain a copyright that would give its holder "any rights in the useful article that inspired it." *Ibid.*

With respect, I dissent.

[Appendix to opinion of BREYER, J., follows this page.]

APPENDIX TO OPINION OF BREYER, J.

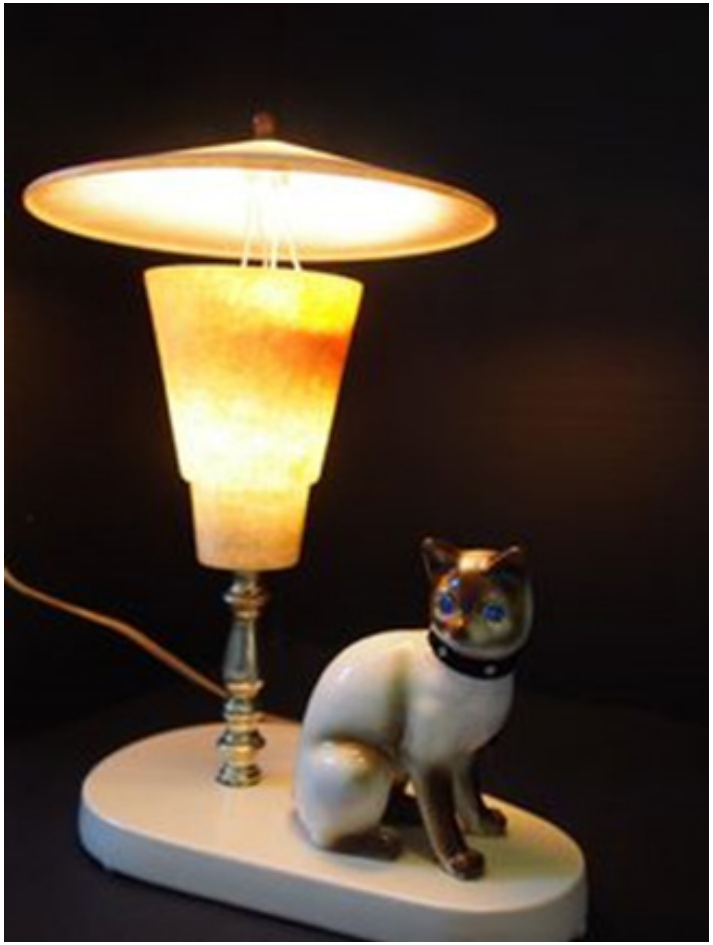

Fig. 1

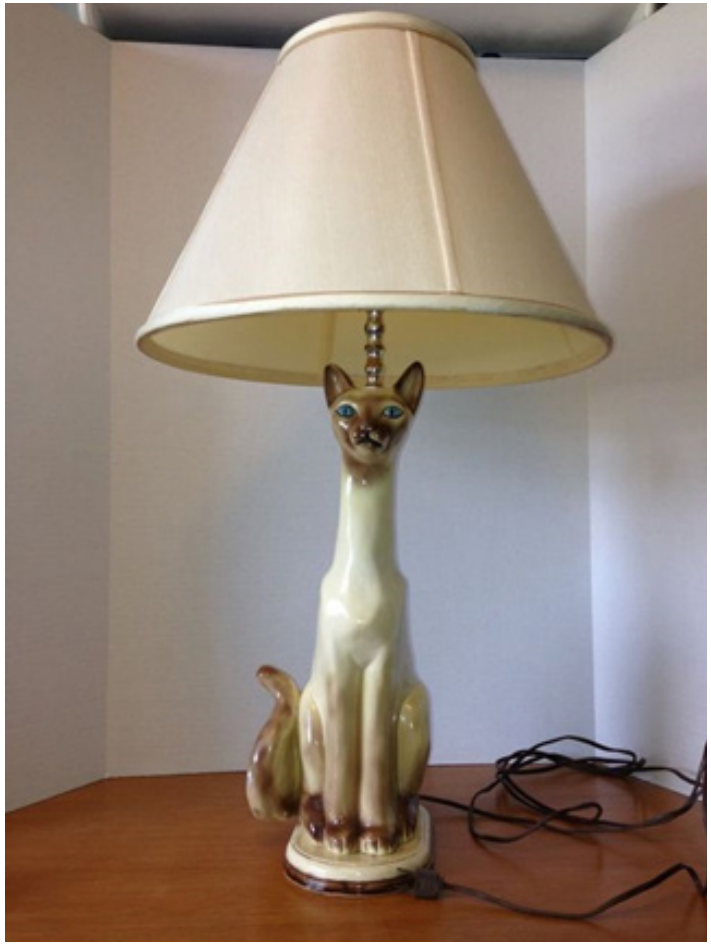

Fig. 2

APPENDIX TO OPINION OF BREYER, J.

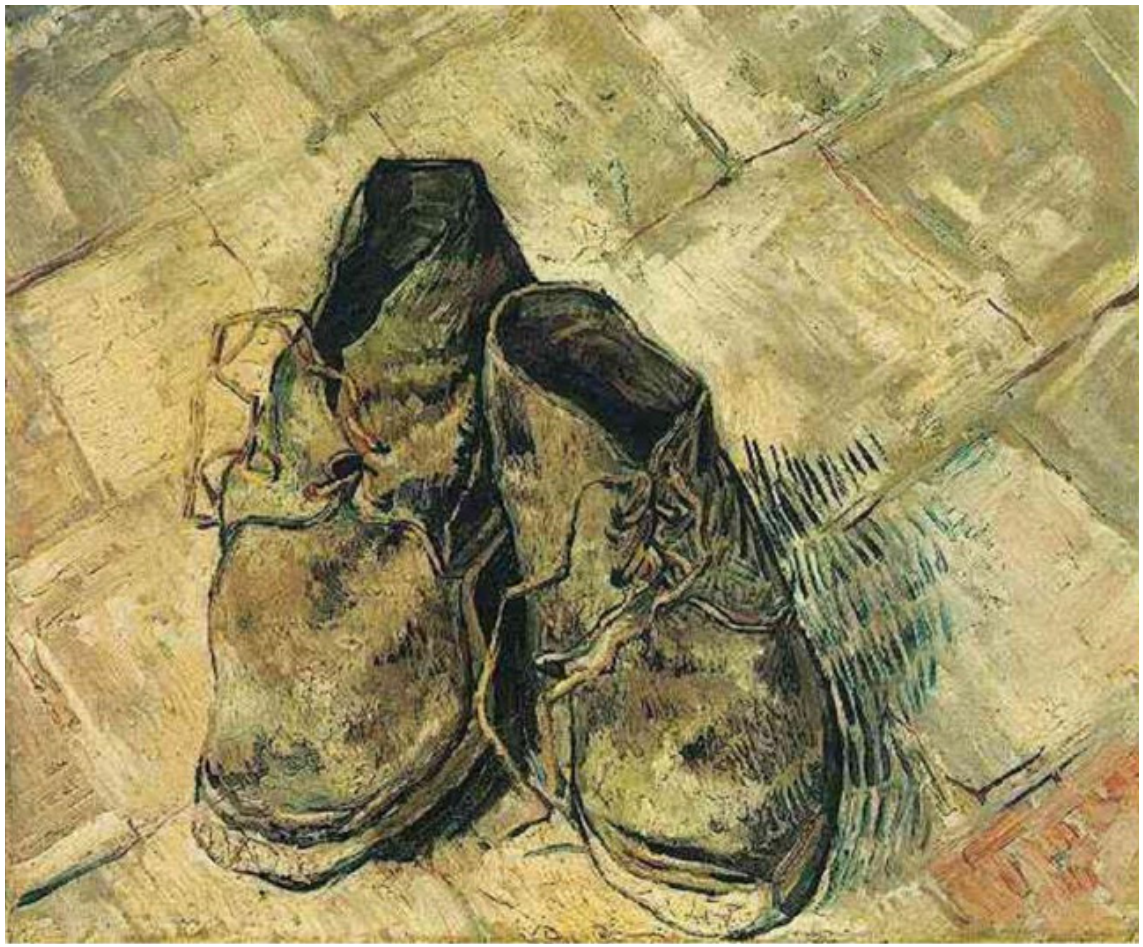

Fig. 3: Vincent Van Gogh, “Shoes”

APPENDIX TO OPINION OF BREYER, J.

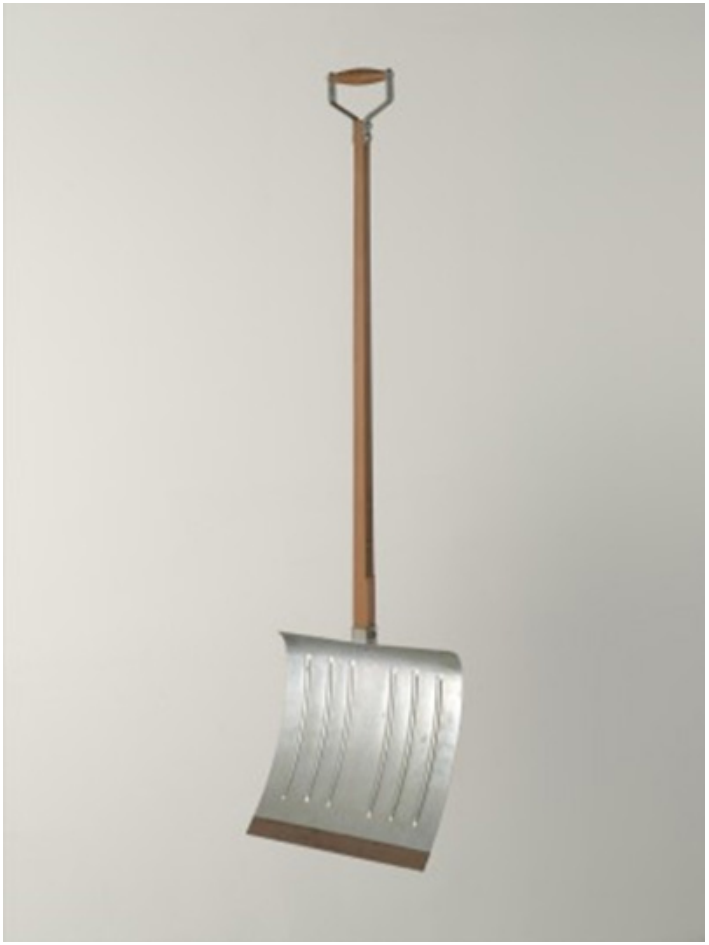

Fig. 4: Marcel Duchamp,
"In Advance of the Broken Arm"

Syllabus

CZYZEWSKI ET AL. *v.* JEVIC HOLDING CORP. ET AL.

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

No. 15–649. Argued December 7, 2016—Decided March 22, 2017

There are three possible conclusions to a Chapter 11 bankruptcy. First, debtor and creditors may negotiate a plan to govern the distribution of the estate's value. See, *e. g.*, 11 U. S. C. §§ 1121, 1123, 1129, 1141. Second, the bankruptcy court may convert the case to Chapter 7 for liquidation of the business and distribution of its assets to creditors. §§ 1112(a), (b), 726. Finally, the bankruptcy court may dismiss the case. § 1112(b). A court ordering a dismissal ordinarily attempts to restore the prepetition financial status quo. § 349(b)(3). Yet if perfect restoration proves difficult or impossible, the court may, "for cause," alter the dismissal's normal restorative consequences, § 349(b)—*i. e.*, it may order a "structured dismissal." The Bankruptcy Code also establishes basic priority rules for determining the order in which the court will distribute an estate's assets. The Code makes clear that distributions in a Chapter 7 liquidation must follow this prescribed order. §§ 725, 726. Chapter 11 permits some flexibility, but a court still cannot confirm a plan that contains priority-violating distributions over the objection of an impaired creditor class. §§ 1129(a)(7), (b)(2). The Code does not explicitly state what priority rules—if any—apply to the distribution of assets in a structured dismissal.

Respondent Jevic Transportation filed for Chapter 11 bankruptcy after being purchased in a leveraged buyout. The bankruptcy prompted two lawsuits. In the first, a group of former Jevic truckdrivers, petitioners here, was awarded a judgment against Jevic for Jevic's failure to provide proper notice of termination in violation of state and federal Worker Adjustment and Retraining Notification (WARN) Acts. Part of that judgment counted as a priority wage claim under § 507(a)(4), entitling the workers to payment ahead of general unsecured claims against the Jevic estate. In the second suit, a court-authorized committee representing Jevic's unsecured creditors sued Sun Capital and CIT Group, respondents here, for fraudulent conveyance in connection with the leveraged buyout of Jevic. These parties negotiated a settlement agreement that called for a structured dismissal of Jevic's Chapter 11 bankruptcy. Under the proposed structured dismissal, petitioners would receive nothing on their WARN claims, but lower-priority general unsecured creditors would be paid. Petitioners argued that the

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distribution scheme accordingly violated the Code's priority rules by paying general unsecured claims ahead of their own. The Bankruptcy Court nevertheless approved the settlement agreement and dismissed the case, reasoning that because the proposed payouts would occur pursuant to a structured dismissal rather than an approved plan, the failure to follow ordinary priority rules did not bar approval. The District Court and the Third Circuit affirmed.

Held:

1. Petitioners have Article III standing. Respondents argue that petitioners have not "suffered an injury in fact," or at least one "likely to be redressed by a favorable judicial decision," *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 338, because petitioners would have gotten nothing even if the Bankruptcy Court had never approved the structured dismissal and will still get nothing if the structured dismissal is undone now. That argument rests upon the assumptions that (1) without a violation of ordinary priority rules, there will be no settlement, and (2) without a settlement, the fraudulent-conveyance lawsuit has no value. The record, however, indicates both that a settlement that respects ordinary priorities remains a reasonable possibility and that the fraudulent-conveyance claim could have litigation value. Therefore, as a consequence of the Bankruptcy Court's approval of the structured dismissal, petitioners lost a chance to obtain a settlement that respected their priorities or, if not that, the power to assert the fraudulent-conveyance claim themselves. A decision in their favor is likely to redress that loss. Pp. 462–464.

2. Bankruptcy courts may not approve structured dismissals that provide for distributions that do not follow ordinary priority rules without the consent of affected creditors. Pp. 464–471.

(a) Given the importance of the priority system, this Court looks for an affirmative indication of intent before concluding that Congress means to make a major departure. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468. Nothing in the statute evinces such intent. Insofar as the dismissal sections of Chapter 11 foresee any transfer of assets, they seek a restoration of the prepetition financial status quo. Read in context, § 349(b), which permits a bankruptcy judge, "for cause, [to] orde[r] otherwise," seems designed to give courts the flexibility to protect reliance interests acquired in the bankruptcy, not to make general end-of-case distributions that would be flatly impermissible in a Chapter 11 plan or Chapter 7 liquidation. Precedent does not support a contrary position. *E. g.*, *In re Iridium Operating LLC*, 478 F. 3d 452 (CA2), distinguished. Cases in which courts have approved deviations from ordinary priority rules generally involve interim

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distributions serving significant Code-related objectives. That is not the case here, where, *e. g.*, the priority-violating distribution is attached to a final disposition, does not preserve the debtor as a going concern, does not make the disfavored creditors better off, does not promote the possibility of a confirmable plan, does not help to restore the *status quo ante*, and does not protect reliance interests. Pp. 464–469.

