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OF
THE SUPREME COURT

JUNE 12 THROUGH JUNE 19, 2017

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS



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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.
NEIL M. GORSUCH, ASSOCIATE JUSTICE.

RETIRED

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

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DECISIONS.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

APPOINTMENT OF JUSTICE GORSUCH

SUPREME COURT OF THE UNITED STATES

THURSDAY, JUNE 15, 2017

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

THE CHIEF JUSTICE said:

This special sitting of the Court is held today to receive the Commission of the newly appointed Associate Justice of the Supreme Court of the United States, Neil M. Gorsuch.

We are pleased to have with us today the President of the United States. On behalf of the Court, Mr. President, I extend to you and the First Lady a warm welcome. We are also pleased to have with us our retired colleague, Justice Stevens. Welcome back.

The Court now recognizes the Deputy Attorney General of the United States, Rod J. Rosenstein.

Deputy Attorney General Rosenstein said:

MR. CHIEF JUSTICE, and may it please the Court. I have the Commission which has been issued to the Honorable Neil M. Gorsuch, as an Associate Justice of the Supreme Court of the United States. The Commission has been duly signed by the President of the United States and attested by the Attorney General of the United States. I move that the Clerk read the Commission and that it be made part of the permanent records of this Court.

THE CHIEF JUSTICE said:

Thank you, Deputy Attorney General Rosenstein, your motion is granted. Mr. Clerk, will you please read the Commission.

The Clerk read the Commission:

DONALD J. TRUMP,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Neil M. Gorsuch, of Colorado, I have nominated, and, by and with the advice and consent of the Senate, do appoint him Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto him, the said Neil M. Gorsuch, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this eighth day of April, in the year of our Lord two thousand and seventeen, and of the Independence of the United States of America the two hundred and forty-first.

[SEAL]

DONALD J. TRUMP

By the President:

JEFFERSON B. SESSIONS, III,
Attorney General

THE CHIEF JUSTICE said:

I now ask the Deputy Clerk of the Court to escort Justice Gorsuch to the bench.

THE CHIEF JUSTICE said:

Please repeat after me.

Justice Gorsuch said:

I, Neil M. Gorsuch, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an Associate Justice of the Supreme Court of the United States under the Constitution and laws of the United States. So help me God.

NEIL M. GORSUCH

Subscribed and sworn to before me this fifteenth day of June, 2017.

JOHN G. ROBERTS, JR.

Chief Justice

THE CHIEF JUSTICE said:

Congratulations. JUSTICE GORSUCH, on behalf of all the members of the Court, it is my pleasure to extend to you a very warm welcome as the 101st Associate Justice of the Supreme Court of the United States. We wish for you a long and happy career in our common calling.

JUSTICE GORSUCH said:

Mr. Chief Justice, I want to thank all of my colleagues and all of those who serve in this remarkable institution for the warm welcome I've received. Thank you.

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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 2016

SANDOZ INC. *v.* AMGEN INC. ET AL.

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

No. 15–1039. Argued April 26, 2017—Decided June 12, 2017*

The Biologics Price Competition and Innovation Act of 2009 (BPCIA or Act) provides an abbreviated pathway for obtaining Food and Drug Administration (FDA) approval of a drug that is biosimilar to an already licensed biological product (reference product). 42 U. S. C. § 262(k). It also provides procedures for resolving patent disputes between biosimilar manufacturers (applicants) and manufacturers of reference products (sponsors). § 262(l). The Act treats the mere submission of a biosimilar application as an “artificial” act of infringement, enabling parties to bring patent infringement actions at certain points in the application process even if the applicant has not committed a traditional act of patent infringement. See 35 U. S. C. §§ 271(e)(2)(C)(i), (ii).

Under § 262(l)(2)(A), an applicant seeking FDA approval of a biosimilar must provide its application and manufacturing information to the sponsor within 20 days of the date the FDA notifies the applicant that it has accepted the application for review. This triggers an exchange of information between the applicant and sponsor designed to create lists of relevant patents and flesh out potential legal arguments. § 262(l)(3). The BPCIA then channels the parties into two phases of patent litigation. In the first, the parties collaborate to identify patents

*Together with No. 15–1195, *Amgen Inc. et al. v. Sandoz Inc.*, also on certiorari to the same court.

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on the lists for immediate litigation. The second phase—triggered when the applicant, pursuant to § 262(l)(8)(A), gives the sponsor notice at least 180 days before commercially marketing the biosimilar—involves any listed patents not litigated in the first phase. The applicant has substantial control over the timing and scope of both phases of litigation.

Failure to comply with these procedural requirements may lead to two consequences relevant here. Under § 262(l)(9)(C), if an applicant fails to provide its application and manufacturing information to the sponsor under § 262(l)(2)(A), then the sponsor, but not the applicant, may immediately bring an action “for a declaration of infringement, validity, or enforceability of any patent that claims the biological product or a use of the biological product.” And under § 262(l)(9)(B), if an applicant provides the application and manufacturing information but fails to complete a subsequent step in the process, the sponsor, but not the applicant, may bring a declaratory-judgment action with respect to any patent included on the sponsor’s list of relevant patents.

Neupogen is a filgrastim product marketed by Amgen, which claims to hold patents on methods of manufacturing and using filgrastim. Sandoz sought FDA approval to market a biosimilar filgrastim product under the brand name Zarxio, with Neupogen as the reference product. A day after the FDA informed Sandoz that its application had been accepted for review, Sandoz notified Amgen that it had submitted an application and that it intended to market Zarxio immediately upon receiving FDA approval. It later informed Amgen that it did not intend to provide the application and manufacturing information required by § 262(l)(2)(A) and that Amgen could sue immediately for infringement under § 262(l)(9)(C).

Amgen sued Sandoz for patent infringement and also asserted that Sandoz engaged in “unlawful” conduct in violation of California’s unfair competition law. This latter claim was predicated on two alleged violations of the BPCIA: Sandoz’s failure to provide its application and manufacturing information under § 262(l)(2)(A), and its provision of notice of commercial marketing under § 262(l)(8)(A) prior to obtaining licensure from the FDA. Amgen sought injunctions to enforce both BPCIA requirements. Sandoz counterclaimed for declaratory judgments that the asserted patent was invalid and not infringed and that it had not violated the BPCIA.

While the case was pending, the FDA licensed Zarxio, and Sandoz provided Amgen a further notice of commercial marketing. The District Court subsequently granted partial judgment on the pleadings to Sandoz on its BPCIA counterclaims and dismissed Amgen’s unfair competition claims with prejudice. The Federal Circuit affirmed in part,

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vacated in part, and remanded. The court affirmed the dismissal of Amgen’s state-law claim based on Sandoz’s alleged violation of § 262(l)(2)(A), holding that Sandoz did not violate the BPCIA in failing to disclose its application and manufacturing information and that the BPCIA provides the exclusive remedies for failure to comply with this requirement. The court also held that under § 262(l)(8)(A) an applicant must provide notice of commercial marketing after obtaining licensure, and that this requirement is mandatory. It thus enjoined Sandoz from marketing Zarxio until 180 days after the date it provided its second notice.

Held: Section 262(l)(2)(A) is not enforceable by injunction under federal law, but the Federal Circuit on remand should determine whether a state-law injunction is available. An applicant may provide notice under § 262(l)(8)(A) prior to obtaining licensure. Pp. 14–22.

(a) Section 262(l)(2)(A)’s requirement that an applicant provide the sponsor with its application and manufacturing information is not enforceable by an injunction under federal law. The Federal Circuit reached the proper result on this point, but its reasoning was flawed. It cited § 271(e)(4), which expressly provides the “only remedies” for an act of artificial infringement. In light of this language, the court reasoned that no remedy other than those specified in the text—such as an injunction to compel the applicant to provide its application and manufacturing information—was available. The problem with this reasoning is that Sandoz’s failure to disclose was not an act of artificial infringement remediable under § 271(e)(4). Submitting an application constitutes an act of artificial infringement; failing to disclose the application and manufacturing information required by § 262(l)(2)(A) does not.

Another provision, § 262(l)(9)(C), provides a remedy for an applicant’s failure to turn over its application and manufacturing information. It authorizes the sponsor, but not the applicant, to bring an immediate declaratory-judgment action for artificial infringement, thus vesting in the sponsor the control that the applicant would otherwise have exercised over the scope and timing of the patent litigation and depriving the applicant of the certainty it could have obtained by bringing a declaratory-judgment action prior to marketing its product. The presence of this remedy, coupled with the absence of any other textually specified remedies, indicates that Congress did not intend sponsors to have access to injunctive relief, at least as a matter of federal law, to enforce the disclosure requirement. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U. S. 204, 209. Statutory context further confirms that Congress did not authorize courts to enforce § 262(l)(2)(A) by injunction. Pp. 14–17.

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(b) The Federal Circuit should determine on remand whether an injunction is available under state law to enforce § 262(l)(2)(A). Whether Sandoz's conduct was "unlawful" under California's unfair competition statute is a question of state law, and the Federal Circuit thus erred in attempting to answer that question by referring only to the BPCIA. There is no dispute about how the federal scheme actually works on the facts of these cases: Sandoz failed to disclose the requisite information under § 262(l)(2)(A), and was accordingly subject to the consequence specified in § 262(l)(9)(C). As a result, there is nothing to decide on this point as a matter of federal law. The court on remand should determine whether California law would treat noncompliance with § 262(l)(2)(A) as "unlawful," and whether the BPCIA pre-empts any additional state-law remedy for failure to comply with § 262(l)(2)(A). Pp. 17–19.

(c) An applicant may provide notice of commercial marketing before obtaining a license. Section 262(l)(8)(A) states that the applicant "shall provide notice to the reference product sponsor not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k)." Because the phrase "of the biological product licensed under subsection (k)" modifies "commercial marketing" rather than "notice," "commercial marketing" is the point in time by which the biosimilar must be "licensed." Accordingly, the applicant may provide notice either before or after receiving FDA approval. Statutory context confirms that § 262(l)(8)(A) contains a single timing requirement (180 days before marketing) rather than the two requirements posited by the Federal Circuit (after licensing, and 180 days before marketing). "Had Congress intended to" impose two timing requirements in § 262(l)(8)(A), "it presumably would have done so expressly as it did in the" adjacent provision, § 262(l)(8)(B). *Russello v. United States*, 464 U.S. 16, 23. Amgen's contrary arguments are unpersuasive, and its various policy arguments cannot overcome the statute's plain language. Pp. 19–21.

794 F. 3d 1347, vacated in part, reversed in part, and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. BREYER, J., filed a concurring opinion, *post*, p. 22.

Deanne E. Maynard argued the cause for petitioner in No. 15–1039 and respondent in No. 15–1195. With her on the briefs were *Joseph R. Palmore*, *Marc A. Hearron*, *Bryan J. Leitch*, *Rachel Krevans*, and *Julie Y. Park*.

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JUSTICE THOMAS delivered the opinion of the Court.

These cases involve 42 U. S. C. § 262(l), which was enacted as part of the Biologics Price Competition and Innovation Act of 2009 (BPCIA), 124 Stat. 808. The BPCIA governs a type of drug called a biosimilar, which is a biologic product that is highly similar to a biologic product that has already been approved by the Food and Drug Administration (FDA). Under § 262(l), an applicant that seeks FDA approval of a biosimilar must provide its application materials and manu-

†Briefs of *amici curiae* urging reversal in No. 15–1039 were filed for AARP et al. by *William Alvarado Rivera*; for Adello Biologics, LLC, by *Clifton S. Elgarten, Teresa Stanek Rea, and Deborah Yellin*; and for Pharmaceutical Care Management Association et al. by *James P. Ellison.*

Kevin E. Noonan, John D. Cravero, and Erika Lietzan filed a brief for 11 Professors as *amici curiae* urging reversal in No. 15–1195.

Briefs of *amici curiae* in both cases were filed for Abbvie Inc. by *Melissa Arbus Sherry, Gregory G. Garre, Michael A. Morin, and Alexandra Shechtel*; for America’s Health Insurance Plans by *Carlos T. Angulo and Julie Simon Miller*; for Apotex Inc. et al. by *David C. Frederick, Miles J. Sweet, Kerry B. McTigue, Barry P. Golob, Aaron S. Lukas, and Stephen A. Miller*; for Biosimilars Council by *William M. Jay, Jaime A. Santos, and Elaine Hermann Blais*; for Biotechnology Innovation Organization by *Donald R. Ware and Barbara A. Fiaco*; for Coherus Biosciences, Inc., by *W. Chad Shear and Craig E. Countryman*; for Genentech, Inc., by *E. Joshua Rosenkranz and Eric A. Shumsky*; for Jansen Biotech Inc. by *Gregory L. Diskant, Eugene M. Gelernter, and Irene Royzman*; and for Mylan Inc. by *William A. Rakoczy.*

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facturing information to the manufacturer of the corresponding biologic within 20 days of the date the FDA notifies the applicant that it has accepted the application for review. The applicant then must give notice to the manufacturer at least 180 days before marketing the biosimilar commercially.

The first question presented by these cases is whether the requirement that an applicant provide its application and manufacturing information to the manufacturer of the biologic is enforceable by injunction. We conclude that an injunction is not available under federal law, but we remand for the court below to decide whether an injunction is available under state law. The second question is whether the applicant must give notice to the manufacturer after, rather than before, obtaining a license from the FDA for its biosimilar. We conclude that an applicant may provide notice before obtaining a license.

I

The complex statutory scheme at issue in these cases establishes processes both for obtaining FDA approval of biosimilars and for resolving patent disputes between manufacturers of licensed biologics and manufacturers of biosimilars. Before turning to the questions presented, we first explain the statutory background.

A

A biologic is a type of drug derived from natural, biological sources such as animals or microorganisms. Biologics thus differ from traditional drugs, which are typically synthesized from chemicals.¹ A manufacturer of a biologic may market the drug only if the FDA has licensed it pursuant to either of two review processes set forth in §262. The default pathway for approval, used for new biologics, is set forth in §262(a). Under that subsection, the FDA may li-

¹ FDA, What Are “Biologics” Questions and Answers (Aug. 5, 2015), <http://www.fda.gov/aboutfda/centersoffices/officeofmedicalproductsandtobacco/cber/ucm133077.htm> (as last visited June 6, 2017).

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cense a new biologic if, among other things, the manufacturer demonstrates that it is “safe, pure, and potent.” § 262(a)(2)(C)(i)(I). In addition to this default route, the statute also prescribes an alternative, abbreviated route for FDA approval of biosimilars, which is set forth in § 262(k).

To obtain approval through the BPCIA’s abbreviated process, the manufacturer of a biosimilar (applicant) does not need to show that the product is “safe, pure, and potent.” Instead, the applicant may piggyback on the showing made by the manufacturer (sponsor) of a previously licensed biologic (reference product). See § 262(k)(2)(A)(iii). An applicant must show that its product is “highly similar” to the reference product and that there are no “clinically meaningful differences” between the two in terms of “safety, purity, and potency.” §§ 262(i)(2)(A), (B); see also § 262(k)(2)(A)(i)(I). An applicant may not submit an application until 4 years after the reference product is first licensed, and the FDA may not license a biosimilar until 12 years after the reference product is first licensed. §§ 262(k)(7)(A), (B). As a result, the manufacturer of a new biologic enjoys a 12-year period when its biologic may be marketed without competition from biosimilars.

B

A sponsor may hold multiple patents covering the biologic, its therapeutic uses, and the processes used to manufacture it. Those patents may constrain an applicant’s ability to market its biosimilar even after the expiration of the 12-year exclusivity period contained in § 262(k)(7)(A).

The BPCIA facilitates litigation during the period preceding FDA approval so that the parties do not have to wait until commercial marketing to resolve their patent disputes. It enables the parties to bring infringement actions at certain points in the application process, even if the applicant has not yet committed an act that would traditionally constitute patent infringement. See 35 U. S. C. § 271(a) (traditionally infringing acts include making, using, offering to sell,

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or selling any patented invention within the United States without authority to do so). Specifically, it provides that the mere submission of a biosimilar application constitutes an act of infringement. §§271(e)(2)(C)(i), (ii). We will refer to this kind of preapproval infringement as “artificial” infringement. Section 271(e)(4) provides remedies for artificial infringement, including injunctive relief and damages.

C

The BPCIA sets forth a carefully calibrated scheme for preparing to adjudicate, and then adjudicating, claims of infringement. See 42 U.S.C. §262(l). When the FDA accepts an application for review, it notifies the applicant, who within 20 days “shall provide” to the sponsor a copy of the application and information about how the biosimilar is manufactured. §262(l)(2)(A). The applicant also “may provide” the sponsor with any additional information that it requests. §262(l)(2)(B). These disclosures enable the sponsor to evaluate the biosimilar for possible infringement of patents it holds on the reference product (*i. e.*, the corresponding biologic). §262(l)(1)(D). The information the applicant provides is subject to strict confidentiality rules, enforceable by injunction. See §262(l)(1)(H). The first question presented by these cases is whether §262(l)(2)(A)’s requirement—that the applicant provide its application and manufacturing information to the sponsor—is itself enforceable by injunction.

After the applicant makes the requisite disclosures, the parties exchange information to identify relevant patents and to flesh out the legal arguments that they might raise in future litigation. Within 60 days of receiving the application and manufacturing information, the sponsor “shall provide” to the applicant “a list of patents” for which it believes it could assert an infringement claim if a person without a license made, used, offered to sell, sold, or imported “the biological product that is the subject of the [biosimilar] appli-

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cation.” §262(l)(3)(A)(i). The sponsor must also identify any patents on the list that it would be willing to license. §262(l)(3)(A)(ii).

Next, within 60 days of receiving the sponsor’s list, the applicant may provide to the sponsor a list of patents that the applicant believes are relevant but that the sponsor omitted from its own list, §262(l)(3)(B)(i), and “shall provide” to the sponsor reasons why it could not be held liable for infringing the relevant patents, §262(l)(3)(B)(ii). The applicant may argue that the relevant patents are invalid, unenforceable, or not infringed, or the applicant may agree not to market the biosimilar until a particular patent has expired. *Ibid.* The applicant must also respond to the sponsor’s offers to license particular patents. §262(l)(3)(B)(iii). Then, within 60 days of receiving the applicant’s responses, the sponsor “shall provide” to the applicant its own arguments concerning infringement, enforceability, and validity as to each relevant patent. §262(l)(3)(C).

Following this exchange, the BPCIA channels the parties into two phases of patent litigation. In the first phase, the parties collaborate to identify patents that they would like to litigate immediately. The second phase is triggered by the applicant’s notice of commercial marketing and involves any patents that were included on the parties’ §262(l)(3) lists but not litigated in the first phase.

At the outset of the first phase, the applicant and the sponsor must negotiate to determine which patents included on the §262(l)(3) lists will be litigated immediately. See §§262(l)(4)(A), (l)(6). If they cannot agree, then they must engage in another list exchange. §262(l)(4)(B). The applicant “shall notify” the sponsor of the number of patents it intends to list for litigation, §262(l)(5)(A), and, within five days, the parties “shall simultaneously exchange” lists of the patents they would like to litigate immediately. §262(l)(5)(B)(i). This process gives the applicant substantial control over the scope of the first phase of litigation:

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The number of patents on the sponsor's list is limited to the number contained in the applicant's list, though the sponsor always has the right to list at least one patent. § 262(l)(5)(B)(ii).

The parties then proceed to litigate infringement with respect to the patents they agreed to litigate or, if they failed to agree, the patents contained on the lists they simultaneously exchanged under § 262(l)(5). §§ 262(l)(6)(A), (B). Section 271(e)(2)(C)(i) facilitates this first phase of litigation by making it an act of artificial infringement, with respect to any patent included on the parties' § 262(l)(3) lists, to submit an application for a license from the FDA. The sponsor "shall bring an action" in court within 30 days of the date of agreement or the simultaneous list exchange. §§ 262(l)(6)(A), (B). If the sponsor brings a timely action and prevails, it may obtain a remedy provided by § 271(e)(4).

The second phase of litigation involves patents that were included on the original § 262(l)(3) lists but not litigated in the first phase (and any patents that the sponsor acquired after the § 262(l)(3) exchange occurred and added to the lists, see § 262(l)(7)). The second phase is commenced by the applicant's notice of commercial marketing, which the applicant "shall provide" to the sponsor "not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k)." § 262(l)(8)(A). The BPCIA bars any declaratory-judgment action prior to this notice. § 262(l)(9)(A) (prohibiting, in situations where the parties have complied with each step of the BPCIA process, either the sponsor or the applicant from seeking a "declaration of infringement, validity, or enforceability of any patent" that was included on the § 262(l)(3) lists but not litigated in the first phase "prior to the date notice is received under paragraph (8)(A)"). Because the applicant (subject to certain constraints) chooses when to begin commercial marketing and when to give notice, it wields substantial control over the timing of the second phase of litigation. The second

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question presented is whether notice is effective if an applicant provides it prior to the FDA's decision to license the biosimilar.

In this second phase of litigation, *either* party may sue for declaratory relief. See § 262(l)(9)(A). In addition, prior to the date of first commercial marketing, the sponsor may “seek a preliminary injunction prohibiting the [biosimilar] applicant from engaging in the commercial manufacture or sale of [the biosimilar] until the court decides the issue of patent validity, enforcement, and infringement with respect to any patent that” was included on the § 262(l)(3) lists but not litigated in the first phase. § 262(l)(8)(B).

D

If the parties comply with each step outlined in the BPCIA, they will have the opportunity to litigate the relevant patents before the biosimilar is marketed. To encourage parties to comply with its procedural requirements, the BPCIA includes various consequences for failing to do so. Two of the BPCIA's remedial provisions are at issue here. Under § 262(l)(9)(C), if an applicant fails to provide its application and manufacturing information to the sponsor—thus effectively pretermittting the entire two-phase litigation process—then the sponsor, but not the applicant, may immediately bring an action “for a declaration of infringement, validity, or enforceability of any patent that claims the biological product or a use of the biological product.” Section 271(e)(2)(C)(ii) facilitates this action by making it an artificial act of infringement, with respect to any patent that *could* have been included on the § 262(l)(3) lists, to submit a biosimilar application. Similarly, when an applicant provides the application and manufacturing information but fails to complete a subsequent step, § 262(l)(9)(B) provides that the sponsor, but not the applicant, may bring a declaratory-judgment action with respect to any patent included on the sponsor's § 262(l)(3)(A) list of patents (as well as those it acquired later

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and added to the list). As noted, it is an act of artificial infringement, with respect to any patent on the § 262(l)(3) lists, to submit an application to the FDA. See § 271(e)(2)(C)(i).

II

These cases concern filgrastim, a biologic used to stimulate the production of white blood cells. Amgen (collectively), the respondent in No. 15–1039 and the petitioner in No. 15–1195, has marketed a filgrastim product called Neupogen since 1991 and claims to hold patents on methods of manufacturing and using filgrastim. In May 2014, Sandoz, the petitioner in No. 15–1039 and the respondent in No. 15–1195, filed an application with the FDA seeking approval to market a filgrastim biosimilar under the brand name Zarxio, with Neupogen as the reference product. The FDA informed Sandoz on July 7, 2014, that it had accepted the application for review. One day later, Sandoz notified Amgen both that it had submitted an application and that it intended to begin marketing Zarxio immediately upon receiving FDA approval, which it expected in the first half of 2015. Sandoz later confirmed that it did not intend to provide the requisite application and manufacturing information under § 262(l)(2)(A) and informed Amgen that Amgen could sue for infringement immediately under § 262(l)(9)(C).

In October 2014, Amgen sued Sandoz for patent infringement. Amgen also asserted two claims under California’s unfair competition law, which prohibits “any unlawful . . . business act or practice.” Cal. Bus. & Prof. Code Ann. § 17200 (West 2008). A “business act or practice” is “unlawful” under the unfair competition law if it violates a rule contained in some other state or federal statute. *Rose v. Bank of America, N. A.*, 57 Cal. 4th 390, 396, 304 P. 3d 181, 185 (2013). Amgen alleged that Sandoz engaged in “unlawful” conduct when it failed to provide its application and manufacturing information under § 262(l)(2)(A), and when it provided notice of commercial marketing under § 262(l)(8)(A)

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before, rather than after, the FDA licensed its biosimilar. Amgen sought injunctions to enforce both requirements. Sandoz counterclaimed for declaratory judgments that the asserted patent was invalid and not infringed and that it had not violated the BPCIA.

While the case was pending in the District Court, the FDA licensed Zarxio, and Sandoz provided Amgen a further notice of commercial marketing. The District Court subsequently granted partial judgment on the pleadings to Sandoz on its BPCIA counterclaims and dismissed Amgen's unfair competition claims with prejudice. 2015 WL 1264756, *7–*9 (ND Cal., Mar. 19, 2015). After the District Court entered final judgment as to these claims, Amgen appealed to the Federal Circuit, which granted an injunction pending appeal against the commercial marketing of Zarxio.

A divided Federal Circuit affirmed in part, vacated in part, and remanded. First, the court affirmed the dismissal of Amgen's state-law claim based on Sandoz's alleged violation of §262(l)(2)(A). It held that Sandoz did not violate the BPCIA in failing to disclose its application and manufacturing information. It further held that the remedies contained in the BPCIA are the exclusive remedies for an applicant's failure to comply with §262(l)(2)(A). 794 F. 3d 1347, 1357, 1360 (2015).

Second, the court held that an applicant may provide effective notice of commercial marketing only *after* the FDA has licensed the biosimilar. *Id.*, at 1358. Accordingly, the 180-day clock began after Sandoz's second, postlicensure notice. The Federal Circuit further concluded that the notice requirement is mandatory and extended its injunction pending appeal to bar Sandoz from marketing Zarxio until 180 days after the date it provided its second notice. *Id.*, at 1360–1361.

We granted Sandoz's petition for certiorari, No. 15–1039, and Amgen's conditional cross-petition for certiorari, No. 15–1195, and consolidated the cases. 580 U. S. 1089 (2017).

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III

The first question we must answer is whether §262(l)(2)(A)'s requirement that an applicant provide the sponsor with its application and manufacturing information is enforceable by an injunction under either federal or state law.

A

We agree with the Federal Circuit that an injunction under federal law is not available to enforce §262(l)(2)(A), though for slightly different reasons than those provided by the court below. The Federal Circuit held that “42 U. S. C. §262(l)(9)(C) and 35 U. S. C. §271(e) expressly provide the only remedies” for a violation of §262(l)(2)(A), 794 F. 3d, at 1357, and neither of those provisions authorizes a court to compel compliance with §262(l)(2)(A). In concluding that the remedies specified in the BPCIA are exclusive, the Federal Circuit relied primarily on §271(e)(4), which states that it provides “‘the only remedies which may be granted by a court for an act of [artificial] infringement.’” *Id.*, at 1356 (emphasis deleted).

The flaw in the Federal Circuit's reasoning is that Sandoz's failure to disclose its application and manufacturing information was not an act of artificial infringement, and thus was not remediable under §271(e)(4). Submitting an application constitutes an act of artificial infringement. See §§271(e)(2)(C)(i), (ii) (“It shall be an act of infringement to submit . . . an application seeking approval of a biological product”). Failing to disclose the application and manufacturing information under §262(l)(2)(A) does not.

In reaching the opposite conclusion, the Federal Circuit relied on §271(e)(2)(C)(ii), which states that “[i]t shall be an act of infringement to submit[,] *if the applicant for the application fails to provide the application and information required under [§262(l)(2)(A)]*, an application seeking approval of a biological product for a patent that could be identified pursuant to [§262(l)(3)(A)(i)].” (Emphasis added.)

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The court appeared to conclude, based on the italicized language, that an applicant's noncompliance with § 262(l)(2)(A) is an element of the act of artificial infringement (along with the submission of the application). 794 F. 3d, at 1356. We disagree. The italicized language merely assists in identifying which patents will be the subject of the artificial infringement suit. It does not define the act of artificial infringement itself.

This conclusion follows from the structure of § 271(e)(2)(C). Clause (i) of § 271(e)(2)(C) defines artificial infringement in the situation where the parties proceed through the list exchange process and the patents subject to suit are those contained in the § 262(l)(3) lists, as supplemented under § 262(l)(7). That clause provides that it is an act of artificial infringement to submit, "*with respect to a patent that is identified in the list of patents described in [§ 262(l)(3)] (including as provided under [§ 262(l)(7))]*", an application seeking approval of a biological product." (Emphasis added.) Clause (ii) of § 271(e)(2)(C), in contrast, defines artificial infringement in the situation where an applicant fails to disclose its application and manufacturing information altogether and the parties never prepare the § 262(l)(3) lists. That clause provides that the submission of the application represents an act of artificial infringement with respect to any patent that *could* have been included on the lists.

In this way, the two clauses of § 271(e)(2)(C) work in tandem. They both treat submission of the application as the act of artificial infringement for which § 271(e)(4) provides the remedies. And they both identify the patents subject to suit, although by different means depending on whether the applicant disclosed its application and manufacturing information under § 262(l)(2)(A). If the applicant made the disclosures, clause (i) applies; if it did not, clause (ii) applies. In neither instance is the applicant's failure to provide its application and manufacturing information an element of the act of artificial infringement, and in neither instance does

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§ 271(e)(4) provide a remedy for that failure. See Brief for Amgen Inc. et al. 66–67 (conceding both points).

A separate provision of § 262, however, does provide a remedy for an applicant’s failure to turn over its application and manufacturing information. When an applicant fails to comply with § 262(l)(2)(A), § 262(l)(9)(C) authorizes the sponsor, but not the applicant, to bring an immediate declaratory-judgment action for artificial infringement as defined in § 271(e)(2)(C)(ii). Section 262(l)(9)(C) thus vests in the sponsor the control that the applicant would otherwise have exercised over the scope and timing of the patent litigation. It also deprives the applicant of the certainty that it could have obtained by bringing a declaratory-judgment action prior to marketing its product.

The remedy provided by § 262(l)(9)(C) excludes all other federal remedies, including injunctive relief. Where, as here, “a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.” *Karahalios v. Federal Employees*, 489 U. S. 527, 533 (1989). The BPCIA’s “carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.” *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U. S. 204, 209 (2002) (internal quotation marks omitted). The presence of § 262(l)(9)(C), coupled with the absence of any other textually specified remedies, indicates that Congress did not intend sponsors to have access to injunctive relief, at least as a matter of federal law, to enforce the disclosure requirement.

Statutory context further confirms that Congress did not authorize courts to enforce § 262(l)(2)(A) by injunction. Section 262(l)(1)(H) provides that “the court shall consider immediate injunctive relief to be an appropriate and necessary remedy for any violation or threatened violation” of the rules governing the confidentiality of information disclosed under § 262(l). We assume that Congress acted intention-

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ally when it provided an injunctive remedy for breach of the confidentiality requirements but not for breach of § 262(l)(2)(A)’s disclosure requirement. Cf. *Touche Ross & Co. v. Redington*, 442 U. S. 560, 572 (1979) (“[W]hen Congress wished to provide a private damage remedy, it knew how to do so and did so expressly”).² Accordingly, the Federal Circuit properly declined to grant an injunction under federal law.

B

The Federal Circuit rejected Amgen’s request for an injunction under state law for two reasons. First, it interpreted California’s unfair competition law not to provide a remedy when the underlying statute specifies an “expressly . . . exclusive” remedy. 794 F. 3d, at 1360 (citing Cal. Bus. & Prof. Code Ann. § 17205; *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1125–1126, 324 P. 3d 50, 76 (2014)). It further held that § 271(e)(4), by its text, “provides ‘the only remedies’” for an applicant’s failure to disclose its application and manufacturing information. 794 F. 3d, at 1360 (quoting § 271(e)(4)). The court thus concluded that no state remedy was available for Sandoz’s alleged violation of § 262(l)(2)(A) under the terms of California’s unfair competition law.

This state-law holding rests on an incorrect interpretation of federal law. As we have explained, failure to comply with § 262(l)(2)(A) is not an act of artificial infringement. Because § 271(e)(4) provides remedies only for artificial infringement, it provides no remedy at all, much less an “ex-

² In holding that § 262(l)(9)(C) represents the exclusive remedy for an applicant’s failure to provide its application and manufacturing information, we express no view on whether a district court could take into account an applicant’s violation of § 262(l)(2)(A) (or any other BPCIA procedural requirement) in deciding whether to grant a preliminary injunction under 35 U. S. C. § 271(e)(4)(B) or § 283 against marketing the biosimilar. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008) (court should consider “balance of equities” in deciding whether to grant a preliminary injunction).

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pressly . . . exclusive” one, for Sandoz’s failure to comply with § 262(l)(2)(A).

Second, the Federal Circuit held in the alternative that Sandoz’s failure to disclose its application and manufacturing information was not “unlawful” under California’s unfair competition law. In the court’s view, when an applicant declines to provide its application and manufacturing information to the sponsor, it takes a path “expressly contemplated by” § 262(l)(9)(C) and § 271(e)(2)(C)(ii) and thus does not violate the BPCIA. 794 F. 3d, at 1357, 1360. In their briefs before this Court, the parties frame this issue as whether the § 262(l)(2)(A) requirement is mandatory in all circumstances, see Brief for Amgen Inc. et al. 58, or merely a condition precedent to the information exchange process, see Reply Brief for Sandoz Inc. 33. If it is only a condition precedent, then an applicant effectively has the option to withhold its application and manufacturing information and does not commit an “unlawful” act in doing so.

We decline to resolve this particular dispute definitively because it does not present a question of federal law. The BPCIA, standing alone, does not require a court to decide whether § 262(l)(2)(A) is mandatory or conditional; the court need only determine whether the applicant supplied the sponsor with the information required under § 262(l)(2)(A). If the applicant failed to provide that information, then the sponsor, but not the applicant, could bring an immediate declaratory-judgment action pursuant to § 262(l)(9)(C). The parties in these cases agree—as did the Federal Circuit—that Sandoz failed to comply with § 262(l)(2)(A), thus subjecting itself to that consequence. There is no dispute about how the federal scheme actually works, and thus nothing for us to decide as a matter of federal law. The mandatory or conditional nature of the BPCIA’s requirements matters *only* for purposes of California’s unfair competition law, which penalizes “unlawful” conduct. Whether Sandoz’s conduct was “unlawful” under the unfair competition law is a

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state-law question, and the court below erred in attempting to answer that question by referring to the BPCIA alone.

On remand, the Federal Circuit should determine whether California law would treat noncompliance with § 262(l)(2)(A) as “unlawful.” If the answer is yes, then the court should proceed to determine whether the BPCIA pre-empts any additional remedy available under state law for an applicant’s failure to comply with § 262(l)(2)(A) (and whether Sandoz has forfeited any pre-emption defense, see 794 F. 3d, at 1360, n. 5). The court is also of course free to address the pre-emption question first by assuming that a remedy under state law exists.

IV

The second question at issue in these cases is whether an applicant must provide notice *after* the FDA licenses its biosimilar, or if it may also provide effective notice before licensure. Section 262(l)(8)(A) states that the applicant “shall provide notice to the reference product sponsor not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k).” The Federal Circuit held that an applicant’s biosimilar must already be “licensed” at the time the applicant gives notice. 794 F. 3d, at 1358.

We disagree. The applicant must give “notice” at least 180 days “before the date of the first commercial marketing.” “[C]ommercial marketing,” in turn, must be “of the biological product licensed under subsection (k).” § 262(l)(8)(A). Because this latter phrase modifies “commercial marketing” rather than “notice,” “commercial marketing” is the point in time by which the biosimilar must be “licensed.” The statute’s use of the word “licensed” merely reflects the fact that, on the “date of the first commercial marketing,” the product must be “licensed.” See § 262(a)(1)(A). Accordingly, the applicant may provide notice either before or after receiving FDA approval.

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Statutory context confirms this interpretation. Section 262(l)(8)(A) contains a single timing requirement: The applicant must provide notice at least 180 days prior to marketing its biosimilar. The Federal Circuit, however, interpreted the provision to impose two timing requirements: The applicant must provide notice after the FDA licenses the biosimilar *and* at least 180 days before the applicant markets the biosimilar. An adjacent provision expressly sets forth just that type of dual timing requirement. See § 262(l)(8)(B) (“*After* receiving notice under subparagraph (A) and *before* such date of the first commercial marketing of such biological product, the reference product sponsor may seek a preliminary injunction” (emphasis added)). But Congress did not use that structure in § 262(l)(8)(A). “Had Congress intended to” impose two timing requirements in § 262(l)(8)(A), “it presumably would have done so expressly as it did in the immediately following” subparagraph. *Russello v. United States*, 464 U. S. 16, 23 (1983).