(b) Congress did not authorize a "rare case" exception that permits courts to disregard priority in structured dismissals for "sufficient reasons." The fact that it is difficult to give precise content to the concept of "sufficient reasons" threatens to turn the court below's exception into a more general rule, resulting in uncertainty that has potentially serious consequences—*e. g.*, departure from the protections granted particular classes of creditors, changes in the bargaining power of different classes of creditors even in bankruptcies that do not end in structured dismissals, risks of collusion, and increased difficulty in achieving settlements. Courts cannot deviate from the strictures of the Code, even in "rare cases." Pp. 469–471.

787 F. 3d 173, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 471.

Danielle Spinelli argued the cause for petitioners. With her on the briefs were *Craig Goldblatt*, *Joel Millar*, *Matthew Guarnieri*, *Jack A. Raisner*, *Rene S. Roupinian*, and *Christopher D. Loizides*.

Sarah E. Harrington argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, *Dana Kaersvang*, *Ramona D. Elliott*, *P. Matthew Sutko*, and *Wendy Cox*.

Christopher Landau argued the cause for respondents. With him on the brief were *James P. Gillespie*, *Jason M. Wilcox*, *Robert J. Feinstein*, *Richard P. Norton*, and *Linda Richenderfer*.*

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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, *David L. Franklin*, Solicitor General, *Brett E. Legner*, Deputy Solicitor General, and

JUSTICE BREYER delivered the opinion of the Court.

Bankruptcy Code Chapter 11 allows debtors and their creditors to negotiate a plan for dividing an estate's value. See 11 U. S. C. §§ 1123, 1129, 1141. But sometimes the parties cannot agree on a plan. If so, the bankruptcy court may decide to dismiss the case. § 1112(b). The Code then ordinarily provides for what is, in effect, a restoration of the prepetition financial status quo. § 349(b).

In the case before us, a Bankruptcy Court dismissed a Chapter 11 bankruptcy. But the court did not simply restore the prepetition status quo. Instead, the court ordered a distribution of estate assets that gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors. The skipped creditors would have been

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James D. Newbold, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jahna Lindemuth* of Alaska, *Mark Brnovich* of Arizona, *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Karl A. Racine* of the District of Columbia, *Sam Olens* of Georgia, *Douglas S. Chin* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healy* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Tim Fox* of Montana, *Adam Paul Laxalt* of Nevada, *Joseph A. Foster* of New Hampshire, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Ellen F. Rosenblum* of Oregon, *Bruce R. Beemer* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Robert W. Ferguson* of Washington, *Patrick Morrisey* of West Virginia, and *Peter K. Michael* of Wyoming; for the Loan Syndications and Trading Association by *Ronald J. Mann* and *Elliot Ganz*; for the National Employment Law Project et al. by *Simon A. Steel*, *Catherine K. Ruckelshaus*, *Sally Greenberg*, *Seymour W. James, Jr.*, and *Kenneth Kimerling*; and for Law Professors by *Jonathan C. Lipson*.

Briefs of *amici curiae* urging affirmance were filed for Jagdeep S. Bhandari et al. by *Richard Lieb* and *John Collen*; and for Law Professors by *David R. Kuney*.

entitled to payment ahead of the general unsecured creditors in a Chapter 11 *plan* (or in a Chapter 7 liquidation). See §§ 507, 725, 726, 1129. The question before us is whether a bankruptcy court has the legal power to order this priority-skipping kind of distribution scheme in connection with a Chapter 11 *dismissal*.

In our view, a bankruptcy court does not have such a power. A distribution scheme ordered in connection with the dismissal of a Chapter 11 case cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.

I

A

1

We begin with a few fundamentals: A business may file for bankruptcy under either Chapter 7 or Chapter 11. In Chapter 7, a trustee liquidates the debtor's assets and distributes them to creditors. See § 701 *et seq.* In Chapter 11, debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern. See, *e. g.*, §§ 1121, 1123, 1129, 1141 (setting out the framework in which the parties negotiate).

Filing for Chapter 11 bankruptcy has several relevant legal consequences. First, an estate is created comprising all property of the debtor. § 541(a)(1). Second, a fiduciary is installed to manage the estate in the interest of the creditors. §§ 1106, 1107(a). This fiduciary, often the debtor's existing management team, acts as "debtor in possession." §§ 1101(1), 1104. It may operate the business, §§ 363(c)(1), 1108, and perform certain bankruptcy-related functions, such as seeking to recover for the estate preferential or fraudulent transfers made to other persons, § 547 (transfers made

before bankruptcy that unfairly preferred particular creditors); § 548 (fraudulent transfers, including transfers made before bankruptcy for which the debtor did not receive fair value). Third, an "automatic stay" of all collection proceedings against the debtor takes effect. § 362(a).

It is important to keep in mind that Chapter 11 foresees three possible outcomes. The first is a bankruptcy-court-confirmed plan. Such a plan may keep the business operating but, at the same time, help creditors by providing for payments, perhaps over time. See §§ 1123, 1129, 1141. The second possible outcome is conversion of the case to a Chapter 7 proceeding for liquidation of the business and a distribution of its remaining assets. §§ 1112(a), (b), 726. That conversion in effect confesses an inability to find a plan. The third possible outcome is dismissal of the Chapter 11 case. § 1112(b). A dismissal typically "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case"—in other words, it aims to return to the prepetition financial status quo. § 349(b)(3).

Nonetheless, recognizing that conditions may have changed in ways that make a perfect restoration of the status quo difficult or impossible, the Code permits the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a

> "hybrid dismissal and confirmation order . . . that . . . typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).

Although the Code does not expressly mention structured dismissals, they "appear to be increasingly common." *Ibid.*, n. 973.

2

The Code also sets forth a basic system of priority, which ordinarily determines the order in which the bankruptcy court will distribute assets of the estate. Secured creditors are highest on the priority list, for they must receive the proceeds of the collateral that secures their debts. 11 U. S. C. § 725. Special classes of creditors, such as those who hold certain claims for taxes or wages, come next in a listed order. §§ 507, 726(a)(1). Then come low-priority creditors, including general unsecured creditors. § 726(a)(2). The Code places equity holders at the bottom of the priority list. They receive nothing until all previously listed creditors have been paid in full. § 726(a)(6).

The Code makes clear that distributions of assets in a Chapter 7 liquidation must follow this prescribed order. §§ 725, 726. It provides somewhat more flexibility for distributions pursuant to Chapter 11 plans, which may impose a different ordering with the consent of the affected parties. But a bankruptcy court cannot confirm a plan that contains priority-violating distributions over the objection of an impaired creditor class. §§ 1129(a)(7), (b)(2).

The question here concerns the interplay between the Code's priority rules and a Chapter 11 dismissal. Here, the Bankruptcy Court neither liquidated the debtor under Chapter 7 nor confirmed a Chapter 11 plan. But the court, instead of reverting to the prebankruptcy status quo, ordered a distribution of the estate assets to creditors by attaching conditions to the dismissal (*i. e.*, it ordered a structured dismissal). The Code does not explicitly state what priority rules—if any—apply to a distribution in these circumstances. May a court consequently provide for distributions that deviate from the ordinary priority rules that would apply to a Chapter 7 liquidation or a Chapter 11 plan? Can it approve conditions that give estate assets to members of a lower pri-

ority class while skipping objecting members of a higher priority class?

B

In 2006, Sun Capital Partners, a private equity firm, acquired Jevic Transportation Corporation with money borrowed from CIT Group in a "leveraged buyout." In a leveraged buyout, the buyer (B) typically borrows from a third party (T) a large share of the funds needed to purchase a company (C). B then pays the money to C's shareholders. Having bought the stock, B owns C. B then pledges C's assets to T so that T will have security for its loan. Thus, if the selling price for C is $50 million, B might use $10 million of its own money, borrow $40 million from T, pay $50 million to C's shareholders, and then pledge C assets worth $40 million (or more) to T as security for T's $40 million loan. If B manages C well, it might make enough money to pay T back the $40 million and earn a handsome profit on its own $10 million investment. But, if the deal sours and C descends into bankruptcy, beware of what might happen: Instead of C's $40 million in assets being distributed to its existing creditors, the money will go to T to pay back T's loan—the loan that allowed B to buy C. (T will receive what remains of C's assets because T is now a secured creditor, putting it at the top of the priority list). Since C's shareholders receive money while C's creditors lose their claim to C's remaining assets, unsuccessful leveraged buyouts often lead to fraudulent-conveyance suits alleging that the purchaser (B) transferred the company's assets without receiving fair value in return. See Lipson & Vandermeuse, *Stern*, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts, 2013 Wis. L. Rev. 1161, 1220–1221.

This is precisely what happened here. Just two years after Sun's buyout, Jevic (C in our leveraged buyout example) filed for Chapter 11 bankruptcy. At the time of filing, it owed $53 million to senior secured creditors Sun and CIT

(B and T in our example), and over $20 million to tax and general unsecured creditors.

The circumstances surrounding Jevic's bankruptcy led to two lawsuits. First, petitioners, a group of former Jevic truckdrivers, filed suit in Bankruptcy Court against Jevic and Sun. Petitioners pointed out that, just before entering bankruptcy, Jevic had halted almost all its operations and had told petitioners that they would be fired. Petitioners claimed that Jevic and Sun had thereby violated state and federal Worker Adjustment and Retraining Notification (WARN) Acts—laws that require a company to give workers at least 60 days' notice before their termination. See 29 U. S. C. § 2102; N. J. Stat. Ann. § 34:21–2 (West 2011). The Bankruptcy Court granted summary judgment for petitioners against Jevic, leaving them (and *this* is the point to remember) with a judgment that petitioners say is worth $12.4 million. See *In re Jevic Holding Corp.*, 496 B. R. 151 (Bkrtcy. Ct. Del. 2013). Some $8.3 million of that judgment counts as a priority wage claim under 11 U. S. C. § 507(a)(4), and is therefore entitled to payment ahead of general unsecured claims against the Jevic estate.

Petitioners' WARN suit against Sun continued throughout most of the litigation now before us. But eventually Sun prevailed on the ground that Sun was not the workers' employer at the relevant times. See *In re Jevic Holding Corp.*, 656 Fed. Appx. 617 (CA3 2016).

Second, the Bankruptcy Court authorized a committee representing Jevic's unsecured creditors to sue Sun and CIT. The Bankruptcy Court and the parties were aware that any proceeds from such a suit would belong not to the unsecured creditors, but to the bankruptcy estate. See §§ 541(a)(1), (6); *Official Comm. of Unsecured Creditors of Cybergenics Corp.* v. *Chinery*, 330 F. 3d 548, 552–553 (CA3 2003) (en banc) (holding that a creditor's committee can bring a derivative action on behalf of the estate). The committee alleged that Sun and CIT, in the course of their leveraged buyout, had "has-

tened Jevic's bankruptcy by saddling it with debts that it couldn't service." *In re Jevic Holding Corp.*, 787 F. 3d 173, 176 (CA3 2015). In 2011, the Bankruptcy Court held that the committee had adequately pleaded claims of preferential transfer under § 547 and of fraudulent transfer under § 548. *In re Jevic Holding Corp.*, 2011 WL 4345204 (Bkrtcy. Ct. Del., Sept. 15, 2011).

Sun, CIT, Jevic, and the committee then tried to negotiate a settlement of this "fraudulent-conveyance" lawsuit. By that point, the depleted Jevic estate's only remaining assets were the fraudulent-conveyance claim itself and $1.7 million in cash, which was subject to a lien held by Sun.

The parties reached a settlement agreement. It provided (1) that the Bankruptcy Court would dismiss the fraudulent-conveyance action with prejudice; (2) that CIT would deposit $2 million into an account earmarked to pay the committee's legal fees and administrative expenses; (3) that Sun would assign its lien on Jevic's remaining $1.7 million to a trust, which would pay taxes and administrative expenses and distribute the remainder on a pro rata basis to the low-priority general unsecured creditors, *but which would not distribute anything to petitioners* (who, by virtue of their WARN judgment, held an $8.3 million mid-level-priority wage claim against the estate); and (4) that Jevic's Chapter 11 bankruptcy would be dismissed.

Apparently Sun insisted on a distribution that would skip petitioners because petitioners' WARN suit against Sun was still pending and Sun did not want to help finance that litigation. See 787 F. 3d, at 177–178, n. 4 (Sun's counsel acknowledging before the Bankruptcy Court that "'Sun probably does care where the money goes because you can take judicial notice that there's a pending WARN action against Sun by the WARN plaintiffs. And if the money goes to the WARN plaintiffs, then you're funding someone who is suing you who otherwise doesn't have funds and is doing it on a contingent fee basis'"). The essential point is that, regard-

less of the reason, the proposed settlement called for a structured dismissal that provided for distributions that did not follow ordinary priority rules.

Sun, CIT, Jevic, and the committee asked the Bankruptcy Court to approve the settlement and dismiss the case. Petitioners and the U. S. Trustee objected, arguing that the settlement's distribution plan violated the Code's priority scheme because it skipped petitioners—who, by virtue of their WARN judgment, had mid-level priority claims against estate assets—and distributed estate money to low-priority general unsecured creditors.

The Bankruptcy Court agreed with petitioners that the settlement's distribution scheme failed to follow ordinary priority rules. App. to Pet. for Cert. 58a. But it held that this did not bar approval. *Ibid.* That, in the Bankruptcy Court's view, was because the proposed payouts would occur pursuant to a structured dismissal of a Chapter 11 petition rather than an approval of a Chapter 11 plan. *Ibid.* The court accordingly decided to grant the motion in light of the "dire circumstances" facing the estate and its creditors. *Id.*, at 57a. Specifically, the court predicted that without the settlement and dismissal, there was "no realistic prospect" of a meaningful distribution for anyone other than the secured creditors. *Id.*, at 58a. A confirmable Chapter 11 plan was unattainable. And there would be no funds to operate, investigate, or litigate were the case converted to a proceeding in Chapter 7. *Ibid.*

The District Court affirmed the Bankruptcy Court. It recognized that the settlement distribution violated ordinary priority rules. But those rules, it wrote, were "not a bar to the approval of the settlement as [the settlement] is not a reorganization plan." *In re Jevic Holding Corp.*, 2014 WL 268613, *3 (D Del., Jan. 24, 2014).

The Third Circuit affirmed the District Court by a vote of 2 to 1. 787 F. 3d, at 175; *id.*, at 186 (Scirica, J., concurring in part and dissenting in part). The majority held that

structured dismissals need not always respect priority. Congress, the court explained, had only "codified the absolute priority rule . . . in the specific context of plan confirmation." *Id.*, at 183. As a result, courts could, "in rare instances like this one, approve structured dismissals that do not strictly adhere to the Bankruptcy Code's priority scheme." *Id.*, at 180.

Petitioners (the workers with the WARN judgment) sought certiorari. We granted their petition.

II

Respondents initially argue that petitioners lack standing because they have suffered no injury, or at least no injury that will be remedied by a decision in their favor. See *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 338 (2016) (explaining that, for Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision"). Respondents concede that the structured dismissal approved by the Bankruptcy Court contained distribution conditions that skipped over petitioners, ensuring that petitioners received nothing on their multimillion-dollar WARN claim against the Jevic estate. But respondents still assert that petitioners suffered no loss.

The reason, respondents say, is that petitioners would have gotten nothing even if the Bankruptcy Court had never approved the structured dismissal in the first place, and will still get nothing if the structured dismissal is undone now. Reversal will eliminate the settlement of the committee's fraudulent-conveyance lawsuit, which was conditioned on the Bankruptcy Court's approval of the priority-violating structured dismissal. If the Bankruptcy Court cannot approve that dismissal, respondents contend, Sun and CIT will no longer agree to settle. Nor will petitioners ever be able to obtain a litigation recovery. Hence there will be no lawsuit

money to distribute. And in the absence of lawsuit money, Jevic's assets amount to about $1.7 million, all pledged to Sun, leaving nothing for anyone else, let alone petitioners. Thus, even if petitioners are right that the structured dismissal was impermissible, it cost them nothing. And a judicial decision in their favor will gain them nothing. No loss. No redress.

This argument, however, rests upon respondents' claims that (1) without a violation of ordinary priority rules, there will be no settlement, and (2) without a settlement, the fraudulent-conveyance lawsuit has no value. In our view, the record does not support either of these propositions.

As to the first, the record indicates that a settlement that respects ordinary priorities remains a reasonable possibility. It makes clear (as counsel made clear before our Court, see Tr. of Oral Arg. 58) that Sun insisted upon a settlement that gave petitioners nothing only because it did not want to help fund petitioners' WARN lawsuit against it. See 787 F. 3d, at 177–178, n. 4. But Sun has now won that lawsuit. See 656 Fed. Appx. 617. If Sun's given reason for opposing distributions to petitioners has disappeared, why would Sun not settle while permitting some of the settlement money to go to petitioners?

As to the second, the record indicates that the fraudulent-conveyance claim could have litigation value. CIT and Sun, after all, settled the lawsuit for $3.7 million, which would make little sense if the action truly had no chance of success. The Bankruptcy Court could convert the case to Chapter 7, allowing a Chapter 7 trustee to pursue the suit against Sun and CIT. Or the court could simply dismiss the Chapter 11 bankruptcy, thereby allowing petitioners to assert the fraudulent-conveyance claim themselves. Given these possibilities, there is no reason to believe that the claim could not be pursued with counsel obtained on a contingency basis. Of course, the lawsuit—like any lawsuit—*might* prove fruitless, but the mere *possibility* of failure does not eliminate

the value of the claim or petitioners' injury in being unable to bring it.

Consequently, the Bankruptcy Court's approval of the structured dismissal cost petitioners something. They lost a chance to obtain a settlement that respected their priority. Or, if not that, they lost the power to bring their own lawsuit on a claim that had a settlement value of $3.7 million. For standing purposes, a loss of even a small amount of money is ordinarily an "injury." See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 430–431 (1961) (finding that appellants fined $5 plus costs had standing to assert an Establishment Clause challenge). And the ruling before us could well have cost petitioners considerably more. See *Clinton* v. *City of New York*, 524 U. S. 417, 430–431 (1998) (imposition of a "substantial contingent liability" qualifies as an injury). A decision in petitioners' favor is likely to redress that loss. We accordingly conclude that petitioners have standing.

III

We turn to the basic question presented: Can a bankruptcy court approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent? Our simple answer to this complicated question is "no."

The Code's priority system constitutes a basic underpinning of business bankruptcy law. Distributions of estate assets at the termination of a business bankruptcy normally take place through a Chapter 7 liquidation or a Chapter 11 plan, and both are governed by priority. In Chapter 7 liquidations, priority is an absolute command—lower-priority creditors cannot receive anything until higher-priority creditors have been paid in full. See 11 U. S. C. §§ 725, 726. Chapter 11 plans provide somewhat more flexibility, but a priority-violating plan still cannot be confirmed over the objection of an impaired class of creditors. See § 1129(b).

The priority system applicable to those distributions has long been considered fundamental to the Bankruptcy Code's operation. See H. R. Rep. No. 103–835, p. 33 (1994) (explaining that the Code is "designed to enforce a distribution of the debtor's assets in an orderly manner . . . in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor"); Roe & Tung, Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain, 99 Va. L. Rev. 1235, 1243, 1236 (2013) (arguing that the first principle of bankruptcy is that "distribution conforms to predetermined statutory and contractual priorities," and that priority is, "quite appropriately, bankruptcy's most important and famous rule"); Markell, Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations, 44 Stan. L. Rev. 69, 123 (1991) (stating that a fixed priority scheme is recognized as "the cornerstone of reorganization practice and theory").

The importance of the priority system leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes"). Put somewhat more directly, we would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans.

We can find nothing in the statute that evinces this intent. The Code gives a bankruptcy court the power to "dismiss" a Chapter 11 case. § 1112(b). But the word "dismiss" itself says nothing about the power to make nonconsensual priority-violating distributions of estate value. Neither the word "structured," nor the word "conditions," nor anything else about distributing estate value to creditors pursuant to a dismissal appears in any relevant part of the Code.

Insofar as the dismissal sections of Chapter 11 foresee any transfer of assets, they seek a restoration of the prepetition financial status quo. See § 349(b)(1) (dismissal ordinarily reinstates a variety of avoided transfers and voided liens); § 349(b)(2) (dismissal ordinarily vacates certain types of bankruptcy orders); § 349(b)(3) (dismissal ordinarily "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case"); see also H. R. Rep. No. 95–595, p. 338 (1977) (dismissal's "basic purpose . . . is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case").

Section 349(b), we concede, also says that a bankruptcy judge may, "for cause, orde[r] otherwise." But, read in context, this provision appears designed to give courts the flexibility to "make the appropriate orders to protect rights acquired in reliance on the bankruptcy case." *Id.*, at 338; cf., *e. g.*, *Wiese* v. *Community Bank of Central Wis.*, 552 F. 3d 584, 590 (CA7 2009) (upholding, under § 349(b), a Bankruptcy Court's decision not to reinstate a debtor's claim against a bank that gave up a lien in reliance on the claim being released in the debtor's reorganization plan). Nothing else in the Code authorizes a court ordering a dismissal to make general end-of-case distributions of estate assets to creditors of the kind that normally take place in a Chapter 7 liquidation or Chapter 11 plan—let alone final distributions that do not help to restore the *status quo ante* or protect reliance interests acquired in the bankruptcy, and that would be flatly impermissible in a Chapter 7 liquidation or a Chapter 11 plan because they violate priority without the impaired creditors' consent. That being so, the word "cause" is too weak a reed upon which to rest so weighty a power. See *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988) (noting that "[s]tatutory construction . . . is a holistic endeavor" and that a court should select

a "meanin[g that] produces a substantive effect that is compatible with the rest of the law"); *Kelly* v. *Robinson*, 479 U. S. 36, 43 (1986) (in interpreting a statute, a court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" (internal quotation marks omitted)); cf. *In re Sadler*, 935 F. 2d 918, 921 (CA7 1991) (" 'Cause' under § 349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason").

We have found no contrary precedent, either from this Court, or, for that matter, from lower court decisions reflecting common bankruptcy practice. The Third Circuit referred briefly to *In re Buffet Partners, L. P.*, 2014 WL 3735804 (Bkrtcy. Ct. ND Tex., July 28, 2014). The court in that case approved a structured dismissal. (We express no view about the legality of structured dismissals in general.) But at the same time it pointed out "that not one party with an economic stake in the case has objected to the dismissal in this manner." *Id.*, at *4.

The Third Circuit also relied upon *In re Iridium Operating LLC*, 478 F. 3d 452 (CA2 2007). But *Iridium* did not involve a structured dismissal. It addressed an *interim* distribution of settlement proceeds to fund a litigation trust that would press claims on the estate's behalf. See *id.*, at 459–460. The *Iridium* court observed that, when evaluating this type of preplan settlement, "[i]t is difficult to employ the rule of priorities" because "the nature and extent of the Estate and the claims against it are *not yet fully resolved*." *Id.*, at 464 (emphasis added). The decision does not state or suggest that the Code authorizes nonconsensual departures from ordinary priority rules in the context of a dismissal—which is a *final* distribution of estate value—and in the absence of any further unresolved bankruptcy issues.

We recognize that *Iridium* is not the only case in which a court has approved interim distributions that violate ordinary priority rules. But in such instances one can generally

find significant Code-related objectives that the priority-violating distributions serve. Courts, for example, have approved "first-day" wage orders that allow payment of employees' prepetition wages, "critical vendor" orders that allow payment of essential suppliers' prepetition invoices, and "roll-ups" that allow lenders who continue financing the debtor to be paid first on their prepetition claims. See *Cybergenics*, 330 F. 3d, at 574, n. 8; D. Baird, Elements of Bankruptcy 232–234 (6th ed. 2014); Roe, 99 Va. L. Rev., at 1250–1264. In doing so, these courts have usually found that the distributions at issue would "enable a successful reorganization and make even the disfavored creditors better off." *In re Kmart Corp.*, 359 F. 3d 866, 872 (CA7 2004) (discussing the justifications for critical-vendor orders); see also *Toibb* v. *Radloff*, 501 U. S. 157, 163–164 (1991) (recognizing "permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses" and "maximizing the value of the bankruptcy estate" as purposes of the Code). By way of contrast, in a structured dismissal like the one ordered below, the priority-violating distribution is attached to a final disposition; it does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable plan; it does not help to restore the *status quo ante*; and it does not protect reliance interests. In short, we cannot find in the violation of ordinary priority rules that occurred here any significant offsetting bankruptcy-related justification.

Rather, the distributions at issue here more closely resemble proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards. See, *e. g.*, *In re Braniff Airways, Inc.*, 700 F. 2d 935, 940 (CA5 1983) (prohibiting an attempt to "short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets"); *In re Lionel*

Corp., 722 F. 2d 1063, 1069 (CA2 1983) (reversing a Bankruptcy Court's approval of an asset sale after holding that § 363 does not "gran[t] the bankruptcy judge *carte blanche*" or "swallo[w] up Chapter 11's safeguards"); *In re Biolitec, Inc.*, 528 B. R. 261, 269 (Bkrtcy. Ct. NJ 2014) (rejecting a structured dismissal because it "seeks to alter parties' rights without their consent and lacks many of the Code's most important safeguards"); cf. *In re Chrysler LLC*, 576 F. 3d 108, 118 (CA2 2009) (approving a § 363 asset sale because the Bankruptcy Court demonstrated "proper solicitude for the priority between creditors and deemed it essential that the [s]ale in no way upset that priority"), vacated as moot, 592 F. 3d 370 (CA2 2010) (*per curiam*).

IV

We recognize that the Third Circuit did not approve nonconsensual priority-violating structured dismissals in general. To the contrary, the court held that they were permissible only in those "rare case[s]" in which courts could find "sufficient reasons" to disregard priority. 787 F. 3d, at 175, 186. Despite the "rare case" limitation, we still cannot agree.

For one thing, it is difficult to give precise content to the concept "sufficient reasons." That fact threatens to turn a "rare case" exception into a more general rule. Consider the present case. The Bankruptcy Court feared that (1) without the worker-skipping distribution, there would be no settlement, (2) without a settlement, all the unsecured creditors would receive nothing, and consequently (3) its distributions would make some creditors (high- and low-priority creditors) better off without making other (mid-priority) creditors worse off (for they would receive nothing regardless). But, as we have pointed out, the record provides equivocal support for the first two propositions. See *supra*, at 462–464. And one can readily imagine other cases that turn on comparably dubious predictions. The result is uncer-

tainty. And uncertainty will lead to similar claims being made in many, not just a few, cases. See Rudzik, A Priority Is a Priority Is a Priority—Except When It Isn't, 34 Am. Bkrtcy. Inst. J. 16, 79 (2015) ("[O]nce the floodgates are opened, debtors and favored creditors can be expected to make every case that 'rare case' ").

The consequences are potentially serious. They include departure from the protections Congress granted particular classes of creditors. See, *e. g.*, *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 32 (1959) (Congress established employee wage priority "to alleviate in some degree the hardship that unemployment usually brings to workers and their families" when an employer files for bankruptcy); H. R. Rep. No. 95–595, at 187 (explaining the importance of ensuring that employees do not "abandon a failing business for fear of not being paid"). They include changes in the bargaining power of different classes of creditors even in bankruptcies that do not end in structured dismissals. See Warren, A Theory of Absolute Priority, 1991 Ann. Survey Am. L. 9, 30. They include risks of collusion, *i. e.*, senior secured creditors and general unsecured creditors teaming up to squeeze out priority unsecured creditors. See *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership*, 526 U. S. 434, 444 (1999) (discussing how the absolute priority rule was developed in response to "concern with 'the ability of a few insiders, whether representatives of management or major creditors, to use the reorganization process to gain an unfair advantage' " (quoting H. R. Doc. No. 93–137, pt. I, p. 255 (1973))). And they include making settlement more difficult to achieve. See Landes & Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J. Law & Econ. 249, 271 (1976) (arguing that "the ratio of lawsuits to settlements is mainly a function of the amount of uncertainty, which leads to divergent estimates by the parties of the probable outcome"); see also *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639,

649 (2012) (noting the importance of clarity and predictability in light of the fact that the "Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law").

For these reasons, as well as those set forth in Part III, we conclude that Congress did not authorize a "rare case" exception. We cannot "alter the balance struck by the statute," *Law* v. *Siegel*, 571 U. S. 415, 427 (2014), not even in "rare cases." Cf. *Norwest Bank Worthington* v. *Ahlers*, 485 U. S. 197, 207 (1988) (explaining that courts cannot deviate from the procedures "specified by the Code," even when they sincerely "believ[e] that . . . creditors would be better off"). 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 THOMAS, with whom JUSTICE ALITO joins, dissenting.

Today, the Court answers a novel and important question of bankruptcy law. Unfortunately, it does so without the benefit of any reasoned opinions on the dispositive issue from the courts of appeals (apart from the Court of Appeals' opinion in this case) and with briefing on that issue from only one of the parties. That is because, having persuaded us to grant certiorari on one question, petitioners chose to argue a different question on the merits. In light of that switch, I would dismiss the writ of certiorari as improvidently granted.

We granted certiorari to decide "[w]hether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme." Pet. for Cert. i. According to petitioners, the decision below "deepened an existing . . . split" among the Courts of Appeals on this question. *Id.*, at 8; see *id.*, at 15–16 (citing *In re AWECO, Inc.*, 725 F. 2d 293, 298 (CA5 1984), and *In re Iridium Operating LLC*, 478 F. 3d 452, 464 (CA2 2007)). After

we granted certiorari, however, petitioners recast the question presented to ask "[w]hether a Chapter 11 case may be terminated by a 'structured dismissal' that distributes estate property in violation of the Bankruptcy Code's priority scheme." Brief for Petitioners i. Although both questions involve priority-skipping distributions of estate assets, the recast question is narrower—and different—than the one on which we granted certiorari. It is also not the subject of a circuit conflict.

I think it is unwise for the Court to decide the reformulated question today, for two reasons. First, it is a "novel question of bankruptcy law" arising in the rapidly developing field of structured dismissals. *In re Jevic Holding Corp.*, 787 F. 3d 173, 175 (CA3 2015). Experience shows that we would greatly benefit from the views of additional courts of appeals on this question. We also would have benefited from full, adversarial briefing. In reliance on this Court's Rules prohibiting parties from changing the substance of the question presented, see Rule 24.1(a); see also Rule 14.1(a), respondents declined to brief the question that the majority now decides, see Brief for Respondents 52. Second, deciding this question may invite future petitioners to seek review of a circuit conflict only then to change the question to one that seems more favorable. "I would not reward such bait-and-switch tactics." *City and County of San Francisco* v. *Sheehan*, 575 U. S. 600, 620 (2015) (Scalia, J., concurring in part and dissenting in part); see also *Visa, Inc.* v. *Osborn*, *post*, p. 993.