We are not persuaded by Amgen’s arguments to the contrary. Amgen points out that other provisions refer to “the biological product *that is the subject of*” the application rather than the “‘biological product *licensed under* subsection (k).’” Brief for Amgen Inc. et al. 28 (emphasis added). In its view, this variation “is a strong textual indication that § 262(l)(8)(A), unlike the other provisions, refers to a product that has already been ‘licensed’ by the FDA.” *Ibid.*

Amgen’s interpretation is not necessary to harmonize Congress’ use of the two different phrases. The provision upon which Amgen primarily relies (and that is generally illustrative of the other provisions it cites) requires the applicant to explain why the sponsor’s patents are “‘invalid, unenforceable, or will not be infringed by the commercial marketing of the biological product that is the subject of the subsection (k) application.’” *Id.*, at 29–30 (quoting § 262(l)(3)(B)(ii)(I); emphasis deleted). This provision uses the phrase “subject of the subsection (k) application” rather than “product li-

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censed under subsection (k)” because the applicant can evaluate validity, enforceability, and infringement with respect to the biosimilar only as it exists *when the applicant is conducting the evaluation*, which it does before licensure. The applicant cannot make the same evaluation with respect to the biosimilar as it will exist after licensure, because the biosimilar’s specifications may change during the application process. See, *e. g.*, 794 F. 3d, at 1358. In contrast, nothing in § 262(l)(8)(A) turns on the precise status or characteristics of the biosimilar application.

Amgen also advances a host of policy arguments that prelicensure notice is undesirable. See Brief for Amgen Inc. et al. 35–42. Sandoz and the Government, in turn, respond with their own bevy of arguments that Amgen’s concerns are misplaced and that prelicensure notice affirmatively furthers Congress’ intent. See Brief for Sandoz Inc. 39–42, 56; Brief for United States as *Amicus Curiae* 28–29. The plausibility of the contentions on both sides illustrates why such disputes are appropriately addressed to Congress, not the courts. Even if we were persuaded that Amgen had the better of the policy arguments, those arguments could not overcome the statute’s plain language, which is our “primary guide” to Congress’ preferred policy. *McFarland v. Scott*, 512 U. S. 849, 865 (1994) (THOMAS, J., dissenting).

In sum, because Sandoz fully complied with § 262(l)(8)(A) when it first gave notice (before licensure) in July 2014, the Federal Circuit erred in issuing a federal injunction prohibiting Sandoz from marketing Zarxio until 180 days after licensure. Furthermore, because Amgen’s request for state-law relief is predicated on its argument that the BPCIA forbids prelicensure notice, its claim under California’s unfair competition law also fails. We accordingly reverse the Federal Circuit’s judgment as to the notice provision.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is vacated in part and reversed in part, and the

BREYER, J., concurring

cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, concurring.

The Court's interpretation of the statutory terms before us is a reasonable interpretation, and I join its opinion. In my view, Congress implicitly delegated to the Food and Drug Administration authority to interpret those same terms. That being so, if that agency, after greater experience administering this statute, determines that a different interpretation would better serve the statute's objectives, it may well have authority to depart from, or to modify, today's interpretation, see *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U. S. 967, 982–984 (2005), though we need not now decide any such matter.

Syllabus

MICROSOFT CORP. *v.* BAKER ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 15–457. Argued March 21, 2017—Decided June 12, 2017

Orders granting or denying class certification are inherently interlocutory, hence not immediately reviewable under 28 U. S. C. § 1291, which empowers federal courts of appeals to review only “final decisions of the district courts.” In *Coopers & Lybrand v. Livesay*, 437 U. S. 463, a 1978 decision, this Court held that the death-knell doctrine—which rested on courts’ recognition that a denial of class certification would sometimes end a lawsuit for all practical purposes—did not warrant mandatory appellate jurisdiction of certification orders. *Id.*, at 470, 477. Although the death-knell theory likely “enhanced the quality of justice afforded a few litigants,” it did so at a heavy cost to § 1291’s finality requirement. *Id.*, at 473. First, the potential for multiple interlocutory appeals inhered in the doctrine. See *id.*, at 474. Second, the death-knell theory forced appellate courts indiscriminately into the trial process, circumventing the two-tiered “screening procedure” Congress established for interlocutory appeals in 28 U. S. C. § 1292(b). 437 U. S., at 474, 476. Finally, the doctrine “operat[ed] only in favor of plaintiffs,” even though the class-certification question may be critically important to defendants as well. *Id.*, at 476.

Two decades later, in 1998, after Congress amended the Rules Enabling Act, 28 U. S. C. § 2071 *et seq.*, to empower this Court to promulgate rules providing for interlocutory appeal of orders “not otherwise provided for [in § 1292],” § 1292(e), this Court approved Federal Rule of Civil Procedure 23(f). Rule 23(f) authorizes “permissive interlocutory appeal” from adverse class-certification orders in “the sole discretion of the court of appeals.” 28 U. S. C. App., p. 815. This discretionary arrangement was the product of careful calibration on the part of the rulemakers.

Respondents, owners of Microsoft’s videogame console, the Xbox 360, filed this putative class action alleging a design defect in the device. The District Court struck respondents’ class allegations from the complaint, and the Court of Appeals denied respondents permission to appeal that order under Rule 23(f). Instead of pursuing their individual claims to final judgment on the merits, respondents stipulated to a voluntary dismissal of their claims with prejudice, but reserved the right to revive their claims should the Court of Appeals reverse the District

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Court's certification denial. Respondents then appealed, challenging only the interlocutory order striking their class allegations. The Ninth Circuit held it had jurisdiction to entertain the appeal under § 1291. It then held that the District Court's rationale for striking respondents' class allegations was an impermissible one, but refused to opine on whether class certification was inappropriate for a different reason, leaving that question for the District Court on remand.

Held: Federal courts of appeals lack jurisdiction under § 1291 to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice. Pp. 36–42.

(a) Section 1291's final-judgment rule preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. This Court has resisted efforts to stretch § 1291 to permit appeals of right that would erode the finality principle and disserve its objectives. See, e.g., *Mohawk Industries, Inc. v. Carpenter*, 558 U. S. 100, 112. Attempts to secure appeal as of right from adverse class-certification orders fit that bill. Pp. 36–37.

(b) Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff "ha[d] adequate incentive to continue" despite the denial of class certification. *Coopers & Lybrand*, 437 U. S., at 471. Under respondents' theory, however, the decision whether an immediate appeal will lie resides exclusively with the plaintiff, who need only dismiss her claims with prejudice in order to appeal the district court's order denying class certification. And she may exercise that option more than once, interrupting district court proceedings with an interlocutory appeal again, should the court deny class certification on a different ground.

Respondents contend that their position promotes efficiency, observing that after dismissal with prejudice the case is over if the plaintiff loses on appeal. But plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement. And the same argument was evident in the death-knell context, yet this Court determined that the potential for piecemeal litigation was "apparent and serious." *Id.*, at 474. That potential is greater still under respondents' theory, where plaintiffs alone determine whether and when to appeal an adverse certification ruling. Pp. 37–39.

(c) Also like the death-knell doctrine, respondents' theory allows indiscriminate appellate review of interlocutory orders. Beyond disturb-

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ing the “appropriate relationship between the respective courts,” *Coopers & Lybrand*, 437 U. S., at 476, respondents’ dismissal tactic undercuts Rule 23(f)’s discretionary regime. This consideration is “[o]f prime significance to the jurisdictional issue” in this case, *Swint v. Chambers County Comm’n*, 514 U. S. 35, 46, because Congress has established rulemaking as the means for determining when a decision is final for purposes of § 1291 and for providing for appellate review of interlocutory orders not covered by statute, see §§ 2072(c) and 1292(e).

Respondents maintain that Rule 23(f) is irrelevant, for it concerns interlocutory orders, whereas this case involves an actual final judgment. Yet permitting respondents’ voluntary-dismissal tactic to yield an appeal of right would seriously undermine Rule 23(f)’s careful calibration, as well as Congress’ designation of rulemaking “as the preferred means for determining whether and when prejudgment orders should be immediately appealable,” *Mohawk Industries*, 558 U. S., at 113. Plaintiffs in putative class actions cannot transform a tentative interlocutory order into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice. Finality “is not a technical concept of temporal or physical termination.” *Cobbledick v. United States*, 309 U. S. 323, 326. It is one “means [geared to] achieving a healthy legal system,” *ibid.*, and its contours are determined accordingly. Pp. 39–41.

(d) The one-sidedness of respondents’ voluntary-dismissal device reinforces the conclusion that it does not support mandatory appellate jurisdiction of refusals to grant class certification. The tactic permits only plaintiffs, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the “class issue” may be just as important to defendants, *Coopers & Lybrand*, 437 U. S., at 476, for class certification may force a defendant to settle rather than run the risk of ruinous liability. Pp. 41–42.

797 F. 3d 607, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and ALITO, J., joined, *post*, p. 42. GORSUCH, J., took no part in the consideration or decision of the case.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *Stephen M. Rummage*, *Fred B. Burnside*, *Bradford L. Smith*, *Horacio E. Gutiérrez*, *David M. Howard*, *Timothy G. Fielden*, and *Charles B. Casper*.

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Peter K. Stris argued the cause for respondents. With him on the brief were *Brendan S. Maher, Daniel L. Geysler, Douglas D. Geysler, Dana Berkowitz, Victor O’Connell, Shaun P. Martin, Robert L. Esensten, Jeffrey M. Ostrow, Jonathan M. Streisfeld, Darren T. Kaplan, Mark A. Griffin, Amy Williams-Derry, Benjamin Gould, Paul L. Stritmatter, and Bradley J. Moore*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns options open to plaintiffs, when denied class-action certification by a district court, to gain appellate review of the district court’s order. Orders granting or denying class certification, this Court has held, are “inherently interlocutory,” *Coopers & Lybrand v. Livesay*, 437 U. S. 463, 470 (1978), hence not immediately reviewable under 28 U. S. C. § 1291, which provides for appeals from “final decisions.” Pursuant to Federal Rule of Civil Procedure 23(f), promulgated in 1998, however, orders denying or granting class certification may be appealed immediately if the court of appeals so permits. Absent such permission, plaintiffs may pursue their individual claims on the merits to final judgment, at which point the denial of class-action certification becomes ripe for review.

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Mark W. Mosier, Kate Comerford Todd, Warren Postman, and Deborah R. White*; for Civil Procedure Scholars by *E. Joshua Rosenkranz, Robert M. Loeb, and Thomas M. Bondy*; for DRI—The Voice of the Defense Bar by *Mary Massaron, Laura E. Proctor, and Hilary A. Ballentine*; for the Pacific Legal Foundation by *Deborah J. La Fetra*; for the Product Liability Advisory Council, Inc., by *John H. Beisner and Geoffrey M. Wyatt*; and for the Washington Legal Foundation et al. by *Cory L. Andrews*.

Briefs of *amici curiae* urging affirmance were filed for Complex Litigation Law Professors by *Rishi Bhandari*; and for Public Citizen, Inc., by *Adina H. Rosenbaum and Scott L. Nelson*.

A brief of *amicus curiae* was filed for Public Justice, P. C., by *Jason L. Lichtman, Jonathan D. Selbin, Andrew R. Kaufman, Leslie A. Brueckner, and F. Paul Bland, Jr.*

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The plaintiffs in the instant case, respondents here, were denied Rule 23(f) permission to appeal the District Court’s refusal to grant class certification. Instead of pursuing their individual claims to final judgment on the merits, respondents stipulated to a voluntary dismissal of their claims “with prejudice,” but reserved the right to revive their claims should the Court of Appeals reverse the District Court’s certification denial.

We hold that the voluntary dismissal essayed by respondents does not qualify as a “final decision” within the compass of § 1291. The tactic would undermine § 1291’s firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders.

I

A

Under § 1291 of the Judicial Code, federal courts of appeals are empowered to review only “final decisions of the district courts.” 28 U. S. C. § 1291.¹ Two guides, our decision in *Coopers & Lybrand v. Livesay*, 437 U. S. 463 (1978), and Federal Rule of Civil Procedure 23(f), control our application of that finality rule here.

1

In *Coopers & Lybrand*, this Court considered whether a plaintiff in a putative class action may, under certain circumstances, appeal as of right a district court order striking class allegations or denying a motion for class certification. We held unanimously that the so-called “death-knell” doctrine did not warrant mandatory appellate jurisdiction of such “inherently interlocutory” orders. 437 U. S., at 470, 477. Courts of Appeals employing the doctrine “regarded

¹Section 1292, which authorizes review of certain interlocutory decisions, does not include among those decisions class-action certifications. See 28 U. S. C. § 1292.

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[their] jurisdiction as depending on whether [rejection of class-action status] had sounded the ‘death knell’ of the action.” *Id.*, at 466. These courts asked whether the refusal to certify a class would end a lawsuit for all practical purposes because the value of the named plaintiff’s individual claims made it “economically imprudent to pursue his lawsuit to a final judgment and [only] then seek appellate review of [the] adverse class determination.” *Id.*, at 469–470. If, in the court of appeals’ view, the order would terminate the litigation, the court deemed the order an appealable final decision under § 1291. *Id.*, at 471. If, instead, the court determined that the plaintiff had “adequate incentive to continue [litigating], the order [was] considered interlocutory.” *Ibid.* Consequently, immediate appeal would be denied.

The death-knell theory likely “enhance[d] the quality of justice afforded a few litigants,” we recognized. *Id.*, at 473. But the theory did so, we observed, at a heavy cost to § 1291’s finality requirement, and therefore to “the judicial system’s overall capacity to administer justice.” *Id.*, at 473; see *id.*, at 471 (Section 1291 “evinces a legislative judgment that ‘restricting appellate review to final decisions prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition.’” (quoting *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, 170 (1974); alterations and internal quotation marks omitted)). First, the potential for multiple interlocutory appeals inhered in the doctrine: When a ruling denying class certification on one ground was reversed on appeal, a death-knell plaintiff might again claim “entitlement] to an appeal as a matter of right” if, on remand, the district court denied class certification on a different ground. *Coopers & Lybrand*, 437 U. S., at 474.

Second, the doctrine forced appellate courts indiscriminately into the trial process, thereby defeating a “vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts.” *Id.*, at 476 (internal quotation marks omitted); see *id.*, at 474.

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The Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), we explained, had created a two-tiered “screening procedure” to preserve this relationship and to restrict the availability of interlocutory review to “appropriate cases.” 437 U.S., at 474. For a party to obtain review under § 1292(b), the district court must certify that the interlocutory order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” The court of appeals may then, “in its discretion, permit an appeal to be taken from such order.” The death-knell doctrine, we stressed, “circumvent[ed] [§ 1292(b)]’s restrictions.” *Id.*, at 475.

Finally, we observed, the doctrine was one sided: It “operate[d] only in favor of plaintiffs,” even though the class-certification question is often “of critical importance to defendants as well.” *Id.*, at 476. Just as a denial of class certification may sound the death knell for plaintiffs, “[c]ertification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” *Ibid.*²

In view of these concerns, the Court reached this conclusion in *Coopers & Lybrand*: “[T]he fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering [the order] a ‘final decision’ within the meaning of § 1291.” *Id.*, at 477.³

²This scenario has been called a “reverse death knell,” Sullivan & Trueblood, Rule 23(f): A Note on Law and Discretion in the Courts of Appeals, 246 F. R. D. 277, 280 (2008), or “inverse death knell,” 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1802, p. 299 (3d ed. 2005), for it too ends the litigation as a practical matter.

³*Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), also rejected the collateral-order doctrine as a basis for invoking § 1291 to appeal an order denying class certification. The collateral-order doctrine applies only to a “small class” of decisions that are conclusive, that resolve important

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2

After *Coopers & Lybrand*, a party seeking immediate review of an adverse class-certification order had no easy recourse. The Federal Rules of Civil Procedure did not then “contain any unique provisions governing appeals” in class actions, *id.*, at 470, so parties had to survive § 1292(b)’s two-level inspection, see *id.*, at 474–475, and n. 27; *supra*, at 29, or satisfy the extraordinary-circumstances test applicable to writs of mandamus, see *Will v. United States*, 389 U. S. 90, 108 (1967) (Black, J., concurring) (“[In] extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means ‘final’ and thus appealable under federal statutes.”); cf. *Coopers & Lybrand*, 437 U. S., at 466, n. 6.

Another avenue opened in 1998 when this Court approved Federal Rule of Civil Procedure 23(f). Seen as a response to *Coopers & Lybrand*, see, e. g., *Blair v. Equifax Check Services, Inc.*, 181 F. 3d 832, 834 (CA7 1999); Solimine & Hines, *Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531, 1568 (2000), Rule 23(f) authorizes “permissive interlocutory appeal” from adverse class-certification orders in the discretion of the court of appeals, Advisory Committee’s 1998 Note on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 815 (hereinafter Committee Note on Rule 23(f)). The Rule was adopted pursuant to § 1292(e), see Committee Note on Rule 23(f), which empowers this Court, in accordance with the Rules Enabling Act, 28 U. S. C. § 2072, to promulgate rules “to provide for an appeal of an interlocutory decision to the

issues “completely separate from the merits,” and that are “effectively unreviewable on appeal from a final judgment.” *Id.*, at 468. An order concerning class certification, we explained, fails each of these criteria. See *id.*, at 469.

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courts of appeals that is not otherwise provided for [in § 1292].” § 1292(e).⁴ Rule 23(f) reads:

“A court of appeals may permit an appeal from an order granting or denying class-action certification . . . if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”⁵

Courts of appeals wield “unfettered discretion” under Rule 23(f), akin to the discretion afforded circuit courts under § 1292(b). Committee Note on Rule 23(f). But Rule 23(f) otherwise “departs from the § 1292(b) model,” for it requires neither district court certification nor adherence to § 1292(b)’s other “limiting requirements.” Committee Note on Rule 23(f); see *supra*, at 29.

This resolution was the product of careful calibration. By “[r]emoving the power of the district court to defeat any opportunity to appeal,” the drafters of Rule 23(f) sought to provide “significantly greater protection against improvident certification decisions than § 1292(b)” alone offered. Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of November 9–10, 1995. But the drafters declined to go further and provide for appeal as a

⁴ Congress amended the Rules Enabling Act, 28 U. S. C. § 2071 *et seq.*, in 1990 to authorize this Court to prescribe rules “defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291.” § 2072(c). Congress enacted § 1292(e) two years later, and that same year the Advisory Committee on the Federal Rules of Civil Procedure began to review proposals for what would become Rule 23(f). See Solimine & Hines, *Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 *Wm. & Mary L. Rev.* 1531, 1563–1564, 1566, n. 189 (2000).

⁵ Rule 23(f) has changed little since its adoption in 1998. See Advisory Committee’s 2007 and 2009 Notes on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 820 (deleting a redundancy and increasing the time to petition for permission to appeal from 10 to 14 days, respectively).

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matter of right. “[A] right to appeal would lead to abuse” on the part of plaintiffs and defendants alike, the drafters apprehended, “increas[ing] delay and expense” over “routine class certification decisions” unworthy of immediate appeal. *Ibid.* (internal quotation marks omitted). See also Brief for Civil Procedure Scholars as *Amici Curiae* 6–7, 11–14 (“Rule 23(f) was crafted to balance the benefits of immediate review against the costs of interlocutory appeals.” (capitalization omitted)). Rule 23(f) therefore commits the decision whether to permit interlocutory appeal from an adverse certification decision to “the sole discretion of the court of appeals.” Committee Note on Rule 23(f); see Federal Judicial Center, T. Willging, L. Hooper, & R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 86 (1996)* (hereinafter *Federal Judicial Center Study*) (“The discretionary nature of the proposed rule . . . is designed to be a guard against abuse of the appellate process.”).⁶

The Rules Committee offered some guidance to courts of appeals considering whether to authorize appeal under Rule 23(f). “Permission is most likely to be granted,” the Committee Note states, “when the certification decision turns on a novel or unsettled question of law,” or when “the decision on certification is likely dispositive of the litigation,” as in a death-knell or reverse death-knell situation. Committee Note on Rule 23(f); see *supra*, at 29, and n. 2. Even so, the Rule allows courts of appeals to grant or deny review “on

⁶ Legislation striking this balance was also introduced in Congress. See H. R. 660, 105th Cong., 1st Sess. (1997). The bill, which would have amended § 1292(b) to provide for interlocutory appeal of adverse class determinations, likewise committed the decision whether an immediate appeal would lie exclusively to the courts of appeals: “The court of appeals may, in its discretion, permit the appeal to be taken from such determination.” *Ibid.* Upon learning that “proposed Rule 23(f) [was] well advanced,” the bill’s sponsor, Representative Charles Canady, joined forces with the Rules Committee. See Judicial Conference of the United States, *Advisory Committee on Civil Rules, Minutes of May 1–2, 1997*.

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the basis of *any* consideration.” Committee Note on Rule 23(f) (emphasis added).

B

With this background in mind, we turn to the putative class action underlying our jurisdictional inquiry. The lawsuit is not the first of its kind. A few years after petitioner Microsoft Corporation released its popular videogame console, the Xbox 360, a group of Xbox owners brought a putative class action against Microsoft based on an alleged design defect in the device. See *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 WL 10219350, *1 (WD Wash., Oct. 5, 2009). The named plaintiffs, advised by some of the same counsel representing respondents in this case, asserted that the Xbox scratched (and thus destroyed) game discs during normal game-playing conditions. See *ibid.* The District Court denied class certification, holding that individual issues of damages and causation predominated over common issues. See *id.*, at *6–*7. The plaintiffs petitioned the Ninth Circuit under Rule 23(f) for leave to appeal the class-certification denial, but the Ninth Circuit denied the request. See 851 F. Supp. 2d 1274, 1276 (WD Wash. 2012). Thereafter, the *Scratched Disc* plaintiffs settled their claims individually. 851 F. Supp. 2d, at 1276.

Two years later, in 2011, respondents filed this lawsuit in the same Federal District Court. They proposed a nationwide class of Xbox owners based on the same design defect alleged in *Scratched Disc Litigation*. See 851 F. Supp. 2d, at 1275–1276. The class-certification analysis in the earlier case did not control, respondents urged, because an intervening Ninth Circuit decision constituted a change in law sufficient to overcome the deference ordinarily due, as a matter of comity, the previous certification denial. *Id.*, at 1277–1278. The District Court disagreed. Concluding that the relevant Circuit decision had not undermined *Scratched Disc Litigation*’s causation analysis, the court determined that comity required adherence to the earlier certification denial

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and therefore struck respondents' class allegations. 851 F. Supp. 2d, at 1280–1281.

Invoking Rule 23(f), respondents petitioned the Ninth Circuit for permission to appeal that ruling.⁷ Interlocutory review was appropriate in this case, they argued, because the District Court's order striking the class allegations created a "death-knell situation": The "small size of [their] claims ma[de] it economically irrational to bear the cost of litigating th[e] case to final judgment," they asserted, so the order would "effectively kil[l] the case." Pet. for Permission To Appeal Under Rule 23(f) in No. 12–80085 (CA9), App. 118. The Ninth Circuit denied the petition. Order in No. 12–80085 (CA9, June 12, 2012), App. 121.

Respondents then had several options. They could have settled their individual claims like their *Scratched Disc* predecessors or petitioned the District Court, pursuant to § 1292(b), to certify the interlocutory order for appeal, see *supra*, at 29. They could also have proceeded to litigate their case, mindful that the District Court could later reverse course and certify the proposed class. See Fed. Rule Civ. Proc. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *Coopers & Lybrand*, 437 U. S., at 469 (a certification order "is subject to revision in the District Court"). Or, in the event the District Court did not change course, respondents could have litigated the case to final judgment and then appealed. *Ibid.* ("an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff").

⁷ An order striking class allegations is "functional[ly] equivalent" to an order denying class certification and therefore appealable under Rule 23(f). *Scott v. Family Dollar Stores, Inc.*, 733 F. 3d 105, 110–111, n. 2 (CA4 2013) (quoting *In re Bemis Co.*, 279 F. 3d 419, 421 (CA7 2002)). See also *United Airlines, Inc. v. McDonald*, 432 U. S. 385, 388, and n. 4 (1977) (equating order striking class allegations with "a denial of class certification").

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Instead of taking one of those routes, respondents moved to dismiss their case with prejudice. “After the [c]ourt has entered a final order and judgment,” respondents explained, they would “appeal the . . . order striking [their] class allegations.” Motion To Dismiss in No. 11–cv–00722 (WD Wash., Sept. 25, 2012), App. 122–123. In respondents’ view, the voluntary dismissal enabled them “to pursue their individual claims or to pursue relief solely on behalf of the class, should the certification decision be reversed.” Brief for Respondents 15. Microsoft stipulated to the dismissal, but maintained that respondents would have “no right to appeal” the order striking the class allegations after thus dismissing their claims. App. to Pet. for Cert. 35a–36a. The District Court granted the stipulated motion to dismiss, *id.*, at 39a, and respondents appealed. They challenged only the District Court’s interlocutory order striking their class allegations, not the dismissal order which they invited. See Brief for Plaintiffs-Appellants in No. 12–35946 (CA9).

The Ninth Circuit held it had jurisdiction to entertain the appeal under § 1291. 797 F. 3d 607, 612 (2015). The Court of Appeals rejected Microsoft’s argument that respondents’ voluntary dismissal, explicitly engineered to appeal the District Court’s interlocutory order striking the class allegations, impermissibly circumvented Rule 23(f). *Ibid.*, n. 3. Because the stipulated dismissal “did not involve a settlement,” the court reasoned, it was “‘a sufficiently adverse—and thus appealable—final decision’” under § 1291. *Id.*, at 612 (quoting *Berger v. Home Depot USA, Inc.*, 741 F. 3d 1061, 1065 (CA9 2014)); see *id.*, at 1065 (relying on 7B C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1802, pp. 297–298 (3d ed. 2005), for the proposition “that finality for appeal purposes can be achieved in this manner”).

Satisfied of its jurisdiction, the Ninth Circuit held that the District Court had abused its discretion in striking respondents’ class allegations. 797 F. 3d, at 615. The Court of Appeals “express[ed] no opinion on whether” respondents

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“should prevail on a motion for class certification,” *ibid.*, concluding only that the District Court had misread recent Circuit precedent, see *id.*, at 613–615, and therefore misapplied the comity doctrine, *id.*, at 615. Whether a class should be certified, the court said, was a question for remand, “better addressed if and when [respondents] move[d] for class certification.” *Ibid.*

We granted certiorari to resolve a Circuit conflict over this question: Do federal courts of appeals have jurisdiction under § 1291 and Article III of the Constitution to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice?⁸ 577 U.S. 1099 (2016). Because we hold that § 1291 does not countenance jurisdiction by these means, we do not reach the constitutional question, and therefore do not address the arguments and analysis discussed in the opinion concurring in the judgment.

II

“From the very foundation of our judicial system,” the general rule has been that “the whole case and every matter in controversy in it [must be] decided in a single appeal.” *McLish v. Roff*, 141 U.S. 661, 665–666 (1891). This final-judgment rule, now codified in § 1291, preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration

⁸ Compare *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (CA9 2014) (assuming jurisdiction under these circumstances); *Gary Plastic Packaging Corp. v. Merrill Lynch*, 903 F.2d 176, 179 (CA2 1990) (assuming jurisdiction after dismissal for failure to prosecute), with *Camesi v. University of Pittsburgh Medical Center*, 729 F.3d 239, 245–247 (CA3 2013) (no jurisdiction under § 1291 or Article III in this situation); *Rhodes v. E. I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (CA4 2011) (no jurisdiction under Article III).

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of justice. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U. S. 368, 374 (1981).

Construing § 1291 in line with these reasons for the rule, we have recognized that “finality is to be given a practical rather than a technical construction.” *Eisen*, 417 U. S., at 171 (internal quotation marks omitted). Repeatedly we have resisted efforts to stretch § 1291 to permit appeals of right that would erode the finality principle and disserve its objectives. See, e. g., *Mohawk Industries, Inc. v. Carpenter*, 558 U. S. 100, 112 (2009); *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U. S. 863, 878–879, 884 (1994); *Cobbledick v. United States*, 309 U. S. 323, 324–325, 330 (1940) (construing § 1291’s predecessor statute). Attempts to secure appeal as of right from adverse class-certification orders fit that bill. See *supra*, at 27–29. Because respondents’ dismissal device subverts the final-judgment rule and the process Congress has established for refining that rule and for determining when nonfinal orders may be immediately appealed, see §§ 2072(c) and 1292(e), the tactic does not give rise to a “final decisio[n]” under § 1291.

A

Respondents’ voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff “ha[d] adequate incentive to continue” despite the denial of class certification. *Coopers & Lybrand*, 437 U. S., at 471. Appellate courts lack even that authority under respondents’ theory. Instead, the decision whether an immediate appeal will lie resides exclusively with the plaintiff; she need only dismiss her claims with prejudice, whereupon she may appeal the district court’s order denying class certification. And, as under the death-knell doctrine, she may exercise that option more than once, stopping and starting the district court proceedings with repeated inter-

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locutory appeals. See *id.*, at 474 (death-knell doctrine offered “no assurance that the trial process [would] not again be disrupted by interlocutory review”).

Consider this case. The Ninth Circuit reviewed and rejected only the District Court’s application of comity as a basis for striking respondents’ class allegations. 797 F. 3d, at 615. The appeals court declined to reach Microsoft’s other arguments against class certification. See *ibid.* It remained open to the District Court, in the Court of Appeals’ view, to deny class certification on a different ground, and respondents would be free, under their theory, to force appellate review of any new order denying certification by again dismissing their claims. In designing Rule 23(f)’s provision for discretionary review, the Rules Committee sought to prevent such disruption and delay. See *supra*, at 31–34.⁹

Respondents nevertheless maintain that their position promotes efficiency, observing that after dismissal with prejudice the case is over if the plaintiff loses on appeal. Brief for Respondents 38–39. Their way, they say, means prompt resolution of many lawsuits and infrequent use of the voluntary-dismissal tactic, for “most appeals lose” and few plaintiffs will “take th[e] risk” of losing their claims for good. *Id.*, at 35–36. Respondents overlook the prospect that plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement. See *Coopers & Lybrand*, 437 U. S., at 476 (defendant facing the specter of classwide liability may “abandon a meritorious defense”). Indeed, the same argument—that the case was over if the plaintiff lost on appeal—was

⁹ Rule 23(f) avoids delay not only by limiting class-certification appeals to those permitted by the federal courts of appeals, but also by specifying that “[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.” See *Blair v. Equifax Check Services, Inc.*, 181 F. 3d 832, 835 (CA7 1999) (“Rule 23(f) is drafted to avoid delay.”). Respondents’ dismissal tactic, by contrast, halts district court proceedings whenever invoked.

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evident in the death-knell context, yet this Court determined that the potential for piecemeal litigation was “apparent and serious.” *Id.*, at 474.¹⁰ And that potential is greater still under respondents’ theory, where plaintiffs alone determine whether and when to appeal an adverse certification ruling.

B

Another vice respondents’ theory shares with the death-knell doctrine, both allow indiscriminate appellate review of interlocutory orders. *Ibid.* Beyond disturbing the “appropriate relationship between the respective courts,” *id.*, at 476 (internal quotation marks omitted), respondents’ dismissal tactic undercuts Rule 23(f)’s discretionary regime. This consideration is “[o]f prime significance to the jurisdictional issue before us.” *Swint v. Chambers County Comm’n*, 514 U. S. 35, 46 (1995) (pendent appellate jurisdiction in collateral-order context would undermine § 1292(b)); see *supra*, at 28–29 (death-knell doctrine impermissibly circumvented § 1292(b)).

In the Rules Enabling Act, as earlier recounted, Congress authorized this Court to determine when a decision is final for purposes of § 1291, and to provide for appellate review of interlocutory orders not covered by statute. See *supra*, at 30–32, and n. 4. These changes are to come from rulemaking, however, not judicial decisions in particular controversies or inventive litigation ploys. See *Swint*, 514 U. S., at 48. In this case, the rulemaking process has dealt with the matter, yielding a “measured, practical solutio[n]” to the questions

¹⁰The very premise of the death-knell doctrine was that plaintiffs “would not pursue their claims individually.” *Coopers & Lybrand*, 437 U. S., at 466. Having pressed such an argument for the benefit of immediate review, a death-knell plaintiff who lost on appeal would encounter the general proposition, long laid down, that “where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.” *Davis v. Wakelee*, 156 U. S. 680, 689 (1895).

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whether and when adverse certification orders may be immediately appealed. *Mohawk Industries*, 558 U. S., at 114. Over years the Advisory Committee on the Federal Rules of Civil Procedure studied the data on class-certification rulings and appeals, weighed various proposals, received public comment, and refined the draft rule and Committee Note. See Solimine & Hines, 41 Wm. & Mary L. Rev., at 1564–1566, and nn. 178–189; Federal Judicial Center Study 80–87. Rule 23(f) reflects the rulemakers’ informed assessment, permitting, as explained *supra*, at 30–32, interlocutory appeals of adverse certification orders, whether sought by plaintiffs or defendants, solely in the discretion of the courts of appeals. That assessment “warrants the Judiciary’s full respect.” *Swint*, 514 U. S., at 48; see *Mohawk Industries*, 558 U. S., at 118–119 (THOMAS, J., concurring in part and concurring in judgment).

Here, however, the Ninth Circuit, after denying respondents permission to appeal under Rule 23(f), nevertheless assumed jurisdiction of their appeal challenging only the District Court’s order striking the class allegations. See *supra*, at 34–35. According to respondents, even plaintiffs who altogether bypass Rule 23(f) may force an appeal by dismissing their claims with prejudice. See Tr. of Oral Arg. 34. Rule 23(f), respondents say, is irrelevant, for it “address[es] *interlocutory* orders,” whereas this case involves “an *actual* final judgment.” Brief for Respondents 26, 28.

We are not persuaded. If respondents’ voluntary-dismissal tactic could yield an appeal of right, Rule 23(f)’s careful calibration—as well as Congress’ designation of rule-making “as the preferred means for determining whether and when prejudgment orders should be immediately appealable,” *Mohawk Industries*, 558 U. S., at 113 (majority opinion)—“would be severely undermined,” *Swint*, 514 U. S., at 47. Respondents, after all, “[sought] review of only the [inherently interlocutory] orde[r]” striking their class allegations; they “d[id] not complain of the ‘final’ orde[r] that dis-

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missed their cas[e].” *Camesi v. University of Pittsburgh Medical Center*, 729 F. 3d 239, 244 (CA3 2013).

Plaintiffs in putative class actions cannot transform a tentative interlocutory order, see *supra*, at 34–35, into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice—subject, no less, to the right to “revive” those claims if the denial of class certification is reversed on appeal, see Brief for Respondents 45; Tr. of Oral Arg. 31 (assertion by respondents’ counsel that, if the appeal succeeds, “everything would spring back to life” on remand). Were respondents’ reasoning embraced by this Court, “Congress[’] final decision rule would end up a pretty puny one.” *Digital Equipment Corp.*, 511 U. S., at 872. Contrary to respondents’ argument, § 1291’s firm final-judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation. Finality, we have long cautioned, “is not a technical concept of temporal or physical termination.” *Cobbledick*, 309 U. S., at 326. It is one “means [geared to] achieving a healthy legal system,” *ibid.*, and its contours are determined accordingly, see *supra*, at 37.¹¹

C

The one-sidedness of respondents’ voluntary-dismissal device “reinforce[s] our conclusion that [it] does not support appellate jurisdiction of prejudgment orders denying class certification.” *Coopers & Lybrand*, 437 U. S., at 476; see *supra*, at 29. Respondents’ theory permits plaintiffs only, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the “class issue” may be just as important to defendants, *Coopers & Lybrand*, 437 U. S., at 476, for “[a]n order granting certification . . . may force a defend-

¹¹ Respondents also invoke our decision in *United States v. Procter & Gamble Co.*, 356 U. S. 677 (1958), but that case—a civil antitrust enforcement action—involved neither class-action certification nor the sort of dismissal tactic at issue here. See *id.*, at 681 (the Government “did not consent to a judgment against [it]” (internal quotation marks omitted)).

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ant to settle rather than . . . run the risk of potentially ruinous liability,” Committee Note on Rule 23(f); see *supra*, at 29, and n. 2 (defendants may face a “reverse death knell”). Accordingly, we recognized in *Coopers & Lybrand* that “[w]hatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress.” 437 U. S., at 476. Congress chose the rulemaking process to settle the matter, and the rulemakers did so by adopting Rule 23(f)’s evenhanded prescription. It is not the prerogative of litigants or federal courts to disturb that settlement. See *supra*, at 39–40.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, concurring in the judgment.

I agree with the Court that the Court of Appeals lacked jurisdiction over respondents’ appeal, but I would ground that conclusion in Article III of the Constitution instead of 28 U. S. C. § 1291. I therefore concur only in the judgment.

The plaintiffs in this case, respondents here, sued Microsoft, petitioner here, to recover damages after they purchased allegedly faulty video game consoles that Microsoft manufactured. The plaintiffs brought claims for themselves (individual claims) and on behalf of a putative class of similarly situated consumers (class allegations). Early in the litigation, the District Court granted Microsoft’s motion to strike the class allegations, effectively declining to certify

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the class. The Court of Appeals denied permission to appeal that decision under Federal Rule of Civil Procedure 23(f), which requires a party to obtain permission from the court of appeals before appealing a decision regarding class certification.