Accordingly, I would dismiss the writ as improvidently granted. I respectfully dissent.

Reporter's Note

Orders commencing with March 6, 2017, begin with page 1168. The preceding orders in 580 U. S., from October 3, 2016, through February 28, 2017, were reported in Part 1, at 801–1168. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

FEBRUARY 28, 2017

Miscellaneous Order

No. 16–605. TOWN OF CHESTER, NEW YORK *v.* LAROE ESTATES, INC. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1089.] Motion of Nancy Sherman, Executrix, to be added as respondent and for leave to participate in oral argument denied.

MARCH 6, 2017

Certiorari Granted—Vacated and Remanded. (See No. 16–6316, *ante*, p. 285.)

Vacated and Remanded After Certiorari Granted

No. 16–273. GLOUCESTER COUNTY SCHOOL BOARD *v.* G. G., BY HIS NEXT FRIEND AND MOTHER, GRIMM. C. A. 4th Cir. [Certiorari granted, *ante*, p. 951.] Judgment vacated, and case remanded for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.

Certiorari Dismissed

No. 16–7404. MODRALL *v.* FREY ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 672 Fed. Appx. 34.

No. 16–7803. LAI *v.* BELL, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Miscellaneous Orders

No. D–2917. IN RE DISBARMENT OF BRODER. Disbarment entered. [For earlier order herein, see 579 U. S. 962.]

No. D–2919. IN RE BRONSNICK. Warren Jay Bronsnick, of Short Hills, N. J., having requested to resign as a member of the

Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on August 8, 2016, [579 U. S. 963] is discharged.

No. D–2921. IN RE DISBARMENT OF GAHWYLER. Disbarment entered. [For earlier order herein, see 579 U. S. 963.]

No. D–2922. IN RE DISBARMENT OF CULBREATH. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–2923. IN RE DISBARMENT OF HUBBARD. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–2925. IN RE DISBARMENT OF LAMBAJIAN. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–2926. IN RE DISBARMENT OF LUCID. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–2927. IN RE DISBARMENT OF RHOADS. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–2928. IN RE DISBARMENT OF LERCH. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–2929. IN RE DISBARMENT OF CARAMADRE. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. D–2930. IN RE DISBARMENT OF GOLDMAN. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. D–2931. IN RE DISBARMENT OF NACHAMIE. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. D–2932. IN RE DISBARMENT OF VESNAVER. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. D–2933. IN RE DISBARMENT OF DIGGS. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. D–2934. IN RE DISBARMENT OF FUSILIER. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. 16M88. STEVENSON *v.* HALL; and

No. 16M90. PILCHESKY *v.* WELLS FARGO BANK, N. A., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 16M89. MELVIN *v.* NAYLOR ET AL. Motion for leave to proceed as a veteran denied.

No. 15–1031. HOWELL *v.* HOWELL. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 1017.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 15–1189. IMPRESSION PRODUCTS, INC. *v.* LEXMARK INTERNATIONAL, INC. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 1017.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted in part, and the time is to be divided as follows: 25 minutes for petitioner, 10 minutes for the Acting Solicitor General, and 30 minutes for respondent.

No. 16–254. WATER SPLASH, INC. *v.* MENON. Ct. App. Tex., 14th Dist. [Certiorari granted, *ante*, p. 1017.] Motion of petitioner Water Splash, Inc., for divided argument denied. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–369. COUNTY OF LOS ANGELES, CALIFORNIA, ET AL. *v.* MENDEZ ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1017.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–5294. MCWILLIAMS *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1090.] Motion of petitioner for appointment of counsel granted, and Stephen B. Bright, Esq., of Atlanta, Ga., is appointed to serve as counsel for petitioner in this case.

No. 16–6387. LOOMIS *v.* WISCONSIN. Sup. Ct. Wis. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 16–6461. PIANKA *v.* ARIZONA. Ct. App. Ariz. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1028] denied.

No. 16–6495. CLARK *v.* DEPARTMENT OF EDUCATION ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1042] denied.

No. 16–6741. ASPELMEIER *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1043] denied.

No. 16–6846. WALKER *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1046] denied.

No. 16–7386. CHANG *v.* DELAWARE. Sup. Ct. Del.; and
No. 16–7472. NURRIDDIN *v.* BOLDEN, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION. C. A. D. C. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 27, 2017, 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. 16–7878. IN RE MITCHELL; and
No. 16–7886. IN RE ROBINSON. Petitions for writs of habeas corpus denied.

No. 16–7391. IN RE TAYLOR. Petition for writ of mandamus denied.

Certiorari Denied

No. 16–508. VILOSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 3d 104.

No. 16–531. AMEREN SERVICES CO., AS AGENT FOR UNION ELECTRIC CO., ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 819 F. 3d 329.

No. 16–564. DARIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 16–692. INDIAN INSTITUTE OF TECHNOLOGY, KHARAGPUR *v.* FARHANG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 655 Fed. Appx. 569.

No. 16–709. DANIELS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 832 F. 3d 1049.

No. 16–725. JEDA Capital-56, LLC *v.* Village of Potsdam, New York. C. A. 2d Cir. Certiorari denied. Reported below: 661 Fed. Appx. 20.

No. 16–816. Hamilton *v.* Murray et al. C. A. 4th Cir. Certiorari denied. Reported below: 648 Fed. Appx. 344.

No. 16–831. Woldeselassie *v.* American Eagle Airlines, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 647 Fed. Appx. 21.

No. 16–836. Feldt *v.* Heritage Homes of Nebraska, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 655 Fed. Appx. 669.

No. 16–854. McKinney *v.* Kelly, Secretary of Homeland Security. C. A. 7th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 314.

No. 16–862. Regency Heritage Nursing and Rehabilitation Center *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. Reported below: 657 Fed. Appx. 129.

No. 16–878. McKay *v.* Federspiel et al. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 3d 862.

No. 16–885. Brothers, as Independent Executor of the Estate of Sullivan, et al. *v.* Zoss et al. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 3d 513.

No. 16–890. TDE Petroleum Data Solutions, Inc. *v.* AKM Enterprise, Inc., dba Moblize, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 657 Fed. Appx. 991.

No. 16–891. Bell et al. *v.* City of Chicago, Illinois. C. A. 7th Cir. Certiorari denied. Reported below: 835 F. 3d 736.

No. 16–895. Vosse *v.* City of New York, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 666 Fed. Appx. 11.

No. 16–899. Myr *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 663 Fed. Appx. 433.

No. 16–909. M2 Software, Inc. *v.* M2 Technology, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 657 Fed. Appx. 318.

No. 16–941. SNIDER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–959. FINANCIAL EDUCATION SERVICES, INC. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 336 Ga. App. 606, 785 S. E. 2d 544.

No. 16–960. WU ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 835 F. 3d 711.

No. 16–963. TITO *v.* MATTIS, SECRETARY OF DEFENSE. C. A. 4th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 27.

No. 16–968. MEIDINGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 774.

No. 16–6313. PETERSON *v.* KLEE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 655 Fed. Appx. 327.

No. 16–6872. VALDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 559.

No. 16–6953. HOWELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 16–6989. FOX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 650 Fed. Appx. 734.

No. 16–6995. WILLIS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 496 S. W. 3d 653.

No. 16–7032. YOUNG *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 3d 520.

No. 16–7080. TYREE *v.* CHAO, SECRETARY OF TRANSPORTATION. C. A. 1st Cir. Certiorari denied. Reported below: 835 F. 3d 35.

No. 16–7110. HARROD *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 16–7392. ROMERO-LUNA *v.* MADDEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7394. SMITH *v.* DICKHAUT, SUPERINTENDENT, SOUZA BARANOWSKI CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 836 F. 3d 97.

No. 16–7399. RODRIGUEZ *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7400. TAYLOR *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES ET AL. Ct. App. D. C. Certiorari denied. Reported below: 152 A. 3d 150.

No. 16–7402. SHEPARD *v.* MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES. Sup. Ct. Mich. Certiorari denied. Reported below: 499 Mich. 915, 877 N. W. 2d 726.

No. 16–7405. STOUFFER *v.* ROYAL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 825 F. 3d 1167.

No. 16–7408. STEELE *v.* HARRINGTON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7411. CLARK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 133643–U.

No. 16–7413. CLARK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 63 Cal. 4th 522, 372 P. 3d 811.

No. 16–7414. DAKER *v.* BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 3d 1278.

No. 16–7418. TAYLOR *v.* UNITED STATES; and
No. 16–7624. COLLIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 652 Fed. Appx. 902.

No. 16–7419. GUNCHES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 240 Ariz. 198, 377 P. 3d 993.

No. 16–7424. ANDERSON *v.* KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 16–7431. HICKSON *v.* DELBAISO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–7451. HILL *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied.

No. 16–7458. DORR *v.* MICHIGAN ET AL. Ct. App. Mich. Certiorari denied.

No. 16–7465. WILLIAMS *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–7479. LAND *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 198 So. 3d 388.

No. 16–7498. WEISCHMAN *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 194.

No. 16–7516. JIMENEZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 196 So. 3d 499.

No. 16–7525. JONES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 229 Md. App. 726.

No. 16–7530. MOAT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 208 So. 3d 709.

No. 16–7551. NAVARETTE-DURAN *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 16–7552. CANERDY *v.* MONTGOMERY. Ct. App. Miss. Certiorari denied. Reported below: 202 So. 3d 627.

No. 16–7565. WANLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 657 Fed. Appx. 631.

No. 16–7620. WATTS *v.* GRIFFIN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 16–7626. HEFFERNAN *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Sup. Ct. Ark. Certiorari denied. Reported below: 2016 Ark. 369, 501 S. W. 3d 372.

No. 16–7650. KNORR *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 672 Fed. Appx. 5.

No. 16–7655. MANZANO *v.* MONTGOMERY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 864.

No. 16–7660. DECKER *v.* PERSSON, SUPERINTENDENT, COFFEE CREEK CORRECTIONAL FACILITY. C. A. 9th Cir. Certiorari denied. Reported below: 663 Fed. Appx. 520.

No. 16–7711. MUNOZ *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 651 Fed. Appx. 633.

No. 16–7718. REDD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 16–7729. WATKINS *v.* BAUM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 651 Fed. Appx. 652.

No. 16–7731. DAVIS *v.* WALMART STORES EAST, L. P., ET AL. C. A. 5th Cir. Certiorari denied.

No. 16–7733. SPEIGHT-BEY *v.* SAAD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 77.

No. 16–7743. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 653 Fed. Appx. 209.

No. 16–7747. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 686.

No. 16–7758. COLTON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 16–7761. DOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 656 Fed. Appx. 384.

No. 16–7764. BENSON *v.* TAYLOR, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 929.

No. 16–7766. HERNANDEZ OLGIN *v.* UNITED STATES; and
No. 16–7805. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 3d 339.

No. 16–7769. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 663 Fed. Appx. 727.

No. 16–7772. MARTINEZ RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 3d 578.

No. 16–7774. CRAIG ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 3d 1207 and 659 Fed. Appx. 908.

No. 16–7778. ROYSTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–7787. HAYMER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 335 Ga. App. XXIII.

No. 16–7788. MARCANTONI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 668.

No. 16–7789. KOFALT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 668 Fed. Appx. 426.

No. 16–7793. JAVIER ESTRADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 16–7795. BOHN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 658 Fed. Appx. 554.

No. 16–7799. MOREFIELD *v.* TICE, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–7808. CARTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 655 Fed. Appx. 179.

No. 16–7813. PORCAYO-CARBAJAL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 468.

No. 16–7823. ALDERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 934.

No. 16–7824. BAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 211.

No. 16–7826. DUREN *v.* HOME PROPERTIES COVE TOWNHOMES, LLC, ET AL. Ct. App. Md. Certiorari denied.

No. 16–7827. LOCKWOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 3d 896.

No. 16–7828. MARTINEZ-VEGA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 826 F. 3d 514.

No. 16–7829. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 658 Fed. Appx. 832.

No. 16–7834. CARDONA-VICENTY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 842 F. 3d 766.

No. 16–7844. ZARECK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 662 Fed. Appx. 110.

No. 16–7845. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 426.

No. 16–122. LEONARD *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

This petition asks an important question: whether modern civil-forfeiture statutes can be squared with the Due Process Clause and our Nation's history.

I

Early in the morning on April 1, 2013, a police officer stopped James Leonard for a traffic infraction along a known drug corridor. During a search of the vehicle, the officer found a safe in the trunk. Leonard and his passenger, Nicosa Kane, gave conflicting stories about the contents of the safe, with Leonard at one point indicating that it belonged to his mother, who is the petitioner here. The officer obtained a search warrant and discovered that the safe contained $201,100 and a bill of sale for a Pennsylvania home.

The State initiated civil-forfeiture proceedings against the $201,100 on the ground that it was substantially connected to criminal activity, namely, narcotics sales. See Tex. Code Crim. Proc. Ann., Art. 59.01 (Vernon Cum. Supp. 2016). The trial court issued a forfeiture order, and petitioner appealed. Citing the suspicious circumstances of the stop and the contradictory stories provided by Leonard and Kane, the Court of Appeals affirmed the trial court's conclusion that the government had shown by a preponderance of the evidence that the money was either the proceeds of a drug sale or intended to be used in such a sale. It also affirmed the trial court's rejection of petitioner's innocent-owner defense. Petitioner had asserted that the money was not related to a drug sale at all, but was instead from a home she had

recently sold in Pennsylvania. The court deemed this testimony insufficient to establish that she was in fact an innocent owner.

Petitioner now challenges the constitutionality of the procedures used to adjudicate the seizure of her property. In particular, she argues that the Due Process Clause required the State to carry its burden by clear and convincing evidence rather than by a preponderance of the evidence.

II

Modern civil-forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes. See, *e. g.*, *Austin* v. *United States*, 509 U. S. 602, 618–619 (1993). When a State wishes to punish one of its citizens, it ordinarily proceeds against the defendant personally (known as *in personam*), and in many cases it must provide the defendant with full criminal procedural protections. Nevertheless, for reasons discussed below, this Court permits prosecutors seeking forfeiture to proceed against the property (known as *in rem*) and to do so civilly. See, *e. g.*, *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 56–57 (1993). *In rem* proceedings often enable the government to seize the property without any predeprivation judicial process and to obtain forfeiture of the property even when the owner is personally innocent (though some statutes, including the one here, provide for an innocent-owner defense). Civil proceedings often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof.

Partially as a result of this distinct legal regime, civil forfeiture has in recent decades become widespread and highly profitable. See, *e. g.*, Institute for Justice, D. Carpenter, L. Knepper, A. Erickson, & J. McDonald, Policing for Profit: The Abuse of Civil Asset Forfeiture 10 (2d ed. Nov. 2015) (Department of Justice Assets Forfeiture Fund took in $4.5 billion in 2014 alone), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf (as last visited Feb. 27, 2017). And because the law enforcement entity responsible for seizing the property often keeps it, these entities have strong incentives to pursue forfeiture. *Id.*, at 14 (noting that the Federal Government and many States permit 100 percent of forfeiture proceeds to flow directly to law enforcement); see also App. to Pet. for Cert. B–2 (directing that the money in this case be divided between the "Cleveland Police

Department" and the "Liberty County District Attorney's Office").