The plaintiffs decided not to pursue their individual claims, instead stipulating to a voluntary dismissal of those claims with prejudice. They then filed a notice of appeal from the voluntary dismissal order. On appeal, they did not ask the Court of Appeals to reverse the District Court's dismissal of their individual claims. They instead asked the Court of Appeals to reverse the order striking their class allegations. The question presented in this case is whether the Court of Appeals had jurisdiction to hear the appeal under both § 1291, which grants appellate jurisdiction to the courts of appeals over “final decisions” by district courts, and under Article III of the Constitution, which limits the jurisdiction of federal courts to “cases” and “controversies.”

The Court today holds that the Court of Appeals lacked jurisdiction under § 1291 because the voluntary dismissal with prejudice did not result in a “final decision.” I disagree with that holding. A decision is “final” for purposes of § 1291 if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324 U. S. 229, 233 (1945). The order here dismissed all of the plaintiffs' claims with prejudice and left nothing for the District Court to do but execute the judgment. See App. to Pet. for Cert. 39a (“direct[ing] the Clerk to enter Judgment . . . and close th[e] case”).

The Court reaches the opposite conclusion, relying not on the text of § 1291 or this Court's precedents about finality, but on Rule 23(f). Rule 23(f) makes interlocutory orders regarding class certification appealable only with the permission of the court of appeals. The Court concludes that the plaintiffs' “voluntary dismissal” “does not qualify as a ‘final decision’” because allowing the plaintiffs' appeal would “sub-

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vert the balanced solution Rule 23(f) put in place for immediate review of class-action orders.” *Ante*, at 27.

The Court’s conclusion does not follow from its reasoning. Whether a dismissal with prejudice is “final” depends on the meaning of § 1291, not Rule 23(f). Rule 23(f) says nothing about finality, much less about the finality of an order dismissing individual claims with prejudice. I agree with the Court that the plaintiffs are trying to avoid the requirements for interlocutory appeals under Rule 23(f), but our view of the balance struck in that Rule should not warp our understanding of finality under § 1291.

Although I disagree with the Court’s reading of § 1291, I agree that the plaintiffs could not appeal in these circumstances. In my view, they could not appeal because the Court of Appeals lacked jurisdiction under Article III of the Constitution. The “judicial Power” of the United States extends only to “Cases” and “Controversies.” Art. III, §2. This requirement limits the jurisdiction of the federal courts to issues presented “in an adversary context,” *Flast v. Cohen*, 392 U. S. 83, 95 (1968), in which the parties maintain an “actual” and “concrete” interest, *Campbell-Ewald Co. v. Gomez*, 577 U. S. 153, 160–161 (2016) (internal quotation marks omitted). Put another way, “Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character.” *Lewis v. Continental Bank Corp.*, 494 U. S. 472, 477 (1990) (internal quotation marks, citation, and alteration omitted).

The plaintiffs’ appeal from their voluntary dismissal did not satisfy this jurisdictional requirement. When the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties thus were no longer adverse to each other on any claims, and the Court of

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Appeals could not “affect the[ir] rights” in any legally cognizable manner. *Ibid.* Indeed, it has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it. See, e. g., *Evans v. Phillips*, 4 Wheat. 73 (1819); *Lord v. Veazie*, 8 How. 251, 255–256 (1850); *United States v. Babbitt*, 104 U. S. 767 (1882); *Deakins v. Monaghan*, 484 U. S. 193, 199–200 (1988).

The plaintiffs contend that their interest in reversing the order striking their class allegations is sufficient to satisfy Article III’s case-or-controversy requirement, but they misunderstand the status of putative class actions. Class allegations, without an underlying individual claim, do not give rise to a “case” or “controversy.” Those allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class. See *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U. S. 393, 408 (2010) (plurality opinion). Thus, because the Court of Appeals lacked Article III jurisdiction to adjudicate the individual claims, it could not hear the plaintiffs’ appeal of the order striking their class allegations.

The plaintiffs’ representation that they hope to “revive their [individual] claims should they prevail” on the appeal of the order striking their class allegations does not undermine this conclusion. Brief for Respondents 45. This Court has interpreted Article III “to demand that an actual controversy be extant at all stages of review, not merely at the time the complaint is filed.” *Campbell Ewald Co.*, *supra*, at 160 (internal quotation marks and alterations omitted). And in any event, a favorable ruling on class certification would not “revive” their individual claims: A court’s decision about class allegations “in no way touch[es] the merits” of those claims. *Gardner v. Westinghouse Broadcasting Co.*, 437 U. S. 478, 482 (1978) (internal quotation marks omitted).

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* * *

Because I would hold that the Court of Appeals lacked jurisdiction under Article III to consider respondents' appeal, I concur in the judgment.

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SESSIONS, ATTORNEY GENERAL *v.* MORALES-SANTANA

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

No. 15–1191. Argued November 9, 2016—Decided June 12, 2017

The Immigration and Nationality Act provides the framework for acquisition of U. S. citizenship from birth by a child born abroad, when one parent is a U. S. citizen and the other a citizen of another nation. Applicable to married couples, the main rule in effect at the time here relevant, 8 U. S. C. § 1401(a)(7) (1958 ed.), required the U. S.-citizen parent to have ten years' physical presence in the United States prior to the child's birth, "at least five of which were after attaining" age 14. The rule is made applicable to unwed U. S.-citizen fathers by § 1409(a), but § 1409(c) creates an exception for an unwed U. S.-citizen mother, whose citizenship can be transmitted to a child born abroad if she has lived continuously in the United States for just one year prior to the child's birth.

Respondent Luis Ramón Morales-Santana, who has lived in the United States since he was 13, asserts U. S. citizenship at birth based on the U. S. citizenship of his biological father, José Morales. José moved to the Dominican Republic 20 days short of his 19th birthday, therefore failing to satisfy § 1401(a)(7)'s requirement of five years' physical presence after age 14. There, he lived with the Dominican woman who gave birth to Morales-Santana. José accepted parental responsibility and included Morales-Santana in his household; he married Morales-Santana's mother and his name was then added to hers on Morales-Santana's birth certificate. In 2000, the Government sought to remove Morales-Santana based on several criminal convictions, ranking him as alien because, at his time of birth, his father did not satisfy the requirement of five years' physical presence after age 14. An immigration judge rejected Morales-Santana's citizenship claim and ordered his removal. Morales-Santana later moved to reopen the proceedings, asserting that the Government's refusal to recognize that he derived citizenship from his U. S.-citizen father violated the Constitution's equal protection guarantee. The Board of Immigration Appeals denied the motion, but the Second Circuit reversed. Relying on this Court's post-1970 construction of the equal protection principle as it bears on gender-based classifications, the court held unconstitutional the differential treatment of unwed mothers and fathers. To cure this infirmity, the

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Court of Appeals held that Morales-Santana derived citizenship through his father, just as he would were his mother the U. S. citizen.

Held:

1. The gender line Congress drew is incompatible with the Fifth Amendment’s requirement that the Government accord to all persons “the equal protection of the laws.” Pp. 56–72.

(a) Morales-Santana satisfies the requirements for third-party standing in seeking to vindicate his father’s right to equal protection. José Morales’ ability to pass citizenship to his son easily satisfies the requirement that the third party have a “‘close’ relationship with the person who possesses the right.” *Kowalski v. Tesmer*, 543 U. S. 125, 130. And José’s death many years before the current controversy arose is “a ‘hindrance’ to [José’s] ability to protect his own interests.” *Ibid.* Pp. 56–57.

(b) Sections 1401 and 1409 date from an era when the Nation’s law-books were rife with overbroad generalizations about the way men and women are. Today, such laws receive the heightened scrutiny that now attends “all gender-based classifications,” *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 136, including laws granting or denying benefits “on the basis of the sex of the qualifying parent,” *Califano v. Westcott*, 443 U. S. 76, 84. Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications declared unconstitutional in *Westcott*; *Reed v. Reed*, 404 U. S. 71, 74, 76–77; *Frontiero v. Richardson*, 411 U. S. 677, 688–691; *Weinberger v. Wiesenfeld*, 420 U. S. 636, 648–653; and *Califano v. Goldfarb*, 430 U. S. 199, 206–207. A successful defense therefore requires an “‘exceedingly persuasive justification.’” *United States v. Virginia*, 518 U. S. 515, 531. Pp. 57–59.

(c) The Government must show, at least, that its gender-based “classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to [achieving] those objectives.”” *Virginia*, 518 U. S., at 533. The classification must serve an important governmental interest *today*, for “new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.” *Obergefell v. Hodges*, 576 U. S. 644, 673. Pp. 59–64.

(1) At the time § 1409 was enacted as part of the Nationality Act of 1940 (1940 Act), two once habitual, but now untenable, assumptions pervaded the Nation’s citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the sole guardian of a nonmarital child. In the 1940 Act, Congress codified the mother-as-sole-guardian perception for unmarried parents. According to the stereotype, a residency re-

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quirement was justified for unwed citizen fathers, who would care little about, and have scant contact with, their nonmarital children. Unwed citizen mothers needed no such prophylactic, because the alien father, along with his foreign ways, was presumptively out of the picture. Pp. 59–62.

(2) For close to a half century, this Court has viewed with suspicion laws that rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Virginia*, 518 U. S., at 533. No “important [governmental] interest” is served by laws grounded, as § 1409(a) and (c) are, in the obsolescing view that “unwed fathers [are] invariably less qualified and entitled than mothers” to take responsibility for nonmarital children. *Caban v. Mohammed*, 441 U. S. 380, 382, 394. In light of this equal protection jurisprudence, § 1409(a) and (c)’s discrete duration-of-residence requirements for mothers and fathers are anachronistic. Pp. 62–64.

(d) The Government points to *Fiallo v. Bell*, 430 U. S. 787; *Miller v. Albright*, 523 U. S. 420; and *Tuan Anh Nguyen v. INS*, 533 U. S. 53, for support. But *Fiallo* involved entry preferences for alien children; the case did not present a claim of U. S. citizenship. And *Miller* and *Nguyen* addressed a paternal-acknowledgment requirement well met here, not the length of a parent’s prebirth residency in the United States. Pp. 64–66.

(e) The Government’s suggested rationales for § 1409(a) and (c)’s gender-based differential do not survive heightened scrutiny. Pp. 66–72.

(1) The Government asserts that Congress sought to ensure that a child born abroad has a strong connection to the United States. The statute, the Government suggests, bracketed an unwed U. S.-citizen mother with a married couple in which both parents are U. S. citizens because she is the only legally recognized parent at birth; and aligned an unwed U. S.-citizen father with a married couple, one spouse a citizen, the other, an alien, because of the competing national influence of the alien mother. This rationale conforms to the long-held view that unwed fathers care little about their children. And the gender-based means scarcely serve the suggested congressional interest. Citizenship may be transmitted to children who have no tie to the United States so long as their U. S.-citizen mother was continuously present in the United States for one year at any point in her life *prior* to the child’s birth; but it may not be transmitted by a U. S.-citizen father who falls a few days short of meeting § 1401(a)(7)’s longer physical-presence requirements, even if he acknowledges paternity on the day the child is born and raises the child in the United States. Pp. 66–68.

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(2) The Government also maintains that Congress wished to reduce the risk of statelessness for the foreign-born child of a U. S. citizen. But congressional hearings and reports offer no support for the assertion that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed U. S.-citizen mothers. Pp. 68–72.

2. Because this Court is not equipped to convert § 1409(c)'s exception for unwed U. S.-citizen mothers into the main rule displacing §§ 1401(a)(7) and 1409(a), it falls to Congress to select a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, § 1401(a)(7)'s current requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers. The legislature's intent, as revealed by the statute at hand, governs the choice between the two remedial alternatives: extending favorable treatment to the excluded class or withdrawing favorable treatment from the favored class. Ordinarily, the preferred rule is to extend favorable treatment. *Westcott*, 443 U. S., at 89–90. Here, however, extension to fathers of § 1409(c)'s favorable treatment for mothers would displace Congress' general rule, the longer physical-presence requirements of §§ 1401(a)(7) and 1409 applicable to unwed U. S.-citizen fathers and U. S.-citizen parents, male as well as female, married to the child's alien parent. Congress' "commitment to th[is] residual policy" and "the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation," *Heckler v. Mathews*, 465 U. S. 728, 739, n. 5, indicate that Congress would likely have abrogated § 1409(c)'s special exception, preferring to preserve "the importance of residence in this country as the talisman of dedicated attachment," *Rogers v. Bellei*, 401 U. S. 815, 834. Pp. 72–77.

804 F. 3d 520, affirmed in part, reversed in part, and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part, in which ALITO, J., joined, *post*, p. 78. GORSUCH, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Kneedler argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Mizer*, *Sarah E. Harrington*, *Donald E. Keener*, and *Andrew C. MacLachlan*.

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Stephen A. Broome argued the cause for respondent. With him on the brief were *Kathleen M. Sullivan*, *Todd Anten*, *Justin T. Reinheimer*, and *Ellyde R. Thompson*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns a gender-based differential in the law governing acquisition of U. S. citizenship by a child born abroad, when one parent is a U. S. citizen, the other, a citizen of another nation. The main rule appears in 8 U. S. C. § 1401(a)(7) (1958 ed.), now § 1401(g) (2012 ed.). Applicable to married couples, § 1401(a)(7) requires a period of physical presence in the United States for the U. S.-citizen parent. The requirement, as initially prescribed, was ten years' physical presence prior to the child's birth, § 601(g) (1940 ed.); currently, the requirement is five years prebirth, § 1401(g) (2012 ed.). That main rule is rendered applicable to unwed U. S.-citizen fathers by § 1409(a). Congress ordered an exception, however, for unwed U. S.-citizen mothers. Contained in § 1409(c), the exception allows an unwed mother to transmit her citizenship to a child born abroad if she has lived in the United States for just one year prior to the child's birth.

The respondent in this case, Luis Ramón Morales-Santana, was born in the Dominican Republic when his father was just 20 days short of meeting § 1401(a)(7)'s physical-presence requirement. Opposing removal to the Dominican Republic,

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Sandra S. Park*, *Lee Gelernt*, *Lenora M. Lapidus*, *Steven R. Shapiro*, *Jennifer Chang Newell*, *Cecillia D. Wang*, and *Arthur N. Eisenberg*; for Constitutional Law Scholars et al. by *Meir Feder*, *Judith Resnik*, and *Stephen I. Vladeck*; for Equality Now et al. by *Martha F. Davis*, *William R. Stein*, *Scott H. Christensen*, and *Steven A. Hammond*; for the National Immigrant Justice Center et al. by *Charles Roth*; for Population and Family Scholars by *Suzanne B. Goldberg*, *Peter K. Stris*, and *Elizabeth Rogers Brannen*; for Professors of History et al. by *Catherine E. Stetson* and *Kristin A. Collins*; and for Scholars on Statelessness by *Max Gitter*.

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Morales-Santana asserts that the equal protection principle implicit in the Fifth Amendment¹ entitles him to citizenship stature. We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons “the equal protection of the laws.” Nevertheless, we cannot convert § 1409(c)’s exception for unwed mothers into the main rule displacing § 1401(a)(7) (covering married couples) and § 1409(a) (covering unwed fathers). We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U. S.-citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination.

I

A

We first describe in greater detail the regime Congress constructed. The general rules for acquiring U. S. citizenship are found in 8 U. S. C. § 1401, the first section in Chapter 1 of Title III of the Immigration and Nationality Act (1952 Act or INA), § 301, 66 Stat. 235–236. Section 1401 sets forth the INA’s rules for determining who “shall be nationals and citizens of the United States at birth” by establishing a range of residency and physical-presence requirements calibrated

¹ As this case involves federal, not state, legislation, the applicable equality guarantee is not the Fourteenth Amendment’s explicit Equal Protection Clause, it is the guarantee implicit in the Fifth Amendment’s Due Process Clause. See *Weinberger v. Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975) (“[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.” (citations and internal quotation marks omitted; alteration in original)).

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primarily to the parents' nationality and the child's place of birth. § 1401(a) (1958 ed.); § 1401 (2012 ed.). The primacy of § 1401 in the statutory scheme is evident. Comprehensive in coverage, § 1401 provides the general framework for the acquisition of citizenship at birth. In particular, at the time relevant here,² § 1401(a)(7) provided for the U. S. citizenship of

“a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.”

Congress has since reduced the duration requirement to five years, two after age 14. § 1401(g) (2012 ed.).³

Section 1409 pertains specifically to children with unmarried parents. Its first subsection, § 1409(a), incorporates by reference the physical-presence requirements of § 1401, thereby allowing an acknowledged unwed citizen parent to transmit U. S. citizenship to a foreign-born child under the same terms as a married citizen parent. Section 1409(c)—a provision applicable only to unwed U. S.-citizen mothers—

² Unless otherwise noted, references to 8 U. S. C. §§ 1401 and 1409 are to the 1958 edition of the U. S. Code, the version in effect when respondent Morales-Santana was born. Section 1409(a) and (c) have retained their numbering; § 1401(a)(7) has become § 1401(g).

³ The reduction affects only children born on or after November 14, 1986. § 8(r), 102 Stat. 2619; see §§ 12–13, 100 Stat. 3657. Because Morales-Santana was born in 1962, his challenge is to the ten-years, five-after-age-14 requirement applicable at the time of his birth.

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states an exception to the physical-presence requirements of §§ 1401 and 1409(a). Under § 1409(c)'s exception, only one year of continuous physical presence is required before unwed mothers may pass citizenship to their children born abroad.

B

Respondent Luis Ramón Morales-Santana moved to the United States at age 13, and has resided in this country most of his life. Now facing deportation, he asserts U. S. citizenship at birth based on the citizenship of his biological father, José Morales, who accepted parental responsibility and included Morales-Santana in his household.

José Morales was born in Guánica, Puerto Rico, on March 19, 1900. Record 55–56. Puerto Rico was then, as it is now, part of the United States, see *Puerto Rico v. Sánchez Valle*, 579 U. S. 59, 63–65 (2016); 8 U. S. C. § 1101(a)(38) (1958 ed.) (“The term United States . . . means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the [U. S.] Virgin Islands.” (internal quotation marks omitted)); § 1101(a)(38) (2012 ed.) (similar), and José became a U. S. citizen under the Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 953 (a predecessor to 8 U. S. C. § 1402). After living in Puerto Rico for nearly two decades, José left his childhood home on February 27, 1919, 20 days short of his 19th birthday, therefore failing to satisfy § 1401(a)(7)'s requirement of five years' physical presence after age 14. Record 57, 66. He did so to take up employment as a builder-mechanic for a U. S. company in the then-U. S.-occupied Dominican Republic. *Ibid.*⁴

By 1959, José attested in a June 21, 1971 affidavit presented to the U. S. Embassy in the Dominican Republic, he was living with Yrma Santana Montilla, a Dominican woman

⁴See generally B. Calder, *The Impact of Intervention: The Dominican Republic During the U. S. Occupation of 1916–1924*, pp. 17, 204–205 (1984) (describing establishment of a U. S. military government in the Dominican Republic in 1916, and plans, beginning in late 1920, for withdrawal).

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he would eventually marry. *Id.*, at 57. In 1962, Yrma gave birth to their child, respondent Luis Morales-Santana. *Id.*, at 166–167. While the record before us reveals little about Morales-Santana’s childhood, the Dominican archives disclose that Yrma and José married in 1970, and that José was then added to Morales-Santana’s birth certificate as his father. *Id.*, at 163–164, 167. José also related in the same affidavit that he was then saving money “for the susten[ance] of [his] family” in anticipation of undergoing surgery in Puerto Rico, where members of his family still resided. *Id.*, at 57. In 1975, when Morales-Santana was 13, he moved to Puerto Rico, *id.*, at 368, and by 1976, the year his father died, he was attending public school in the Bronx, a New York City borough, *id.*, at 140, 369.⁵

C

In 2000, the Government placed Morales-Santana in removal proceedings based on several convictions for offenses under New York State Penal Law, all of them rendered on May 17, 1995. *Id.*, at 426. Morales-Santana ranked as an alien despite the many years he lived in the United States, because, at the time of his birth, his father did not satisfy the requirement of five years’ physical presence after age 14. See *supra*, at 53–54, and n. 3. An immigration judge rejected Morales-Santana’s claim to citizenship derived from the U. S. citizenship of his father, and ordered Morales-Santana’s removal to the Dominican Republic. Record 253, 366; App. to Pet. for Cert. 45a–49a. In 2010, Morales-Santana moved to reopen the proceedings, asserting that the Government’s refusal to recognize that he derived citizenship from his U. S.-citizen father violated the Constitution’s equal protection guarantee. See Record 27, 45. The Board of Immigration

⁵There is no question that Morales-Santana himself satisfied the five-year residence requirement that once conditioned a child’s acquisition of citizenship under § 1401(a)(7). See § 1401(b).

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Appeals (BIA) denied the motion. App. to Pet. for Cert. 8a, 42a–44a.

The United States Court of Appeals for the Second Circuit reversed the BIA’s decision. 804 F. 3d 520, 524 (2015). Relying on this Court’s post-1970 construction of the equal protection principle as it bears on gender-based classifications, the court held unconstitutional the differential treatment of unwed mothers and fathers. *Id.*, at 527–535. To cure the constitutional flaw, the court further held that Morales-Santana derived citizenship through his father, just as he would were his mother the U. S. citizen. *Id.*, at 535–538. In so ruling, the Second Circuit declined to follow the conflicting decision of the Ninth Circuit in *United States v. Flores-Villar*, 536 F. 3d 990 (2008), see 804 F. 3d, at 530, 535, n. 17. We granted certiorari in *Flores-Villar*, but ultimately affirmed by an equally divided Court. *Flores-Villar v. United States*, 564 U. S. 210 (2011) (*per curiam*). Taking up Morales-Santana’s request for review, 579 U. S. 940 (2016), we consider the matter anew.

II

Because § 1409 treats sons and daughters alike, Morales-Santana does not suffer discrimination on the basis of *his* gender. He complains, instead, of gender-based discrimination against his father, who was unwed at the time of Morales-Santana’s birth and was not accorded the right an unwed U. S.-citizen mother would have to transmit citizenship to her child. Although the Government does not contend otherwise, we briefly explain why Morales-Santana may seek to vindicate his father’s right to the equal protection of the laws.⁶

⁶ We explain why Morales-Santana has third-party standing in view of the Government’s opposition to such standing in *Flores-Villar v. United States*, 564 U. S. 210 (2011) (*per curiam*). See Brief for United States, O. T. 2010, No. 09–5801, pp. 10–14.

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Ordinarily, a party “must assert his own legal rights” and “cannot rest his claim to relief on the legal rights . . . of third parties.” *Warth v. Seldin*, 422 U. S. 490, 499 (1975). But we recognize an exception where, as here, “the party asserting the right has a close relationship with the person who possesses the right [and] there is a hindrance to the possessor’s ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U. S. 125, 130 (2004) (quoting *Powers v. Ohio*, 499 U. S. 400, 411 (1991)). José Morales’ ability to pass citizenship to his son, respondent Morales-Santana, easily satisfies the “close relationship” requirement. So, too, is the “hindrance” requirement well met. José Morales’ failure to assert a claim in his own right “stems from disability,” not “disinterest,” *Miller v. Albright*, 523 U. S. 420, 450 (1998) (O’Connor, J., concurring in judgment), for José died in 1976, Record 140, many years before the current controversy arose. See *Hodel v. Irving*, 481 U. S. 704, 711–712, 723, n. 7 (1987) (children and their guardians may assert Fifth Amendment rights of deceased relatives). Morales-Santana is thus the “obvious claimant,” see *Craig v. Boren*, 429 U. S. 190, 197 (1976), the “best available proponent,” *Singleton v. Wulff*, 428 U. S. 106, 116 (1976), of his father’s right to equal protection.

III

Sections 1401 and 1409, we note, date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are. See, e. g., *Hoyt v. Florida*, 368 U. S. 57, 62 (1961) (women are the “center of home and family life,” therefore they can be “relieved from the civic duty of jury service”); *Goesaert v. Cleary*, 335 U. S. 464, 466 (1948) (States may draw “a sharp line between the sexes”). Today, laws of this kind are subject to review under the heightened scrutiny that now attends “all gender-based classifications.” *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 136 (1994); see, e. g., *United States v. Virginia*, 518

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U. S. 515, 555–556 (1996) (state-maintained military academy may not deny admission to qualified women).

Laws granting or denying benefits “on the basis of the sex of the qualifying parent,” our post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution’s equal protection guarantee. *Califano v. Westcott*, 443 U. S. 76, 84 (1979); see *id.*, at 88–89 (holding unconstitutional provision of unemployed-parent benefits exclusively to fathers). Accord *Califano v. Goldfarb*, 430 U. S. 199, 206–207 (1977) (plurality opinion) (holding unconstitutional a Social Security classification that denied widowers survivors’ benefits available to widows); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 648–653 (1975) (holding unconstitutional a Social Security classification that excluded fathers from receipt of child-in-care benefits available to mothers); *Frontiero v. Richardson*, 411 U. S. 677, 688–691 (1973) (plurality opinion) (holding unconstitutional exclusion of married female officers in the military from benefits automatically accorded married male officers); cf. *Reed v. Reed*, 404 U. S. 71, 74, 76–77 (1971) (holding unconstitutional a probate-code preference for a father over a mother as administrator of a deceased child’s estate).⁷

Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we declared unconstitutional in *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*, and *Westcott*. As in those cases, heightened scrutiny is in order. Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an “exceedingly persuasive justification.” *Virginia*, 518 U. S., at 531 (internal quotation marks omitted); *Kirchberg v. Feen-*

⁷See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972) (“It is difficult to understand [*Reed*] without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means . . . can the [*Reed*] result be made entirely persuasive.”).

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stra, 450 U. S. 455, 461 (1981) (internal quotation marks omitted).

A

The defender of legislation that differentiates on the basis of gender must show “at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Virginia*, 518 U. S., at 533 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 724 (1982); alteration in original); see *Tuan Anh Nguyen v. INS*, 533 U. S. 53, 60, 70 (2001). Moreover, the classification must substantially serve an important governmental interest *today*, for “in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.” *Obergefell v. Hodges*, 576 U. S. 644, 673 (2015). Here, the Government has supplied no “exceedingly persuasive justification,” *Virginia*, 518 U. S., at 531 (internal quotation marks omitted), for §1409(a) and (c)’s “gender-based” and “gender-biased” disparity, *Westcott*, 443 U. S., at 84 (internal quotation marks omitted).

1

History reveals what lurks behind §1409. Enacted in the Nationality Act of 1940 (1940 Act), see 54 Stat. 1139–1140, §1409 ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents.⁸ During this era, two once habitual, but now untenable, assumptions pervaded our Nation’s citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.

⁸The provision was first codified in 1940 at 8 U. S. C. §605, see §205, 54 Stat. 1139–1140, and recodified in 1952 at §1409, see §309, 66 Stat. 238–239. For simplicity, we here use the latter designation.

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Under the once entrenched principle of male dominance in marriage, the husband controlled both wife and child. “[D]ominance [of] the husband,” this Court observed in 1915, “is an ancient principle of our jurisprudence.” *Mackenzie v. Hare*, 239 U. S. 299, 311 (1915).⁹ See generally Brief for Professors of History et al. as *Amici Curiae* 4–15. Through the early 20th century, a male citizen automatically conferred U. S. citizenship on his alien wife. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604; see *Kelly v. Owen*, 7 Wall. 496, 498 (1869) (the 1855 Act “confers the privileges of citizenship upon women married to citizens of the United States”); C. Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 15–16, 20–21 (1998). A female citizen, however, was incapable of conferring citizenship on her husband; indeed, she was subject to expatriation if she married an alien.¹⁰ The family of a citizen or a lawfully admitted permanent resident enjoyed statutory exemptions from entry requirements, but only if the citizen or resident was male. See, *e.g.*, Act of Mar. 3, 1903, ch. 1012, § 37, 32 Stat. 1221 (wives and children entering the country to join permanent-resident aliens and found to have contracted contagious diseases during transit shall not be deported if the diseases were easily curable or did not present a danger to others); S. Rep. No. 1515, 81st Cong., 2d Sess., 415–417 (1950) (wives exempt from literacy and quota requirements). And

⁹This “ancient principle” no longer guides the Court’s jurisprudence. See *Kirchberg v. Feenstra*, 450 U. S. 455, 456 (1981) (invalidating, on equal protection inspection, Louisiana’s former “head and master” rule).

¹⁰See generally C. Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 58–61 (1998); Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 *Politics & Soc.* 1, 4–10 (1984). In 1907, Congress codified several judicial decisions and prevailing State Department views by providing that a female U. S. citizen automatically lost her citizenship upon marriage to an alien. Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228; see L. Gettys, *The Law of Citizenship in the United States* 119 (1934). This Court upheld the statute. *Mackenzie v. Hare*, 239 U. S. 299, 311 (1915).

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from 1790 until 1934, the foreign-born child of a married couple gained U. S. citizenship only through the father.¹¹

For unwed parents, the father-controls tradition never held sway. Instead, the mother was regarded as the child's natural and sole guardian. At common law, the mother, and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian." 2 J. Kent, *Commentaries on American Law* *215–*216; see *Nguyen*, 533 U. S., at 91–92 (O'Connor, J., dissenting). In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, despite the absence of any statutory authority for the practice. See Hearings on H. R. 6127 before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., 43, 431 (1940) (hereinafter 1940 Hearings); 39 Op. Atty. Gen. 397, 397–398 (1939); 39 Op. Atty. Gen. 290, 291 (1939). See also Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *Yale L. J.* 2134, 2199–2205 (2014) (hereinafter Collins).

In the 1940 Act, Congress discarded the father-controls assumption concerning married parents, but codified the mother-as-sole-guardian perception regarding unmarried parents. The Roosevelt administration, which proposed § 1409, explained: "[T]he mother [of a nonmarital child] stands in the place of the father . . . [,] has a right to the custody and control of such a child as against the putative

¹¹ Act of Mar. 26, 1790, ch. 3, 1 Stat. 104; Act of Jan. 29, 1795, § 3, 1 Stat. 415; Act of Apr. 14, 1802, § 4, 2 Stat. 155; Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604; see 2 J. Kent, *Commentaries on American Law* *52–*53 (explaining that the 1802 Act, by adding "fathers," "seem[ed] to remove the doubt" about "whether the act intended by the words, 'children of persons,' both the father and mother, . . . or the father only"); L. Kerber, *No Constitutional Right To Be Ladies: Women and the Obligations of Citizenship* 36 (1998); Brief for Professors of History et al. as *Amici Curiae* 5–6. In 1934, Congress moved in a new direction by allowing a married mother to transmit her citizenship to her child. Act of May 24, ch. 344, § 1, 48 Stat. 797.

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father, and is bound to maintain it as its natural guardian.” 1940 Hearings 431 (internal quotation marks omitted).

This unwed-mother-as-natural-guardian notion renders § 1409’s gender-based residency rules understandable. Fearing that a foreign-born child could turn out “more alien than American in character,” the administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent. *Id.*, at 426–427. Concern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children. For unwed citizen mothers, however, there was no need for a prolonged residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the picture. See *id.*, at 431; *Collins* 2203 (in “nearly uniform view” of U. S. officials, “almost invariably,” the mother alone “concern[ed] herself with [a nonmarital] child” (internal quotation marks omitted)).

2

For close to a half century, as earlier observed, see *supra*, at 57–58, this Court has viewed with suspicion laws that rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Virginia*, 518 U. S., at 533; see *Wiesenfeld*, 420 U. S., at 643, 648. In particular, we have recognized that if a “statutory objective is to exclude or ‘protect’ members of one gender” in reliance on “fixed notions concerning [that gender’s] roles and abilities,” the “objective itself is illegitimate.” *Mississippi Univ. for Women*, 458 U. S., at 725.

In accord with this eventual understanding, the Court has held that no “important [governmental] interest” is served by laws grounded, as § 1409(a) and (c) are, in the obsolescing view that “unwed fathers [are] invariably less qualified and entitled than mothers” to take responsibility for nonmarital

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children. *Caban v. Mohammed*, 441 U.S. 380, 382, 394 (1979).¹² Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives.¹³ Laws according or denying benefits in reliance on “[s]tereotypes about women’s domestic roles,” the Court has observed, may “creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver.” *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003). Correspondingly, such laws may disserve men who exercise responsibility for raising their children. See *ibid.* In light of the

¹² *Lehr v. Robertson*, 463 U.S. 248 (1983), on which the Court relied in *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 62–64 (2001), recognized that laws treating fathers and mothers differently “may not constitutionally be applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child,” *Lehr*, 463 U.S., at 267. The “similarly situated” condition was not satisfied in *Lehr*, however, for the father in that case had “never established any custodial, personal, or financial relationship” with the child. *Ibid.*

Here, there is no dispute that José Morales formally accepted parental responsibility for his son during Morales-Santana’s childhood. See *supra*, at 54–55. If subject to the same physical-presence requirements that applied to unwed U.S.-citizen mothers, José would have been recognized as Morales-Santana’s father “as of the date of birth.” § 1409(a); see § 1409(c) (“at birth”).

¹³ Even if stereotypes frozen into legislation have “statistical support,” our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn. *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 139, n. 11 (1994); see, e.g., *Craig v. Boren*, 429 U.S. 190, 198–199 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). In fact, unwed fathers assume responsibility for their children in numbers already large and notably increasing. See Brief for Population and Family Scholars as *Amici Curiae* 3, 5–13 (documenting that nonmarital fathers “are [often] in a parental role at the time of their child’s birth,” and “most . . . formally acknowledge their paternity either at the hospital or in the birthing center just after the child is born”); Brief for American Civil Liberties Union et al. as *Amici Curiae* 22 (observing, *inter alia*, that “[i]n 2015, fathers made up 16 percent of single parents with minor children in the United States”).

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equal protection jurisprudence this Court has developed since 1971, see *Virginia*, 518 U. S., at 531–534, § 1409(a) and (c)’s discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic.

B

In urging this Court nevertheless to reject Morales-Santana’s equal protection plea, the Government cites three decisions of this Court: *Fiallo v. Bell*, 430 U. S. 787 (1977); *Miller v. Albright*, 523 U. S. 420; and *Nguyen v. INS*, 533 U. S. 53. None controls this case.

The 1952 Act provision at issue in *Fiallo* gave special immigration preferences to alien children of citizen (or lawful-permanent-resident) mothers, and to alien unwed mothers of citizen (or lawful-permanent-resident) children. 430 U. S., at 788–789, and n. 1. Unwed fathers and their children, asserting their right to equal protection, sought the same preferences. *Id.*, at 791. Applying minimal scrutiny (rational-basis review), the Court upheld the provision, relying on Congress’ “exceptionally broad power” to admit or exclude aliens. *Id.*, at 792, 794.¹⁴ This case, however, involves no entry preference for aliens. Morales-Santana claims he is, and since birth has been, a U. S. citizen. Examining a claim of that order, the Court has not disclaimed, as it did in *Fiallo*, the application of an exacting standard of review. See *Nguyen*, 533 U. S., at 60–61, 70; *Miller*, 523 U. S., at 434–435, n. 11 (opinion of Stevens, J.).

¹⁴In 1986, nine years after the decision in *Fiallo v. Bell*, 430 U. S. 787 (1977), Congress amended the governing law. The definition of “child” that included offspring of natural mothers but not fathers was altered to include children born out of wedlock who established a bona fide parent-child relationship with their natural fathers. See Immigration Reform and Control Act of 1986, § 315(a), 100 Stat. 3439, as amended, 8 U. S. C. § 1101(b)(1)(D) (1982 ed., Supp. IV); *Miller v. Albright*, 523 U. S. 420, 429, n. 4 (1998) (opinion of Stevens, J.).

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The provision challenged in *Miller* and *Nguyen* as violative of equal protection requires unwed U. S.-citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U. S. citizenship to those children. See § 1409(a)(4) (2012 ed.).¹⁵ After *Miller* produced no opinion for the Court, see 523 U. S., at 423, we took up the issue anew in *Nguyen*. There, the Court held that imposing a paternal-acknowledgment requirement on fathers was a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth. See 533 U. S., at 62–63. Morales-Santana’s challenge does not renew the contest over § 1409’s paternal-acknowledgment requirement (whether the current version or that in effect in 1970), and the Government does not dispute that Morales-Santana’s father, by marrying Morales-Santana’s mother, satisfied that requirement.

Unlike the paternal-acknowledgment requirement at issue in *Nguyen* and *Miller*, the physical-presence requirements

¹⁵Section 1409(a), following amendments in 1986 and 1988, see § 13, 100 Stat. 3657; § 8(k), 102 Stat. 2618, now states:

“The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, . . . shall apply as of the date of birth to a person born out of wedlock if—

“(1) a blood relationship between the person and the father is established by clear and convincing evidence,

“(2) the father had the nationality of the United States at the time of the person’s birth,

“(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

“(4) while the person is under the age of 18 years—

“(A) the person is legitimated under the law of the person’s residence or domicile,

“(B) the father acknowledges paternity of the person in writing under oath, or

“(C) the paternity of the person is established by adjudication of a competent court.”

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now before us relate solely to the duration of the parent’s prebirth residency in the United States, not to the parent’s filial tie to the child. As the Court of Appeals observed in this case, a man needs no more time in the United States than a woman “in order to have assimilated citizenship-related values to transmit to [his] child.” 804 F. 3d, at 531. And unlike *Nguyen’s* parental-acknowledgment requirement, § 1409(a)’s age-calibrated physical-presence requirements cannot fairly be described as “minimal.” 533 U. S., at 70.

C

Notwithstanding § 1409(a) and (c)’s provenance in traditional notions of the way women and men are, the Government maintains that the statute serves two important objectives: (1) ensuring a connection between the child to become a citizen and the United States and (2) preventing “statelessness,” *i. e.*, a child’s possession of no citizenship at all. Even indulging the assumption that Congress intended § 1409 to serve these interests, but see *supra*, at 59–62, neither rationale survives heightened scrutiny.

1

We take up first the Government’s assertion that § 1409(a) and (c)’s gender-based differential ensures that a child born abroad has a connection to the United States of sufficient strength to warrant conferral of citizenship at birth. The Government does not contend, nor could it, that unmarried men take more time to absorb U. S. values than unmarried women do. See *supra* this page. Instead, it presents a novel argument, one it did not advance in *Flores-Villar*.¹⁶

An unwed mother, the Government urges, is the child’s only “legally recognized” parent at the time of childbirth.

¹⁶In *Flores-Villar*, the Government asserted only the risk-of-statelessness rationale, which it repeats here. See Brief for United States, O. T. 2010, No. 09–5801, at 22–39; *infra*, at 68–72.

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Brief for Petitioner 9–10, 28–32.¹⁷ An unwed citizen father enters the scene later, as a second parent. A longer physical connection to the United States is warranted for the unwed father, the Government maintains, because of the “competing national influence” of the alien mother. *Id.*, at 9–10. Congress, the Government suggests, designed the statute to bracket an unwed U. S.-citizen mother with a married couple in which both parents are U. S. citizens,¹⁸ and to align an unwed U. S.-citizen father with a married couple, one spouse a citizen, the other, an alien.

Underlying this apparent design is the assumption that the alien father of a nonmarital child born abroad to a U. S.-citizen mother will not accept parental responsibility. For an actual affiliation between alien father and nonmarital child would create the “competing national influence” that, according to the Government, justifies imposing on unwed U. S.-citizen fathers, but not unwed U. S.-citizen mothers, lengthy physical-presence requirements. Hardly gender neutral, see *id.*, at 9, that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children. See *supra*, at 59–63. Lump characterization of that kind, however, no longer passes equal protection inspection. See *supra*, at 63–64, and n. 13.

Accepting, *arguendo*, that Congress intended the diverse physical-presence prescriptions to serve an interest in ensuring a connection between the foreign-born nonmarital child and the United States, the gender-based means scarcely serve the posited end. The scheme permits the transmis-

¹⁷But see § 1409(a) (unmarried U. S.-citizen father who satisfies the physical-presence requirements and, after his child is born, accepts parental responsibility transmits his citizenship to the child “as of the date of birth”).

¹⁸When a child is born abroad to married parents, both U. S. citizens, the child ranks as a U. S. citizen at birth if either parent “has had a residence in the United States or one of its outlying possessions, prior to the birth of [the child].” § 1401(a)(3) (1958 ed.); § 1401(c) (2012 ed.) (same).

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sion of citizenship to children who have no tie to the United States so long as their mother was a U. S. citizen continuously present in the United States for one year at any point in her life *prior* to the child's birth. The transmission holds even if the mother marries the child's alien father immediately after the child's birth and never returns with the child to the United States. At the same time, the legislation precludes citizenship transmission by a U. S.-citizen father who falls a few days short of meeting § 1401(a)(7)'s longer physical-presence requirements, even if the father acknowledges paternity on the day of the child's birth and raises the child in the United States.¹⁹ One cannot see in this driven-by-gender scheme the close means-end fit required to survive heightened scrutiny. See, *e. g.*, *Wengler v. Drug-gists Mut. Ins. Co.*, 446 U. S. 142, 151–152 (1980) (holding unconstitutional state workers' compensation death-benefits statute presuming widows' but not widowers' dependence on their spouse's earnings); *Westcott*, 443 U. S., at 88–89.

2

The Government maintains that Congress established the gender-based residency differential in § 1409(a) and (c) to reduce the risk that a foreign-born child of a U. S. citizen would be born stateless. Brief for Petitioner 33. This risk,

¹⁹Brief for Respondent 26, n. 9, presents this example: “Child A is born in Germany and raised there by his U. S.-citizen mother who spent only a year of her life in the United States during infancy; Child B is born in Germany and is legitimated and raised in Germany by a U. S.-citizen father who spent his entire life in the United States before leaving for Germany one week before his nineteenth birthday. Notwithstanding the fact that Child A's ‘legal relationship’ with his U. S.-citizen mother may have been established ‘at the moment of birth,’ and Child B's ‘legal relationship’ with his U. S.-citizen father may have been established a few hours later, Child B is more likely than Child A to learn English and assimilate U. S. values. Nevertheless, under the discriminatory scheme, only Child A obtains U. S. citizenship at birth.” For another telling example, see Brief for Equality Now et al. as *Amici Curiae* 19–20.

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according to the Government, was substantially greater for the foreign-born child of an unwed U. S.-citizen mother than it was for the foreign-born child of an unwed U. S.-citizen father. *Ibid.* But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

As the Court of Appeals pointed out, with one exception,²⁰ nothing in the congressional hearings and reports on the 1940 and 1952 Acts “refer[s] to the problem of statelessness for children born abroad.” 804 F. 3d, at 532–533. See Collins 2205, n. 283 (author examined “many hundreds of pre-1940 administrative memos . . . defend[ing] or explain[ing] recognition of the nonmarital foreign-born children of American mothers as citizens”; of the hundreds, “exactly one memo by a U. S. official . . . mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern”). Reducing the incidence of statelessness was the express goal of *other* sections of the 1940 Act. See 1940 Hearings 430 (“stateless[ness]” is “object” of section on foundlings). The justification for § 1409’s gender-based di-

²⁰ A Senate Report dated January 29, 1952, is the sole exception. That Report relates that a particular problem of statelessness accounts for the 1952 Act’s elimination of a 1940 Act provision the State Department had read to condition a citizen mother’s ability to transmit nationality to her child on the father’s failure to legitimate the child prior to the child’s 18th birthday. See 1940 Act, § 205, 54 Stat. 1140 (“*In the absence of . . . legitimation or adjudication* [during the child’s minority], . . . the child” born abroad to an unmarried citizen mother “shall be held to have acquired at birth [the mother’s] nationality status.” (emphasis added)). The 1952 Act eliminated this provision, allowing the mother to transmit citizenship independent of the father’s actions. S. Rep. No. 1137, 82d Cong., 2d Sess., 39 (1952) (“This provision establish[es] the child’s nationality as that of the [citizen] mother *regardless of legitimation or establishment of paternity . . .*” (emphasis added)). This sole reference to a statelessness problem does not touch or concern the different physical-presence requirements carried over from the 1940 Act into the 1952 Act.

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chotomy, however, was not the child's plight, it was the mother's role as the "natural guardian" of a nonmarital child. See *supra*, at 59–63; Collins 2205 (“[T]he pronounced gender asymmetry of the Nationality Act’s treatment of nonmarital foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother’s relationship with her nonmarital child—and the father’s lack of such a relationship.”). It will not do to “hypothsiz[e] or inven[t]” governmental purposes for gender classifications “*post hoc* in response to litigation.” *Virginia*, 518 U. S., at 533, 535–536.

Infecting the Government’s risk-of-statelessness argument is an assumption without foundation. “[F]oreign laws that would put the child of the U. S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father’s citizenship at birth),” the Government asserts, “would *protect* the child of the U. S.-citizen father against statelessness by providing that the child would take his mother’s citizenship.” Brief for Petitioner 35. The Government, however, neglected to expose this supposed “protection” to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother’s transmission of citizenship to her child. See Brief for Scholars on Statelessness as *Amici Curiae* 13–22, A1–A15.

Experts who have studied the issue report that, at the time relevant here, in “at least thirty countries,” citizen mothers generally could not transmit their citizenship to nonmarital children born within the mother’s country. *Id.*, at 14; see *id.*, at 14–17. “[A]s many as forty-five countries,” they further report, “did not permit their female citizens to assign nationality to a nonmarital child born outside the subject country with a foreign father.” *Id.*, at 18; see *id.*, at 18–21. In still other countries, they also observed, there was no legislation in point, leaving the nationality of nonmarital children uncertain. *Id.*, at 21–22; see Sandifer, A Compar-

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tive Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248, 256, 258 (1935) (of 79 nations studied, about half made no specific provision for the nationality of nonmarital children). Taking account of the foreign laws actually in force, these experts concluded, “the risk of parenting stateless children abroad was, as of [1940 and 1952], and remains today, substantial for unmarried U. S. fathers, a risk perhaps greater than that for unmarried U. S. mothers.” Brief for Scholars on Statelessness as *Amici Curiae* 9–10; see *id.*, at 38–39. One can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U. S.-citizen mothers while ignoring the same risk for children of unwed U. S.-citizen fathers.

In 2014, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to eliminate statelessness by 2024. See generally UNHCR, Ending Statelessness Within 10 Years, online at <http://www.unhcr.org/en-us/protection/statelessness/546217229/special-report-ending-statelessness-10-years.html> (all Internet materials as last visited June 9, 2017). Cognizant that discrimination against either mothers or fathers in citizenship and nationality laws is a major cause of statelessness, the Commissioner has made a key component of its project the elimination of gender discrimination in such laws. UNHCR, The Campaign To End Statelessness: April 2016 Update 1 (referring to speech of UNHCR “highlight[ing] the issue of gender discrimination in the nationality laws of 27 countries—a major cause of statelessness globally”), online at <http://www.unhcr.org/ibelong/wp-content/uploads/Campaign-Update-April-2016.pdf>; UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2016, p. 1 (“Ensuring gender equality in nationality laws can mitigate the risks of statelessness.”), online at <http://www.refworld.org/docid/56de83ca4.html>. In this light, we cannot countenance risk of statelessness as a reason to uphold, rather than

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strike out, differential treatment of unmarried women and men with regard to transmission of citizenship to their children.

In sum, the Government has advanced no “exceedingly persuasive” justification for § 1409(a) and (c)’s gender-specific residency and age criteria. Those disparate criteria, we hold, cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens.²¹

IV

While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers is clear, this Court is not equipped to grant the relief Morales-Santana seeks, *i. e.*, extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term § 1409(c) reserves for unwed mothers.

There are “two remedial alternatives,” our decisions instruct, *Westcott*, 443 U. S., at 89 (quoting *Welsh v. United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result)), when a statute benefits one class (in this case, unwed mothers and their children), as § 1409(c) does, and excludes another from the benefit (here, unwed fathers and their children). “[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.” *Westcott*, 443 U. S., at 89 (quoting

²¹ JUSTICE THOMAS, joined by JUSTICE ALITO, sees our equal protection ruling as “unnecessary,” *post*, at 78, given our remedial holding. But, “as we have repeatedly emphasized, discrimination itself . . . perpetuat[es] ‘archaic and stereotypic notions’” incompatible with the equal treatment guaranteed by the Constitution. *Heckler v. Mathews*, 465 U. S. 728, 739 (1984) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 725 (1982)).

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Welsh, 398 U. S., at 361 (opinion of Harlan, J.).²² “[W]hen the ‘right invoked is that to equal treatment,’ the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.” *Heckler v. Mathews*, 465 U. S. 728, 740 (1984) (quoting *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239, 247 (1931); emphasis deleted). “How equality is accomplished . . . is a matter on which the Constitution is silent.” *Levin v. Commerce Energy, Inc.*, 560 U. S. 413, 426–427 (2010).²³

The choice between these outcomes is governed by the legislature’s intent, as revealed by the statute at hand. See *id.*, at 427 (“On finding unlawful discrimination, . . . courts may attempt, within the bounds of their institutional competence,

²² After silently following the path Justice Harlan charted in *Welsh v. United States*, 398 U. S. 333 (1970), in several cases involving gender-based discrimination, see, e. g., *Wiesenfeld*, 420 U. S., at 642, 653 (extending benefits); *Frontiero v. Richardson*, 411 U. S. 677, 690–691, and n. 25 (1973) (plurality opinion) (same), the Court unanimously adopted his formulation in *Califano v. Westcott*, 443 U. S. 76 (1979). See *id.*, at 89–90 (opinion for the Court); *id.*, at 94–95 (Powell, J., concurring in part and dissenting in part). The appropriate remedy, the *Westcott* majority held, was extension to unemployed mothers of federal family-aid unemployment benefits provided by statute only for families of unemployed fathers. *Id.*, at 90–93. In the dissent’s view, nullification was the proper course. *Id.*, at 94–96.

²³ Because the manner in which a State eliminates discrimination “is an issue of state law,” *Stanton v. Stanton*, 421 U. S. 7, 18 (1975), upon finding state statutes constitutionally infirm, we have generally remanded to permit state courts to choose between extension and invalidation. See *Levin v. Commerce Energy, Inc.*, 560 U. S. 413, 427 (2010). In doing so, we have been explicit in leaving open on remand the option of removal of a benefit, as opposed to extension. See, e. g., *Orr v. Orr*, 440 U. S. 268, 283–284 (1979) (leaving to state courts remedy for unconstitutional imposition of alimony obligations on husbands but not wives); *Stanton*, 421 U. S., at 17–18 (how to eliminate unconstitutional age differential, for child-support purposes, between male and female children, is “an issue of state law to be resolved by the Utah courts”).

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to implement what the legislature would have willed had it been apprised of the constitutional infirmity.”). See also *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 330 (2006) (“the touchstone for any decision about remedy is legislative intent”).²⁴

Ordinarily, we have reiterated, “extension, rather than nullification, is the proper course.” *Westcott*, 443 U. S., at 89. Illustratively, in a series of cases involving federal financial assistance benefits, the Court struck discriminatory exceptions denying benefits to discrete groups, which meant benefits previously denied were extended. See, *e. g.*, *Goldfarb*, 430 U. S., at 202–204, 213–217 (plurality opinion) (survivors’ benefits), *aff’g* 396 F. Supp. 308, 309 (EDNY 1975) (*per curiam*); *Jimenez v. Weinberger*, 417 U. S. 628, 630–631, and n. 2, 637–638 (1974) (disability benefits); *Department of Agriculture v. Moreno*, 413 U. S. 528, 529–530, 538 (1973) (food stamps); *Frontiero*, 411 U. S., at 678–679, and n. 2, 691, and n. 25 (plurality opinion) (military spousal benefits). Here, however, the discriminatory exception consists of *favorable*

²⁴We note, however, that a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity. In *Grayned v. City of Rockford*, 408 U. S. 104 (1972), for example, the defendant participated in a civil rights demonstration in front of a school. Convicted of violating a local “antipicketing” ordinance that exempted “peaceful picketing of any school involved in a labor dispute,” he successfully challenged his conviction on equal protection grounds. *Id.*, at 107 (internal quotation marks omitted). It was irrelevant to the Court’s decision whether the legislature likely would have cured the constitutional infirmity by excising the labor-dispute exemption. In fact, the legislature had done just that subsequent to the defendant’s conviction. *Ibid.*, and n. 2. “Necessarily,” the Court observed, “we must consider the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted.” *Id.*, at 107, n. 2. See also *Welsh*, 398 U. S., at 361–364 (Harlan, J., concurring in result) (reversal required even if, going forward, Congress would cure the unequal treatment by extending rather than invalidating the criminal proscription).

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treatment for a discrete group (a shorter physical-presence requirement for unwed U. S.-citizen mothers giving birth abroad). Following the same approach as in those benefits cases—striking the discriminatory exception—leads here to extending the general rule of longer physical-presence requirements to cover the previously favored group.

The Court has looked to Justice Harlan’s concurring opinion in *Welsh v. United States*, 398 U. S., at 361–367, in considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation. In making this assessment, a court should “‘measure the intensity of commitment to the residual policy’”—the main rule, not the exception—“‘and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.’” *Heckler*, 465 U. S., at 739, n. 5 (quoting *Welsh*, 398 U. S., at 365 (opinion of Harlan, J.)).

The residual policy here, the longer physical-presence requirement stated in §§ 1401(a)(7) and 1409, evidences Congress’ recognition of “the importance of residence in this country as the talisman of dedicated attachment.” *Rogers v. Bellei*, 401 U. S. 815, 834 (1971); see *Weedin v. Chin Bow*, 274 U. S. 657, 665–666 (1927) (Congress “attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent. . . . [T]he heritable blood of citizenship was thus associated unmistakably with residence within the country which was thus recognized as essential to full citizenship.” (internal quotation marks omitted)). And the potential for “disruption of the statutory scheme” is large. For if § 1409(c)’s one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U. S.-citizen parent is married? Disadvantageous treatment of marital children in comparison to nonmarital chil-

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dren is scarcely a purpose one can sensibly attribute to Congress.²⁵

Although extension of benefits is customary in federal benefit cases, see *supra*, at 73, n. 22, 74, all indicators in this case point in the opposite direction.²⁶ Put to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule.²⁷

V

The gender-based distinction infecting §§ 1401(a)(7) and 1409(a) and (c), we hold, violates the equal protection principle, as the Court of Appeals correctly ruled. For the rea-

²⁵ Distinctions based on parents' marital status, we have said, are subject to the same heightened scrutiny as distinctions based on gender. *Clark v. Jeter*, 486 U. S. 456, 461 (1988).

²⁶ In crafting the INA in 1952, Congress considered, but did not adopt, an amendment that would have applied the shorter one-year continuous physical-presence requirement now contained in § 1409(c) to all foreign-born children of parents with different nationalities. See S. 2842, 82d Cong., 2d Sess., § 301(a)(5) (1952).

²⁷ Compare with the remedial issue presented here suits under Title VII of the Civil Rights Act of 1964 challenging laws prescribing terms and conditions of employment applicable to women only, *e. g.*, minimum wage, premium pay, rest breaks, or lunch breaks. Most courts, perhaps mindful of the mixed motives implicated in passage of such legislation (some conceiving the laws as protecting women, others, as discouraging employers from hiring women), and, taking into account the economic burdens extension would impose on employers, have invalidated the provisions. See, *e. g.*, *Homemakers, Inc., of Los Angeles v. Division of Industrial Welfare*, 509 F. 2d 20, 22–23 (CA9 1974), *aff'g* 356 F. Supp. 1111 (1973) (ND Cal. 1973); *Burns v. Rohr Corp.*, 346 F. Supp. 994, 997–998 (SD Cal. 1972); *RCA del Caribe, Inc. v. Silva Recio*, 429 F. Supp. 651, 655–658 (PR 1976); *Doctors Hospital, Inc. v. Recio*, 383 F. Supp. 409, 417–418 (PR 1974); *State v. Fairfield Communities Land Co.*, 260 Ark. 277, 279–281, 538 S. W. 2d 698, 699–700 (1976); *Jones Metal Products Co. v. Walker*, 29 Ohio St. 2d 173, 178–183, and n. 6, 281 N. E. 2d 1, 6–9, and n. 6 (1972); *Vick v. Pioneer Oil Co.*, 569 S. W. 2d 631, 633–635 (Tex. Civ. App. 1978).

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sons stated, however, we must adopt the remedial course Congress likely would have chosen “had it been apprised of the constitutional infirmity.” *Levin*, 560 U. S., at 427. Although the preferred rule in the typical case is to extend favorable treatment, see *Westcott*, 443 U. S., at 89–90, this is hardly the typical case.²⁸ Extension here would render the special treatment Congress prescribed in § 1409(c), the one-year physical-presence requirement for U. S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)’s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U. S.-citizen parent and one foreign-citizen parent, therefore, must hold sway.²⁹ Going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, § 1401(a)(7)’s now-five-year requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers. See Brief for Petitioner 12, 51; Reply Brief 19, n. 3.

* * *

The judgment of the Court of Appeals for the Second Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

²⁸The Court of Appeals found the remedial issue “the most vexing problem in this case.” 804 F. 3d 520, 535 (2015).

²⁹That *Morales-Santana* did not seek this outcome does not restrain the Court’s judgment. The issue turns on what the legislature would have willed. “The relief the complaining party requests does not circumscribe this inquiry.” *Levin*, 560 U. S., at 427.

THOMAS, J., concurring in judgment in part

JUSTICE THOMAS, with whom JUSTICE ALITO joins, concurring in the judgment in part.

The Court today holds that we are “not equipped to” remedy the equal protection injury that respondent claims his father suffered under the Immigration and Nationality Act (INA) of 1952. *Ante*, at 72. I agree with that holding. As the majority concludes, extending 8 U. S. C. § 1409(c)’s 1-year physical presence requirement to unwed citizen fathers (as respondent requests) is not, under this Court’s precedent, an appropriate remedy for any equal protection violation. See *ante*, at 72. Indeed, I am skeptical that we even have the “power to provide relief of the sort requested in this suit—namely, conferral of citizenship on a basis other than that prescribed by Congress.” *Tuan Anh Nguyen v. INS*, 533 U. S. 53, 73 (2001) (Scalia, J., joined by THOMAS, J., concurring) (citing *Miller v. Albright*, 523 U. S. 420, 452 (1998) (Scalia, J., joined by THOMAS, J., concurring in judgment)).

The Court’s remedial holding resolves this case. Because respondent cannot obtain relief in any event, it is unnecessary for us to decide whether the 1952 version of the INA was constitutional, whether respondent has third-party standing to raise an equal protection claim on behalf of his father, or whether other immigration laws (such as the current versions of §§ 1401(g) and 1409) are constitutional. I therefore concur only in the judgment reversing the Second Circuit.

Syllabus

HENSON ET AL. *v.* SANTANDER CONSUMER
USA INC.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 16–349. Argued April 18, 2017—Decided June 12, 2017

The Fair Debt Collection Practices Act authorizes private lawsuits and weighty fines designed to deter the wayward practices of “debt collector[s],” a term embracing anyone who “regularly collects or attempts to collect . . . debts owed or due . . . another.” 15 U. S. C. § 1692a(6). The complaint filed in this case alleges that CitiFinancial Auto loaned money to petitioners seeking to buy cars; that petitioners defaulted on those loans; and that respondent Santander then purchased the defaulted loans from CitiFinancial and sought to collect in ways petitioners believe violated the Act. The district court and Fourth Circuit held that Santander didn’t qualify as a debt collector because it did not regularly seek to collect debts “owed . . . another” but sought instead only to collect debts that it purchased and owned.

Held: A company may collect debts that it purchased for its own account, like Santander did here, without triggering the statutory definition in dispute. By defining debt collectors to include those who regularly seek to collect debts “owed . . . another,” the statute’s plain language seems to focus on third party collection agents regularly collecting for a debt owner—not on a debt owner seeking to collect debts for itself.

Petitioners’ arguments to the contrary do not dislodge the statute’s plain meaning. Petitioners point out that the word “owed” is the *past* participle of the verb “to owe,” and so suggest that the debt collector definition must exclude loan originators (who never seek to collect debts previously owed someone else) but embrace debt purchasers like Santander (who necessarily do). But past participles like “owed” are routinely used as adjectives to describe the present state of a thing. Congress also used the word “owed” to refer to present debt relationships in neighboring provisions of the Act, and petitioners have not rebutted the presumption that identical words in the same statute carry the same meaning. Neither would reading the word “owed” to refer to present debt relationships render any of the Act’s provisions surplusage, contrary to what petitioners suggest.

Petitioners also contend that their interpretation best furthers the Act’s perceived purposes because, they primarily argue, if Congress had been aware of defaulted debt purchasers like Santander it would have

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treated them like traditional debt collectors because they pose similar risks of abusive collection practices. But it is not this Court's job to rewrite a constitutionally valid text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced. And neither are petitioners' policy arguments unassailable, as reasonable legislators might contend both ways on the question of how defaulted debt purchasers should be treated. This fact suggests for certain but one thing: that these are matters for Congress, not this Court, to resolve. Pp. 83–90.

817 F. 3d 131, affirmed.

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

Kevin K. Russell argued the cause for petitioners. With him on the briefs was *Cory L. Zajdel*.

Kannon K. Shanmugam argued the cause for respondent. With him on the brief were *Allison Jones Rushing*, *Masha G. Hansford*, *Barrett J. Anderson*, and *Matthew A. Fitzgerald*.*

*Briefs of *amici curiae* urging reversal were filed by the State of Oregon et al. by *Ellen F. Rosenblum*, Attorney General of Oregon, *Benjamin Gutman*, Solicitor General, and *Jona Maukonen*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jahna Lindemuth* of Alaska, *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Tim Fox* of Montana, *Joseph A. Foster* of New Hampshire, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Josh Shapiro* of Pennsylvania, *Peter Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for the Jerome N. Frank Legal Services Organization at Yale Law School et al. by *Seth E. Mermin* and *Jeffrey Gentes*; for the National Consumer Law Center et al. by *Daniel A. Edelman*; and for Public Counsel by *Anne Richardson* and *Stuart Banner*.

Briefs of *amici curiae* urging affirmance were filed for ACA International by *Brian Melendez*; for the Chamber of Commerce of the United

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JUSTICE GORSUCH delivered the opinion of the Court.

Disruptive dinnertime calls, downright deceit, and more besides drew Congress’s eye to the debt collection industry. From that scrutiny emerged the Fair Debt Collection Practices Act, a statute that authorizes private lawsuits and weighty fines designed to deter wayward collection practices. So perhaps it comes as little surprise that we now face a question about who exactly qualifies as a “debt collector” subject to the Act’s rigors. Everyone agrees that the term embraces the repo man—someone hired by a creditor to collect an outstanding debt. But what if you purchase a debt and then try to collect it for yourself—does that make you a “debt collector” too? That’s the nub of the dispute now before us.

The parties approach the question from common ground. The complaint alleges that CitiFinancial Auto loaned money to petitioners seeking to buy cars; that petitioners defaulted on those loans; that respondent Santander then purchased the defaulted loans from CitiFinancial; and that Santander sought to collect in ways petitioners believe troublesome under the Act. The parties agree, too, that in deciding whether Santander’s conduct falls within the Act’s ambit we should look to statutory language defining the term “debt collector” to embrace anyone who “regularly collects or attempts to collect . . . debts owed or due . . . another.” 15 U. S. C. § 1692a(6).

Even when it comes to that question, the parties agree on at least part of an answer. Both sides accept that third party debt collection agents generally qualify as “debt collectors” under the relevant statutory language, while those who seek only to collect for themselves loans they originated generally do not. These results follow, the parties tell us, be-

States of America et al. by *Kate Comerford Todd* and *Joseph R. Palmore*; and for the Clearing House Association, LLC, et al. by *H. Rodgin Cohen*, *Michael M. Wiseman*, *Matthew A. Schwartz*, and *Thomas Pinder*.

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cause debt collection agents seek to collect debts “owed . . . another,” while loan originators acting on their own account aim only to collect debts owed to themselves. All that remains in dispute is how to classify individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account. Does the Act treat the debt purchaser in that scenario more like the repo man or the loan originator?

For their part, the district court and Fourth Circuit sided with Santander. They held that the company didn’t qualify as a debt collector because it didn’t regularly seek to collect debts “owed . . . another” but sought instead only to collect debts that it purchased and owned. At the same time, the Fourth Circuit acknowledged that some circuits faced with the same question have ruled otherwise—and it is to resolve this conflict that we took the case. Compare 817 F. 3d 131, 133–134, 137–138 (2016) (case below); *Davidson v. Capital One Bank (USA), N. A.*, 797 F. 3d 1309, 1315–1316 (CA11 2015), with *McKinney v. Caldeway Properties, Inc.*, 548 F. 3d 496, 501 (CA7 2008); *FTC v. Check Investors, Inc.*, 502 F. 3d 159, 173–174 (CA3 2007).

Before attending to that job, though, we pause to note two related questions we do not attempt to answer today. First, petitioners suggest that Santander can qualify as a debt collector not only because it regularly seeks to collect for its own account debts that it has purchased, but also because it regularly acts as a third party collection agent for debts owed to others. Petitioners did not, however, raise the latter theory in their petition for certiorari and neither did we agree to review it. Second, the parties briefly allude to another statutory definition of the term “debt collector”—one that encompasses those engaged “in any business the principal purpose of which is the collection of any debts.” §1692a(6). But the parties haven’t much litigated that alternative definition and in granting certiorari, see 580 U. S. 1089 (2017), we didn’t agree to address it either.

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With these preliminaries by the board, we can turn to the much narrowed question properly before us. In doing so, we begin, as we must, with a careful examination of the statutory text. And there we find it hard to disagree with the Fourth Circuit’s interpretive handiwork. After all, the Act defines debt collectors to include those who regularly seek to collect debts “owed . . . another.” And by its plain terms this language seems to focus our attention on third party collection agents working for a debt owner—not on a debt owner seeking to collect debts for itself. Neither does this language appear to suggest that we should care how a debt owner came to be a debt owner—whether the owner originated the debt or came by it only through a later purchase. All that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for “another.” And given that, it would seem a debt purchaser like Santander may indeed collect debts for its own account without triggering the statutory definition in dispute, just as the Fourth Circuit explained.

Petitioners reply that this seemingly straightforward reading overlooks an important question of tense. They observe that the word “owed” is the *past* participle of the verb “to owe.” And this, they suggest, means the statute’s definition of debt collector captures anyone who regularly seeks to collect debts *previously* “owed . . . another.” So it is that, on petitioners’ account, the statute excludes from its compass loan originators (for they never seek to collect debts previously owed someone else) but embraces many debt purchasers like Santander (for in collecting purchased debts they necessarily seek to collect debts previously owed another). If Congress wanted to exempt all present debt owners from its debt collector definition, petitioners submit, it would have used the *present* participle “owing.” That would have better sufficed to do the job—to make clear that you must collect debts *currently* “owing . . . another” before implicating the Act.

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But this much doesn't follow even as a matter of good grammar, let alone ordinary meaning. Past participles like "owed" are routinely used as adjectives to describe the present state of a thing—so, for example, *burnt* toast is inedible, a *fallen* branch blocks the path, and (equally) a debt *owed* to a current owner may be collected by him or her. See P. Peters, *The Cambridge Guide to English Usage* 409 (2004) (explaining that the term "past participle" is a "misnomer[], since" it "can occur in what is technically a present . . . tense"). Just imagine if you told a friend that you were seeking to "collect a debt owed to Steve." Doesn't it seem likely your friend would understand you as speaking about a debt *currently* owed to Steve, not a debt Steve *used* to own and that's now actually yours? In the end, even petitioners find themselves forced to admit that past participles can and regularly do work just this way, as adjectives to describe the present state of the nouns they modify. See Brief for Petitioners 28; see also B. Garner, *Modern English Usage* 666 (4th ed. 2016) (while "*owing* . . . is an old and established usage . . . the more logical course is simply to write *owed*").

Widening our view to take in the statutory phrase in which the word "owed" appears—"owed or due . . . another"—serves to underscore the point. Petitioners acknowledge that the word "due" describes a debt *currently* due at the time of collection and not a debt that *was* due only in some previous period. Brief for Petitioners 26–28. So to rule for them we would have to suppose Congress set two words cheek by jowl in the same phrase but meant them to speak to entirely different periods of time. All without leaving any clue. We would have to read the phrase not as referring to "debts that *are* owed or due another" but as describing "debts that *were* owed or *are* due another." And supposing such a surreptitious subphrasal shift in time seems to us a bit much. Neither are we alone in that assessment, for even petitioners acknowledge that theirs "may not

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be the most natural interpretation of the phrase standing in isolation.” *Id.*, at 26–27.

Given that, you might wonder whether extending our gaze from the narrow statutory provision at issue to take in the larger statutory landscape might offer petitioners a better perspective. But it does not. Looking to other neighboring provisions in the Act, it quickly comes clear that Congress routinely used the word “owed” to refer to present (not past) debt relationships. For example, in one nearby subsection, Congress defined a creditor as someone “to whom a debt is owed.” 15 U. S. C. § 1692a(4). In another subsection, too, Congress required a debt collector to identify “the creditor to whom the debt is owed.” § 1692g(a)(2). Yet petitioners offer us no persuasive reason why the word “owed” should bear a different meaning here, in the subsection before us, or why we should abandon our usual presumption that “identical words used in different parts of the same statute” carry “the same meaning.” *IBP, Inc. v. Alvarez*, 546 U. S. 21, 34 (2005).

Still other contextual clues add to petitioners’ problems. While they suggest that the statutory definition before us implicitly distinguishes between loan originators and debt purchasers, a pass through the statute shows that when Congress wished to distinguish between originators and purchasers it left little doubt in the matter. In the very definitional section where we now find ourselves working, Congress expressly differentiated between a person “who offers” credit (the originator) and a person “to whom a debt is owed” (the present debt owner). § 1692a(4). Elsewhere, Congress recognized the distinction between a debt “originated by” the collector and a debt “owed or due” another. § 1692a(6)(F)(ii). And elsewhere still, Congress drew a line between the “original” and “current” creditor. § 1692g(a)(5). Yet no similar distinction can be found in the language now before us. To the contrary, the statutory text at issue speaks not at all about originators and current debt owners

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but only about whether the defendant seeks to collect on behalf of itself or “another.” And, usually at least, when we’re engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning. See, *e. g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014).

Even what may be petitioners’ best piece of contextual evidence ultimately proves unhelpful to their cause. Petitioners point out that the Act exempts from the definition of “debt collector” certain individuals who have “obtained” particular kinds of debt—for example, debts not yet in default or debts connected to secured commercial credit transactions. §§ 1692a(6)(F)(iii) and (iv). And because these exemptions contemplate the possibility that someone might “obtain” a debt “owed or due . . . another,” petitioners submit, the word “owed” must refer only to a *previous* owner. *Ibid.* This conclusion, they say, necessarily follows because, once you have “obtained” a debt, that same debt just cannot be *currently* “owed or due” another.

This last and quite essential premise of the argument, however, misses its mark. As a matter of ordinary English, the word “obtained” can (and often does) refer to taking possession of a piece of property without also taking ownership—so, for example, you might obtain a rental car or a hotel room or an apartment. See, *e. g.*, 10 Oxford English Dictionary 669 (2d ed. 1989) (defining “obtain” to mean, among other things, “[t]o come into the possession or enjoyment of (something) by one’s own effort or by request”); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 532–533 (2013) (distinguishing between ownership and obtaining possession). And it’s easy enough to see how you might also come to possess (obtain) a debt without taking ownership of it. You might, for example, take possession of a debt for servicing and collection even while the debt formally remains owed another. Or as a secured party you might take possession of a debt as collateral, again without taking full

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ownership of it. See, *e. g.*, U. C. C. § 9–207, 3 U. L. A. 197 (2010). So it simply isn't the case that the statute's exclusions imply that the phrase "owed . . . another" must refer to debts *previously* owed to another.

By this point petitioners find themselves in retreat. Unable to show that debt purchasers regularly collecting for their own account always qualify as debt collectors, they now suggest that purchasers sometimes qualify as debt collectors. On their view, debt purchasers surely qualify as collectors at least when they regularly purchase and seek to collect *defaulted* debts—just as Santander allegedly did here. In support of this narrower and more particular understanding of the Act, petitioners point again to the fact that the statute excludes from the definition of "debt collector" certain persons who obtain debts before default. 15 U. S. C. § 1692a(6)(F)(iii). This exclusion, petitioners now suggest, implies that the term "debt collector" must embrace those who regularly seek to collect debts obtained after default. Others aligned with petitioners also suggest that the Act treats everyone who attempts to collect a debt as either a "debt collector" or a "creditor," but not both. And because the statutory definition of the term "creditor" excludes those who seek to collect a debt obtained "in default," § 1692a(4), they contend it again follows as a matter of necessary inference that these persons must qualify as debt collectors.

But these alternative lines of inferential argument bear their own problems. For while the statute surely excludes from the debt collector definition certain persons who acquire a debt before default, it doesn't necessarily follow that the definition must include anyone who regularly collects debts acquired after default. After all and again, under the definition at issue before us you have to attempt to collect debts owed *another* before you can ever qualify as a debt collector. And petitioners' argument simply does not fully confront this plain and implacable textual prerequisite. Likewise, even spotting (without granting) the premise that

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a person cannot be both a creditor and a debt collector with respect to a particular debt, we don't see why a defaulted debt purchaser like Santander couldn't qualify as a creditor. For while the creditor definition excludes persons who "receive an assignment or transfer of a debt in default," it does so only (and yet again) when the debt is assigned or transferred "*solely* for the purpose of facilitating collection of such debt *for another*." *Ibid.* (emphasis added). So a company collecting purchased defaulted debt for its own account—like Santander—would hardly seem to be barred from qualifying as a creditor under the statute's plain terms.