This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses. According to one nationally publicized report, for example, police in the town of Tenaha, Texas, regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights. Stillman, Taken, The New Yorker, Aug. 12 & 19, 2013, pp. 54–56. In one case, local officials threatened to file unsubstantiated felony charges against a Latino driver and his girlfriend and to place their children in foster care unless they signed a waiver. *Id.*, at 49. In another, they seized a black plant worker's car and all his property (including cash he planned to use for dental work), jailed him for a night, forced him to sign away his property, and then released him on the side of the road without a phone or money. *Id.*, at 51. He was forced to walk to a Walmart, where he borrowed a stranger's phone to call his mother, who had to rent a car to pick him up. *Ibid.*

These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. *Id.*, at 53–54; Sallah, O'Harrow, & Rich, Stop and Seize, Washington Post, Sept. 7, 2014, pp. A1, A10. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.

III

The Court has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding. See, *e. g.*, *Bennis* v. *Michigan*, 516 U. S. 442, 446–448 (1996). "'English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws.'" *Austin*, *supra*, at 612 (quoting *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 682 (1974)). This practice "took hold in the United States," where the "First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture." 509 U. S., at 613.

Other early statutes also provided for the forfeiture of pirate ships. *United States* v. *Parcel of Rumson, N. J., Land*, 507 U. S. 111, 119 (1993) (plurality opinion). These early statutes permitted the government to proceed *in rem* under the fiction that the thing itself, rather than the owner, was guilty of the crime. See *Calero-Toledo*, *supra*, at 684–685; Act of Aug. 4, 1790, § 67, 1 Stat. 176–177. And, because these suits were *in rem* rather than *in personam*, they typically proceeded civilly rather than criminally. See *United States* v. *La Vengeance*, 3 Dall. 297, 301 (1796).

In the absence of this historical practice, the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation. See *Bennis*, *supra*, at 454 (THOMAS, J., concurring) ("One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process"). I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice, for two reasons.

First, historical forfeiture laws were narrower in most respects than modern ones. Cf. *James Daniel Good*, *supra*, at 85 (THOMAS, J., concurring in part and dissenting in part) (noting that "ambitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture"). Most obviously, they were limited to a few specific subject matters, such as customs and piracy. Proceeding *in rem* in those cases was often justified by necessity, because the party responsible for the crime was frequently located overseas and thus beyond the personal jurisdiction of United States courts. See Herpel, Toward a Constitutional Kleptocracy: Civil Forfeiture in America, 96 Mich. L. Rev. 1910, 1918–1920 (1998); see also *id.*, at 1925–1926 (arguing that founding-era precedents do not support the use of forfeiture against purely domestic offenses where the owner is plainly within the personal jurisdiction of both state and federal courts). These laws were also narrower with respect to the type of property they encompassed. For example, they typically covered only the instrumentalities of the crime (such as the vessel used to transport the goods), not the derivative proceeds of the crime (such as property purchased with money from the sale of the illegal goods). See *Rumson*, *supra*, at 121–122,

125 (plurality opinion) (Forfeiture of criminal proceeds is a modern innovation).

Second, it is unclear whether courts historically permitted forfeiture actions to proceed civilly in all respects. Some of this Court's early cases suggested that forfeiture actions were in the nature of criminal proceedings. See, *e. g.*, *Boyd* v. *United States*, 116 U. S. 616, 633–634 (1886) ("We are . . . clearly of [the] opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal"); but see R. Waples, Proceedings *In Rem* 29–30 (1882) (collecting contrary authorities). Whether forfeiture is characterized as civil or criminal carries important implications for a variety of procedural protections, including the right to a jury trial and the proper standard of proof. Indeed, as relevant in this case, there is some evidence that the government was historically required to prove its case beyond a reasonable doubt. See *United States* v. *Brig Burdett*, 9 Pet. 682, 690 (1835) ("The object of the prosecution against the Burdett is to enforce a forfeiture of the vessel, and all that pertains to it, for a violation of a revenue law. This prosecution then is a highly penal one, and the penalty should not be inflicted, unless the infractions of the law shall be established beyond reasonable doubt").

IV

Unfortunately, petitioner raises her due process arguments for the first time in this Court. As a result, the Texas Court of Appeals lacked the opportunity to address them in the first instance. I therefore concur in the denial of certiorari. Whether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail.

No. 16–704. Soo Line Railroad Co., dba Canadian Pacific *v.* Werner Enterprises. C. A. 8th Cir. Certiorari denied. Justice Thomas took no part in the consideration or decision of this petition. Reported below: 825 F. 3d 413.

No. 16–5454. Baston *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 3d 651.

JUSTICE THOMAS, dissenting.

The Constitution, through the Foreign Commerce Clause, grants Congress authority to "regulate Commerce with foreign Nations." Art. I, § 8, cl. 3. Without guidance from this Court as to the proper scope of Congress' power under this Clause, the courts of appeals have construed it expansively, to permit Congress to regulate economic activity abroad if it has a substantial effect on this Nation's foreign commerce. In this case, the Court of Appeals declared constitutional a restitution award against a non-U. S. citizen based upon conduct that occurred in Australia. The facts are not sympathetic, but the principle involved is fundamental. We should grant certiorari and reaffirm that our Federal Government is one of limited and enumerated powers, not the world's lawgiver.

I

Petitioner Damion St. Patrick Baston is a citizen of Jamaica. He forced numerous women to prostitute for him through violence, threats, and humiliation. One of his victims, K. L., was a citizen of Australia. She prostituted for petitioner in Australia, the United States, and the United Arab Emirates before escaping from his control. While in the United States, petitioner was arrested and charged with the sex trafficking of K. L. by force, fraud, or coercion, 18 U. S. C. § 1591(a), "'in the Southern District of Florida, Australia, the United Arab Emirates, and elsewhere.'" 818 F. 3d 651, 658 (CA11 2016). As relevant here, § 1591(a)(1) states that the sex trafficking must "affec[t] interstate or foreign commerce." Congress has granted federal courts "extraterritorial jurisdiction" over sex trafficking if the "alleged offender is present in the United States, irrespective of the nationality of the alleged offender." § 1596(a)(2).

After a jury convicted petitioner, the District Court ordered him to pay K. L. $78,000 in restitution, which included the money she earned while prostituting for petitioner in the United States. See § 1593(b)(1) (requiring sentencing courts to order restitution in "the full amount of the victim's losses" for offenses under § 1591). But the court refused to include in the restitution award the $400,000 that K. L. earned while prostituting in Australia. In the court's view, the Foreign Commerce Clause did not permit an award of restitution based on petitioner's extraterritorial conduct. 818 F. 3d, at 657, 660.

The Court of Appeals vacated the order of restitution and remanded with instructions to increase the award by $400,000 to account for K. L.'s prostitution in Australia. The court reasoned that whatever the outer bounds of the Foreign Commerce Clause might be, this Court has suggested that it has at least the same scope as the Interstate Commerce Clause. Relying on our Interstate Commerce Clause precedents, the Court of Appeals concluded that the Foreign Commerce Clause grants Congress power to regulate "activities that have a 'substantial effect' on commerce between the United States and other countries," including sex trafficking overseas. *Id.*, at 668 (citing *Gonzales* v. *Raich*, 545 U. S. 1, 16–17 (2005)).

II

The Court of Appeals correctly noted that this Court has never "thoroughly explored the scope of the Foreign Commerce Clause." 818 F. 3d, at 667; accord, *e. g.*, Goodno, When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause, 65 Fla. L. Rev. 1139, 1148–1149 (2013) ("The U. S. Supreme Court has not yet articulated the extent of Congress's power under the Foreign Commerce Clause to enact laws with extraterritorial reach. Because of this lack of guidance . . . lower courts are at a loss for how to analyze Foreign Commerce Clause issues"). The few decisions from this Court addressing the scope of the Clause have generally been confined to laws regulating conduct with a significant connection to the United States. See, *e. g.*, *Board of Trustees of Univ. of Ill.* v. *United States*, 289 U. S. 48, 57 (1933) ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted"); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 290 (1904) ("[T]he power to regulate commerce with foreign nations . . . includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States"). This Court has also articulated limits on the power of the States to regulate commerce with foreign nations under the so-called dormant Foreign Commerce Clause. See, *e. g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 449–454 (1979). We have not, however, considered the limits of Congress' power under the Clause to regulate conduct occurring entirely within the jurisdiction of a foreign sovereign.

In the absence of specific guidance, the courts of appeals—including the court below—have understandably extended this Court's Interstate Commerce Clause precedents abroad. In *United States* v. *Lopez*, 514 U. S. 549, 558–559 (1995), we held that Congress is limited to regulating three categories of interstate activity: "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce," and "activities that substantially affect interstate commerce." Some courts of appeals "have imported the *Lopez* categories directly into the foreign context," some "have applied *Lopez* generally but recognized that Congress has greater power to regulate foreign commerce," and others have gone further still, "holding that Congress has authority to legislate under the Foreign Commerce Clause when the text of a statute has a constitutionally tenable nexus with foreign commerce." *United States* v. *Bollinger*, 798 F. 3d 201, 215 (CA4 2015) (internal quotation marks omitted); see also *id.*, at 215–216 ("Instead of requiring that an activity have a substantial effect on foreign commerce, we hold that the Foreign Commerce Clause allows Congress to regulate activities that demonstrably affect such commerce").

III

I am concerned that language in some of this Court's precedents has led the courts of appeals into error. At the very least, the time has come for us to clarify the scope of Congress' power under the Foreign Commerce Clause to regulate extraterritorially.

A

The courts of appeals have relied upon statements by this Court comparing the foreign commerce power to the interstate commerce power, but have removed those statements from their context. In certain contexts, this Court has described the foreign commerce power as "exclusive and plenary," *Board of Trustees*, *supra*, at 56–57 (citing *Gibbons* v. *Ogden*, 9 Wheat. 1, 196–200 (1824)), explaining that Congress' commerce power "when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce," *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 434 (1932); see also *Brolan* v. *United States*, 236 U. S. 216, 218–220 (1915). None of these opinions, however, "involve[d] legislation of extraterritorial operation which purports to regulate conduct inside foreign nations." Col-

angelo, The Foreign Commerce Clause, 96 Va. L. Rev. 949, 1001 (2010). This Court's statements about the comparative breadth of the Foreign Commerce Clause are of questionable relevance where the issue is Congress' power to regulate, or even criminalize, conduct within another nation's sovereign territory.

Moreover, this Court's comparative statements about the breadth of the Foreign Commerce Clause have relied on some "evidence that the Founders intended the scope of the foreign commerce power to be greater" than Congress' power to regulate commerce among the States. *Japan Line*, *supra*, at 448. Whatever the Founders' intentions might have been in this respect, they were grounded in the original understanding of the Interstate Commerce Clause. But this Court's modern doctrine has "drifted far from the original understanding." *Lopez*, *supra*, at 584 (THOMAS, J., concurring). For one thing, the "Clause's text, structure, and history all indicate that, at the time of the founding, the term '"commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes.'" *Raich*, *supra*, at 58 (THOMAS, J., dissenting) (quoting *Lopez*, *supra*, at 585 (opinion of THOMAS, J.)). For another, "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *United States* v. *Morrison*, 529 U. S. 598, 627 (2000) (THOMAS, J., concurring).

Thus, even if the foreign commerce power were broader than the interstate commerce power as understood at the founding, it would not follow that the foreign commerce power is broader than the interstate commerce power as this Court now construes it. But rather than interpreting the Foreign Commerce Clause as it was originally understood, the courts of appeals have taken this Court's modern interstate commerce doctrine and assumed that the foreign commerce power is at least as broad. The result is a doctrine justified neither by our precedents nor by the original understanding.

B

Taken to the limits of its logic, the consequences of the Court of Appeals' reasoning are startling. The Foreign Commerce Clause would permit Congress to regulate any economic activity anywhere in the world, so long as Congress had a rational basis to conclude that the activity has a substantial effect on commerce between this Nation and any other. Congress would be able not

only to criminalize prostitution in Australia but also to regulate working conditions in factories in China, pollution from power-plants in India, or agricultural methods on farms in France. I am confident that whatever the correct interpretation of the foreign commerce power may be, it does not confer upon Congress a virtually plenary power over global economic activity.

* * *

We should grant certiorari in this case to consider the proper scope of Congress' Foreign Commerce Clause power.

I respectfully dissent.

No. 16–6250. PEREZ *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 189 So. 3d 797.

JUSTICE SOTOMAYOR, concurring.

Robert Perez is serving more than 15 years in a Florida prison for what may have been nothing more than a drunken joke. The road to this unfortunate outcome began with Perez and his friends drinking a mixture of vodka and grapefruit juice at the beach. Sentencing Tr. 24, App. to Pet. for Cert. (Sentencing Tr.). As the group approached a nearby liquor store to purchase additional ingredients for the mixture, which Perez called a "Molly cocktail," *ibid.*, a store employee overheard the group's conversation, *id.*, at 25. The employee apparently believed he was referencing an incendiary "Molotov cocktail" and asked if it would "burn anything up." *Ibid.* Perez claims he responded that he did not have "that type" of cocktail, and that the whole group laughed at the apparent joke. *Ibid.* Imprudently, however, the inebriated Perez continued the banter, telling another employee that he had only "one Molotov cocktail" and could "blow the whole place up." App. C to Brief in Opposition 82. Perez later returned to the store and allegedly said, "'I'm going to blow up this whole [expletive] world.'" *Id.*, at 121. Store employees reported the incident to police the next day. Sentencing Tr. 15, 34.

The State prosecuted Perez for violating a Florida statute that makes it a felony "to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person." Fla. Stat. § 790.162 (2007). The trial court instructed the jury that they could return a guilty verdict if the State proved two elements. First, the State had to prove the *actus reus*; that

is, the threat itself. The instruction defined a threat as "a communicated intent to inflict harm or loss on another when viewed and/or heard by an ordinary reasonable person." App. F to Brief in Opposition 350. Second, the State had to prove that Perez possessed the necessary *mens rea*; that is, that he intended to make the threat. Circularly, the instruction defined intent as "the stated intent to do bodily harm to any person or damage to the property of any person." *Ibid.* This instruction permitted the jury to convict Perez based on what he "stated" alone—irrespective of whether his words represented a joke, the ramblings of an intoxicated individual, or a credible threat. The jury found Perez guilty, and because he qualified as a habitual offender, the trial court sentenced him to 15 years and 1 day in prison. Sentencing Tr. 44.

In the courts below and in his petition for certiorari, Perez challenged the instruction primarily on the ground that it contravenes the traditional rule that criminal statutes be interpreted to require proof of *mens rea*, see *Elonis* v. *United States*, 575 U. S. 734–737 (2015). In my view, however, the jury instruction—and Perez's conviction—raise serious First Amendment concerns worthy of this Court's review. But because the lower courts did not reach the First Amendment question, I reluctantly concur in the Court's denial of certiorari in this case.

* * *

The First Amendment's protection of speech and expression does not extend to threats of physical violence. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 388 (1992). Statutes criminalizing threatening speech, however, "must be interpreted with the commands of the First Amendment clearly in mind" in order to distinguish true threats from constitutionally protected speech. *Watts* v. *United States*, 394 U. S. 705, 707 (1969) (*per curiam*). Under our cases, this distinction turns in part on the speaker's intent.

We suggested as much in *Watts*. There, we faced a constitutional challenge to a criminal threat statute and expressed "grave doubts" that the First Amendment permitted a criminal conviction if the speaker merely "uttered the charged words with an apparent determination to carry them into execution." *Id.*, at 708, 707 (emphasis deleted; internal quotation marks omitted).