Faced with so many obstacles in the text and structure of the Act, petitioners ask us to move quickly on to policy. Indeed, from the beginning that is the field on which they seem most eager to pitch battle. Petitioners assert that Congress passed the Act in large measure to add new incentives for independent debt collectors to treat consumers well. In their view, Congress excluded loan originators from the Act's demands because it thought they already faced sufficient economic and legal incentives to good behavior. But, on petitioners' account, Congress never had the chance to consider what should be done about those in the business of purchasing defaulted debt. That's because, petitioners tell us, the "advent" of the market for defaulted debt represents "one of the most significant changes" to the debt market generally since the Act's passage in 1977. Brief for Petitioners 8 (quoting Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014, p. 7 (2014)). Had Congress known this new industry would blossom, they say, it surely would have judged defaulted debt purchasers more like (and in need of the same special rules as) independent debt collectors. Indeed, petitioners contend that no other result would be consistent with the overarching congressional goal of deterring untoward debt collection practices.

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All this seems to us quite a lot of speculation. And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced. See *Magwood v. Patterson*, 561 U. S. 320, 334 (2010) (“We cannot replace the actual text with speculation as to Congress’ intent”). Indeed, it is quite mistaken to assume, as petitioners would have us, that “whatever” might appear to “further[] the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U. S. 522, 526 (1987) (*per curiam*) (emphasis deleted). Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known “pursues its [stated] purpose[] at all costs.” *Id.*, at 525–526. For these reasons and more besides we will not presume with petitioners that any result consistent with their account of the statute’s overarching goal must be the law but will presume more modestly instead “that [the] legislature says . . . what it means and means . . . what it says.” *Dodd v. United States*, 545 U. S. 353, 357 (2005) (internal quotation marks omitted; brackets in original).

Even taken on its own terms, too, the speculation petitioners urge upon us is far from unassailable. After all, is it really impossible to imagine that reasonable legislators might contend both ways on the question whether defaulted debt purchasers should be treated more like loan originators than independent debt collection agencies? About whether other existing incentives (in the form of common law duties, other statutory and regulatory obligations, economic incentives, or otherwise) suffice to deter debt purchasers from engaging in certain undesirable collection activities? Couldn’t a reasonable legislator endorsing the Act as written wonder whether a large financial institution like Santander is any

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more or less likely to engage in abusive conduct than another large financial institution like CitiFinancial Auto? Especially where (as here) the institution says that its primary business is loan origination and not the purchase of defaulted debt? We do not profess sure answers to any of these questions, but observe only that the parties and their *amici* manage to present many and colorable arguments both ways on them all, a fact that suggests to us for certain but one thing: that these are matters for Congress, not this Court, to resolve.

In the end, reasonable people can disagree with how Congress balanced the various social costs and benefits in this area. We have no difficulty imagining, for example, a statute that applies the Act's demands to anyone collecting any debts, anyone collecting debts originated by another, or to some other class of persons still. Neither do we doubt that the evolution of the debt collection business might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past. After all, it's hardly unknown for new business models to emerge in response to regulation, and for regulation in turn to address new business models. Constant competition between constable and quarry, regulator and regulated, can come as no surprise in our changing world. But neither should the proper role of the judiciary in that process—to apply, not amend, the work of the People's representatives.

The judgment of the Court of Appeals is

Affirmed.

Per Curiam

VIRGINIA ET AL. *v.* LEBLANC

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

No. 16–1177. Decided June 12, 2017

Respondent was sentenced to life in prison in 2003 for crimes that he committed when he was 16. The Court later decided in *Graham v. Florida*, 560 U.S. 48, that the Eighth Amendment prohibits juvenile offenders convicted of nonhomicide offenses from being sentenced to life without parole. Respondent sought resentencing in light of *Graham*, but the Virginia courts denied relief based on a Supreme Court of Virginia decision holding that the Commonwealth’s framework for granting release to inmates 60 years and older under certain conditions satisfies *Graham*’s requirement of a meaningful opportunity for parole. Respondent next sought federal habeas relief. The District Court granted relief, finding no possibility that fairminded jurists could disagree that the state court’s decision conflicts with *Graham*. A divided panel of the Fourth Circuit affirmed.

Held: The Fourth Circuit failed to accord the state court’s decision the deference owed under the Antiterrorism and Effective Death Penalty Act of 1996. For a state court’s decision to be an unreasonable application of the Court’s case law, the ruling must be not just wrong but “objectively unreasonable.” *Woods v. Donald*, 575 U.S. 312, 316. This is “meant to be” a difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102. It was not objectively unreasonable based on current case law for the state court to conclude that Virginia’s release program satisfied *Graham*’s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole. *Graham* did not consider whether a release program like Virginia’s fails to satisfy the Eighth Amendment. That question cannot be resolved in the narrow context of federal habeas review, and the Court expresses no view on the merits of the underlying Eighth Amendment claim.

Certiorari granted; 841 F.3d 256, reversed.

PER CURIAM.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner is eligible for federal habeas relief if the underlying state-court merits ruling

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was “contrary to, or involved an unreasonable application of, clearly established Federal law” as determined by this Court. 28 U.S.C. § 2254(d)(1). In this case, the Court of Appeals for the Fourth Circuit held that this demanding standard was met by a Virginia court’s application of *Graham v. Florida*, 560 U.S. 48 (2010). The question presented is whether the Court of Appeals erred in concluding that the state court’s ruling involved an unreasonable application of this Court’s holding.

I

On July 6, 1999, respondent Dennis LeBlanc raped a 62-year-old woman. He was 16 at the time. In 2003, a state trial court sentenced him to life in prison for his crimes. In the 1990’s, Virginia had, for felony offenders, abolished parole that followed a traditional framework. See Va. Code Ann. § 53.1–165.1 (2013). As a form of replacement, Virginia enacted its so-called geriatric release program, which allows older inmates to receive conditional release under some circumstances. *LeBlanc v. Mathena*, 841 F.3d 256, 261 (CA4 2016) (citing Va. Code Ann. § 53.1–40.01).

Seven years after respondent was sentenced, this Court decided *Graham v. Florida*. *Graham* established that the Eighth Amendment prohibits juvenile offenders convicted of nonhomicide offenses from being sentenced to life without parole. While a “State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,” the Court held, it must “give defendants like *Graham* some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” 560 U.S., at 75. The Court in *Graham* left it to the States, “in the first instance, to explore the means and mechanisms for compliance” with the *Graham* rule. *Ibid.*

Respondent later filed a motion in state trial court—the Virginia Beach Circuit Court—seeking to vacate his sentence in light of *Graham*. The trial court denied the motion. In so doing, it relied on the Supreme Court of Virginia’s deci-

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sion in *Angel v. Commonwealth*, 281 Va. 248, 704 S. E. 2d 386 (2011). The *Angel* court held that Virginia’s geriatric release program satisfies *Graham*’s requirement of parole for juvenile offenders. The statute establishing the program provides:

“Any person serving a sentence imposed upon a conviction for a felony offense . . . (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.” § 53.1–40.01.

The *Angel* court explained that “[t]he regulations for conditional release under this statute provide that if the prisoner meets the qualifications for consideration contained in the statute, the factors used in the normal parole consideration process apply to conditional release decisions under this statute.” 281 Va., at 275, 704 S. E. 2d, at 402. The geriatric release program thus complied with *Graham*, the *Angel* court held, because it provided “the meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation required by the Eighth Amendment.” 281 Va., at 275, 704 S. E. 2d, at 402 (internal quotation marks omitted).

The Virginia Supreme Court, in reviewing the trial court’s ruling in the instant case, summarily denied respondent’s requests for appeal and for rehearing.

In 2012, respondent filed a federal habeas petition in the Eastern District of Virginia pursuant to 28 U. S. C. § 2254. A Magistrate Judge recommended dismissing the petition, but the District Court disagreed and granted the writ. The District Court explained that “there is no possibility that fairminded jurists could disagree that the state court’s decision conflicts wit[h] the dictates of *Graham*.” *LeBlanc v. Mathena*, 2015 WL 4042175, *18 (July 1, 2015).

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A divided panel of the Court of Appeals for the Fourth Circuit affirmed, holding that the state trial court’s ruling was an unreasonable application of *Graham*. 841 F. 3d, at 259–260. In the panel majority’s view, Virginia’s geriatric release program did not provide a meaningful opportunity for juvenile nonhomicide offenders to obtain release based on demonstrated maturity and rehabilitation.

Judge Niemeyer dissented. He criticized the majority for “fail[ing] to respect, in any meaningful way, the deference Congress requires federal courts to give state court decisions on postconviction review.” *Id.*, at 275.

The Commonwealth of Virginia petitioned for certiorari. The petition is now granted, and the judgment is reversed: The Virginia trial court did not unreasonably apply the *Graham* rule.

II

In order for a state court’s decision to be an unreasonable application of this Court’s case law, the ruling must be “objectively unreasonable, not merely wrong; even clear error will not suffice.” *Woods v. Donald*, 575 U. S. 312, 316 (2015) (*per curiam*) (internal quotation marks omitted). In other words, a litigant must “show that the state court’s ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Ibid.* (internal quotation marks omitted). This is “meant to be” a difficult standard to meet. *Harrington v. Richter*, 562 U. S. 86, 102 (2011).

The Court of Appeals for the Fourth Circuit erred by failing to accord the state court’s decision the deference owed under AEDPA. *Graham* did not decide that a geriatric release program like Virginia’s failed to satisfy the Eighth Amendment because that question was not presented. And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*’s require-

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ment that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole. The geriatric release program instructs Virginia’s parole board to consider factors like the “individual’s history . . . and the individual’s conduct . . . during incarceration,” as well as the prisoner’s “inter-personal relationships with staff and inmates” and “[c]hanges in attitude toward self and others.” See 841 F. 3d, at 280–281 (Niemeyer, J., dissenting) (citing Virginia Parole Board Policy Manual 2–4 (Oct. 2006)). Consideration of these factors could allow the parole board to order a former juvenile offender’s conditional release in light of his or her “demonstrated maturity and rehabilitation.” *Graham*, 560 U. S., at 75. The state court thus did not diverge so far from *Graham*’s dictates as to make it “so obvious that . . . there could be no ‘fairminded disagreement’” about whether the state court’s ruling conflicts with this Court’s case law. *White v. Woodall*, 572 U. S. 415, 427 (2014).

“Perhaps the logical next step from” *Graham* would be to hold that a geriatric release program does not satisfy the Eighth Amendment, but “perhaps not.” 572 U. S., at 427. “[T]here are reasonable arguments on both sides.” *Ibid.* With respect to petitioners, these include the arguments discussed above. With regards to respondent, these include the contentions that the parole board’s substantial discretion to deny geriatric release deprives juvenile nonhomicide offenders a meaningful opportunity to seek parole and that juveniles cannot seek geriatric release until they have spent at least four decades in prison.

These arguments cannot be resolved on federal habeas review. Because this case arises “only in th[at] narrow context,” the Court “express[es] no view on the merits of the underlying” Eighth Amendment claim. *Woods*, *supra*, at 319 (internal quotation marks omitted). Nor does the Court “suggest or imply that the underlying issue, if presented on direct review, would be insubstantial.” *Marshall v. Rodgers*, 569 U. S. 58, 64 (2013) (*per curiam*); accord, *Woodall*,

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supra, at 427. The Court today holds only that the Virginia trial court’s ruling, resting on the Virginia Supreme Court’s earlier ruling in *Angel*, was not objectively unreasonable in light of this Court’s current case law.

III

A proper respect for AEDPA’s high bar for habeas relief avoids unnecessarily “disturb[ing] the State’s significant interest in repose for concluded litigation, den[ying] society the right to punish some admitted offenders, and intrud[ing] on state sovereignty to a degree matched by few exercises of federal judicial authority.” *Harrington, supra*, at 103 (internal quotation marks omitted). The federalism interest implicated in AEDPA cases is of central relevance in this case, for the Court of Appeals for the Fourth Circuit’s holding created the potential for significant discord in the Virginia sentencing process. Before today, Virginia courts were permitted to impose—and required to affirm—a sentence like respondent’s, while federal courts presented with the same fact pattern were required to grant habeas relief. Reversing the Court of Appeals’ decision in this case—rather than waiting until a more substantial split of authority develops—spares Virginia courts from having to confront this legal quagmire.

For these reasons, the petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE GINSBURG, concurring in the judgment.

Graham v. Florida, 560 U. S. 48 (2010), as today’s *per curiam* recognizes, established that a juvenile offender convicted of a nonhomicide offense must have “some meaningful opportunity to obtain release [from prison] based on demonstrated maturity and rehabilitation.” *Id.*, at 75. See *ante*,

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at 92. I join the Court’s judgment on the understanding that the Virginia Supreme Court, in *Angel v. Commonwealth*, 281 Va. 248, 704 S. E. 2d 386 (2011), interpreted Virginia law to require the parole board to provide such a meaningful opportunity under the geriatric release program. See *id.*, at 275, 704 S. E. 2d, at 402 (“the factors used in the normal parole consideration process apply to conditional release decisions under this statute”). In other words, contrary to the Fourth Circuit’s interpretation of Virginia law, the parole board may not deny a juvenile offender geriatric release “for *any* reason whatsoever,” 841 F. 3d 256, 269 (2016) (emphasis in original); instead, the board, when evaluating a juvenile offender for geriatric release, must consider the normal parole factors, including rehabilitation and maturity. See *ante*, at 95.

Syllabus

PACKINGHAM *v.* NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 15–1194. Argued February 27, 2017—Decided June 19, 2017

North Carolina law makes it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” N. C. Gen. Stat. Ann. §§ 14–202.5(a), (e). According to sources cited to the Court, the State has prosecuted over 1,000 people for violating this law, including petitioner, who was indicted after posting a statement on his personal Facebook profile about a positive experience in traffic court. The trial court denied petitioner’s motion to dismiss the indictment on the ground that the law violated the First Amendment. He was convicted and given a suspended prison sentence. On appeal, the State Court of Appeals struck down § 14–202.5 on First Amendment grounds, but the State Supreme Court reversed.

Held: The North Carolina statute impermissibly restricts lawful speech in violation of the First Amendment. Pp. 104–109.

(a) A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers “relatively unlimited, low-cost capacity for communication of all kinds,” *Reno v. American Civil Liberties Union*, 521 U. S. 844, 870, to users engaged in a wide array of protected First Amendment activity on any number of diverse topics. The Internet’s forces and directions are so new, so protean, and so far reaching that courts must be conscious that what they say today may be obsolete tomorrow. Here, in one of the first cases the Court has taken to address the relationship between the First Amendment and the modern Internet, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium. Pp. 104–105.

(b) This background informs the analysis of the statute at issue. Even assuming that the statute is content neutral and thus subject to intermediate scrutiny, the provision is not ““narrowly tailored to serve a significant governmental interest.”” *McCullen v. Coakley*, 573 U. S. 464, 486. Like other inventions heralded as advances in human progress, the Internet and social media will be exploited by the criminal

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mind. It is also clear that “sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people,” *Ashcroft v. Free Speech Coalition*, 535 U. S. 234, 244, and that a legislature “may pass valid laws to protect children” and other sexual assault victims, *id.*, at 245. However, the assertion of a valid governmental interest “cannot, in every context, be insulated from all constitutional protections.” *Stanley v. Georgia*, 394 U. S. 557, 563.

Two assumptions are made in resolving this case. First, while the Court need not decide the statute’s precise scope, it is enough to assume that the law applies to commonplace social networking sites like Facebook, LinkedIn, and Twitter. Second, the Court assumes that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.

Even with these assumptions, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another on any subject that might come to mind. With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives. Pp. 105–108.

(c) The State has not met its burden to show that this sweeping law is necessary or legitimate to serve its purpose of keeping convicted sex offenders away from vulnerable victims. No case or holding of this Court has approved of a statute as broad in its reach. The State relies on *Burson v. Freeman*, 504 U. S. 191, but that case considered a more limited restriction—prohibiting campaigning within 100 feet of a polling place—in order to protect the fundamental right to vote. The Court noted, moreover, that a larger buffer zone could “become an impermissible burden” under the First Amendment. *Id.*, at 210. The better analogy is *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U. S. 569. If an ordinance prohibiting any “First Amendment activities” at a single Los Angeles airport could be struck down because it covered all manner of protected, nondisruptive behavior, including “talking and reading, or the wearing of campaign buttons or symbolic

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clothing,” *id.*, at 571, 575, it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of modern society and culture. Pp. 108–109.

368 N. C. 380, 777 S. E. 2d 738, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 109. GORSUCH, J., took no part in the consideration or decision of the case.

David T. Goldberg argued the cause for petitioner. With him on the briefs were *Jeffrey L. Fisher*, *Pamela S. Karlan*, and *Glenn Gerding*.

Robert C. Montgomery, Senior Deputy Attorney General of North Carolina, argued the cause for respondent. With him on the brief were *Josh Stein*, Attorney General, *John F. Maddrey*, Solicitor General, and *Daniel P. O’Brien* and *Anne Murray Middleton*, Special Deputy Attorneys General.*

*Briefs of *amici curiae* urging reversal were filed for the Association for the Treatment of Sexual Abusers et al. by *John J. Korzen*; for the Cato Institute et al. by *Mark C. Fleming*, *Jason D. Hirsch*, *Ari J. Savitzky*, *Ilya Shapiro*, *Esha Bhandari*, *Lee Rowland*, and *Christopher A. Brook*; for the Electronic Frontier Foundation et al. by *Jonathan Sherman*, *Perry M. Grossman*, *David G. Post*, and *Charles Duan*; for the Electronic Privacy Information Center by *Marc Rotenberg* and *Alan Butler*; for the National Association of Criminal Defense Lawyers by *Johnathan D. Hacker*, *Deanna M. Rice*, and *Jeffrey T. Green*; and for the Reporters Committee for Freedom of the Press by *Bruce D. Brown*, *Gregg P. Leslie*, and *J. Joshua Wheeler*.

Briefs of *amici curiae* urging affirmance were filed for the State of Louisiana et al. by *Jeff Landry*, Attorney General of Louisiana, *Elizabeth Murrill*, Solicitor General, *Colin Clark*, Deputy Attorney General, and *Andrea Barinet*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Cynthia H. Coffman* of Colorado, *Douglas S. Chin* of Hawaii, *Curtis T. Hill, Jr.*, of Indiana, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Adam Paul Laxalt* of Nevada, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, and *Brad D. Schimel* of Wisconsin; for the Council of State Gov-

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JUSTICE KENNEDY delivered the opinion of the Court.

In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter. The question presented is whether that law is permissible under the First Amendment’s Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

I

A

North Carolina law makes it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” N. C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). A “commercial social networking Web site” is defined as a website that meets four criteria. First, it “[i]s operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.” § 14–202.5(b). Second, it “[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.” *Ibid.* Third, it “[a]llows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.” *Ibid.* And fourth, it “[p]rovides users or visitors . . . mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.” *Ibid.*

ernments et al. by *Lisa Soronen* and *John C. Neiman, Jr.*; and for Stop Child Predators et al. by *Melissa Arbus Sherry*.

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The statute includes two express exemptions. The statutory bar does not extend to websites that “[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform.” § 14–202.5(c)(1). The law also does not encompass websites that have as their “primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors.” § 14–202.5(c)(2).

According to sources cited to the Court, § 14–202.5 applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it. Brief for Petitioner 6–8.

B

In 2002, petitioner Lester Gerard Packingham—then a 21-year-old college student—had sex with a 13-year-old girl. He pleaded guilty to taking indecent liberties with a child. Because this crime qualifies as “an offense against a minor,” petitioner was required to register as a sex offender—a status that can endure for 30 years or more. See § 14–208.6A; see § 14–208.7(a). As a registered sex offender, petitioner was barred under § 14–202.5 from gaining access to commercial social networking sites.

In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile:

“Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . .Praise be to GOD, WOW! Thanks JESUS!” App. 136.

At the time, a member of the Durham Police Department was investigating registered sex offenders who were thought to be violating § 14–202.5. The officer noticed that a “J. R. Gerrard” had posted the statement quoted above. 368 N. C. 380, 381, 777 S. E. 2d 738, 742 (2015). By checking

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court records, the officer discovered that a traffic citation for petitioner had been dismissed around the time of the post. Evidence obtained by search warrant confirmed the officer's suspicions that petitioner was J. R. Gerrard.

Petitioner was indicted by a grand jury for violating § 14–202.5. The trial court denied his motion to dismiss the indictment on the grounds that the charge against him violated the First Amendment. Petitioner was ultimately convicted and given a suspended prison sentence. At no point during trial or sentencing did the State allege that petitioner contacted a minor—or committed any other illicit act—on the Internet.

Petitioner appealed to the Court of Appeals of North Carolina. That court struck down § 14–202.5 on First Amendment grounds, explaining that the law is not narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse. 229 N. C. App. 293, 304, 748 S. E. 2d 146, 154 (2013). Rather, the law “arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal.” *Ibid.* The North Carolina Supreme Court reversed, concluding that the law is “constitutional in all respects.” 368 N. C., at 381, 777 S. E. 2d, at 741. Among other things, the court explained that the law is “carefully tailored . . . to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors.” *Id.*, at 389, 777 S. E. 2d, at 747. The court also held that the law leaves open adequate alternative means of communication because it permits petitioner to gain access to websites that the court believed perform the “same or similar” functions as social media, such as the Paula Deen Network and the website for the local NBC affiliate. *Id.*, at 390, 777 S. E. 2d, at 747. Two justices dissented. They stated that the law impermissibly “creates a criminal prohibition of alarming breadth and extends well beyond the evils the State seeks to combat.” *Id.*, at 401, 777

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S. E. 2d, at 754 (opinion of Hudson, J.) (alteration, citation, and internal quotation marks omitted).

The Court granted certiorari, 580 U.S. 951 (2016), and now reverses.

II

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the “vast democratic forums of the Internet” in general, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 5–6 (Brief for Electronic Frontier Foundation). One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. *Id.*, at 6. This is about three times the population of North America.

Social media offers “relatively unlimited, low-cost capacity for communication of all kinds.” *Reno, supra*, at 870. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and other-

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wise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. See Brief for Electronic Frontier Foundation 15–16. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics “as diverse as human thought.” *Reno, supra*, at 870 (internal quotation marks omitted).

The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. Cf. D. Hawke, Benjamin Rush: Revolutionary Gadfly 341 (1971) (quoting Rush as observing: “‘The American war is over; but this is far from being the case with the American revolution. On the contrary, nothing but the first act of the great drama is closed’”). So too here. While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

III

This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be “narrowly tailored to

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serve a significant governmental interest.” *McCullen v. Coakley*, 573 U. S. 464, 486 (2014) (internal quotation marks omitted). In other words, the law must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ibid.* (internal quotation marks omitted).

For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example, see M. Crichton, *The Great Train Robbery*, p. xv (1975), and the telephone another, see 18 U. S. C. § 1343. So it will be with the Internet and social media.

There is also no doubt that, as this Court has recognized, “[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.” *Ashcroft v. Free Speech Coalition*, 535 U. S. 234, 244 (2002). And it is clear that a legislature “may pass valid laws to protect children” and other victims of sexual assault “from abuse.” See *id.*, at 245; accord, *New York v. Ferber*, 458 U. S. 747, 757 (1982). The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest “cannot, in every context, be insulated from all constitutional protections.” *Stanley v. Georgia*, 394 U. S. 557, 563 (1969).

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. See *post*, at 114–117; see also Brief for Electronic Frontier Foundation 24–27; Brief for Cato Institute et al. as *Amici Curiae* 10–12, and n. 6. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites “as commonly understood”—that is, websites like Face-

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book, LinkedIn, and Twitter. See Brief for Respondent 54; Tr. of Oral Arg. 27.

Second, this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. See *Brandenburg v. Ohio*, 395 U. S. 444, 447–449 (1969) (*per curiam*). Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. Cf. Brief for Respondent 42–43. Specific laws of that type must be the State’s first resort to ward off the serious harm that sexual crimes inflict. (Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.)

Even with these assumptions about the scope of the law and the State’s interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. *Supra*, at 104–105. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.” *Reno*, 521 U. S., at 870.

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In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

IV

The primary response from the State is that the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose. See *McCullen*, 573 U. S., at 496.

It is instructive that no case or holding of this Court has approved of a statute as broad in its reach. The closest analogy that the State has cited is *Burson v. Freeman*, 504 U. S. 191 (1992). There, the Court upheld a prohibition on campaigning within 100 feet of a polling place. That case gives little or no support to the State. The law in *Burson* was a limited restriction that, in a context consistent with constitutional tradition, was enacted to protect another fundamental right—the right to vote. The restrictions there were far less onerous than those the State seeks to impose here. The law in *Burson* meant only that the last few seconds before voters entered a polling place were “their own, as free from interference as possible.” *Id.*, at 210. And the Court noted that, were the buffer zone larger than 100 feet, it “could effectively become an impermissible burden” under the First Amendment. *Ibid.*

The better analogy to this case is *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U. S. 569 (1987), where the Court struck down an ordinance prohibit-

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ing any “First Amendment activities” at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including “talking and reading, or the wearing of campaign buttons or symbolic clothing,” *id.*, at 571, 575. If a law prohibiting “all protected expression” at a single airport is not constitutional, *id.*, at 574 (emphasis deleted), it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.

* * *

It is well established that, as a general rule, the government “may not suppress lawful speech as the means to suppress unlawful speech.” *Ashcroft*, 535 U. S., at 255. That is what North Carolina has done here. Its law must be held invalid.

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

It is so ordered.

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

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in the judgment.

The North Carolina statute at issue in this case was enacted to serve an interest of “surpassing importance.” *New York v. Ferber*, 458 U. S. 747, 757 (1982)—but it has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because of the law’s extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment.

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I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the Internet with public streets and parks. *Ante*, at 104. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any Internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court’s unnecessary rhetoric.

I

A

The North Carolina law at issue makes it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” N. C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). And as I will explain, the statutory definition of a “commercial social networking Web site” is very broad.

Packingham and the State debate the analytical framework that governs this case. The State argues that the law in question is content neutral and merely regulates a “place” (*i. e.*, the Internet) where convicted sex offenders may wish to engage in speech. See Brief for Respondent 20–25. Therefore, according to the State, the standard applicable to “time, place, or manner” restrictions should apply. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Packingham responds that the challenged statute is “unlike any law this Court has considered as a time, place, or manner restriction,” Brief for Petitioner 37, and he advocates a more demanding standard of review, *id.*, at 37–39.

Like the Court, I find it unnecessary to resolve this dispute because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur.

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B

A content-neutral “time, place, or manner” restriction must serve a “legitimate” government interest, *Ward, supra*, at 798, and the North Carolina law easily satisfies this requirement. As we have frequently noted, “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” *Ferber, supra*, at 757. “Sex offenders are a serious threat,” and “the victims of sexual assault are most often juveniles.” *McKune v. Lile*, 536 U. S. 24, 32 (2002) (plurality opinion); see *Connecticut Dept. of Public Safety v. Doe*, 538 U. S. 1, 4 (2003). “[T]he . . . interest [of] safeguarding the physical and psychological well-being of a minor . . . is a compelling one,” *Globe Newspaper Co. v. Superior Court, County of Norfolk*, 457 U. S. 596, 607 (1982), and “we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights,” *Ferber, supra*, at 757.

Repeat sex offenders pose an especially grave risk to children. “When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.” *McKune, supra*, at 33 (plurality opinion); see *United States v. Kebedeaux*, 570 U. S. 387, 395–396 (2013).

The State’s interest in protecting children from recidivist sex offenders plainly applies to Internet use. Several factors make the Internet a powerful tool for the would-be child abuser. First, children often use the Internet in a way that gives offenders easy access to their personal information—by, for example, communicating with strangers and allowing sites to disclose their location.¹ Second, the Internet pro-

¹See Pew Research Center, *Teens, Social Media, and Privacy* 5 (May 21, 2013), http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf (all Internet materials as last visited June 16, 2017); J. Wolak, K. Mitchell, & D. Finkelhor, National Center for Missing & Exploited Children, *Online Victimization of Youth: Five Years Later* 7 (2006)

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vides previously unavailable ways of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser’s age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child’s location posts on the Internet to determine the pattern of the child’s day-to-day activities—and even the child’s location at a given moment. Such uses of the Internet are already well documented, both in research² and in reported decisions.³

Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the Internet

(prepared by Univ. of N. H., Crimes Against Children Research Center), <http://www.unh.edu/ccrc/pdf/CV138.pdf>.

²See *id.*, at 2–3; Wolak, Finkelhor, Mitchell, & Ybarra, Online “Predators” and Their Victims, 63 *Am. Psychologist* 111, 112 (Feb.–Mar. 2008).

³For example, in *State v. Gallo*, 275 Ore. App. 868, 869, 365 P. 3d 1154, 1154–1155 (2015), a 32-year-old defendant posing as a 15-year-old boy used a social networking site to contact and befriend a 16-year-old autistic girl. “He then arranged to meet the victim, took her to a park, and sexually abused her.” *Ibid.*, 365 P. 3d, at 1155. In *United States v. Steele*, 664 Fed. Appx. 260, 261 (CA3 2016), the defendant “began interacting with a minor [victim] on the gay social networking cell phone application ‘Jack’d.’” He eventually met the 14-year-old victim and sexually abused him. *Ibid.* Sadly, these cases are not unique. See, e. g., *Himko v. English*, 2016 WL 7645584, *1 (ND Fla., Dec. 5, 2016) (a convicted rapist and registered sex offender “contacted a sixteen-year-old girl using . . . Facebook” and then exchanged explicit text messages and photographs with her), report and recommendation adopted, 2017 WL 54246 (Jan. 4, 2017); *Roberts v. United States*, 2015 WL 7424858, *2–*3 (SD Ohio, Nov. 23, 2015) (the defendant “met a then 14-year-old child online via a social networking website called vampirefreaks.com” and then enticed the child to his home and “coerced the child to perform oral sex on him”), report and recommendation adopted, 2016 WL 112647 (Jan. 8, 2016), certificate of appealability denied, No. 16–3050 (CA6, June 15, 2016); *State v. Murphy*, 2016–0901, p. 3 (La. App. 1 Cir. 10/28/16), 206 So. 3d 219, 224 (a defendant “initiated conversations” with his 12-year-old victim “on a social network chat site called ‘Kik’” and later sent sexually graphic photographs of himself to the victim and received sexually graphic photos from her).

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to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens.

C

1

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U. S., at 798–799; see also *McCullen v. Coakley*, 573 U. S. 464, 486 (2014). The North Carolina law fails this requirement.

A straightforward reading of the text of N. C. Gen. Stat. Ann. § 14–202.5 compels the conclusion that it prohibits sex offenders from accessing an enormous number of websites. The law defines a “commercial social networking Web site” as one with four characteristics. First, the website must be “operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.” § 14–202.5(b)(1). Due to the prevalence of advertising on websites of all types, this requirement does little to limit the statute’s reach.

Second, the website must “[f]acilitat[e] the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.” § 14–202.5(b)(2). The term “social introduction” easily encompasses any casual exchange, and the term “information exchanges” seems to apply to any site that provides an opportunity for a visitor to post a statement or comment that may be read by other visitors. Today, a great many websites include this feature.

Third, a website must “[a]llow users to create Web pages or personal profiles that contain information *such as* the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information

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about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.” § 14–202.5(b)(3) (emphasis added). This definition covers websites that allow users to create anything that can be called a “personal profile,” *i. e.*, a short description of the user.⁴ Contrary to the argument of the State, Brief for Respondent 26–27, everything that follows the phrase “such as” is an illustration of features that a covered website or personal profile may (but need not) include.

Fourth, in order to fit within the statute, a website must “[p]rovid[e] users or visitors . . . mechanisms to communicate with other users, *such as* a message board, chat room, electronic mail, or instant messenger.” § 14–202.5(b)(4) (emphasis added). This requirement seems to demand no more than that a website allow back-and-forth comments between users. And since a comment function is undoubtedly a “mechanis[m] to communicate with other users,” *ibid.*, it appears to follow that any website with such a function satisfies this requirement.

2

The fatal problem for § 14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point.

Take, for example, the popular retail website Amazon.com, which allows minors to use its services⁵ and meets all four requirements of § 14–202.5’s definition of a commercial social networking website. First, as a seller of products, Amazon unquestionably derives revenue from the operation of its

⁴See New Oxford American Dictionary 1394 (3d ed. 2010); Webster’s Third New International Dictionary 1811 (2002); 12 Oxford English Dictionary 576 (2d ed. 1989).

⁵See Amazon, Conditions of Use (June 21, 2016), https://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-2?ie=UTF8&nodeId=201909000&qid=1490898710&sr=1-2.

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website. Second, the Amazon site facilitates the social introduction of people for the purpose of information exchanges. When someone purchases a product on Amazon, the purchaser can review the product and upload photographs, and other buyers can then respond to the review.⁶ This information exchange about products that Amazon sells undoubtedly fits within the definition in § 14–202.5. It is the equivalent of passengers on a bus comparing notes about products they have purchased. Third, Amazon allows a user to create a personal profile, which is then associated with the product reviews that the user uploads. Such a profile can contain an assortment of information, including the user’s name, e-mail address, and picture.⁷ And fourth, given its back-and-forth comment function, Amazon satisfies the final statutory requirement.⁸

Many news websites are also covered by this definition. For example, the Washington Post’s website gives minors access⁹ and satisfies the four elements that define a commercial social networking website. The website (1) derives revenue from ads and (2) facilitates social introductions for the purpose of information exchanges. Users of the site can

⁶ See Amazon, About Customer Reviews, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201967050; Amazon, About Public Activity, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=202076150.

⁷ See Amazon, About Your Profile, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=202076210; Amazon, About Public Information, https://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-2?ie=UTF8&nodeId=202076170&qid=1490835739&sr=1-2.

⁸ Amazon does not appear to fall within the statute’s exemption for websites that have as their “primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.” § 14–202.5(c)(2). Amazon’s primary purpose seems to be the facilitation of commercial transactions between its users and *itself*.

⁹ See Washington Post, Terms of Service (July 1, 2014), https://www.washingtonpost.com/terms-of-service/2011/11/18/gIQAldiYiN_story.html?utm_term=.9be5851f95.

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comment on articles, reply to other users' comments, and recommend another user's comment.¹⁰ Users can also (3) create personal profiles that include a name or nickname and a photograph. The photograph and name will then appear next to every comment the user leaves on an article. Finally (4), the back-and-forth comment section is a mechanism for users to communicate among themselves. The site thus falls within § 14–202.5 and is accordingly off limits for registered sex offenders in North Carolina.

Or consider WebMD—a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site.¹¹ And it exhibits the four hallmarks of a “commercial social networking” website. It obtains revenue from advertisements.¹² It facilitates information exchanges—via message boards that allow users to engage in public discussion of an assortment of health issues.¹³ It allows users to create basic profile pages: Users can upload a picture and some basic information about themselves, and other users can see their aggregated comments and “likes.”¹⁴ WebMD also provides message boards, which are specifically mentioned in the statute as a “mechanis[m] to communicate with other users.” N. C. Gen. Stat. Ann. § 14–202.5(b)(4).

¹⁰ See Washington Post, Ad choices (Nov. 21, 2011), https://www.washingtonpost.com/how-can-i-opt-out-of-online-advertising-cookies/2011/11/18/gIQAEBcBiN_story.html?utm_term=.3da1f56d67e7; Washington Post, Privacy Policy (May 2, 2017), https://www.washingtonpost.com/privacypolicy/2011/11/18/gIQASiiaiN_story.html?utm_term=.8252a76f8df2.

¹¹ See WebMD, Terms and Conditions of Use (Nov. 2, 2016), <https://www.webmd.com/about-webmd-policies/about-terms-and-conditions-of-use>.

¹² WebMD, Advertising Policy (June 9, 2016), <http://www.webmd.com/about-webmd-policies/about-advertising-policy>.

¹³ WebMD, Message Board Overview (Sept. 22, 2016), <http://www.webmd.com/about-webmd-policies/about-community-overview>.

¹⁴ See WebMD, Change Your Profile Settings (Feb. 19, 2014), <http://www.webmd.com/about-webmd-policies/profile>.