Virginia v. *Black*, 538 U. S. 343 (2003), made the import of the speaker's intent plain. There, we considered a state statute that

criminalized cross burning "'with the intent of intimidating any person.'" *Id.*, at 348 (quoting Va. Code Ann. § 18.2–423 (1996)). We defined a "true threat" as one "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U. S., at 359. We recognized that cross burning is not always such an expression and held the statute constitutional "insofar as it ban[ned] cross burning *with intent* to intimidate." *Id.*, at 362 (emphasis added); *id.*, at 365 (plurality opinion).

A four-Member plurality went further and found unconstitutional a provision of the statute that declared the speech itself "'prima facie evidence of an intent to intimidate.'" *Id.*, at 363–364. The plurality reached this conclusion because "a burning cross is not always intended to intimidate." *Id.*, at 365. Two separate opinions endorsed this view. See *id.*, at 372 (Scalia, J., joined by THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) ("The plurality is correct in all of this"); *id.*, at 386 (Souter, J., joined by KENNEDY and GINSBURG, JJ., concurring in judgment in part and dissenting in part).

Together, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.

* * *

The jury instruction in this case relieved the State of its burden of proving anything other than Perez's "stated" or "communicated" intent. This replicates the view we doubted in *Watts*, which permitted a criminal conviction based upon threatening words and only "'an *apparent* determination to carry them into execution.'" 394 U. S., at 707. And like the prima facie provision in *Black*, the trial court's jury instruction "ignore[d] all of the contextual factors that are necessary to decide whether a particular [expression] is intended to intimidate." 538 U. S., at 367 (plurality opinion).

Context in this case might have made a difference. Even as she argued for a 15-year sentence, the prosecutor acknowledged that Perez may have been "just a harmless drunk guy at the

beach," Sentencing Tr. 35, and it appears that at least one witness testified that she did not find Perez threatening, Pet. for Cert. 8. Instead of being instructed to weigh this evidence to determine whether Perez actually intended to convey a threat—or even whether a reasonable person would have construed Perez's words as a threat—the jury was directed to convict solely on the basis of what Perez "stated."

In an appropriate case, the Court should affirm that "[t]he First Amendment does not permit such a shortcut." *Black*, 538 U. S., at 367 (plurality opinion). The Court should also decide precisely what level of intent suffices under the First Amendment—a question we avoided two Terms ago in *Elonis*.

No. 16–6814. ASHE *v.* PNC FINANCIAL SERVICES GROUP, INC. C. A. 4th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 652 Fed. Appx. 155.

No. 16–7403. MORALES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 16–7423. MITCHELL *v.* SANCHEZ ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 652 Fed. Appx. 491.

No. 16–7466. HAZELQUIST *v.* KLEWIN ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 16–7748. VAUGHN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 668 Fed. Appx. 204.

Rehearing Denied

No. 16–645. LINGFEI SUN *v.* CITY OF NEW YORK, NEW YORK, ET AL., *ante*, p. 1055;

No. 16–6056. TAYLOR *v.* BERRY, WARDEN, *ante*, p. 1004;

No. 16–6131. FALANA *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 1006;

No. 16–6564. ARMISTEAD *v.* CLAY, WARDEN, *ante*, p. 1063;

No. 16–6716. GRIMES *v.* MCFADDEN, WARDEN, *ante*, p. 1069;

No. 16–6785. WILLIAMS *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1072;

No. 16–6833. FEREBEE *v.* INTERNATIONAL HOUSE OF PANCAKES, *ante*, p. 1074;

No. 16–6967. BAKER *v.* PFISTER, WARDEN, *ante*, p. 1078;

No. 16–6974. BRYANT *v.* UNITED STATES POSTAL SERVICE, *ante*, p. 1078;

No. 16–7128. OKEAYAINNEH *v.* UNITED STATES, *ante*, p. 1082; and

No. 16–7262. IN RE WILLIAMS, *ante*, p. 1091. Petitions for rehearing denied.

MARCH 7, 2017

Miscellaneous Orders

No. 16A841 (16–7792). RUIZ *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

JUSTICE BREYER, dissenting.

Petitioner Rolando Ruiz has been on death row for 22 years, most of which he has spent in permanent solitary confinement. Ruiz argues that his execution "violates the Eighth Amendment" because it "follow[s] lengthy [death row] incarceration in traumatic conditions," principally his "permanent solitary confinement." Pet. for Cert. 25. I believe his claim is a strong one, and we should consider it.

This Court long ago, speaking of a period of only four weeks of imprisonment prior to execution, said that a prisoner's uncertainty before execution is "one of the most horrible feelings to which he can be subjected." *In re Medley*, 134 U. S. 160, 172 (1890). Here the prisoner has undergone death row imprisonment, not of four weeks, but of 22 years.

Moreover, in 1890, this Court recognized longstanding "serious objections" to extended solitary confinement. The Court pointed to studies showing that "[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident

that some changes must be made in the system," as "its main feature of solitary confinement was found to be too severe." *Id.*, at 168.

Others have more recently pointed out that a terrible "human toll" is "wrought by extended terms of isolation" and that "[y]ears on end of near-total isolation exact a terrible" psychiatric "price." *Davis* v. *Ayala*, 576 U. S. 257, 287–289 (2015) (KENNEDY, J., concurring) (citing *In re Medley*, *supra*, at 170). As a result it has been suggested that, "[i]n a case that present[s] the issue," this Court should determine whether extended solitary confinement survives Eighth Amendment scrutiny. *Ayala*, *supra*, at 289–290 (opinion of KENNEDY, J.). This I believe is an appropriate case to conduct that constitutional scrutiny.

Here the "human toll" that accompanies extended solitary confinement is exacerbated by the fact that execution is in the offing. Moreover, Ruiz has developed symptoms long associated with solitary confinement, namely, severe anxiety and depression, suicidal thoughts, hallucinations, disorientation, memory loss, and sleep difficulty. Further, the lower courts have recognized that Ruiz has been diligent in pursuing his claims, finding the 22-year delay attributable to the State or the lower courts. *Ruiz* v. *Quarterman*, 504 F. 3d 523, 530 (CA5 2007) (citing *Ruiz* v. *Dretke*, 2005 WL 2620193, *2 (WD Tex., Oct. 13, 2005)). Nor are Ruiz's 20 years of solitary confinement attributable to any special penological problem or need. They arise simply from the fact that he is a prisoner awaiting execution. App. to Pet. for Cert. E–16.

If extended solitary confinement alone raises serious constitutional questions, then 20 years of solitary confinement, all the while under threat of execution, must raise similar questions, and to a rare degree, and with particular intensity. That is why I would grant a stay of execution, allowing the Court to examine the record more fully.

No. 16A858 (16–8135). RUIZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 16A868 (16–8197). RUIZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Application for stay of execution of sentence of death,

presented to JUSTICE THOMAS, and by him referred to the Court, denied.

MARCH 17, 2017

Miscellaneous Orders

No. 15–1503. TURNER ET AL. *v.* UNITED STATES; and

No. 15–1504. OVERTON *v.* UNITED STATES. Ct. App. D. C. [Certiorari granted, *ante*, p. 1040.] Motion of petitioner Russell L. Overton for divided argument granted.

No. 16–74. ADVOCATE HEALTH CARE NETWORK ET AL. *v.* STAPLETON ET AL. C. A. 7th Cir.;

No. 16–86. SAINT PETER'S HEALTHCARE SYSTEM ET AL. *v.* KAPLAN. C. A. 3d Cir.; and

No. 16–258. DIGNITY HEALTH ET AL. *v.* ROLLINS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1017.] Motion of the Deputy Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

MARCH 20, 2017

Certiorari Granted—Vacated and Remanded

No. 16–7448. STEPHENS *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 *Mathis* v. *United States*, 579 U. S. 500 (2016). Reported below: 651 Fed. Appx. 445.

Certiorari Dismissed

No. 16–7512. ELLIS *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. 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. 16–7537. HAMILTON *v.* BIRD ET AL.;

No. 16–7538. HAMILTON *v.* BIRD ET AL.; and

No. 16–7539. HAMILTON *v.* BIRD ET AL. C. A. 10th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 650 Fed. Appx. 585.

No. 16–7674. TAYLOR *v.* UNITED STATES. C. A. Fed. 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*). JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 666 Fed. Appx. 896.

Miscellaneous Orders

No. D–2946. IN RE PICKERSTEIN. Harold James Pickerstein, of Fairfield, Conn., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on February 21, 2017, [*ante*, p. 1110] is discharged.

No. D–2952. IN RE DISCIPLINE OF MOFFATT. Jeffrey D. Moffatt, of Lancaster, 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–2953. IN RE DISCIPLINE OF ORLOFF. Dean I. Orloff, of Mt. Laurel, 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–2954. IN RE DISCIPLINE OF HARRINGTON. Bruce C. Harrington, of Topeka, 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–2955. IN RE DISCIPLINE OF SULLIVAN. Dennis H. Sullivan, Jr., of Wilmington, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2956. IN RE DISCIPLINE OF GOLDTHORPE. Christopher J. Goldthorpe, of Westerville, Ohio, 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. 16M91. STANCU *v.* STARWOOD HOTELS & RESORTS WORLDWIDE, INC., ET AL.;

No. 16M94. TAGOE *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES ET AL.; and

No. 16M95. DODEV *v.* SELECT PORTFOLIO SERVICING INC. ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 16M92. STANCU *v.* STARWOOD HOTELS & RESORTS WORLDWIDE, INC. Motion for leave to file petition for writ of certiorari under seal denied.

No. 16M93. BONNER *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY, ET AL. Motion of petitioner for leave to proceed *in forma pauperis* with declaration of indigency under seal granted.

No. 16M96. NEUMAN *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. 141, Orig. TEXAS *v.* NEW MEXICO ET AL. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. Surreplies, if any, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 578 U. S. 1010.]

No. 142, Orig. FLORIDA *v.* GEORGIA. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. Surreplies, if any, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, *ante*, p. 1111.]

No. 16–7509. CARUSO *v.* ZUGIBE ET AL. C. A. 2d Cir.;

No. 16–7564. KASTNER *v.* CARDOZO ET AL. C. A. 2d Cir.;

No. 16–7570. WILLIAMS *v.* SCHAFER ET AL. Dist. Ct. App. Fla., 1st Dist.;

No. 16–7580. WHITE *v.* EDS CARE MANAGEMENT LLC ET AL.;

No. 16–7593. WHITE ET UX. *v.* ATTORNEY GRIEVANCE COMMISSION OF MICHIGAN. Sup. Ct. Mich.; and

No. 16–7955. GALEMMO *v.* UNITED STATES. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 10, 2017, 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. 16–293. IN RE FIELDS;
No. 16–8030. IN RE COURTRIGHT;
No. 16–8038. IN RE BROWN;
No. 16–8081. IN RE WELLS-ALI; and
No. 16–8111. IN RE LAWSON. Petitions for writs of habeas corpus denied.

No. 16–7985. IN RE CAMPBELL. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 16–294. IN RE FIELDS;
No. 16–907. IN RE BLUMSTEIN ET AL.;
No. 16–7481. IN RE BROWN;
No. 16–7527. IN RE DOUGHERTY; and
No. 16–7588. IN RE ABAZARI. Petitions for writs of mandamus denied.

No. 16–7910. IN RE DAVIS. Petition for writ of mandamus and/or prohibition denied.

No. 16–7589. IN RE BRASCOM. Petition for writ of prohibition denied.

Certiorari Denied

No. 15–6561. EVENSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 15–8605. GAVIN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 190 So. 3d 579.

No. 15–8629. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 16–141. HYOSUNG D&P CO., LTD. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 3d 626.

No. 16–368. NOBLE ENERGY, INC. *v.* HAUGRUD, ACTING SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 650 Fed. Appx. 9.

No. 16–395. PAYNE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 493 S. W. 3d 478.

No. 16–445. SIMS *v.* TENNESSEE; and SAMPLE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 16–464. LAVIGNE *v.* CAJUN DEEP FOUNDATIONS, L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 654 Fed. Appx. 640.

No. 16–479. BYRD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 222 So. 3d 380.

No. 16–523. SCOTT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 299 Ga. 568, 788 S. E. 2d 468.

No. 16–533. RILEY *v.* ELKHART COMMUNITY SCHOOLS. C. A. 7th Cir. Certiorari denied. Reported below: 829 F. 3d 886.

No. 16–579. BRIGHT *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 89 Mass. App. 1116, 47 N. E. 3d 702.

No. 16–603. CONRAD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 815 F. 3d 324.

No. 16–626. GOOGLE INC. ET AL. *v.* ARENDI S. A. R. L. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 832 F. 3d 1355.

No. 16–639. ROWLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 826 F. 3d 100.

No. 16–646. HOLTZMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* TURZA. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 3d 606.

No. 16–685. NORFOLK COUNTY RETIREMENT SYSTEM ET AL. *v.* HEALTH MANAGEMENT ASSOCIATES, LLC, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 608 Fed. Appx. 855.

No. 16–705. MoneyMutual LLC *v.* Rilley et al. Sup. Ct. Minn. Certiorari denied. Reported below: 884 N. W. 2d 321.

No. 16–730. Public Integrity Alliance, Inc., et al. *v.* City of Tucson, Arizona, et al. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 3d 1019.

No. 16–742. Kerr *v.* Haugrud, Acting Secretary of the Interior. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 3d 1048.

No. 16–745. Meyers *v.* Oneida Tribe of Indians of Wisconsin. C. A. 7th Cir. Certiorari denied. Reported below: 836 F. 3d 818.

No. 16–755. Menendez *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 3d 155.

No. 16–809. Mazzei, Individually and on Behalf of All Others Similarly Situated *v.* The Money Store et al. C. A. 2d Cir. Certiorari denied. Reported below: 829 F. 3d 260.

No. 16–827. Alavi Foundation et al. *v.* Kirschenbaum et al. C. A. 2d Cir. Certiorari denied. Reported below: 830 F. 3d 107.

No. 16–848. Hernandez *v.* Ducey, Governor of Arizona, et al. C. A. 9th Cir. Certiorari denied. Reported below: 658 Fed. Appx. 837.

No. 16–849. Dean *v.* Norfolk Southern Railway Co. et al. C. A. 6th Cir. Certiorari denied.

No. 16–851. Lothian Cassidy, LLC, et al. *v.* Lothian Exploration and Development II, L. P. (LEAD II), et al. C. A. 2d Cir. Certiorari denied.

No. 16–863. Jones *v.* Dufek et al. C. A. D. C. Cir. Certiorari denied. Reported below: 830 F. 3d 523.

No. 16–864. Bridgeview Bank Group et al. *v.* FirstMerit Bank, N. A. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2016 IL App (2d) 150364–U.

No. 16–867. Enplas Corp. *v.* Seoul Semiconductor Co., Ltd., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 667 Fed. Appx. 997.

No. 16–880. HABEAS CORPUS RESOURCE CENTER ET AL. *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 3d 1241.

No. 16–883. DATATREASURY CORP. *v.* FIDELITY NATIONAL INFORMATION SERVICES, INC. (Reported below: 669 Fed. Appx. 572); DATATREASURY CORP. *v.* JACK HENRY & ASSOCIATES, INC. (669 Fed. Appx. 573); DATATREASURY CORP. *v.* LEE, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE (669 Fed. Appx. 574); and DATATREASURY CORP. *v.* FISERV, INC. (669 Fed. Appx. 574). C. A. Fed. Cir. Certiorari denied.