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As these examples illustrate, the North Carolina law has a very broad reach and covers websites that are ill suited for use in stalking or abusing children. The focus of the discussion on these sites—shopping, news, health—does not provide a convenient jumping off point for conversations that may lead to abuse. In addition, the social exchanges facilitated by these websites occur in the open, and this reduces the possibility of a child being secretly lured into an abusive situation. These websites also give sex offenders little opportunity to gather personal details about a child; the information that can be listed in a profile is limited, and the profiles are brief. What is more, none of these websites make it easy to determine a child’s precise location at a given moment. For example, they do not permit photo streams (at most, a child could upload a single profile photograph), and they do not include up-to-the minute location services. Such websites would provide essentially no aid to a would-be child abuser.

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State’s goal of protecting children from recidivist sex offenders. I am therefore compelled to conclude that, while the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.¹⁵

II

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court’s loose rhetoric. After noting that “a street or a park is a quintessential forum for the exercise of First Amendment rights,” the Court states that “cyber-

¹⁵I express no view on whether a law that does not reach the sort of sites discussed above would satisfy the First Amendment. Until such a law is before us, it is premature to address that question.

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space” and “social media in particular” are now “the most important places (in a spatial sense) for the exchange of views.” *Ante*, at 104. The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral “time, place, and manner” restrictions. But if the entirety of the Internet or even just “social media” sites¹⁶ are the 21st-century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court’s suggestion, there are important differences between cyberspace and the physical world.

I will mention a few that are relevant to Internet use by sex offenders. First, it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their Internet use. Second, if a sex offender is seen approaching children or loitering in a place frequented by children, this conduct may be observed by parents, teachers, or others. Third, the Internet offers an unprecedented degree of anonymity and easily permits a would-be molester to assume a false identity.

The Court is correct that we should be cautious in applying our free speech precedents to the Internet. *Ante*, at 105. Cyberspace is different from the physical world, and if it is true, as the Court believes, that “we cannot appreciate yet”

¹⁶As the law at issue here shows, it is not easy to provide a precise definition of a “social media” site, and the Court makes no effort to do so. Thus, the scope of its dicta is obscure.

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the “full dimensions and vast potential” of “the Cyber Age,” *ibid.*, we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

Syllabus

ZIGLAR *v.* ABBASI ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 15–1358. Argued January 18, 2017—Decided June 19, 2017*

In the immediate aftermath of the September 11 terrorist attacks, the Federal Government ordered hundreds of illegal aliens to be taken into custody and held pending a determination whether a particular detainee had connections to terrorism. Respondents, six men of Arab or South Asian descent, were detained for periods of three to six months in a federal facility in Brooklyn. After their release, they were removed from the United States. They then filed this putative class action against petitioners, two groups of federal officials. The first group consisted of former Attorney General John Ashcroft, former Federal Bureau of Investigation Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar (Executive Officials). The second group consisted of the facility’s warden and assistant warden, Dennis Hasty and James Sherman (Wardens). Respondents sought damages for constitutional violations under the implied cause-of-action theory adopted in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, alleging that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the Fifth Amendment; that petitioners did so because of their actual or apparent race, religion, or national origin, in violation of the Fifth Amendment; that the Wardens subjected them to punitive strip searches, in violation of the Fourth and Fifth Amendments; and that the Wardens knowingly allowed the guards to abuse them, in violation of the Fifth Amendment. Respondents also brought a claim under 42 U. S. C. § 1985(3), which forbids certain conspiracies to violate equal protection rights. The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Second Circuit affirmed in most respects as to the Wardens but reversed as to the Executive Officials, reinstating respondents’ claims.

Held: The judgment is reversed in part and vacated and remanded in part. 789 F. 3d 218, reversed in part and vacated and remanded in part.

*Together with No. 15–1359, *Ashcroft, Former Attorney General, et al. v. Abbasi et al.*, and No. 15–1363, *Hasty et al. v. Abbasi et al.*, also on certiorari to the same court.

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JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–B, concluding:

1. The limited reach of the *Bivens* action informs the decision whether an implied damages remedy should be recognized here. Pp. 130–137.

(a) In 42 U. S. C. § 1983, Congress provided a specific damages remedy for plaintiffs whose constitutional rights were violated by state officials, but Congress provided no corresponding remedy for constitutional violations by agents of the Federal Government. In 1971, and against this background, this Court recognized in *Bivens* an implied damages action to compensate persons injured by federal officers who violated the Fourth Amendment’s prohibition against unreasonable searches and seizures. In the following decade, the Court allowed *Bivens*-type remedies twice more, in a Fifth Amendment gender-discrimination case, *Davis v. Passman*, 442 U. S. 228, and in an Eighth Amendment Cruel and Unusual Punishments Clause case, *Carlson v. Green*, 446 U. S. 14. These are the only cases in which the Court has approved of an implied damages remedy under the Constitution itself. Pp. 130–131.

(b) *Bivens*, *Davis*, and *Carlson* were decided at a time when the prevailing law assumed that a proper judicial function was to “provide such remedies as are necessary to make effective” a statute’s purpose. *J. I. Case Co. v. Borak*, 377 U. S. 426, 433. The Court has since adopted a far more cautious course, clarifying that, when deciding whether to recognize an implied cause of action, the “determinative” question is one of statutory intent. *Alexander v. Sandoval*, 532 U. S. 275, 286. If a statute does not evince Congress’ intent “to create the private right of action asserted,” *Touche Ross & Co. v. Redington*, 442 U. S. 560, 568, no such action will be created through judicial mandate. Similar caution must be exercised with respect to damages actions implied to enforce the Constitution itself. *Bivens* is well-settled law in its own context, but expanding the *Bivens* remedy is now considered a “disfavored” judicial activity. *Ashcroft v. Iqbal*, 556 U. S. 662, 675.

When a party seeks to assert an implied cause of action under the Constitution, separation-of-powers principles should be central to the analysis. The question is whether Congress or the courts should decide to authorize a damages suit. *Bush v. Lucas*, 462 U. S. 367, 380. Most often it will be Congress, for *Bivens* will not be extended to a new context if there are “special factors counselling hesitation in the absence of affirmative action by Congress.” *Carlson, supra*, at 18. If there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, courts must refrain from creating that kind

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of remedy. An alternative remedial structure may also limit the Judiciary's power to infer a new *Bivens* cause of action. Pp. 131–137.

2. Considering the relevant special factors here, a *Bivens*-type remedy should not be extended to the claims challenging the confinement conditions imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. These “detention policy claims” include the allegations that petitioners violated respondents’ due process and equal protection rights by holding them in restrictive conditions of confinement, and the allegations that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The detention policy claims do not include the guard-abuse claim against Warden Hasty. Pp. 137–146.

(a) The proper test for determining whether a claim arises in a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Meaningful differences may include, *e. g.*, the rank of the officers involved; the constitutional right at issue; the extent of judicial guidance for the official conduct; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors not considered in previous *Bivens* cases. Respondents’ detention policy claims bear little resemblance to the three *Bivens* claims the Court has approved in previous cases. The Second Circuit thus should have held that this was a new *Bivens* context and then performed a special-factors analysis before allowing this damages suit to proceed. Pp. 138–140.

(b) The special factors here indicate that Congress, not the courts, should decide whether a damages action should be allowed.

With regard to the Executive Officials, a *Bivens* action is not “a proper vehicle for altering an entity’s policy,” *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74, and is not designed to hold officers responsible for acts of their subordinates, see *Iqbal*, *supra*, at 676. Even an action confined to the Executive Officials’ own discrete conduct would call into question the formulation and implementation of a high-level executive policy, and the burdens of that litigation could prevent officials from properly discharging their duties, see *Cheney v. United States Dist. Court for D. C.*, 542 U.S. 367, 382. The litigation process might also implicate the discussion and deliberations that led to the formation of the particular policy, requiring courts to interfere with sensitive Executive Branch functions. See *Clinton v. Jones*, 520 U.S. 681, 701.

Other special factors counsel against extending *Bivens* to cover the detention policy claims against any of the petitioners. Because those

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claims challenge major elements of the Government’s response to the September 11 attacks, they necessarily require an inquiry into national-security issues. National-security policy, however, is the prerogative of Congress and the President, and courts are “reluctant to intrude upon” that authority absent congressional authorization. *Department of Navy v. Egan*, 484 U. S. 518, 530. Thus, Congress’ failure to provide a damages remedy might be more than mere oversight, and its silence might be more than “inadvertent.” *Schweiker v. Chilicky*, 487 U. S. 412, 423. That silence is also relevant and telling here, where Congress has had nearly 16 years to extend “the kind of remedies [sought by] respondents,” *id.*, at 426, but has not done so. Respondents also may have had available “other alternative forms of judicial relief,” *Minneci v. Pollard*, 565 U. S. 118, 124, including injunctions and habeas petitions.

The proper balance in situations like this, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril, is one for the Congress to undertake, not the Judiciary. The Second Circuit thus erred in allowing respondents’ detention policy claims to proceed under *Bivens*. Pp. 140–146.

3. The Second Circuit also erred in allowing the prisoner abuse claim against Warden Hasty to go forward without conducting the required special-factors analysis. Respondents’ prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation should a *Bivens* remedy be implied. But the first question is whether the claim arises in a new *Bivens* context. This claim has significant parallels to *Carlson*, which extended *Bivens* to cover a failure to provide medical care to a prisoner, but this claim nevertheless seeks to extend *Carlson* to a new context. The constitutional right is different here: *Carlson* was predicated on the Eighth Amendment while this claim was predicated on the Fifth. The judicial guidance available to this warden with respect to his supervisory duties was less developed. There might have been alternative remedies available. And Congress did not provide a standalone damages remedy against federal jailers when it enacted the Prison Litigation Reform Act some 15 years after *Carlson*. Given this Court’s expressed caution about extending the *Bivens* remedy, this context must be regarded as a new one. Pp. 146–149.

4. Petitioners are entitled to qualified immunity with respect to respondents’ claims under 42 U. S. C. § 1985(3). Pp. 149–156.

(a) Assuming that respondents’ allegations are true and well pleaded, the question is whether a reasonable officer in petitioners’ position would have known the alleged conduct was an unlawful conspiracy. The qualified immunity inquiry turns on the “objective legal reasonable-

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ness” of the official’s acts, *Harlow v. Fitzgerald*, 457 U. S. 800, 819, “assessed in light of the legal rules that were ‘clearly established’ at the time [the action] was taken,” *Anderson v. Creighton*, 483 U. S. 635, 639. If it would have been clear to a reasonable officer that the alleged conduct “was unlawful in the situation he confronted,” *Saucier v. Katz*, 533 U. S. 194, 202, the defendant officer is not entitled to qualified immunity. But if a reasonable officer might not have known that the conduct was unlawful, then the officer is entitled to qualified immunity. Pp. 150–152.

(b) Here, reasonable officials in petitioners’ positions would not have known with sufficient certainty that § 1985(3) prohibited their joint consultations and the resulting policies. There are two reasons. First, the conspiracy is alleged to have been among officers in the same Department of the Federal Government. And there is no clearly established law on the issue whether agents of the same executive department are distinct enough to “conspire” with one another within the meaning of 42 U. S. C. § 1985(3). Second, open discussion among federal officers should be encouraged to help those officials reach consensus on department policies, so there is a reasonable argument that § 1985(3) liability should not extend to cases like this one. As these considerations indicate, the question whether federal officials can be said to “conspire” in these kinds of situations is sufficiently open that the officials in this suit would not have known that § 1985(3) applied to their discussions and actions. It follows that reasonable officers in petitioners’ positions would not have known with any certainty that the alleged agreements were forbidden by that statute. Pp. 152–155.

KENNEDY, J., delivered the opinion of the Court, except as to Part IV–B. ROBERTS, C. J., and ALITO, J., joined that opinion in full, and THOMAS, J., joined except as to Part IV–B. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 156. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 160. SOTOMAYOR, KAGAN, and GORSUCH, JJ., took no part in the consideration or decision of the cases.

Acting Solicitor General Gershengorn argued the cause for petitioners in Nos. 15–1358 and 15–1359. With him on the briefs in No. 15–1359 were *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, *Curtis E. Gannon*, *Douglas N. Letter*, *Barbara L. Herwig*, *H. Thomas Byron III*, and *Michael Shih*. *William Alden McDaniel, Jr.*, filed a brief for petitioner in No. 15–1358.

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Jeffrey A. Lamken argued the cause for petitioners in No. 15–1363. With him on the brief were *Michael G. Pattillo, Jr.*, *Eric R. Nitz*, *James A. Barta*, *Clifton S. Elgarten*, *Kate M. Growley*, and *Debra L. Roth*.

Rachel A. Meeropol argued the cause for respondents in all cases. With her on the brief were *Michael Winger*, *Baher A. Azmy*, *Shayana Kadidal*, *Alexander A. Reinert*, *Nancy L. Kestenbaum*, and *David M. Zionts*.†

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–B.

After the September 11 terrorist attacks in this country, and in response to the deaths, destruction, and dangers they caused, the United States Government ordered hundreds of illegal aliens to be taken into custody and held. Pending a determination whether a particular detainee had connections to terrorism, the custody, under harsh conditions to be described, continued. In many instances custody lasted for days and weeks, then stretching into months. Later, some

†*Richard A. Samp* filed a brief in all cases for Former U. S. Attorney General William P. Barr et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance in all cases were filed for the American Association for Justice by *Jeffrey R. White* and *Julie Braman Kane*; for the American Civil Liberties Union et al. by *Matthew E. Price*, *Trina Realmuto*, *Hina Shamsi*, *Lee Gelernt*, *David Cole*, *Jonathan Hafetz*, *Matt Adams*, *Mary A. Kenney*, and *Eugene Iredale*; for Americans United for Separation of Church and State et al. by *Richard B. Katskee* and *Elliot M. Minberg*; for Asian Americans Advancing Justice et al. by *Catherine E. Stetson*; for the Commonwealth Lawyers Association by *Gary A. Isaac* and *Logan A. Steiner*; for Former Correctional Officials by *Andrew S. Pollis*; for Immigration Detention Advocacy Organizations by *Brian J. Murray* and *Ranjana Natarajan*; for Medical and Other Scientific and Health-Related Professionals by *Eric Ordway*, *Kami Lizarraga*, *Glenda Bleiberg*, and *Alexandria Swette*; and for Karen Korematsu et al. by *Joseph Margulies*, *Robert L. Rushky*, and *Eric K. Yamamoto*.

Allan Ides, pro se, filed a brief in all cases for Professors of Civil Procedure as *amici curiae*.

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of the aliens who had been detained filed suit, leading to the cases now before the Court.

The complaint named as defendants three high executive officers in the Department of Justice and two of the wardens at the facility where the detainees had been held. Most of the claims, alleging various constitutional violations, sought damages under the implied cause-of-action theory adopted by this Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Another claim in the complaint was based upon the statutory cause of action authorized and created by Congress under Rev. Stat. §1980, 42 U. S. C. §1985(3). This statutory cause of action allows damages to persons injured by conspiracies to deprive them of the equal protection of the laws.

The suit was commenced in the United States District Court for the Eastern District of New York. After this Court's decision in *Ashcroft v. Iqbal*, 556 U. S. 662 (2009), a fourth amended complaint was filed; and that is the complaint to be considered here. Motions to dismiss the fourth amended complaint were denied as to some defendants and granted as to others. These rulings were the subject of interlocutory appeals to the United States Court of Appeals for the Second Circuit. Over a dissenting opinion by Judge Raggi with respect to the decision of the three-judge panel—and a second unsigned dissent from the court's declining to rehear the suit en banc, joined by Judge Raggi and five other judges—the Court of Appeals ruled that the complaint was sufficient for the action to proceed against the named officials who are now before us. See *Turkmen v. Hastly*, 789 F. 3d 218 (2015) (panel decision); *Turkmen v. Hastly*, 808 F. 3d 197 (2015) (en banc decision).

The Court granted certiorari to consider these rulings. 580 U. S. 915 (2016). The officials who must defend the suit on the merits, under the ruling of the Court of Appeals, are the petitioners here. The former detainees who seek relief under the fourth amended complaint are the respondents.

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The various claims and theories advanced for recovery, and the grounds asserted for their dismissal as insufficient as a matter of law, will be addressed in turn.

I

Given the present procedural posture of the suit, the Court accepts as true the facts alleged in the complaint. See *Iqbal*, 556 U. S., at 678.

A

In the weeks following the September 11, 2001, terrorist attacks—the worst in American history—the Federal Bureau of Investigation (FBI) received more than 96,000 tips from members of the public. See *id.*, at 667. Some tips were based on well-grounded suspicion of terrorist activity, but many others may have been based on fear of Arabs and Muslims. FBI agents “questioned more than 1,000 people with suspected links to the [September 11] attacks in particular or to terrorism in general.” *Ibid.*

While investigating the tips—including the less substantiated ones—the FBI encountered many aliens who were present in this country without legal authorization. As a result, more than 700 individuals were arrested and detained on immigration charges. *Ibid.* If the FBI designated an alien as not being “of interest” to the investigation, then he or she was processed according to normal procedures. In other words the alien was treated just as if, for example, he or she had been arrested at the border after an illegal entry. If, however, the FBI designated an alien as “of interest” to the investigation, or if it had doubts about the proper designation in a particular case, the alien was detained subject to a “hold-until-cleared policy.” The aliens were held without bail.

Respondents were among some 84 aliens who were subject to the hold-until-cleared policy and detained at the Metropolitan Detention Center (MDC) in Brooklyn, New York. They were held in the Administrative Maximum Special Housing

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Unit (or Unit) of the MDC. The complaint includes these allegations: Conditions in the Unit were harsh. Pursuant to official Bureau of Prisons policy, detainees were held in “tiny cells for over 23 hours a day.” 789 F. 3d, at 228. Lights in the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched often—any time they were moved, as well as at random in their cells.

Some of the harsh conditions in the Unit were not imposed pursuant to official policy. According to the complaint, prison guards engaged in a pattern of “physical and verbal abuse.” *Ibid.* Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.

B

Respondents are six men of Arab or South Asian descent. Five are Muslims. Each was illegally in this country, arrested during the course of the September 11 investigation, and detained in the Administrative Maximum Special Housing Unit for periods ranging from three to eight months. After being released respondents were removed from the United States.

Respondents then sued on their own behalf, and on behalf of a putative class, seeking compensatory and punitive damages, attorney’s fees, and costs. Respondents, it seems fair to conclude from the arguments presented, acknowledge that in the ordinary course aliens who are present in the United States without legal authorization can be detained for some period of time. But here the challenge is to the conditions

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of their confinement and the reasons or motives for imposing those conditions. The gravamen of their claims was that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions.

As relevant here, respondents sued two groups of federal officials in their official capacities. The first group consisted of former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar. This opinion refers to these three petitioners as the “Executive Officials.” The other petitioners named in the complaint were the MDC’s warden, Dennis Hasty, and associate warden, James Sherman. This opinion refers to these two petitioners as the “Wardens.”

Seeking to invoke the Court’s decision in *Bivens*, respondents brought four claims under the Constitution itself. First, respondents alleged that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the substantive due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive strip searches unrelated to any legitimate penological interest, in violation of the Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents, in violation of the substantive due process component of the Fifth Amendment.

Respondents also brought a claim under 42 U. S. C. § 1985(3), which forbids certain conspiracies to violate equal protection rights. Respondents alleged that petitioners conspired with one another to hold respondents in harsh con-

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ditions because of their actual or apparent race, religion, or national origin.

C

The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Court of Appeals affirmed in most respects as to the Wardens, though it held that the prisoner abuse claim against Sherman (the associate warden) should have been dismissed. 789 F. 3d, at 264–265. As to the Executive Officials, however, the Court of Appeals reversed, reinstating respondents’ claims. *Ibid.* As noted above, Judge Raggi dissented. She would have held that only the prisoner abuse claim against Hasty should go forward. *Id.*, at 295, n. 41, 302 (opinion concurring in part in judgment and dissenting in part). The Court of Appeals declined to rehear the suit en banc, 808 F. 3d, at 197; and, again as noted above, Judge Raggi joined a second dissent along with five other judges, *id.*, at 198. This Court granted certiorari. 580 U. S. 915 (2016).

II

The first question to be discussed is whether petitioners can be sued for damages under *Bivens* and the ensuing cases in this Court defining the reach and the limits of that precedent.

A

In 1871, Congress passed a statute that was later codified at Rev. Stat. § 1979, 42 U. S. C. § 1983. It entitles an injured person to money damages if a state official violates his or her constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.

In 1971, and against this background, this Court decided *Bivens*. The Court held that, even absent statutory au-

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thorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures. See 403 U.S., at 397. The Court acknowledged that the Fourth Amendment does not provide for money damages “in so many words.” *Id.*, at 396. The Court noted, however, that Congress had not foreclosed a damages remedy in “explicit” terms and that no “special factors” suggested that the Judiciary should “hesitat[e]” in the face of congressional silence. *Id.*, at 396–397. The Court, accordingly, held that it could authorize a remedy under general principles of federal jurisdiction. See *id.*, at 392 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

In the decade that followed, the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations. In *Davis v. Passman*, 442 U.S. 228 (1979), an administrative assistant sued a Congressman for firing her because she was a woman. The Court held that the Fifth Amendment Due Process Clause gave her a damages remedy for gender discrimination. *Id.*, at 248–249. And in *Carlson v. Green*, 446 U.S. 14 (1980), a prisoner’s estate sued federal jailers for failing to treat the prisoner’s asthma. The Court held that the Eighth Amendment Cruel and Unusual Punishments Clause gave him a damages remedy for failure to provide adequate medical treatment. See *id.*, at 19. These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.

B

To understand *Bivens* and the two other cases implying a damages remedy under the Constitution, it is necessary to understand the prevailing law when they were decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this “*ancien regime*,” *Alexander v. Sandoval*,

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532 U. S. 275, 287 (2001), the Court assumed it to be a proper judicial function to “provide such remedies as are necessary to make effective” a statute’s purpose, *J. I. Case Co. v. Borak*, 377 U. S. 426, 433 (1964). Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself. See, e. g., *id.*, at 430–432; *Allen v. State Bd. of Elections*, 393 U. S. 544, 557 (1969); *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969) (“The existence of a statutory right implies the existence of all necessary and appropriate remedies”).

These statutory decisions were in place when *Bivens* recognized an implied cause of action to remedy a constitutional violation. Against that background, the *Bivens* decision held that courts must “‘adjust their remedies so as to grant the necessary relief’” when “‘federally protected rights have been invaded.’” 403 U. S., at 392 (quoting *Bell, supra*, at 684); see also 403 U. S., at 402 (Harlan, J., concurring in judgment) (discussing cases recognizing implied causes of action under federal statutes). In light of this interpretive framework, there was a possibility that “the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U. S. C. § 1983.” Kent, *Are Damages Different?: Bivens and National Security*, 87 S. Cal. L. Rev. 1123, 1139–1140 (2014).

C

Later, the arguments for recognizing implied causes of action for damages began to lose their force. In cases decided after *Bivens*, and after the statutory implied cause-of-action cases that *Bivens* itself relied upon, the Court adopted a far more cautious course before finding implied causes of action. In two principal cases under other statutes, it declined to find an implied cause of action. See *Piper v. Chris-Craft Industries, Inc.*, 430 U. S. 1, 42, 45–46 (1977); *Cort v. Ash*, 422 U. S. 66, 68–69 (1975). Later, in *Cannon v. University of Chicago*, 441 U. S. 677 (1979), the Court did allow an implied cause of action; but it cautioned that, where Congress “intends private litigants to have a cause of action,” the “far

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better course” is for Congress to confer that remedy in explicit terms. *Id.*, at 717.

Following this expressed caution, the Court clarified in a series of cases that, when deciding whether to recognize an implied cause of action, the “determinative” question is one of statutory intent. *Sandoval*, 532 U. S., at 286. If the statute itself does not “displa[y] an intent” to create “a private remedy,” then “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Id.*, at 286–287; see also *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U. S. 11, 15–16, 23–24 (1979); *Karahalios v. Federal Employees*, 489 U. S. 527, 536–537 (1989). The Court held that the judicial task was instead “limited solely to determining whether Congress intended to create the private right of action asserted.” *Touche Ross & Co. v. Redington*, 442 U. S. 560, 568 (1979). If the statute does not itself so provide, a private cause of action will not be created through judicial mandate. See *Transamerica*, *supra*, at 24.

The decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself. When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Even so, it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages rem-

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edy is necessary—there are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered. In an analogous context, Congress, it is fair to assume, weighed those concerns in deciding not to substitute the Government as defendant in suits seeking damages for constitutional violations. See 28 U. S. C. § 2679(b)(2)(A) (providing that certain provisions of the Federal Tort Claims Act do not apply to any claim against a federal employee “which is brought for a violation of the Constitution”).

For these and other reasons, the Court’s expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself. Indeed, in light of the changes to the Court’s general approach to recognizing implied damages remedies, it is possible that the analysis in the Court’s three *Bivens* cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions. And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

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Given the notable change in the Court’s approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a “disfavored” judicial activity. *Iqbal*, 556 U. S., at 675. This is in accord with the Court’s observation that it has “consistently refused to extend *Bivens* to any new context or new category of defendants.” *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 68 (2001). Indeed, the Court has refused to do so for the past 30 years.

For example, the Court declined to create an implied damages remedy in the following cases: a First Amendment suit against a federal employer, *Bush v. Lucas*, 462 U. S. 367, 390 (1983); a race-discrimination suit against military officers, *Chappell v. Wallace*, 462 U. S. 296, 297, 304–305 (1983); a substantive due process suit against military officers, *United States v. Stanley*, 483 U. S. 669, 671–672, 683–684 (1987); a procedural due process suit against Social Security officials, *Schweiker v. Chilicky*, 487 U. S. 412, 414 (1988); a procedural due process suit against a federal agency for wrongful termination, *FDIC v. Meyer*, 510 U. S. 471, 473–474 (1994); an Eighth Amendment suit against a private prison operator, *Malesko*, *supra*, at 63; a due process suit against officials from the Bureau of Land Management, *Wilkie v. Robbins*, 551 U. S. 537, 547–548, 562 (2007); and an Eighth Amendment suit against prison guards at a private prison, *Minnecci v. Pollard*, 565 U. S. 118, 120 (2012).

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is “who should decide” whether to provide for a damages remedy, Congress or the courts? *Bush*, 462 U. S., at 380.

The answer most often will be Congress. When an issue “involves a host of considerations that must be weighed and appraised,” it should be committed to “those who write

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the laws’” rather than “‘those who interpret them.’” *Ibid.* (quoting *United States v. Gilman*, 347 U. S. 507, 512–513 (1954)). In most instances, the Court’s precedents now instruct, the Legislature is in the better position to consider if “‘the public interest would be served’” by imposing a “‘new substantive legal liability.’” *Schweiker, supra*, at 426–427 (quoting *Bush, supra*, at 390). As a result, the Court has urged “caution” before “extending *Bivens* remedies into any new context.” *Malesko, supra*, at 74. The Court’s precedents now make clear that a *Bivens* remedy will not be available if there are “‘special factors counselling hesitation in the absence of affirmative action by Congress.’” *Carlson*, 446 U. S., at 18 (quoting *Bivens*, 403 U. S., at 396).

This Court has not defined the phrase “special factors counselling hesitation.” The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a “special factor counselling hesitation,” a factor must cause a court to hesitate before answering that question in the affirmative.

It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others. It is true that, if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may make it less probable

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that Congress would want the Judiciary to entertain a damages suit in a given case.

Sometimes there will be doubt because the case arises in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere. See *Chappell, supra*, at 302 (military); *Stanley, supra*, at 679 (same); *Meyer, supra*, at 486 (public purse); *Wilkie, supra*, at 561–562 (federal land). And sometimes there will be doubt because some other feature of a case—difficult to predict in advance—causes a court to pause before acting without express congressional authorization. In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.

In a related way, if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action. For if Congress has created “any alternative, existing process for protecting the [injured party’s] interest” that itself may “amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Wilkie, supra*, at 550; see also *Bush, supra*, at 385–388 (recognizing that civil-service regulations provided alternative means for relief); *Malesko*, 534 U. S., at 73–74 (recognizing that state tort law provided alternative means for relief); *Minnecci, supra*, at 127–130 (same).

III

It is appropriate now to turn first to the *Bivens* claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks.

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The Court will refer to these claims as the “detention policy claims.” The detention policy claims allege that petitioners violated respondents’ due process and equal protection rights by holding them in restrictive conditions of confinement; the claims further allege that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The term “detention policy claims” does not include respondents’ claim alleging that Warden Hasty allowed guards to abuse the detainees. That claim will be considered separately, and further, below. At this point, the question is whether, having considered the relevant special factors in the whole context of the detention policy claims, the Court should extend a *Bivens*-type remedy to those claims.

A

Before allowing respondents’ detention policy claims to proceed under *Bivens*, the Court of Appeals did not perform any special-factors analysis at all. 789 F. 3d, at 237. The reason, it said, was that the special-factors analysis is necessary only if a plaintiff asks for a *Bivens* remedy in a new context. 789 F. 3d, at 234. And in the Court of Appeals’ view, the context here was not new. *Id.*, at 235.

To determine whether the *Bivens* context was novel, the Court of Appeals employed a two-part test. First, it asked whether the asserted constitutional right was at issue in a previous *Bivens* case. 789 F. 3d, at 234. Second, it asked whether the mechanism of injury was the same mechanism of injury in a previous *Bivens* case. 789 F. 3d, at 234. Under the Court of Appeals’ approach, if the answer to both questions is “yes,” then the context is not new and no special-factors analysis is required. *Ibid.*

That approach is inconsistent with the analysis in *Malesko*. Before the Court decided that case, it had approved a *Bivens* action under the Eighth Amendment against federal prison officials for failure to provide medical treatment. See *Carlson*, 446 U. S., at 16, n. 1, 18–19. In *Malesko*, the plaintiff

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sought relief against a private prison operator in almost parallel circumstances. 534 U. S., at 64. In both cases, the right at issue was the same: the Eighth Amendment right to be free from cruel and unusual punishment. And in both cases, the mechanism of injury was the same: failure to provide adequate medical treatment. Thus, if the approach followed by the Court of Appeals is the correct one, this Court should have held that the cases arose in the same context, obviating any need for a special-factors inquiry.

That, however, was not the controlling analytic framework in *Malesko*. Even though the right and the mechanism of injury were the same as they were in *Carlson*, the Court held that the contexts were different. 534 U. S., at 70, and n. 4. The Court explained that special factors counseled hesitation and that the *Bivens* remedy was therefore unavailable. 534 U. S., at 74.

For similar reasons, the holding of the Court of Appeals in the instant suit is inconsistent with this Court's analytic framework in *Chappell*. In *Davis*, decided before the Court's cautionary instructions with respect to *Bivens* suits, see *supra*, at 135–136, the Court had held that an employment-discrimination claim against a Congressman could proceed as a *Bivens*-type action. *Davis*, 442 U. S., at 230–231. In *Chappell*, however, the cautionary rules were applicable; and, as a result, a similar discrimination suit against military officers was not allowed to proceed. It is the *Chappell* framework that now controls; and, under it, the Court of Appeals erred by holding that this suit did not present a new *Bivens* context.

The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaning-

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ful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

In the present suit, respondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma. See *Bivens*, 403 U. S. 388; *Davis*, 442 U. S. 228; *Carlson*, 446 U. S. 14. The Court of Appeals therefore should have held that this was a new *Bivens* context. Had it done so, it would have recognized that a special-factors analysis was required before allowing this damages suit to proceed.

B

After considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that whether a damages action should be allowed is a decision for the Congress to make, not the courts.

With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not "a proper vehicle for altering an entity's policy." *Malesko*, *supra*, at 74. Furthermore, a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others. "[T]he purpose of *Bivens* is to deter *the officer*." *Meyer*,

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510 U. S., at 485. *Bivens* is not designed to hold officers responsible for acts of their subordinates. See *Iqbal*, 556 U. S., at 676 (“Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*”).

Even if the action is confined to the conduct of a particular Executive Official in a discrete instance, these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged. These consequences counsel against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties. See *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 382 (2004) (noting “the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties”).

A closely related problem, as just noted, is that the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. See *Federal Open Market Comm. v. Merrill*, 443 U. S. 340, 360 (1979) (noting that disclosure of Executive Branch documents “could inhibit the free flow of advice, including analysis, reports, and expression of opinion within an agency”). Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch. See *Clinton v. Jones*, 520 U. S. 681, 701 (1997) (recognizing that “[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional du-

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ties’” (quoting *Loving v. United States*, 517 U. S. 748, 757 (1996))). These considerations also counsel against allowing a damages claim to proceed against the Executive Officials. See *Cheney, supra*, at 385 (noting that “special considerations control” when a case implicates “the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications”).

In addition to this special factor, which applies to the claims against the Executive Officials, there are three other special factors that apply as well to the detention policy claims against all of the petitioners. First, respondents’ detention policy claims challenge more than standard “law enforcement operations.” *United States v. Verdugo-Urquidez*, 494 U. S. 259, 273 (1990). They challenge as well major elements of the Government’s whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. Were this inquiry to be allowed in a private suit for damages, the *Bivens* action would assume dimensions far greater than those present in *Bivens* itself, or in either of its two follow-on cases, or indeed in any putative *Bivens* case yet to come before the Court.

National-security policy is the prerogative of the Congress and President. See U. S. Const., Art. I, § 8; Art. II, §§ 1, 2. Judicial inquiry into the national-security realm raises “concerns for the separation of powers in trenching on matters committed to the other branches.” *Christopher v. Harbury*, 536 U. S. 403, 417 (2002). These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.

For these and other reasons, courts have shown deference to what the Executive Branch “has determined . . . is ‘essential to national security.’” *Winter v. Natural Resources De-*

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fense Council, Inc., 555 U.S. 7, 24, 26 (2008). Indeed, “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs” unless “Congress specifically has provided otherwise.” *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988). Congress has not provided otherwise here.

There are limitations, of course, on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 527, 532–537 (2004) (plurality opinion) (“Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake”); *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (“Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law”). And national-security concerns must not become a talisman used to ward off inconvenient claims—a “label” used to “cover a multitude of sins.” *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). This “‘danger of abuse’” is even more heightened given “‘the difficulty of defining’” the “‘security interest’” in domestic cases. *Ibid.* (quoting *United States v. United States Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 313–314 (1972)).

Even so, the question is only whether “congressionally uninvited intrusion” is “inappropriate” action for the Judiciary to take. *Stanley*, 483 U.S., at 683. The factors discussed above all suggest that Congress’ failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than “inadvertent.” *Schweiker*, 487 U.S., at 423. This possibility counsels hesitation “in the absence of affirmative action by Congress.” *Bivens*, 403 U.S., at 396.

Furthermore, in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant;

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and here that silence is telling. In the almost 16 years since September 11, the Federal Government's responses to that terrorist attack have been well documented. Congressional interest has been "frequent and intense," *Schweiker, supra*, at 425, and some of that interest has been directed to the conditions of confinement at issue here. Indeed, at Congress' behest, the Department of Justice's Office of the Inspector General compiled a 300-page report documenting the conditions in the MDC in great detail. See 789 F. 3d, at 279 (opinion of Raggi, J.) (noting that the USA PATRIOT Act required "the Department's Inspector General to review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism"). Nevertheless, "[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit." *Schweiker*, 487 U. S., at 426.

This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that "congressional inaction" was "inadvertent." *Id.*, at 423.

It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." *Bivens, supra*, at 410 (Harlan, J., concurring in judgment); *Davis*, 442 U. S., at 245. Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement conditions via a petition for a writ of habeas corpus. See *Bell v. Wolfish*, 441 U. S. 520, 526–527, n. 6 (1979) ("[W]e

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leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement”); *Preiser v. Rodriguez*, 411 U. S. 475, 499 (1973) (“When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal”).

Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages. A successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately; yet this damages suit remains unresolved some 15 years later. (As in *Bell* and *Preiser*, the Court need not determine the scope or availability of the habeas corpus remedy, a question that is not before the Court and has not been briefed or argued.) In sum, respondents had available to them “‘other alternative forms of judicial relief.’” *Minneci*, 565 U. S., at 124. And when alternative methods of relief are available, a *Bivens* remedy usually is not. See *Bush*, 462 U. S., at 386–388; *Schweiker*, *supra*, at 425–426; *Malesko*, 534 U. S., at 73–74; *Minneci*, *supra*, at 125–126.

There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution. In circumstances like those presented here, however, the stakes on both sides of the argument are far higher than in past cases the Court has considered. If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office.

On the other side of the balance, the very fact that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to

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impose restraint and to provide some redress from injury. There is therefore a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril. Cf. *Stanley*, 483 U. S., at 681 (noting that the special-factors analysis in that case turned on “how much occasional, unintended impairment of military discipline one is willing to tolerate”). The proper balance is one for the Congress, not the Judiciary, to undertake. For all of these reasons, the Court of Appeals erred by allowing respondents’ detention policy claims to proceed under *Bivens*.

IV

A

One of respondents’ claims under *Bivens* requires a different analysis: the prisoner abuse claim against the MDC’s warden, Dennis Hasty. The allegation is that Warden Hasty violated the Fifth Amendment by allowing prison guards to abuse respondents.

The warden argues, as an initial matter, that the complaint does not “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U. S., at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 570 (2007)). Applying its precedents, the Court of Appeals held that the substantive standard for the sufficiency of the claim is whether the warden showed “deliberate indifference” to prisoner abuse. 789 F. 3d, at 249–250. The parties appear to agree on this standard, and, for purposes of this case, the Court assumes it to be correct.

The complaint alleges that guards routinely abused respondents; that the warden encouraged the abuse by referring to respondents as “terrorists,” App. to Pet. for Cert. in No. 15–1359, p. 280a; that he prevented respondents from using normal grievance procedures; that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via “inmate complaints, staff complaints,

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hunger strikes, and suicide attempts,” *id.*, at 260a; that he ignored other “direct evidence of [the] abuse, including logs and other official [records],” *id.*, at 280a; that he took no action “to rectify or address the situation,” *id.*, at 260a; and that the abuse resulted in the injuries described above, see *supra*, at 128. These allegations—assumed here to be true, subject to proof at a later stage—plausibly show the warden’s deliberate indifference to the abuse. Consistent with the opinion of every judge in this case to have considered the question, including the dissenters in the Court of Appeals, the Court concludes that the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation if a *Bivens* remedy is to be implied.

Warden Hasty argues, however, that *Bivens* ought not to be extended to this instance of alleged prisoner abuse. As noted above, the first question a court must ask in a case like this one is whether the claim arises in a new *Bivens* context, *i. e.*, whether “the case is different in a meaningful way from previous *Bivens* cases decided by this Court.” *Supra*, at 139.

It is true that this case has significant parallels to one of the Court’s previous *Bivens* cases, *Carlson v. Green*, 446 U. S. 14. There, the Court did allow a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care. And the allegations of injury here are just as compelling as those at issue in *Carlson*. This is especially true given that the complaint alleges serious violations of Bureau of Prisons policy. See 28 CFR § 552.20 (2016) (providing that prison staff may use force “only as a last alternative after all other reasonable efforts to resolve a situation have failed” and that staff may “use only that amount of force necessary to [ensure prison safety and security]”); § 552.22(j) (“All incidents involving the use of force . . . must be carefully documented”); § 542.11 (requiring the warden to investigate certain complaints of inmate abuse).

Yet even a modest extension is still an extension. And this case does seek to extend *Carlson* to a new context. As

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noted above, a case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases. See *supra*, at 135–136.

The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. See 446 U. S., at 16. And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—“deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U. S. 97, 104 (1976). The standard for a claim alleging that a warden allowed guards to abuse detainees is less clear under the Court’s precedents.

This case also has certain features that were not considered in the Court’s previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. *Supra*, at 137. And there might have been alternative remedies available here, for example, a writ of habeas corpus, *Wolfish*, 441 U. S., at 526, n. 6; an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief.

Furthermore, legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation. See *supra*, at 137. Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. See 42 U. S. C. § 1997e. So it seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs. This

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Court has said in dicta that the Act’s exhaustion provisions would apply to *Bivens* suits. See *Porter v. Nussle*, 534 U. S. 516, 524 (2002). But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.

The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court’s expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied. Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under *Bivens*, the Court of Appeals should have performed a special-factors analysis. It should have analyzed whether there were alternative remedies available or other “sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy” in a suit like this one. *Supra*, at 137.

B

Although the Court could perform that analysis in the first instance, the briefs have concentrated almost all of their efforts elsewhere. Given the absence of a comprehensive presentation by the parties, and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special-factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.

V

One issue remains to be addressed: the claim that petitioners are subject to liability for civil conspiracy under 42 U. S. C. § 1985(3). Unlike the prisoner abuse claim just discussed, this claim implicates the activities of all the petition-

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ers—the Executive Officials as well as the Wardens—in creating the conditions of confinement at issue here.

The civil-conspiracy prohibition contained in § 1985(3) was enacted as a significant part of the civil rights legislation passed in the aftermath of the Civil War. See *Carpenters v. Scott*, 463 U. S. 825, 834–837 (1983) (detailing the legislative history of § 1985(3)); *Griffin v. Breckenridge*, 403 U. S. 88, 99–101 (1971) (same); *Great American Fed. Sav. & Loan Assn. v. Novotny*, 442 U. S. 366, 379 (1979) (Powell, J., concurring) (describing § 1985(3) as a “Civil War Era remedial statute”). The statute imposes liability on two or more persons who “conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws.” § 1985(3). In the instant suit, respondents allege that petitioners violated the statute by “agreeing to implement a policy” under which respondents would be detained in harsh conditions “because of their race, religion, ethnicity, and national origin.” App. to Pet. for Cert. in No. 15–1359, at 347a. Assuming these allegations to be true and well pleaded, the question is whether petitioners are entitled to qualified immunity.

A

The qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits “may offer the only realistic avenue for vindication of constitutional guarantees.” *Harlow v. Fitzgerald*, 457 U. S. 800, 814 (1982). “On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.” *Anderson v. Creighton*, 483 U. S. 635, 638 (1987). As one means to accommodate these two objectives, the Court has held that Government officials are entitled to qualified immunity with respect to “discretionary functions” performed in their official capacities. *Ibid.* The doctrine of qualified immunity gives officials “breathing

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room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. al-Kidd*, 563 U. S. 731, 743 (2011).

The Court’s cases provide additional instruction to define and implement that immunity. Whether qualified immunity can be invoked turns on the “objective legal reasonableness” of the official’s acts. *Harlow, supra*, at 819. And reasonableness of official action, in turn, must be “assessed in light of the legal rules that were clearly established at the time [the action] was taken.” *Anderson, supra*, at 639 (internal quotation marks omitted); see also *Mitchell*, 472 U. S., at 528. This requirement—that an official loses qualified immunity only for violating clearly established law—protects officials accused of violating “extremely abstract rights.” *Anderson, supra*, at 639.

The Fourth Amendment provides an example of how qualified immunity functions with respect to abstract rights. By its plain terms, the Amendment forbids unreasonable searches and seizures, yet it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered. See *Saucier v. Katz*, 533 U. S. 194, 205 (2001) (“It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts”). For this reason, “[t]he dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’” *Mullenix v. Luna*, 577 U. S. 7, 12 (2015) (*per curiam*) (quoting *Ashcroft, supra*, at 742).

It is not necessary, of course, that “the very action in question has previously been held unlawful.” *Anderson, supra*, at 640. That is, an officer might lose qualified immunity even if there is no reported case “directly on point.” *Ashcroft, supra*, at 741. But “in the light of pre-existing law,” the unlawfulness of the officer’s conduct “must be apparent.” *Anderson, supra*, at 640. To subject officers to any broader liability would be to “disrupt the balance that our cases

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strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer*, 468 U. S. 183, 195 (1984). For then, both as a practical and legal matter, it would be difficult for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Ibid.*

In light of these concerns, the Court has held that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U. S. 335, 341 (1986). To determine whether a given officer falls into either of those two categories, a court must ask whether it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted." *Saucier, supra*, at 202. If so, then the defendant officer must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity. If not, however—*i. e.*, if a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability.

B

Under these principles, it must be concluded that reasonable officials in petitioners' positions would not have known, and could not have predicted, that § 1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged.

At least two aspects of the complaint indicate that petitioners' potential liability for this statutory offense would not have been known or anticipated by reasonable officials in their position. First, the conspiracy recited in the complaint is alleged to have been between or among officers in the same branch of the Government (the Executive Branch) and in the same Department (the Department of Justice). Second, the discussions were the preface to, and the outline of, a general and far-reaching policy.

As to the fact that these officers were in the same Department, an analogous principle discussed in the context of anti-

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trust law is instructive. The Court’s precedent indicates that there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U. S. 752, 769–771 (1984). Under this principle—sometimes called the intracorporate-conspiracy doctrine—an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy. *Ibid.* The rule is derived from the nature of the conspiracy prohibition. Conspiracy requires an agreement—and in particular an agreement to do an unlawful act—between or among two or more separate persons. When two agents of the same legal entity make an agreement in the course of their official duties, however, as a practical and legal matter their acts are attributed to their principal. And it then follows that there has not been an agreement between two or more separate people. See *id.*, at 771 (analogizing to “a multiple team of horses drawing a vehicle under the control of a single driver”).

To be sure, this Court has not given its approval to this doctrine in the specific context of §1985(3). See *Great American*, 442 U. S., at 372, n. 11. There is a division in the courts of appeals, moreover, respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to §1985 conspiracies. See *Hull v. Shuck*, 501 U. S. 1261, 1261–1262 (1991) (White, J., dissenting from denial of certiorari) (discussing the Circuit split); *Bowie v. Maddox*, 642 F. 3d 1122, 1130–1131 (CADC 2011) (detailing a long-standing split about whether the intracorporate-conspiracy doctrine applies to civil rights conspiracies). Nothing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine’s application in the context of an alleged §1985(3) violation. The Court might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust

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context. Yet the fact that the courts are divided as to whether or not a §1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established. When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability. See *Wilson v. Layne*, 526 U. S. 603, 618 (1999) (noting that it would be “unfair” to subject officers to damages liability when even “judges . . . disagree”); *Reichle v. Howards*, 566 U. S. 658, 669–670 (2012) (same).

In addition to the concern that agents of the same legal entity are not distinct enough to conspire with one another, there are other sound reasons to conclude that conversations and agreements between and among federal officials in the same Department should not be the subject of a private cause of action for damages under §1985(3). To state a claim under §1985(3), a plaintiff must first show that the defendants conspired—that is, reached an agreement—with one another. See *Carpenters*, 463 U. S., at 828 (stating that the elements of a §1985(3) claim include “a conspiracy”). Thus, a §1985(3) claim against federal officials by necessity implicates the substance of their official discussions.

As indicated above with respect to other claims in this suit, open discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue. See *supra*, at 141–142. Close and frequent consultations to facilitate the adoption and implementation of policies are essential to the orderly conduct of governmental affairs. Were those discussions, and the resulting policies, to be the basis for private suits seeking damages against the officials as individuals, the result would be to chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies. See *Cheney*, 542 U. S., at 383 (discussing the need for confidential communications among Executive Branch officials); *Merrill*, 443 U. S., at 360 (same).

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These considerations suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities. Whether that contention should prevail need not be decided here. It suffices to say that the question is sufficiently open so that the officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions. Thus, the law respondents seek to invoke cannot be clearly established. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by law. See *Saucier*, 533 U. S., at 202. Petitioners are entitled to qualified immunity with respect to the claims under 42 U. S. C. § 1985(3).

* * *

If the facts alleged in the complaint are true, then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they contend they were subjected. The question before the Court, however, is not whether petitioners' alleged conduct was proper, nor whether it gave decent respect to respondents' dignity and well-being, nor whether it was in keeping with the idea of the rule of law that must inspire us even in times of crisis.

Instead, the question with respect to the *Bivens* claims is whether to allow an action for money damages in the absence of congressional authorization. For the reasons given above, the Court answers that question in the negative as to the detention policy claims. As to the prisoner abuse claim, because the briefs have not concentrated on that issue, the Court remands to allow the Court of Appeals to consider the claim in light of the *Bivens* analysis set forth above.

The question with respect to the § 1985(3) claim is whether a reasonable officer in petitioners' position would have known the alleged conduct was an unlawful conspiracy. For the reasons given above, the Court answers that question, too, in the negative.

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The judgment of the Court of Appeals is reversed as to all of the claims except the prisoner abuse claim against Warden Hasty. The judgment of the Court of Appeals with respect to that claim is vacated, and that case is remanded for further proceedings.

It is so ordered.

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE GORSUCH took no part in the consideration or decision of these cases.

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

I join the Court's opinion except for Part IV–B. I write separately to express my view on the Court's decision to remand some of respondents' claims under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and my concerns about our qualified immunity precedents.

I

With respect to respondents' *Bivens* claims, I join the opinion of the Court to the extent it reverses the Second Circuit's ruling. The Court correctly applies our precedents to hold that *Bivens* does not supply a cause of action against petitioners for most of the alleged Fourth and Fifth Amendment violations. It also correctly recognizes that respondents' claims against petitioner Dennis Hasty seek to extend *Bivens* to a new context. See *ante*, at 147.

I concur in the judgment of the Court vacating the Court of Appeals' judgment with regard to claims against Hasty. *Ante*, at 152. I have previously noted that “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.” *Wilkie v. Robbins*, 551 U. S. 537, 568 (2007) (concurring opinion) (quoting *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring)). I have thus declined to “extend *Bivens* even [where] its reasoning logically applied,” thereby

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limiting “*Bivens* and its progeny . . . to the precise circumstances that they involved.” *Wilkie, supra*, at 568 (internal quotation marks omitted). This would, in most cases, mean a reversal of the judgment of the Court of Appeals is in order. However, in order for there to be a controlling judgment in this suit, I concur in the judgment vacating and remanding the claims against petitioner Hasty as that disposition is closest to my preferred approach.

II

As for respondents’ claims under 42 U. S. C. § 1985(3), I join Part V of the Court’s opinion, which holds that respondents are entitled to qualified immunity. The Court correctly applies our precedents, which no party has asked us to reconsider. I write separately, however, to note my growing concern with our qualified immunity jurisprudence.

The Civil Rights Act of 1871, of which § 1985(3) and the more frequently litigated § 1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. See §§ 1, 2, 17 Stat. 13. Although the Act made no mention of defenses or immunities, “we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them.” *Malley v. Briggs*, 475 U. S. 335, 339 (1986) (internal quotation marks omitted). We have done so because “[c]ertain immunities were so well established in 1871 . . . that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them.” *Buckley v. Fitzsimmons*, 509 U. S. 259, 268 (1993); accord, *Briscoe v. LaHue*, 460 U. S. 325, 330 (1983). Immunity is thus available under the statute if it was “historically accorded the relevant official” in an analogous situation “at common law,” *Imbler v. Pachtman*, 424 U. S. 409, 421 (1976), unless the statute provides some reason to think that Congress did not preserve the defense, see *Tower v. Glover*, 467 U. S. 914, 920 (1984).

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In some contexts, we have conducted the common-law inquiry that the statute requires. See *Wyatt v. Cole*, 504 U. S. 158, 170 (1992) (KENNEDY, J., concurring). For example, we have concluded that legislators and judges are absolutely immune from liability under § 1983 for their official acts because that immunity was well established at common law in 1871. See *Tenney v. Brandhove*, 341 U. S. 367, 372–376 (1951) (legislators); *Pierson v. Ray*, 386 U. S. 547, 553–555 (1967) (judges). We have similarly looked to the common law in holding that a prosecutor is immune from suits relating to the “judicial phase of the criminal process,” *Imbler, supra*, at 430; *Burns v. Reed*, 500 U. S. 478, 489–492 (1991); but see *Kalina v. Fletcher*, 522 U. S. 118, 131–134 (1997) (Scalia, J., joined by THOMAS, J., concurring) (arguing that the Court in *Imbler* misunderstood 1871 common-law rules), although not from suits relating to the prosecutor’s advice to police officers, *Burns, supra*, at 493.

In developing immunity doctrine for other executive officers, we also started off by applying common-law rules. In *Pierson*, we held that police officers are not absolutely immune from a § 1983 claim arising from an arrest made pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity. 386 U. S., at 555. Rather, we concluded that police officers could assert “the defense of good faith and probable cause” against the claim for an unconstitutional arrest because that defense was available against the analogous torts of “false arrest and imprisonment” at common law. *Id.*, at 557.

In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. See *Wyatt, supra*, at 170 (KENNEDY, J., concurring); accord, *Crawford-El v. Britton*, 523 U. S. 574, 611 (1998) (Scalia, J., joined by THOMAS, J., dissenting). In the decisions following *Pierson*, we have “completely reformulated qualified immunity along principles not at all embodied in the common law.” *Ander-*

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son v. Creighton, 483 U. S. 635, 645 (1987) (discussing *Harlow v. Fitzgerald*, 457 U. S. 800 (1982)). Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff’s claim under § 1983, we instead grant immunity to any officer whose conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Mullenix v. Luna*, 577 U. S. 7, 11 (2015) (*per curiam*) (internal quotation marks omitted); *Taylor v. Barkes*, 575 U. S. 822, 825 (2015) (*per curiam*) (a Government official is liable under the 1871 Act only if “‘existing precedent . . . placed the statutory or constitutional question beyond debate’” (quoting *Ashcroft v. al-Kidd*, 563 U. S. 731, 741 (2011))). We apply this “clearly established” standard “across the board” and without regard to “the precise nature of the various officials’ duties or the precise character of the particular rights alleged to have been violated.” *Anderson, supra*, at 641–643 (internal quotation marks omitted).^{*} We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. See generally Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 45, 51–62 (2018).

Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in “interpret[ing] the intent of Congress in enacting” the Act. *Malley*, 475 U. S., at 342; see *Burns, supra*, at 493. Our qualified immunity precedents instead represent precisely the sort of “freewheeling policy choice[s]” that we have previously disclaimed the power to

^{*}Although we first formulated the “clearly established” standard in *Bivens* cases like *Harlow* and *Anderson*, we have imported that standard directly into our 1871 Act cases. See, e. g., *Pearson v. Callahan*, 555 U. S. 223, 243–244 (2009) (applying the clearly established standard to a § 1983 claim).

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make. *Rehberg v. Paulk*, 566 U. S. 356, 363 (2012) (internal quotation marks omitted); see also *Tower, supra*, at 922–923 (“We do not have a license to establish immunities from” suits brought under the Act “in the interests of what we judge to be sound public policy”). We have acknowledged, in fact, that the “clearly established” standard is designed to “protect the balance between vindication of constitutional rights and government officials’ effective performance of their duties.” *Reichle v. Howards*, 566 U. S. 658, 664 (2012) (internal quotation marks omitted); *Harlow, supra*, at 807 (explaining that “the recognition of a qualified immunity defense . . . reflected an attempt to balance competing values”). The Constitution assigns this kind of balancing to Congress, not the Courts.

In today’s decision, we continue down the path our precedents have marked. We ask “whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted,” *ante*, at 152 (internal quotation marks omitted), rather than whether officers in petitioners’ positions would have been accorded immunity at common law in 1871 from claims analogous to respondents’. Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), this Court held that the Fourth Amendment provides a damages remedy for those whom federal officials have injured as a result of an unconstitutional search or seizure. In *Davis v. Passman*, 442 U. S. 228 (1979), the Court held that the Fifth Amendment provides a damages remedy

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to an individual dismissed by her employer (a Member of Congress) on the basis of her sex in violation of the equal protection component of that Amendment’s Due Process Clause. And in *Carlson v. Green*, 446 U. S. 14 (1980), the Court held that the Eighth Amendment provides a damages remedy to a prisoner who died as a result of prison officials’ deliberate indifference to his medical needs, in violation of the Amendment’s prohibition against cruel and unusual punishment.

It is by now well established that federal law provides damages actions at least in similar contexts, where claims of constitutional violation arise. Congress has ratified *Bivens* actions, plaintiffs frequently bring them, courts accept them, and scholars defend their importance. See J. Pfander, *Constitutional Torts and the War on Terror* (2017) (canvassing the history of *Bivens* and cataloging cases). Moreover, the courts, in order to avoid deterring federal officials from properly performing their work, have developed safeguards for defendants, including the requirement that plaintiffs plead “plausible” claims, *Ashcroft v. Iqbal*, 556 U. S. 662, 679 (2009), as well as the defense of “qualified immunity,” which frees federal officials from both threat of liability and involvement in the lawsuit, unless the plaintiffs establish that officials have violated “‘clearly established . . . constitutional rights,’” *id.*, at 672 (quoting *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982)). “[This] Court has been reluctant to extend *Bivens* liability ‘to any new context or new category of defendants.’” *Iqbal*, *supra*, at 675 (quoting *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 68 (2001)). But the Court has made clear that it would not narrow *Bivens*’ existing scope. See *FDIC v. Meyer*, 510 U. S. 471, 485 (1994) (guarding against “the evisceration of the *Bivens* remedy” so that its “deterrent effects . . . would [not] be lost”).

The plaintiffs before us today seek damages for unconstitutional conditions of confinement. They alleged that federal officials slammed them against walls, shackled them, exposed them to nonstop lighting, lack of hygiene, and the like, all

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based upon invidious discrimination and without penological justification. See *ante*, at 128–129. In my view, these claims are well pleaded, state violations of clearly established law, and fall within the scope of longstanding *Bivens* law. For those reasons, I would affirm the judgment of the Court of Appeals. I shall discuss at some length what I believe is the most important point of disagreement. The Court, in my view, is wrong to hold that permitting a constitutional tort action here would “extend” *Bivens*, applying it in a new context. To the contrary, I fear that the Court’s holding would significantly shrink the existing *Bivens* contexts, diminishing the compensatory remedy constitutional tort law now offers to harmed individuals.

I shall explain why I believe this suit falls well within the scope of traditional constitutional tort law and why I cannot agree with the Court’s arguments to the contrary. I recognize, and write separately about, the strongest of the Court’s arguments, namely, the fact that the plaintiffs’ claims concern detention that took place soon after a serious attack on the United States and some of them concern actions of high-level Government officials. While these facts may affect the substantive constitutional questions (*e. g.*, were any of the conditions “legitimate”?) or the scope of the qualified-immunity defense, they do not extinguish the *Bivens* action itself. If I may paraphrase Justice Harlan, concurring in *Bivens*: In wartime as well as in peacetime, “it is important, in a civilized society, that the judicial branch of the Nation’s government stand ready to afford a remedy” “for the most flagrant and patently unjustified,” unconstitutional “abuses of official power.” 403 U. S., at 410–411 (opinion concurring in judgment); cf. *Boumediene v. Bush*, 553 U. S. 723, 798 (2008).

I

The majority opinion well summarizes the particular claims that the plaintiffs make in this suit. All concern the conditions of their confinement, which began soon after the

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September 11, 2001, attacks and “lasted for days and weeks, then stretching into months.” *Ante*, at 125. At some point, the plaintiffs allege, all the defendants knew that they had nothing to do with the September 11 attacks but continued to detain them anyway in harsh conditions. Official Government policy, both before and after the defendants became aware of the plaintiffs’ innocence, led to the plaintiffs being held in “tiny cells for over 23 hours a day” with lights continuously left on, “shackled” when moved, often “strip searched,” and “denied access to most forms of communication with the outside world.” *Ante*, at 128 (internal quotation marks omitted). The defendants detained the plaintiffs in these conditions on the basis of their race or religion and without justification.

Moreover, the prison wardens were aware of, but deliberately indifferent to, certain unofficial activities of prison guards involving a pattern of “physical and verbal abuse,” such as “slam[ming] detainees into walls; twist[ing] their arms, wrists, and fingers; [breaking] their bones;” and subjecting them to verbal taunts. *Ibid.* (internal quotation marks omitted).

The plaintiffs’ complaint alleges that all the defendants—high-level Department of Justice officials and prison wardens alike—were directly responsible for the official confinement policy, which, in some or all of the aspects mentioned, violated the due process and equal protection components of the Fifth Amendment. The complaint adds that, insofar as the prison wardens were deliberately indifferent to the unofficial conduct of the guards, they violated the Fourth and the Fifth Amendments.

I would hold that the complaint properly alleges constitutional torts, *i. e.*, *Bivens* actions for damages.

A

The Court’s holdings in *Bivens*, *Carlson*, and *Davis* rest upon four basic legal considerations. First, the *Bivens*

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Court referred to longstanding Supreme Court precedent stating or suggesting that the Constitution provides federal courts with considerable legal authority to use traditional remedies to right constitutional wrongs. That precedent begins with *Marbury v. Madison*, 1 Cranch 137 (1803), which effectively placed upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special. Chief Justice John Marshall wrote for the Court that

“[t]he very essence of civil liberty [lies] in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Id.*, at 163.

The Chief Justice referred to Blackstone’s Commentaries stating that there

“is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . [and that] it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” 1 Cranch, at 163.

The Chief Justice then wrote:

“The government of the United States has been emphatically termed a government of laws, and not of men. It will [not] deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Ibid.*

He concluded for the Court that there must be something “peculiar” (*i. e.*, special) about a case that warrants “exclu[d-]ing] the injured party from legal redress [and placing it within] that class of cases which come under the description of *damnum absque injuria*—a loss without an injury.” *Id.*, at 163–164; but cf. *id.*, at 164 (placing “political” questions in the latter, special category).

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Much later, in *Bell v. Hood*, 327 U. S. 678, 684 (1946), the Court wrote that,

“where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”

See also *Bivens*, 403 U. S., at 392 (citing opinions of Justices Cardozo and Holmes to similar effect).

The *Bivens* Court reiterated these principles and confirmed that the appropriate remedial “‘adjust[ment]’” in the case before it was an award of money damages, the “remedial mechanism normally available in the federal courts.” *Id.*, at 392, 397. Justice Harlan agreed, adding that, since Congress’ “general” statutory “grant of jurisdiction” authorized courts to grant equitable relief in cases arising under federal jurisdiction, courts likewise had the authority to award damages—the “traditional remedy at law”—in order to “vindicate the interests of the individual” protected by the Bill of Rights. *Id.*, at 405–407 (opinion concurring in judgment).

Second, our cases have recognized that Congress’ silence on the subject indicates a willingness to leave this matter to the courts. In *Bivens*, the Court noted, as an argument favoring its conclusion, the absence of an “explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents.” *Id.*, at 397. Similarly, in *Davis*, the Court stressed that there was “no evidence . . . that Congress meant . . . to foreclose” a damages remedy. 442 U. S., at 247. In *Carlson*, the Court went further, observing that not only was there no sign “that Congress meant to pre-empt a *Bivens* remedy,” but there was also “clear” evidence that Congress intended to preserve it. 446 U. S., at 19–20.

Third, our *Bivens* cases acknowledge that a constitutional tort may not lie when “special factors counse[l] hesitation” and when Congress has provided an adequate alternative

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remedy. 446 U. S., at 18–19. The relevant special factors in those cases included whether the court was faced “with a question of ‘federal fiscal policy,’” *Bivens, supra*, at 396, or a risk of “deluging federal courts with claims,” *Davis, supra*, at 248 (internal quotation marks omitted). *Carlson* acknowledged an additional factor—that damages suits “might inhibit [federal officials’] efforts to perform their official duties”—but concluded that “the qualified immunity accorded [federal officials] under [existing law] provides adequate protection.” 446 U. S., at 19.

Fourth, as the Court recognized later in *Carlson*, a *Bivens* remedy was needed to cure what would, without it, amount to a constitutional anomaly. Long before this Court incorporated many of the Bill of Rights’ guarantees against the States, see Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L. J.* 1193 (1992), federal civil rights statutes afforded a damages remedy to any person whom a state official deprived of a federal constitutional right, see 42 U. S. C. § 1983; *Monroe v. Pape*, 365 U. S. 167, 171–187 (1961) (describing this history). But federal statutory law did not provide a damages remedy to a person whom a federal official had deprived of that same right, even though the Bill of Rights was at the time of the founding primarily aimed at constraining the Federal Government. Thus, a person harmed by an unconstitutional search or seizure might sue a city mayor, a state legislator, or even a Governor. But that person could not sue a federal agent, a national legislator, or a Justice Department official for an identical offense. “[Our] ‘constitutional design,’” the Court wrote, “would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression.” *Carlson, supra*, at 22 (quoting *Butz v. Economou*, 438 U. S. 478, 504 (1978)).

The *Bivens* Court also recognized that the Court had previously inferred damages remedies caused by violations of certain federal statutes that themselves did not explicitly au-

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thorize damages remedies. 403 U. S., at 395–396. At the same time, *Bivens*, *Davis*, and *Carlson* treat the courts’ power to derive a damages remedy from a constitutional provision not as included within a power to find a statute-based damages remedy but as flowing from those statutory cases *a fortiori*.

As the majority opinion points out, this Court in more recent years has indicated that “*expanding* the *Bivens* remedy is *now* a ‘disfavored’ judicial activity.” *Ante*, at 135 (quoting *Iqbal*, 556 U. S., at 675; emphasis added). Thus, it has held that the remedy is not available in the context of suits against *military* officers, see *Chappell v. Wallace*, 462 U. S. 296, 298–300 (1983); *United States v. Stanley*, 483 U. S. 669, 683–684 (1987); in the context of suits against *privately* operated prisons and their employees, see *Minnecci v. Pollard*, 565 U. S. 118, 120 (2012); *Malesko*, 534 U. S., at 70–73; in the context of suits seeking to vindicate procedural, rather than substantive, constitutional protections, see *Schweiker v. Chilicky*, 487 U. S. 412, 423 (1988); and in the context of suits seeking to vindicate two quite different forms of important substantive protection, one involving free speech, see *Bush v. Lucas*, 462 U. S. 367, 368 (1983), and the other involving protection of land rights, see *Wilkie v. Robbins*, 551 U. S. 537, 551 (2007). Each of these cases involved a context that differed from that of *Bivens*, *Davis*, and *Carlson* with respect to the kind of defendant, the basic nature of the right, or the kind of harm suffered. That is to say, as we have explicitly stated, these cases were “*fundamentally different* from anything recognized in *Bivens* or subsequent cases.” *Malesko*, *supra*, at 70 (emphasis added). In each of them, the plaintiffs were asking the Court to “‘authoriz[e] a *new kind* of federal litigation.’” *Wilkie*, *supra*, at 550 (emphasis added).

Thus the Court, as the majority opinion says, repeatedly wrote that it was not “*expanding*” the scope of the *Bivens* remedy. *Ante*, at 135. But the Court nowhere suggested

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that it would narrow *Bivens*' existing scope. In fact, to diminish any ambiguity about its holdings, the Court set out a framework for determining whether a claim of constitutional violation calls for a *Bivens* remedy. See *Wilkie, supra*, at 549–550. At step one, the court must determine whether the case before it arises in a “new context,” that is, whether it involves a “new category of defendants,” *Malesko, supra*, at 68, or (presumably) a significantly different kind of constitutional harm, such as a purely procedural harm, a harm to speech, or a harm caused to physical property. *If the context is new, then* the court proceeds to step two and asks “whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Wilkie*, 551 U.S., at 550. *If there is none, then* the court proceeds to step three and asks whether there are “any special factors counselling hesitation before authorizing a new kind of federal litigation.’” *Ibid.*

Precedent makes this framework applicable here. I would apply it. And, doing so, I cannot get past step one. This suit, it seems to me, arises in a context similar to those in which this Court has previously permitted *Bivens* actions.

B

1

The context here is not “new,” *Wilkie, supra*, at 550, or “fundamentally different” from our previous *Bivens* cases, *Malesko, supra*, at 70. First, the plaintiffs are civilians, not members of the military. They are not citizens, but the Constitution protects noncitizens against serious mistreatment, as it protects citizens. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”). Some or all of the plaintiffs

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here may have been illegally present in the United States. But that fact cannot justify physical mistreatment. Nor does anyone claim that that fact deprives them of a *Bivens* right available to other persons, citizens and noncitizens alike.

Second, the defendants are Government officials. They are not members of the military or private persons. Two are prison wardens. Three others are high-ranking Department of Justice officials. Prison wardens have been defendants in *Bivens* actions, as have other high-level Government officials. One of the defendants in *Carlson* was the Director of the Bureau of Prisons; the defendant in *Davis* was a Member of Congress. We have also held that the Attorney General of the United States is not entitled to absolute immunity in a damages suit arising out of his actions related to national security. See *Mitchell v. Forsyth*, 472 U. S. 511, 520 (1985).

Third, from a *Bivens* perspective, the injuries that the plaintiffs claim they suffered are familiar ones. They focus upon the conditions of confinement. The plaintiffs say that they were unnecessarily shackled, confined in small unhygienic cells, subjected to continuous lighting (presumably preventing sleep), unnecessarily and frequently strip searched, slammed against walls, injured physically, and subject to verbal abuse. They allege that they suffered these harms because of their race or religion, the defendants having either turned a blind eye to what was happening or themselves introduced policies that they knew would lead to these harms even though the defendants knew the plaintiffs had no connections to terrorism.

These claimed harms are similar to, or even worse than, the harms the plaintiffs suffered in *Bivens* (unreasonable search and seizure in violation of the Fourth Amendment), *Davis* (unlawful discrimination in violation of the Fifth Amendment), and *Carlson* (deliberate indifference to medical need in violation of the Eighth Amendment). Indeed, we have said that, “[i]f a federal prisoner in a [Bureau of Pris-

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ons] facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity.” *Malesko, supra*, at 72; see also *Farmer v. Brennan*, 511 U. S. 825, 832 (1994) (*Bivens* case about prisoner abuse). The claims in this suit would seem to fill the *Bivens*’ bill. See *Sell v. United States*, 539 U. S. 166, 193 (2003) (Scalia, J., dissenting) (“[A] [*Bivens*] action . . . is available to federal pretrial detainees challenging the conditions of their confinement”).

It is true that the plaintiffs bring their “deliberate indifference” claim against Warden Hasty under the Fifth Amendment’s Due Process Clause, not the Eighth Amendment’s Cruel and Unusual Punishments Clause, as in *Carlson*. But that is because the latter applies to convicted criminals while the former applies to pretrial and immigration detainees. Where the harm is the same, where this Court has held that both the Fifth and Eighth Amendments give rise to *Bivens*’ remedies, and where the only difference in constitutional scope consists of a circumstance (the absence of a conviction) that makes the violation here worse, it cannot be maintained that the difference between the use of the two Amendments is “fundamental.” See *City of Revere v. Massachusetts Gen. Hospital*, 463 U. S. 239, 244 (1983) (“due process rights” of an unconvicted person “are at least as great as the Eighth Amendment protections available to a convicted prisoner”); *Kingsley v. Hendrickson*, 576 U. S. 389, 400 (2015) (“pretrial detainees (unlike convicted prisoners) cannot be punished at all”); *Zadvydas v. Davis*, 533 U. S. 678, 721 (2001) (KENNEDY, J., dissenting) (detention “incident to removal . . . cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish”). See also *Bistrrian v. Levi*, 696 F. 3d 352, 372 (CA3 2012) (permitting *Bivens* action brought by detainee in administrative segregation); *Thomas v. Ashcroft*, 470 F. 3d 491, 493, 496–497 (CA2 2006) (detainee alleging failure to provide adequate medical care); *Magluta v. Samples*, 375 F. 3d 1269, 1271, 1275–1276 (CA11 2004) (de-

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tainee in solitary confinement); *Papa v. United States*, 281 F. 3d 1004, 1010–1011 (CA9 2002) (due process claims arising from death of immigration detainee); *Loe v. Armistead*, 582 F. 2d 1291, 1293–1296 (CA4 1978) (detainee’s claim of deliberate indifference to medical need). If an arrestee can bring a claim of excessive force (*Bivens* itself), and a convicted prisoner can bring a claim for denying medical care (*Carlson*), someone who has neither been charged nor convicted with a crime should also be able to challenge abuse that causes him to need medical care.

Nor has Congress suggested that it wants to withdraw a damages remedy in circumstances like these. By its express terms, the Prison Litigation Reform Act of 1995 (PLRA) does not apply to immigration detainees. See 42 U. S. C. § 1997e(h) (“[T]he term ‘prisoner’ means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law . . . ”); see also *Agyeman v. INS*, 296 F. 3d 871, 886 (CA9 2002) (“[W]e hold that an alien detained by the [Immigration and Naturalization Service] pending deportation is not a ‘prisoner’ within the meaning of the PLRA”); *LaFontant v. INS*, 135 F. 3d 158, 165 (CA DC 1998) (same); *Ojo v. INS*, 106 F. 3d 680, 683 (CA5 1997) (same). And, in fact, there is strong evidence that Congress assumed that *Bivens* remedies would be available to prisoners when it enacted the PLRA—*e. g.*, Congress continued to permit prisoners to recover for physical injuries, the typical kinds of *Bivens* injuries. See 28 U. S. C. § 1346(b)(2); Pfander, *Constitutional Torts*, at 105–106.

If there were any lingering doubt that the claim against Warden Hasty arises in a familiar *Bivens* context, the Court has made clear that conditions-of-confinement claims and medical-care claims are subject to the same substantive standard. See *Hudson v. McMillian*, 503 U. S. 1, 8 (1992) (“[*Wilson v. Seiter*, 501 U. S. 294, 303 (1991)] extended the deliberate indifference standard applied to Eighth Amend-

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ment claims involving medical care to claims about conditions of confinement”). Indeed, the Court made this very point in a *Bivens* case alleging that prison wardens were deliberately indifferent to an inmate’s safety. See *Farmer, supra*, at 830, 834.