No. 16–884. BURBANK *v.* LINCOLN ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2016 ME 138, 147 A. 3d 1165.

No. 16–887. MINNESOTA *v.* THOMPSON. Sup. Ct. Minn. Certiorari denied. Reported below: 886 N. W. 2d 224.

No. 16–896. CHUNG *v.* EL PASO COUNTY SCHOOL DISTRICT #11. C. A. 10th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 953.

No. 16–901. JONES *v.* KIRCHNER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 835 F. 3d 74.

No. 16–921. HONEY-LOVE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LOVE *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 358.

No. 16–923. TAYLOR ET AL. *v.* BROWN FAMILY TRUST ET AL. Ct. App. Kan. Certiorari denied. Reported below: 52 Kan. App. 2d xii, 362 P. 3d 1123.

No. 16–925. STUSSY *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 662 Fed. Appx. 972.

No. 16–926. DUTKIEWICZ *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied. Reported below: 663 Fed. Appx. 430.

No. 16–937. WILLIAMS *v.* DEAL. C. A. 11th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 580.

No. 16–938. WILLIAMS *v.* WELLS FARGO BANK. C. A. 3d Cir. Certiorari denied. Reported below: 658 Fed. Appx. 76.

No. 16–942. GILLENWATER *v.* HARRIS, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 16–945. ANDERSON *v.* EASTERN CONNECTICUT HEALTH NETWORK, INC., AKA ECHN, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 668 Fed. Appx. 378.

No. 16–946. VERBLE *v.* MORGAN STANLEY SMITH BARNEY, LLC, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 421.

No. 16–948. LOPEZ *v.* SESSIONS, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 764.

No. 16–953. RETRACTABLE TECHNOLOGIES, INC., ET AL. *v.* BECTON, DICKINSON & CO. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 3d 883.

No. 16–954. SILVA-PEREIRA *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 3d 1176.

No. 16–958. PRESSLEY *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 16–965. JONES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2016 IL 119391, 67 N. E. 3d 256.

No. 16–977. DODD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PIERCE, DECEASED *v.* MOORE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 657 Fed. Appx. 613.

No. 16–982. ROMERO *v.* COUNTY OF SANTA CLARA, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 666 Fed. Appx. 609.

No. 16–987. HESSON, INDIVIDUALLY AND AS GUARDIAN AND ON BEHALF OF MINOR CHILDREN M. H. ET AL. *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 664 Fed. Appx. 932.

No. 16–1014. TABONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 664 Fed. Appx. 23.

No. 16–5132. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 646 Fed. Appx. 914.

No. 16–5151. COLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 166.

No. 16–5296. ELLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 3d 419.

No. 16–5302. GARNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 644 Fed. Appx. 880.

No. 16–5419. FORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 649 Fed. Appx. 756.

No. 16–5442. KINNEY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 16–5692. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 641 Fed. Appx. 654.

No. 16–5760. EDWARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 635 Fed. Appx. 143.

No. 16–6081. PATTERSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 16–6138. FLANAGAN, AKA JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 Fed. Appx. 140.

No. 16–6436. ALTHAGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–6490. JEFFRIES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 822 F. 3d 192.

No. 16–6497. HERNANDEZ GALLARDO *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 16–6574. BLAINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 656 Fed. Appx. 765.

No. 16–6743. GRAF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 827 F. 3d 581.

No. 16–6801. MADISON *v.* DAVIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–6812. SALAZAR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 63 Cal. 4th 214, 371 P. 3d 161.

No. 16–6895. ROBERTS *v.* FERMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 3d 117.

No. 16–6913. CACERES *v.* SKANSKA USA BUILDING INC. ET AL. C. A. 2d Cir. Certiorari denied.

No. 16–6926. SALAS GAYTON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2016 WI 58, 370 Wis. 2d 264, 882 N. W. 2d 459.

No. 16–6948. BROWN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 16–7171. CUNNINGHAM *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied. Reported below: 278 Ore. App. 106, 373 P. 3d 1167.

No. 16–7184. STYERS *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 3d 292.

No. 16–7273. PAYNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–7365. TATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 386.

No. 16–7393. SMITH *v.* ROYAL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 824 F. 3d 1233.

No. 16–7415. HAYNES *v.* STANDING COMMITTEE ON PROFESSIONAL CONDUCT. C. A. 9th Cir. Certiorari denied. Reported below: 639 Fed. Appx. 443.

No. 16–7427. CROWELL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 130 App. Div. 3d 1362, 15 N. Y. S. 3d 494.

No. 16–7428. GANDY *v.* BARBER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 641 Fed. Appx. 835.

No. 16–7430. Flores-Ramirez *v.* Foster, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 811 F. 3d 861.

No. 16–7432. Tidwell *v.* Valenzuela, Warden. C. A. 9th Cir. Certiorari denied.

No. 16–7435. Freeman *v.* O'Brien, Judge, Circuit Court of Illinois, Cook County. Sup. Ct. Ill. Certiorari denied.

No. 16–7449. Gonzales *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 16–7450. Ferguson *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 16–7456. Smith *v.* Glanz et al. C. A. 10th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 595.

No. 16–7457. Smith *v.* United States Court of Appeals for the Fourth Circuit. C. A. 4th Cir. Certiorari denied. Reported below: 655 Fed. Appx. 979.

No. 16–7460. Roberts *v.* Ballard, Warden. Sup. Ct. App. W. Va. Certiorari denied.

No. 16–7461. Rowe *v.* Villmer, Warden. C. A. 8th Cir. Certiorari denied.

No. 16–7462. Rosa *v.* Shartle, Warden. C. A. 9th Cir. Certiorari denied.

No. 16–7469. Berman *v.* Modell. C. A. 4th Cir. Certiorari denied. Reported below: 614 Fed. Appx. 685.

No. 16–7470. Schlittler *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 488 S. W. 3d 306.

No. 16–7474. Taubman *v.* Muniz, Warden. C. A. 9th Cir. Certiorari denied.

No. 16–7480. Shawley *v.* Bear, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 581.

No. 16–7482. Aikens *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 16–7484. BROOKS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 16–7497. TAYLOR *v.* CROWLEY, SUPERINTENDENT, ORLEANS CORRECTIONAL FACILITY, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 140 App. Div. 3d 1716, 32 N. Y. S. 3d 542.

No. 16–7499. ADAMS *v.* TRIBLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–7501. SISK *v.* NEAL, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 16–7508. ESPINOZA *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 16–7513. CHHIM *v.* UNIVERSITY OF TEXAS AT AUSTIN. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 3d 467.

No. 16–7514. KASSAB *v.* GORE, SHERIFF, SAN DIEGO COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 656 Fed. Appx. 868.

No. 16–7517. LAU *v.* RUO MEI CAI, AKA RUOMEI CAI. C. A. 2d Cir. Certiorari denied.

No. 16–7518. LAU *v.* RUO MEI CAI, AKA RUOMEI CAI. C. A. 2d Cir. Certiorari denied.

No. 16–7519. BARRIERA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 133464–U.

No. 16–7520. BANKS *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 16–7529. VON FOX *v.* SOUTH CAROLINA JUDICIAL DEPARTMENT. C. A. 4th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 446.

No. 16–7532. ROCHIN *v.* MCEWEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7533. SANCHEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 63 Cal. 4th 411, 375 P. 3d 812.

No. 16–7536. KNIGHT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 143731–U.

No. 16–7542. NEWSOME *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 149.

No. 16–7547. BROWN *v.* MONTGOMERY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7549. PHILLIPS *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7550. OWENS *v.* LEWIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 148.

No. 16–7556. RAGIN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–7557. SWEETING *v.* MILLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 654 Fed. Appx. 140.

No. 16–7560. HOLLOMAN *v.* MARKOWSKI ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 Fed. Appx. 797.

No. 16–7561. DAVIS *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 305.

No. 16–7574. KINARD *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–7577. WIERSUM *v.* MIGLIORE. Super. Ct. N. J., App. Div. Certiorari denied.

No. 16–7579. WILLIAMS *v.* TILLETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 633.

No. 16–7581. WHITE *v.* SOUTHEAST MICHIGAN SURGICAL HOSPITAL ET AL. Ct. App. Mich. Certiorari denied.

No. 16–7582. TURNER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 3. Certiorari denied.

No. 16–7587. OMRAN *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 131.

No. 16–7594. JEFFERSON EL BEY *v.* ROBERT WOOD JOHNSON UNIVERSITY HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–7598. MATCHETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 802 F. 3d 1185.

No. 16–7601. WILLIAMS *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 840 F. 3d 1006.

No. 16–7603. WILLIAMS *v.* RAYNOR, RENSCH & PFEIFFER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 340.

No. 16–7604. WILLIAMS *v.* DUNBAR ARMORED, INC. C. A. 7th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 662.

No. 16–7610. MINARD *v.* WAL-MART STORES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 389.

No. 16–7619. FRELIX *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 3d 1060, 54 N. E. 3d 1165.

No. 16–7633. RAMIREZ-ARRIAGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 203.

No. 16–7634. SMITH *v.* JENKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–7639. MELVIN *v.* HOOKS, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 281.

No. 16–7642. CHARLES *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 199 So. 3d 271.

No. 16–7654. SHELDEN *v.* DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 672 Fed. Appx. 33.

No. 16–7659. EGGERS *v.* TURNER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 3d 873.

No. 16–7665. PETRE *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 670 Fed. Appx. 723.

No. 16–7678. WATSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–7700. JOHNSON *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 664 Fed. Appx. 919.

No. 16–7704. SHORTER *v.* SCHWEITZER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 227.

No. 16–7715. LAWSON *v.* OVERMYER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FOREST, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–7717. MARQUEZ *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 139.

No. 16–7723. ELANSARI *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 141 A. 3d 603.

No. 16–7742. SHOULDERS *v.* TICE, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–7745. LUNSFORD *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 665 Fed. Appx. 563.

No. 16–7746. WRIGHT *v.* GRANNIS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 267.

No. 16–7771. EMMERT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 825 F. 3d 906.

No. 16–7773. CLARK *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 3d 1013.

No. 16–7777. RAMOS *v.* HAMBLIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 3d 442.

No. 16–7782. BURNSIDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 325.

No. 16–7791. DODSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 144 A. 3d 188.

No. 16–7796. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 627 Fed. Appx. 912.

No. 16–7802. KILMER *v.* SPEARMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7816. MARTINEZ-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 274.

No. 16–7817. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 16–7819. SHIREY *v.* SMITH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MUNCY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–7825. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–7831. LIPSCOMBE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 95.

No. 16–7832. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 655 Fed. Appx. 247.

No. 16–7842. HAMMOUD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 163.

No. 16–7843. PEAKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–7847. WILCOX *v.* SHARTLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7848. TEAGUE *v.* ASLETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 145.

No. 16–7850. BARNES, AKA WOODARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 121.

No. 16–7851. BAKER *v.* SPEER, ACTING SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 357.

No. 16–7852. BARTOK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 662 Fed. Appx. 61.

No. 16–7859. MARTINEZ SALDANA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 326.

No. 16–7860. FORBES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 664 Fed. Appx. 184.

No. 16–7861. HUGHES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 3d 1368.

No. 16–7866. ENCINIA-MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 750.

No. 16–7867. DRAWBAUGH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 154 A. 3d 851.

No. 16–7868. GROOVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 638.

No. 16–7870. FIELDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 16–7871. HELMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–7872. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 653 Fed. Appx. 203.

No. 16–7873. GRANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–7891. DAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 506.

No. 16–7892. STINE *v.* REVELL; and
No. 16–7893. BUHL *v.* REVELL. C. A. 10th Cir. Certiorari denied.

No. 16–7895. HALDEMANN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 820.

No. 16–7897. EWING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 16–7902. BARBER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 153 A. 3d 83.

No. 16–7913. LANE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 16–7919. PRINCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–7921. NIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 138.

No. 16–7922. EARLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 16–7923. CERVANTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 16–7925. SCHNEIDER ET VIR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 665 Fed. Appx. 668.

No. 16–7928. SHEALEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 475.

No. 16–7930. GIAMO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 665 Fed. Appx. 154.

No. 16–7933. SUAREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 16–7936. PEPKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 225.

No. 16–7938. MARRON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–7942. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 181.

No. 16–7944. WATSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 843 F. 3d 335.

No. 16–7946. STRYCHARSKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 839 F. 3d 795.

No. 16–7948. BOLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 Fed. Appx. 805.

No. 16–7949. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 629 Fed. Appx. 554.

No. 16–7951. HILLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 656 Fed. Appx. 222.

No. 16–7959. GILES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 652 Fed. Appx. 210.

No. 16–7964. MILTONHALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 345.

No. 16–7965. MILLER *v.* GONYEA, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 16–7969. URIBE, AKA SERVIN LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 3d 667.

No. 16–7970. WAIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 666 Fed. Appx. 250.

No. 16–7971. REYES TRUJILLO *v.* GROUNDS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7972. TREJO *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 16–7975. MORENO LEON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 468.

No. 16–7982. CHAVEZ-HERNANDEZ, AKA GONZALEZ-HERNANDEZ, AKA ZAMORA-MURILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 596.

No. 16–7983. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 3d 787.

No. 16–7996. NAVA-MAYTOREL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 Fed. Appx. 481.

No. 16–7997. PIEDRA-MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 3d 623.

No. 16–8000. DAWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 842 F. 3d 3.

No. 16–8001. CLAFLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 372.

No. 16–8004. GOLDTOOTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 678.

No. 16–8008. BAHARONA ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 153 A. 3d 82.

No. 16–582. VALDEZ CAHUE *v.* RUVALCABA MARTINEZ. C. A. 7th Cir. Motion of International Academy of Family Lawyers for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 826 F. 3d 983.

No. 16–858. HOME DESIGN SERVICES, INC. *v.* TURNER HERITAGE HOMES INC. ET AL. C. A. 11th Cir. Motion of American Institute of Building Design et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 825 F. 3d 1314.

No. 16–5910. LEIJA-SANCHEZ ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 820 F. 3d 899.

No. 16–7666. GRANT *v.* KABAKER ET AL. C. A. 7th Cir. Certiorari before judgment denied.

No. 16–7779. EBANKS *v.* SAMSUNG TELECOMMUNICATION AMERICA, LLP, ET AL. C. A. 11th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 667 Fed. Appx. 740.

No. 16–7858. SIRLEAF *v.* ROBINSON ET AL. C. A. 4th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 16–642. GROSSMAN *v.* WEHRLE, *ante*, p. 1099;

No. 16–653. IN RE MCDONALD, *ante*, p. 1091;

No. 16–5886. TOVAR *v.* BAUGHMAN, ACTING WARDEN, *ante*, p. 989;

No. 16–6236. BROOKS *v.* EMPLOYMENT DEPARTMENT ET AL., *ante*, p. 1093;

No. 16–6403. HYNOSKI *v.* ATWOOD, MALONE, TURNER & SABIN, ET AL., *ante*, p. 1059;

No. 16–6449. ALEJANDRO *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1060;

No. 16–6539. HOCKENSMITH *v.* FLORIDA, *ante*, p. 1062;

No. 16–6572. IN RE ROBINSON, *ante*, p. 1046;

No. 16–6594. YANEY *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY, ET AL. (two judgments), *ante*, p. 1064;

No. 16–6645. RASAKI *v.* LYNN, *ante*, p. 1066;

No. 16–6723. QUATRINE *v.* BERGHUIS, WARDEN, *ante*, p. 1069;

No. 16–6740. ANDERSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1070;

No. 16–6756. LANE *v.* MURRIE, *ante*, p. 1070;

No. 16–6768. CHARLES *v.* HARRY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL., *ante*, p. 1071;

No. 16–6807. ALEXANDER *v.* GEORGIA, *ante*, p. 1093;

No. 16–6827. MOSQUERA GAMBOA *v.* UNITED STATES ET AL., *ante*, p. 1074;

No. 16–6828. HOLLEY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 1093;

No. 16–6891. CONYERS-CARSON *v.* GERMANTOWN HOMES ET AL., *ante*, p. 1101;

No. 16–6963. LENZ *v.* FLORIDA, *ante*, p. 1078;

No. 16–7050. IN RE SHENEMAN, *ante*, p. 1046;

No. 16–7075. MYTON *v.* UNITED STATES, *ante*, p. 1081;

No. 16–7131. GROOVER *v.* UNITED STATES, *ante*, p. 1095; and

No. 16–7216. CARON *v.* STATE BAR OF CALIFORNIA, *ante*, p. 1103. Petitions for rehearing denied.

No. 16–6464. ALEXANDER *v.* UNITED STATES, *ante*, p. 1015. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 16–6726. CARTER *v.* LANE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL., *ante*, p. 1084. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

MARCH 27, 2017

Certiorari Granted—Vacated and Remanded

No. 15–998. MEDINOL LTD. *v.* CORDIS CORP. ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, *ante*, p. 328. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 16–127. ENDOTACH LLC *v.* COOK MEDICAL LLC. C. A. Fed. Cir. Reported below: 691 Fed. Appx. 907; and

No. 16–202. ROMAG FASTENERS, INC. *v.* FOSSIL, INC., ET AL. C. A. Fed. Cir. Reported below: 817 F. 3d 782. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, *ante*, p. 328.

Certiorari Dismissed

No. 16–7627. SHOVE *v.* DAVIS, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 16–7690. CAISON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 16–7792. RUIZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari dismissed as moot. Reported below: 543 S. W. 3d 805.

No. 16–7992. CRUZ *v.* UNITED STATES. C. A. 3d 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*). JUSTICE ALITO and JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 665 Fed. Appx. 126.

No. 16–8135. RUIZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari dismissed as moot. Reported below: 849 F. 3d 239.

No. 16–8197. RUIZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari dismissed as moot. Reported below: 850 F. 3d 225.

Miscellaneous Orders

No. 16M98. OQUENDO RIVAS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 16M99. MAEHR *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. Motion for leave to proceed as a veteran denied.

No. 16M100. SCOTT *v.* ASUNCION, WARDEN; and
No. 16M103. LESLIE *v.* KIRKPATRICK, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 16M101. HASAN *v.* PENNSYLVANIA DEPARTMENT OF EDUCATION ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied. JUSTICE ALITO took no part in the consideration or decision of this motion.

No. 16M102. IN RE RE017699808US–01 TRUST. Motion for leave to file petition for writ of prohibition under seal denied.

No. 16M104. EPSTEIN *v.* EPSTEIN ET AL. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 16–466. BRISTOL-MYERS SQUIBB CO. *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL. Sup. Ct. Cal. [Certiorari granted, *ante*, p. 1097.] Motion of TV Azteca, S. A. B de C. V., et al. for leave to file brief as *amici curiae* out of time granted.

No. 16–605. TOWN OF CHESTER, NEW YORK *v.* LAROE ESTATES, INC. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1089.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Nancy Sherman, Executrix, for reconsideration of motion to be added as a respondent and for leave to participate in oral argument [*ante*, p. 1168] denied.

No. 16–768. SNYDER, GOVERNOR OF MICHIGAN, ET AL. *v.* DOE ET AL. C. A. 6th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 16–6855. WILSON *v.* SELLERS, WARDEN. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1159.] In light of the letter filed by respondent on March 15, 2017, the order inviting Adam K. Mortara, Esq., of Chicago, Ill., to brief and argue as *amicus curiae* in support of judgment below is withdrawn.

No. 16–8014. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 17, 2017, 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. 16–8148. IN RE SUGGS;
No. 16–8178. IN RE WOODSON;
No. 16–8200. IN RE WALKER; and
No. 16–8216. IN RE YATES. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 16–581. LEIDOS, INC., FKA SAIC, INC. *v.* INDIANA PUBLIC RETIREMENT SYSTEM ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 818 F. 3d 85.

No. 15–1509. U. S. BANK N. A., TRUSTEE, BY AND THROUGH CWCAPITAL ASSET MANAGEMENT LLC *v.* VILLAGE AT LAKERIDGE, LLC. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 814 F. 3d 993.

Certiorari Denied

No. 15–1281. HARTLEY ET AL. *v.* SANCHEZ. C. A. 10th Cir. Certiorari denied. Reported below: 810 F. 3d 750.

No. 16–467. TAYLOR *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 448 Md. 242, 137 A. 3d 1029.

No. 16–536. HOWELL *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 75 M. J. 386.

No. 16–758. MODZELEWSKI'S TOWING & RECOVERY, INC. *v.* CONNECTICUT COMMISSIONER OF MOTOR VEHICLES (Reported below: 322 Conn. 20, 139 A. 3d 594); and RAYMOND'S AUTO REPAIR, LLC *v.* CONNECTICUT COMMISSIONER OF MOTOR VEHICLES (322 Conn. 43, 139 A. 3d 609). Sup. Ct. Conn. Certiorari denied.

No. 16–771. CAPITOL RECORDS, LLC, ET AL. *v.* VIMEO, LLC, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 826 F. 3d 78.

No. 16–786. JUSTICE *v.* INTERNAL REVENUE SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 3d 738.

No. 16–795. EDENS ET AL., INDIVIDUALLY AND AS NEXT OF KIN OF EDENS, DECEASED, ET AL. *v.* NETHERLANDS INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 834 F. 3d 1116.

No. 16–796. BINNO *v.* AMERICAN BAR ASSN. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 3d 338.

No. 16–808. VITREO RETINAL CONSULTANTS OF THE PALM BEACHES, P. A. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 649 Fed. Appx. 684.

No. 16–825. TAYLOR ET AL., AS CO-EXECUTORS OF THE ESTATE OF TAYLOR, DECEASED *v.* EXTENDICARE HEALTH FACILITIES, INC., DBA HAVENCREST NURSING CENTER, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 637 Pa. 163, 147 A. 3d 490.

No. 16–902. JONES *v.* WELLS FARGO BANK, N. A., DBA AMERICA'S SERVICING CO. C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 181.

No. 16–915. WRIGHT *v.* WRIGHT. Ct. App. Mich. Certiorari denied.

No. 16–917. MERA ET AL. *v.* CITY OF GLENDALE, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 3d 1222.

No. 16–951. WILSON *v.* SESSIONS, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 3d 1083.

No. 16–955. PUPPOLO, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PUPPOLO, DECEASED, ET AL. *v.* SIVARAMAN. Ct. Sp. App. Md. Certiorari denied. Reported below: 226 Md. App. 724 and 725.

No. 16–994. CSB-System International, Inc. *v.* Lee, Director, United States Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 832 F. 3d 1335.

No. 16–1005. Man Quoc Dinh *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 16–1007. Simmons *v.* BAC Home Loans Servicing, LP, et al. C. A. 6th Cir. Certiorari denied.

No. 16–1036. Kaplan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 3d 1199.

No. 16–5853. Torres-Jaime *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 821 F. 3d 577.

No. 16–6309. Tiger *v.* Pynkala et al. C. A. 6th Cir. Certiorari denied.

No. 16–6446. Leaschauer *v.* Huerta, Administrator, Federal Aviation Administration. C. A. 9th Cir. Certiorari denied. Reported below: 667 Fed. Appx. 253.

No. 16–6447. Leaschauer *v.* National Transportation Safety Board et al. C. A. 9th Cir. Certiorari denied. Reported below: 667 Fed. Appx. 260.

No. 16–6469. Leaschauer *v.* Federal Aviation Administration et al. C. A. 9th Cir. Certiorari denied. Reported below: 667 Fed. Appx. 251.

No. 16–7217. Haskins *v.* Vermont. Sup. Ct. Vt. Certiorari denied. Reported below: 2016 VT 79, 202 Vt. 461, 150 A. 3d 202.

No. 16–7238. Hall *v.* Westbrooks, Warden. C. A. 6th Cir. Certiorari denied.

No. 16–7521. Von Fox *v.* Medical University of South Carolina;

No. 16–7522. Von Fox *v.* Market Street Pavilion Hotel;

No. 16–7523. Von Fox *v.* South Carolina et al.;

No. 16–7528. Von Fox *v.* Japan;

No. 16–7625. Von Fox *v.* Arizona State University;

No. 16–7635. Von Fox *v.* College of Charleston;

No. 16–7643. Von Fox *v.* Savage Law Firm;

No. 16–7644. Von Fox *v.* Ritz Carlton Corp.; and
No. 16–7645. Von Fox *v.* Nava. C. A. 4th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 442.

No. 16–7605. Gueye *v.* Bishop et al. C. A. 6th Cir. Certiorari denied.

No. 16–7606. Gueye *v.* Richards et al. C. A. 6th Cir. Certiorari denied.

No. 16–7608. Park *v.* California. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 16–7613. Hurtado *v.* Sherman, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 410.

No. 16–7615. Geiger *v.* City of Chino, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 320.

No. 16–7616. Horton *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 16–7617. Hyatt *v.* Silva, Superintendent, Souza Baranowski Correctional Center. C. A. 1st Cir. Certiorari denied. Reported below: 840 F. 3d 8.

No. 16–7628. Smith et vir *v.* First Tennessee Bank N. A. et al. C. A. 4th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 41.

No. 16–7631. Dorvil *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 663 Fed. Appx. 852.

No. 16–7638. McKissick *v.* Deal, Governor of Georgia, et al. C. A. 11th Cir. Certiorari denied.

No. 16–7647. Williams *v.* Washington, Director, Michigan Department of Corrections, et al. C. A. 6th Cir. Certiorari denied.

No. 16–7661. Coleman *v.* Adams, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 880.

No. 16–7669. Belanus *v.* Montana. Sup. Ct. Mont. Certiorari denied. Reported below: 386 Mont. 393, 381 P. 3d 585.

No. 16–7671. BLAKE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 384 Mont. 407, 377 P. 3d 1213.

No. 16–7673. TSEGLIN ET AL. *v.* CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 16–7675. WILLIAMS *v.* JACKSON. Ct. Sp. App. Md. Certiorari denied. Reported below: 228 Md. App. 739 and 751.

No. 16–7680. SIRLEAF *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 879.

No. 16–7683. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–7687. BROWN *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 16–7688. KLEYPAS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 305 Kan. 224, 382 P. 3d 373.

No. 16–7691. CIOTTA *v.* FRAUENHEIM, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7707. CANADY *v.* MANIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 651 Fed. Appx. 146.

No. 16–7732. JENNINGS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 124 So. 3d 257.

No. 16–7735. SHIPLEY *v.* NOBLE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–7738. DIXON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 16–7755. CARL *v.* MCGINLEY, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–7797. BLACK *v.* SESSIONS, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 16–7810. WILLIAMS *v.* RITTER ET AL. C. A. 8th Cir. Certiorari denied.

No. 16–7818. SNIPES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–7863. HOLLENBACK *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 Fed. Appx. 636.

No. 16–7881. SMITH *v.* CAPOZZA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–7889. KELSON *v.* GASTELO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–7894. GOODS *v.* HAMKAR. C. A. 9th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 470.

No. 16–7896. YAGODA *v.* NEW HANOVER CHILD PROTECTIVE SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 38.

No. 16–7903. MORROW *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 886 N. W. 2d 204.

No. 16–7924. TAYLOR *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 265.

No. 16–7935. SCHLAKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 16–7943. WOODBERRY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 193 So. 3d 5.

No. 16–7945. SCOTT *v.* SHARTLE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 356.

No. 16–7957. CELESTINE *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 574.

No. 16–7973. THOMAS, AKA BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 16–7980. MACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 105.

No. 16–7990. NEVER MISSES A SHOT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–7995. NIX *v.* DANIELS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 16–7999. BETHEA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 16–8007. ORR *v.* TATUM, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 16–8010. BYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 479.

No. 16–8017. THORNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 Fed. Appx. 791.

No. 16–8018. WASHINGTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 142 A. 3d 576.

No. 16–8019. VALDEZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2016 IL 119860, 67 N. E. 3d 233.

No. 16–8021. MCDONNEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 337.

No. 16–8023. DAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 16–8024. COBLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 113.

No. 16–8028. MARQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 Fed. Appx. 496.

No. 16–8031. PALOM RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–8033. SAYADI-TAKHTEHKAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 861.

No. 16–8035. BRAMWELL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 16–8039. BURCIAGA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 661 Fed. Appx. 925.

No. 16–8041. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 377.

No. 16–8042. ZAVESKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 839 F. 3d 688.

No. 16–8046. ROMAN-DE-JESUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 16–8048. STEELE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 368.

No. 16–8056. BREVICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 266.

No. 16–8059. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 364.

No. 16–8060. ALVAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 3d 1180.

No. 16–8061. ALFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 16–8066. DODDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 771.

No. 16–8070. MITCHELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–8074. LOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 16–8075. LEON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 3d 1187.

No. 16–8078. PARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 645.

No. 16–8087. VERGOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 320.

No. 16–8094. SUE *v.* KLINE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 604.

No. 16–8095. SAUCEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 351.

No. 16–8096. ROBINSON, AKA MOORE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 16–8104. BULOS-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 356.

No. 16–8106. BERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 413.

No. 16–8121. DAVIS *v.* LANGFORD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–8122. PARSONS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 664 Fed. Appx. 187.

No. 16–8126. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 885.

No. 16–8132. MORALES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 664 Fed. Appx. 228.

No. 16–8140. YATES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 842 F. 3d 1051.

No. 16–8153. JAVIER VILLAFRANCA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 844 F. 3d 199.

No. 16–710. PHOTOS ETC. CORP. ET AL. *v.* HOME DEPOT U. S. A., INC., ET AL. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 827 F. 3d 223.

No. 16–762. PUNDT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* VERIZON COMMUNICATIONS, INC., ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 837 F. 3d 523.

No. 16–6107. FORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 16–8025. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 661 Fed. Appx. 786.

No. 16–8034. RIVERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 16–8088. YUNQUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 16–5608. PIANKA *v.* UNITED STATES ET AL., *ante*, p. 924;
No. 16–6186. HALL *v.* BERGHUIS, WARDEN, *ante*, p. 1022;
No. 16–6408. JONES *v.* ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES ET AL., *ante*, p. 1059;
No. 16–6817. G. I. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL., *ante*, p. 1093;
No. 16–7170. JAMEEL *v.* UNITED STATES, *ante*, p. 1095; and
No. 16–7256. COMFORT *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 1130. Petitions for rehearing denied.

No. 16–6960. GORBEY *v.* RATHMAN, WARDEN, *ante*, p. 1084. Petition for rehearing denied. THE CHIEF JUSTICE and JUSTICE KAGAN took no part in the consideration or decision of this petition.