I recognize that the Court finds a significant difference in the fact that the confinement here arose soon after a national-security emergency, namely, the September 11 attacks. The short answer to this argument, in respect to at least some of the claimed harms, is that some plaintiffs continued to suffer those harms up to eight months after the September 11 attacks took place and after the defendants knew the plaintiffs had no connection to terrorism. See App. to Pet. for Cert. in No. 15–1359, p. 280a. But because I believe the Court’s argument here is its strongest, I will consider it at greater length below. See Part II–C, *infra*.

Because the context here is not new, I would allow the plaintiffs’ constitutional claims to proceed. The plaintiffs have adequately alleged that the defendants were personally involved in imposing the conditions of confinement and did so with knowledge that the plaintiffs bore no ties to terrorism, thus satisfying *Iqbal*’s pleading standard. See 556 U. S., at 679 (claims must be “plausible”); see also *id.*, at 699–700 (BREYER, J., dissenting). And because it is clearly established that it is unconstitutional to subject detainees to punitive conditions of confinement and to target them based solely on their race, religion, or national origin, the defendants are not entitled to qualified immunity on the constitutional claims. See *Bell v. Wolfish*, 441 U. S. 520, 535–539, and n. 20 (1979); *Davis*, 442 U. S., at 236 (“It is equally clear . . . that the Fifth Amendment confers on petitioner a constitutional right to be free from illegal discrimination”). (Similarly, I would affirm the judgment of the Court of Appeals with respect to the plaintiffs’ statutory claim, namely, that the defendants conspired to deprive the plaintiffs of equal protection of the laws in violation of 42 U. S. C. § 1985(3).

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See *Turkmen v. Hasty*, 789 F. 3d 218, 262–264 (CA2 2015). I agree with the Court of Appeals that the defendants are not entitled to qualified immunity on this claim. See *ibid.*)

2

Even were I wrong and were the context here “fundamentally different,” *Malesko*, 534 U. S., at 70, the plaintiffs’ claims would nonetheless survive step two and step three of the Court’s framework for determining whether *Bivens* applies, see *supra*, at 168. Step two consists of asking whether “any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Wilkie*, 551 U. S., at 550. I can find no such “alternative, existing process” here.

The Court does not claim that the PLRA provides the plaintiffs with a remedy. *Ante*, at 148–149. Rather, it says that the plaintiffs *may* have “had available to them” relief in the form of a prospective injunction or an application for a writ of habeas corpus. *Ante*, at 145. Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have *already* suffered. And here the plaintiffs make a strong claim that neither was available to them—at least not for a considerable time. Some of the plaintiffs allege that for two or three months they were subject to a “communications blackout”; that the prison “staff did not permit them visitors, legal or social telephone calls, or mail”; that their families and attorneys did not know where they were being held; that they could not receive visits from their attorneys; that subsequently their lawyers could call them only once a week; and that some or all of the defendants “interfered with the detainees’ effective access to legal counsel.” Office of Inspector General (OIG) Report, App. 223, 293, 251, 391; see App. to Pet. for Cert. in No. 15–1359, at 253a, n. 1 (incorporating the OIG report into the complaint). These claims make it

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virtually impossible to say that here there is an “elaborate, comprehensive” alternative remedial scheme similar to schemes that, in the past, we have found block the application of *Bivens* to new contexts. *Bush*, 462 U. S., at 385. If these allegations are proved, then in this suit, it is “damages or nothing.” *Bivens*, 403 U. S., at 410 (Harlan, J., concurring in judgment).

There being no “alternative, existing process” that provides a “convincing reason” for not applying *Bivens*, we must proceed to step three. *Wilkie, supra*, at 550. Doing so, I can find no “‘special factors [that] counse[l] hesitation before authorizing’” this *Bivens* action. 551 U. S., at 550. I turn to this matter next.

II

A

The Court describes two general considerations that it believes argue against an “extension” of *Bivens*. First, the majority opinion points out that the Court is now far less likely than at the time it decided *Bivens* to imply a cause of action for damages from a statute that does not explicitly provide for a damages claim. See *ante*, at 132–133. Second, it finds the “silence” of Congress “notable” in that Congress, though likely aware of the “high-level policies” involved in this suit, did not “choose to extend to any person the kind of remedies” that the plaintiffs here “seek.” *Ante*, at 144 (internal quotation marks omitted). I doubt the strength of these two general considerations.

The first consideration, in my view, is not relevant. I concede that the majority and concurring opinions in *Bivens* looked in part for support to the fact that the Court had implied damages remedies from *statutes* silent on the subject. See 403 U. S., at 397; *id.*, at 402–403 (Harlan, J., concurring in judgment). But that was not the main argument favoring the Court’s conclusion. Rather, the Court drew far stronger support from the need for such a remedy when

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measured against a common-law and constitutional history of allowing traditional legal remedies where necessary. *Id.*, at 392, 396–397. The Court believed such a remedy was necessary to make effective the Constitution’s protection of certain basic individual rights. See *id.*, at 392; *id.*, at 407 (opinion of Harlan, J.). Similarly, as the Court later explained, a damages remedy against federal officials prevented the serious legal anomaly I previously mentioned. Its existence made basic constitutional protections of the individual against *Federal* Government abuse (the Bill of Rights’ pre-Civil War objective) as effective as protections against abuse by *state* officials (the post-Civil War, post-selective-incorporation objective). See *supra*, at 166.

Nor is the second circumstance—congressional silence—relevant in the manner that the majority opinion describes. The Court initially saw that silence as indicating an absence of congressional hostility to the Court’s exercise of its traditional remedy-infering powers. See *Bivens*, *supra*, at 397; *Davis*, 442 U. S., at 246–247. Congress’ subsequent silence contains strong signs that it accepted *Bivens* actions as part of the law. After all, Congress rejected a proposal that would have eliminated *Bivens* by substituting the U. S. Government as a defendant in suits against federal officers that raised constitutional claims. See Pfander, *Constitutional Torts*, at 102. Later, Congress expressly immunized federal employees acting in the course of their official duties from tort claims *except* those premised on violations of the Constitution. See Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, 28 U. S. C. § 2679(b)(2)(A). We stated that it is consequently “crystal clear that Congress views [the Federal Tort Claims Act] and *Bivens* as [providing] parallel, complementary causes of action.” *Carlson*, 446 U. S., at 20; see *Malesko*, 534 U. S., at 68 (similar). Congress has even assumed the existence of a *Bivens* remedy in suits brought by noncitizen detainees suspected of terrorism. See 42 U. S. C.

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§ 2000dd-1 (granting qualified immunity—but not absolute immunity—to military and civilian federal officials who are sued by alien detainees suspected of terrorism).

B

The majority opinion also sets forth a more specific list of factors that it says bear on “whether a case presents a new *Bivens* context.” *Ante*, at 139. In the Court’s view, a “case might differ” from *Bivens* “in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; [7] or the presence of potential special factors that previous *Bivens* cases did not consider.” *Ante*, at 139–140. In my view, these factors do not make a “meaningful difference” at step one of the *Bivens* framework. Some of them are better cast as “special factors” relevant to step three. But, as I see it, none should normally foreclose a *Bivens* action and none is determinative here. Consider them one by one:

(1) *The rank of the officers.* I can understand why an officer’s rank might bear on whether he violated the Constitution, because, for example, a plaintiff might need to show the officer was willfully blind to a harm caused by lower ranking officers or that the officer had actual knowledge of the misconduct. And I can understand that rank might relate to the existence of a legal defense, such as qualified, or even absolute, immunity. But *if*—and I recognize that this is often a very big *if*—a plaintiff proves a clear constitutional violation, say, of the Fourth Amendment, *and* he shows that the defendant does not possess any form of immunity or other defense, *then* why should he not have a damages remedy for harm suffered? What does rank have to do with

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that question, namely, the *Bivens* question? Why should the law treat differently a high-level official and the local constable where each has similarly violated the Constitution and where neither can successfully assert immunity or any other defense?

(2) *The constitutional right at issue.* I agree that this factor can make a difference, but only when the substance of the right is distinct. See, e. g., *Wilkie*, 551 U. S. 537 (land rights). But, for reasons I have already pointed out, there is no relevant difference between the rights at issue here and the rights at issue in our previous *Bivens* cases, namely, the rights to be free of unreasonable searches, invidious discrimination, and physical abuse in federal custody. See *supra*, at 169–170.

(3) *The generality or specificity of the individual action.* I should think that it is not the “generality or specificity” of an official action but rather the nature of the official action that matters. *Bivens* should apply to some generally applicable actions, such as actions taken deliberately to jail a large group of known-innocent people. And it should not apply to some highly specific actions, depending upon the nature of those actions.

(4) *The extent of judicial guidance.* This factor may be relevant to the existence of a constitutional violation or a qualified-immunity defense. Where judicial guidance is lacking, it is more likely that a constitutional violation is not clearly established. See *Anderson v. Creighton*, 483 U. S. 635, 640 (1987) (Officials are protected by qualified immunity unless “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right”). But I do not see how, assuming the violation is clear, the presence or absence of “judicial guidance” is relevant to the existence of a damages remedy.

(5) *The statutory (or other) legal mandate under which the officer was operating.* This factor too may prove relevant to the question whether a constitutional violation exists

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or is clearly established. But, again, assuming that it is, I do not understand why this factor is relevant to the existence of a damages remedy. See *Stanley*, 483 U. S., at 684 (the question of immunity is “analytically distinct” from the question whether a *Bivens* action should lie).

(6) *Risk of disruptive judicial intrusion.* All damages actions risk disrupting to some degree future decisionmaking by members of the Executive or Legislative Branches. Where this Court has authorized *Bivens* actions, it has found that disruption tolerable, and it has explained why disruption is, from a constitutional perspective, desirable. See *Davis*, 442 U. S., at 242 (Unless constitutional rights “are to become merely precatory, . . . litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for . . . protection”); *Malesko*, 534 U. S., at 70 (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations”). Insofar as the Court means this consideration to provide a reason why there should be no *Bivens* action where a Government employee acts in time of security need, I shall discuss the matter next, in Part C.

(7) *Other potential special factors.* Since I am not certain what these other “potential factors” are and, since the Court does not specify their nature, I would not, and the Court cannot, consider them in differentiating this suit from our previous *Bivens* cases or as militating against recognizing a *Bivens* action here.

C

In my view, the Court’s strongest argument is that *Bivens* should not apply to policy-related actions taken in times of national-security need, for example, during war or national-security emergency. As the Court correctly points out, the Constitution grants primary power to protect the Nation’s security to the Executive and Legislative Branches, not to

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the Judiciary. But the Constitution also delegates to the Judiciary the duty to protect an individual's fundamental constitutional rights. Hence when protection of those rights and a determination of security needs conflict, the Court has a role to play. The Court most recently made this clear in cases arising out of the detention of enemy combatants at Guantanamo Bay. Justice O'Connor wrote that "a state of war is not a blank check." *Hamdi v. Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). In *Boumediene*, 553 U. S., at 732–733, the Court reinforced that point, holding that noncitizens detained as enemy combatants were entitled to challenge their detention through a writ of habeas corpus, notwithstanding the national-security concerns at stake.

We have not, however, answered the specific question the Court places at issue here: Should *Bivens* actions continue to exist in respect to policy-related actions taken in time of war or national emergency? In my view, they should.

For one thing, a *Bivens* action comes accompanied by many legal safeguards designed to prevent the courts from interfering with Executive and Legislative Branch activity reasonably believed to be necessary to protect national security. In Justice Jackson's well-known words, the Constitution is not "a suicide pact." *Terminiello v. Chicago*, 337 U. S. 1, 37 (1949) (dissenting opinion). The Constitution itself takes account of public necessity. Thus, for example, the Fourth Amendment does not forbid *all* Government searches and seizures; it forbids only those that are "unreasonable." Ordinarily, it requires that a police officer obtain a search warrant before entering an apartment, but should the officer observe a woman being dragged against her will into that apartment, he should, and will, act at once. The Fourth Amendment makes allowances for such "exigent circumstances." *Brigham City v. Stuart*, 547 U. S. 398, 401–402 (2006) (warrantless entry justified to forestall imminent injury). Similarly, the Fifth Amendment bars only conditions of confinement that are not "reasonably related to a

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legitimate governmental objective.” *Bell v. Wolfish*, 441 U. S., at 539. What is unreasonable and illegitimate in time of peace may be reasonable and legitimate in time of war.

Moreover, *Bivens* comes accompanied with a qualified-immunity defense. Federal officials will face suit only if they have violated a constitutional right that was “clearly established” at the time they acted. *Harlow*, 457 U. S., at 818.

Further, in order to prevent the very presence of a *Bivens* lawsuit from interfering with the work of a Government official, this Court has held that a complaint must state a claim for relief that is “plausible.” *Iqbal*, 556 U. S., at 679. “[C]onclusory” statements and “[t]hreadbare” allegations will not suffice. *Id.*, at 678. And the Court has protected high-level officials in particular by requiring that plaintiffs plead that an official was personally involved in the unconstitutional conduct; an official cannot be vicariously liable for another’s misdeeds. *Id.*, at 676.

Finally, where such a claim is filed, courts can, and should, tailor discovery orders so that they do not unnecessarily or improperly interfere with the official’s work. The Second Circuit has emphasized the “need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation.” *Iqbal v. Hasty*, 490 F. 3d 143, 158 (2007). Where some of the defendants are “current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court” not only “may, but ‘*must* exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that’ those officials “‘are not subjected to unnecessary and burdensome discovery or trial proceedings.’” *Id.*, at 158–159. The court can make “all such discovery subject to prior court approval.” *Id.*, at 158. It can “structure . . . limited discovery by examining written responses to interrogatories and requests to admit before au-

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thorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks.” *Ibid.* In a word, a trial court can and should so structure the proceedings with full recognition that qualified immunity amounts to immunity from suit as well as immunity from liability.

Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court’s abolition, or limitation of, *Bivens* actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.

At the same time, there may well be a particular need for *Bivens* remedies when security-related Government actions are at issue. History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights. We have read about the Alien and Sedition Acts, the thousands of civilians imprisoned during the Civil War, and the suppression of civil liberties during World War I. See W. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 209–210, 49–50, 173–180, 183 (1998); see also *Ex parte Milligan*, 4 Wall. 2 (1866) (decided *after* the Civil War was over). The pages of the U. S. Reports themselves recite this Court’s refusal to set aside the Government’s World War II action removing more than 70,000 American citizens of Japanese origin from their west coast homes and interning them in camps, see *Korematsu v. United States*, 323 U. S. 214 (1944)—an action that at least some officials knew at the time was unnecessary, see *id.*, at 233–242 (Murphy, J., dissenting); P. Irons, *Justice at War* 202–204, 288 (1983). President Franklin Roosevelt’s Attorney General, perhaps exaggerating, once said that “[t]he Constitution has not greatly bothered any wartime President.” Rehnquist, *supra*, at 191.

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Can we, in respect to actions taken during those periods, rely exclusively, as the Court seems to suggest, upon injunctive remedies or writs of habeas corpus, their retail equivalent? Complaints seeking that kind of relief typically come during the emergency itself, when emotions are strong, when courts may have too little or inaccurate information, and when courts may well prove particularly reluctant to interfere with even the least well-founded Executive Branch activity. That reluctance may itself set an unfortunate precedent, which, as Justice Jackson pointed out, can “li[e] about like a loaded weapon” awaiting discharge in another case. *Korematsu, supra*, at 246 (dissenting opinion).

A damages action, however, is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available. In such circumstances, courts have more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts. We have applied the Constitution to actions taken during periods of war and national-security emergency. See *Boumediene*, 553 U. S., at 732–733; *Hamdi v. Rumsfeld*, 542 U. S. 507; cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). I should think that the wisdom of permitting courts to consider *Bivens* actions, later granting monetary compensation to those wronged at the time, would follow *a fortiori*.

As is well known, Lord Atkins, a British judge, wrote in the midst of World War II that “amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.” *Liversidge v. Anderson*, [1942] A. C. 206 (H. L. 1941) 244. The Court, in my view, should say the same of this *Bivens* action.

With respect, I dissent.

Syllabus

McWILLIAMS *v.* DUNN, COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 16–5294. Argued April 24, 2017—Decided June 19, 2017

Ake v. Oklahoma, 470 U. S. 68, 83, clearly established that when an indigent “defendant demonstrates . . . that his sanity at the time of the offense is to be a significant fact at trial, the State must” provide the defendant with “access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.”

One month after *Ake* was decided, Alabama charged petitioner McWilliams with rape and murder. Finding him indigent, the trial court appointed counsel, who requested a psychiatric evaluation of McWilliams. The court granted the motion and the State convened a commission, which concluded that McWilliams was competent to stand trial and had not been suffering from mental illness at the time of the alleged offense. A jury convicted McWilliams of capital murder and recommended a death sentence. Later, while the parties awaited McWilliams’ judicial sentencing hearing, McWilliams’ counsel asked for neurological and neuropsychological testing of McWilliams. The court agreed and McWilliams was examined by Dr. Goff. Dr. Goff filed a report two days before the judicial sentencing hearing. He concluded that McWilliams was likely exaggerating his symptoms, but nonetheless appeared to have some genuine neuropsychological problems. Just before the hearing, counsel also received updated records from the commission’s evaluation and previously subpoenaed mental health records from the Alabama Department of Corrections. At the hearing, defense counsel requested a continuance in order to evaluate all the new material, and asked for the assistance of someone with expertise in psychological matters to review the findings. The trial court denied defense counsel’s requests. At the conclusion of the hearing, the court sentenced McWilliams to death.

On appeal, McWilliams argued that the trial court denied him the right to meaningful expert assistance guarantee by *Ake*. The Alabama Court of Criminal Appeals affirmed McWilliams’ conviction and sentence, holding that Dr. Goff’s examination satisfied *Ake*’s requirements. The State Supreme Court affirmed, and McWilliams failed to obtain state postconviction relief. On federal habeas review, a Magistrate

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Judge also found that the Goff examination satisfied *Ake* and, therefore, that the State Court of Criminal Appeals' decision was not contrary to, or an unreasonable application of, clearly established federal law. See 28 U.S.C. § 2254(d)(1). Adopting the Magistrate Judge's report and recommendation, the District Court denied relief. The Eleventh Circuit affirmed.

Held:

1. *Ake* clearly established that when certain threshold criteria are met, the state must provide a defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S., at 83. The Alabama courts' determination that McWilliams received all the assistance to which *Ake* entitled him was contrary to, or an unreasonable application of, clearly established federal law. Pp. 195–199.

(a) Three preliminary issues require resolution. First, the conditions that trigger *Ake's* application are present. McWilliams is and was an "indigent defendant," 470 U.S., at 70, and his "mental condition" was both "relevant to . . . the punishment he might suffer," *id.*, at 80, and "seriously in question," *id.*, at 70. Second, this Court rejects Alabama's claim the State was relieved of its *Ake* obligations because McWilliams received brief assistance from a volunteer psychologist at the University of Alabama. Even if the episodic help of an outside volunteer could satisfy *Ake*, the State does not refer to any specific record facts that indicate that the volunteer psychologist was available to the defense at the judicial sentencing proceeding. Third, contrary to Alabama's suggestion, the record indicates that McWilliams did not get all the mental health assistance that he requested. Rather, he asked for additional help at the judicial sentencing hearing, but was rebuffed. Pp. 195–196.

(b) This Court does not have to decide whether *Ake* requires a State to provide an indigent defendant with a qualified mental health expert retained specifically for the defense team. That is because Alabama did not meet even *Ake's* most basic requirements in this case. *Ake* requires more than just an examination. It requires that the State provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." 470 U.S., at 83. Even assuming that Alabama met the examination requirement, it did not meet any of the other three. No expert helped the defense evaluate the Goff report or McWilliams' extensive medical records and translate these data into a legal strategy. No expert helped the defense prepare

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and present arguments that might, *e. g.*, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness. No expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing. Since Alabama's provision of mental health assistance fell so dramatically short of *Ake*'s requirements, the Alabama courts' decision affirming McWilliams' sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Pp. 196–199.

2. The Eleventh Circuit should determine on remand whether the Alabama courts' error had the "substantial and injurious effect or influence" required to warrant a grant of habeas relief, *Davis v. Ayala*, 576 U.S. 257, 268, specifically considering whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires could have made a difference. P. 200.

634 Fed. Appx. 698, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and GORSUCH, JJ., joined, *post*, p. 200.

Stephen B. Bright, by appointment of the Court, 580 U.S. 1170, argued the cause for petitioner. With him on the briefs were *Mark Loudon-Brown*, *Patrick Mulvaney*, *Donald B. Verrilli, Jr.*, and *Michael B. DeSanctis*.

Andrew L. Brasher, Solicitor General of Alabama, argued the cause for respondents. With him on the brief were *Steven T. Marshall*, Attorney General, and *Henry M. Johnson* and *Megan A. Kirkpatrick*, Assistant Attorneys General.*

JUSTICE BREYER delivered the opinion of the Court.

Thirty-one years ago, petitioner James Edmond McWilliams, Jr., was convicted of capital murder by an Alabama

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

George H. Kendall, *Jenay Nurse*, *Corrine A. Irish*, *David Oscar Markus*, and *Janet Moore* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae*.

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jury and sentenced to death. McWilliams challenged his sentence on appeal, arguing that the State had failed to provide him with the expert mental health assistance the Constitution requires, but the Alabama courts refused to grant relief. We now consider, in this habeas corpus case, whether the Alabama courts' refusal was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). We hold that it was. Our decision in *Ake v. Oklahoma*, 470 U. S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." *Id.*, at 83. Petitioner in this case did not receive that assistance.

I

McWilliams and the State of Alabama agree that *Ake* (which this Court decided in February 1985) sets forth the applicable constitutional standards. Before turning to the circumstances of McWilliams' case, we describe what the Court held in *Ake*. We put in italics language that we find particularly pertinent here.

The Court began by stating that the "issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination *and assistance necessary to prepare an effective defense based on his mental condition*, when his sanity at the time of the offense is seriously in question." *Id.*, at 70 (emphasis added). The Court said it would consider that issue within the framework of earlier cases granting "an indigent defendant . . . a fair opportunity to present his defense" and "to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id.*, at 76. "Meaningful access to justice," the Court added, "has been the consistent theme of these cases." *Id.*, at 77.

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The Court then wrote that “when the State has made the defendant’s mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant’s ability to marshal his defense.” *Id.*, at 80. A psychiatrist may, among other things, “gather facts,” “analyze the information gathered and from it draw plausible conclusions,” and “know the probative questions to ask of the opposing party’s psychiatrists and how to interpret their answers.” *Ibid.* These and related considerations

“lea[d] inexorably to the conclusion that, *without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State’s psychiatric witnesses*, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.” *Id.*, at 82 (emphasis added).

The Court concluded: “We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense*. . . . Our concern is that the indigent defendant have access to a competent psychiatrist *for the[se] purpose[s]*.” *Id.*, at 83 (emphasis added).

Ake thus clearly establishes that when its threshold criteria are met, a State must provide a mental health professional capable of performing a certain role: “conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation, and presentation of the defense.” *Ibid.* Unless a defendant is “assure[d]” the assistance of someone who can

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effectively perform these functions, he has not received the “minimum” to which *Ake* entitles him. *Ibid.*

II

A

One month after this Court decided *Ake*, the State of Alabama charged McWilliams with rape and murder. The trial court found McWilliams indigent and provided him with counsel. It also granted counsel’s pretrial motion for a psychiatric evaluation of McWilliams’ sanity, including aspects of his mental condition relevant to “mitigating circumstances to be considered in a capital case in the sentencing stage.” Rec. 1526 (certified trial record) (hereinafter “T.” refers to the certified trial record; “P. C. T.” refers to the certified court reporter’s state postconviction proceedings transcript). The court ordered the State to convene a “Lunacy Commission,” which would examine McWilliams and file a report with the court. See *id.*, at 1528–1529.

Subsequently a three-member Lunacy Commission examined McWilliams at a state hospital, the Taylor Hardin Secure Medical Facility. The three members, all psychiatrists, concluded that McWilliams was competent to stand trial and that he had not been suffering from mental illness at the time of the alleged offense. *Id.*, at 1544–1546. One of them, Dr. Kamal Nagi, wrote that “Mr. McWilliams is grossly exaggerating his psychological symptoms to mimic mental illness.” *Id.*, at 1546. Dr. Nagi noted that McWilliams’ performance on one of the tests “suggested that [McWilliams] had exaggerated his endorsement of symptoms of illness and the profile was considered a ‘fake bad.’” *Ibid.*

McWilliams’ trial took place in late August 1986. On August 26 the jury convicted him of capital murder. The prosecution sought the death penalty, which under then-applicable Alabama law required both a jury recommendation (with at least 10 affirmative votes) and a later determination by the judge. See Ala. Code § 13A–5–46(f) (1986). The jury-related portion of the sentencing proceeding took

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place the next day. The prosecution reintroduced evidence from the guilt phase and called a police officer to testify that McWilliams had a prior conviction. T. 1297, 1299–1303. The defense called McWilliams and his mother. Both testified that McWilliams, when a child, had suffered multiple serious head injuries. *Id.*, at 1303–1318, 1320–1335. McWilliams also described his history of psychiatric and psychological evaluations, reading from the prearrest report of one psychologist, who concluded that McWilliams had a “blatantly psychotic thought disorder” and needed inpatient treatment. *Id.*, at 1329–1332.

When the prosecutor, cross-examining McWilliams, asked about the neurological effects of his head injuries, McWilliams replied, “I am not a psychiatrist.” *Id.*, at 1328. Similarly, when the prosecutor asked McWilliams’ mother whether her son was “crazy,” she answered, “I am no expert: I don’t know whether my son is crazy or not. All I know, that my son do need help.” *Id.*, at 1317.

The prosecution then called two of the mental health professionals who had signed the Lunacy Commission’s report, Dr. Kamal Nagi and Dr. Norman Poythress. Dr. Nagi testified that he had found no evidence of psychosis, but did not appear to be aware of McWilliams’ history of head trauma. See *id.*, at 1351–1352. Dr. Poythress testified that one of the tests that McWilliams took was “clinically invalid” because the test’s “validity scales” indicated that McWilliams had exaggerated or faked his symptoms. *Id.*, at 1361–1363.

Although McWilliams’ counsel had subpoenaed further mental health records from Holman State Prison, where McWilliams was being held, the jury did not have the opportunity to consider them, for, though subpoenaed on August 13, the records had not arrived by August 27, the day of the jury hearing.

After the hearing, the jury recommended the death penalty by a vote of 10 to 2, the minimum required by Alabama law. The court scheduled its judicial sentencing hearing for October 9, about six weeks later.

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B

Five weeks before that hearing, the trial court ordered the Alabama Department of Corrections to respond to McWilliams's subpoena for mental health records. *Id.*, at 1619. The court also granted McWilliams' motion for neurological and neuropsychological exams. *Id.*, at 1615–1617. That motion (apparently filed at the suggestion of a University of Alabama psychologist who had “volunteer[ed]” to help counsel “in her spare time,” P. C. T. 251–252) asked the court to “issue an order requiring the State of Alabama to do complete neurological and neuropsychological testing on the Defendant in order to have the test results available for his sentencing hearing.” T. 1615.

Consequently, Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health, examined McWilliams. On October 7, two days before the judicial sentencing hearing, Dr. Goff filed his report. The report concluded that McWilliams presented “some diagnostic dilemmas.” *Id.*, at 1635. On the one hand, he was “obviously attempting to appear emotionally disturbed” and “exaggerating his neuropsychological problems.” *Ibid.* But on the other hand, it was “quite apparent that he ha[d] some genuine neuropsychological problems.” *Ibid.* Tests revealed “cortical dysfunction attributable to right cerebral hemisphere dysfunction,” shown by “left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills.” *Id.*, at 1636. These deficiencies were “suggestive of a right hemisphere lesion” and “compatible with the injuries [McWilliams] sa[id] he sustained as a child.” *Id.*, at 1635. The report added that McWilliams' “obvious neuropsychological deficit” could be related to his “low frustration tolerance and impulsivity,” and suggested a diagnosis of “organic personality syndrome.” *Ibid.*

The day before the sentencing hearing defense counsel also received updated records from Taylor Hardin hospital,

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and on the morning of the hearing he received the records (subpoenaed in mid-August) from Holman Prison. The prison records indicated that McWilliams was taking an assortment of psychotropic medications including Desyrel, Librium, and an antipsychotic, Mellaril. See App. 190a–193a.

C

The judicial sentencing hearing began on the morning of October 9. Defense counsel told the trial court that the eleventh-hour arrival of the Goff report and the mental health records left him “unable to present any evidence today.” *Id.*, at 194a. He said he needed more time to go over the new information. Furthermore, since he was “not a psychologist or a psychiatrist,” he needed “to have someone else review these findings” and offer “a second opinion as to the severity of the organic problems discovered.” *Id.*, at 192a–196a.

The trial judge responded, “All right. Well, let’s proceed.” *Id.*, at 197a. The prosecution then presented its case. Once it had finished, defense counsel moved for a continuance in order “to allow us to go through the material that has been provided to us in the last 2 days.” *Id.*, at 204a. The judge offered to give defense counsel until 2 p.m. that afternoon. He also stated that “[a]t that time, The Court will entertain any motion that you may have with some other person to review” the new material. *Id.*, at 205a. Defense counsel protested that “there is no way that I can go through this material,” but the judge immediately added, “Well, I will give you the opportunity. . . . If you do not want to try, then you may not.” *Id.*, at 206a. The court then adjourned until 2 p.m.

During the recess, defense counsel moved to withdraw. He said that “the arbitrary [*sic*] position taken by this Court regarding the Defendant’s right to present mitigating circumstances is unconscionable resulting in this proceeding being a mockery.” T. 1644. He added that “further partici-

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pation would be tantamount to exceptance [*sic*] of the Court's ruling." *Ibid.* The trial court denied the motion to withdraw.

When the proceedings resumed, defense counsel renewed his motion for a continuance, explaining:

"It is the position of the Defense that we have received these records at such a late date, such a late time that it has put us in a position as laymen, with regard to psychological matters, that we cannot adequately make a determination as what to present to The Court with regards to the particular deficiencies that the Defendant has. We believe that he has the type of diagnosed illness that we pointed out earlier for The Court and have mentioned for The Court. But we cannot determine ourselves from the records that we have received and the lack of receiving the test and the lack of our own expertise, whether or not such a condition exists; whether the reports and tests that have been run by Taylor Hardin, and the Lunacy Commission, and at Holman are tests that should be challenged in some type of way or the results should be challenged, we really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance." App. 207a.

The trial court denied the motion.

The prosecutor then offered his closing statement, in which he argued that there were "no mitigating circumstances." *Id.*, at 209a. Defense counsel replied that he "would be pleased to respond to [the prosecutor's] remarks that there are no mitigating circumstances in this case if I were able to have time to produce . . . any mitigating circumstances." *Id.*, at 210a. But, he said, since neither he nor his co-counsel were "doctors," neither was "really capable of going through those records on our own." *Ibid.* The court had thus "foreclosed by structuring this hearing as it has,

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the Defendant from presenting any evidence of mitigation in psychological—psychiatric terms.” *Id.*, at 211a.

The trial judge then said that he had reviewed the records himself and found evidence that McWilliams was faking and manipulative. *Ibid.* Defense counsel attempted to contest that point, which led to the following exchange:

“MR. SOGOL: I told Your Honor that my looking at those records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me. Did I not tell Your Honor that?

“THE COURT: As I said, on the record earlier, Mr. Sogol, and I don’t want to argue or belabor this, but I would have given you the opportunity to make a motion to present someone to evaluate that.

“MR. SOGOL: Your Honor gave me no time in which to do that. Your Honor told me to be here at 2 o’clock this afternoon. Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?

“THE COURT: I want you to approach with your client, please.” *Id.*, at 211a–212a.

The court then sentenced McWilliams to death.

The court later issued a written sentencing order. It found three aggravating circumstances and no mitigating circumstances. It found that McWilliams “was not and is not psychotic,” and that “the preponderance of the evidence from these tests and reports show [McWilliams] to be feigning, faking, and manipulative.” *Id.*, at 188a. The court wrote that even if McWilliams’ mental health issues “did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance.” *Ibid.*

D

McWilliams appealed, arguing that the trial court had denied him the right to meaningful expert assistance guar-

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anted by *Ake*. The Alabama Court of Criminal Appeals rejected his argument. It wrote that *Ake's* requirements “are met when the State provides the [defendant] with a competent psychiatrist.” *McWilliams v. State*, 640 So. 2d 982, 991 (1991). And Alabama, by “allowing Dr. Goff to examine” McWilliams, had satisfied those requirements. *Ibid.* The court added that “[t]here is no indication in the record that [McWilliams] could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings,” *ibid.*; that “the trial court indicated that it would have considered a motion to present an expert to evaluate this report” had one been made, *ibid.*; and that there was “no prejudice by the trial court’s denial of [McWilliams’] motion for continuance,” *id.*, at 993. The appeals court therefore affirmed McWilliams’ conviction and sentence. The Alabama Supreme Court, in turn, affirmed the appeals court (without addressing the *Ake* issue). *Ex parte McWilliams*, 640 So. 2d 1015 (1993). After McWilliams failed to obtain postconviction relief from the state courts, he sought a federal writ of habeas corpus. See 28 U. S. C. § 2254.

E

In federal habeas court McWilliams argued before a Magistrate Judge that he had not received the expert assistance that *Ake* required. The Magistrate Judge recommended against issuing the writ. He wrote that McWilliams had “received the assistance required by *Ake*” because Dr. Goff “completed the testing” that McWilliams requested. App. 88a. Hence, the decision of the Alabama Court of Criminal Appeals was not contrary to, or an unreasonable application of, clearly established federal law. See 28 U. S. C. § 2254(d)(1). The District Court adopted the Magistrate Judge’s report and recommendation and denied relief. A divided panel of the Court of Appeals for the Eleventh Circuit affirmed. See *McWilliams v. Commissioner, Ala. Dept. of Corrections*, 634 Fed. Appx. 698 (2015) (*per curiam*); *id.*, at

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711 (Jordan, J., concurring); *id.*, at 712 (Wilson, J., dissenting). McWilliams filed a petition for certiorari. We granted the petition.

III

A

The question before us is whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance to which *Ake* entitled him was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). Before turning to the heart of that question, we resolve three preliminary issues.

First, no one denies that the conditions that trigger application of *Ake* are present. McWilliams is and was an "indigent defendant," 470 U. S., at 70. See *supra*, at 188. His "mental condition" was "relevant to . . . the punishment he might suffer," 470 U. S., at 80. See *supra*, at 189. And, that "mental condition," *i. e.*, his "sanity at the time of the offense," was "seriously in question," 470 U. S., at 70. See *supra*, at 189. Consequently, the Constitution, as interpreted in *Ake*, required the State to provide McWilliams with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U. S., at 83.

Second, we reject Alabama's claim that the State was exempted from its obligations because McWilliams already had the assistance of Dr. Rosenszweig, the psychologist at the University of Alabama who "volunteer[ed]" to help defense counsel "in her spare time" and suggested the defense ask for further testing, P. C. T. 251–252. Even if the episodic assistance of an outside volunteer could relieve the State of its constitutional duty to ensure an indigent defendant access to meaningful expert assistance, no lower court has held or suggested that Dr. Rosenszweig was available to help, or might have helped, McWilliams at the judicial sentencing proceeding, the proceeding here at issue. Alabama does not

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refer to any specific record facts that indicate that she was available to the defense at this time.

Third, Alabama argues that *Ake*'s requirements are irrelevant because McWilliams "never asked for more expert assistance" than he got, "even though the trial court gave him the opportunity to do so." Brief for Respondents 50–51. The record does not support this contention. When defense counsel requested a continuance at the sentencing hearing, he repeatedly told the court that he needed "to have someone else review" the Goff report and medical records. App. 193a. See, e. g., *id.*, at 196a ("[I]t is just incumbent upon me to have a second opinion as to the severity of the organic problems discovered"); *id.*, at 207a ("[W]e really need an opportunity to have the right type of experts in this field, take a look at all of these records and tell us what is happening with him"); *id.*, at 211a ("I told Your Honor that my looking at these records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me"). Counsel also explicitly asked the trial court what else he was supposed to ask for to obtain an expert: "Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?" *Id.*, at 212a. We have reproduced a lengthier account of the exchanges, *supra*, at 191–193. They make clear that counsel wanted additional expert assistance to review the report and records—that was the point of asking for a continuance. In response, the court told counsel to approach the bench and sentenced McWilliams to death. Thus the record, in our view, indicates that McWilliams did request additional help from mental health experts.

B

We turn to the main question before us: whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance that *Ake* requires was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1).

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McWilliams would have us answer “yes” on the ground that *Ake* clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties. He points to language in *Ake* that seems to foresee that consequence. See, *e. g.*, 470 U. S., at 81 (“By organizing a defendant’s mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, *the psychiatrists for each party* enable the jury to make its most accurate determination of the truth on the issue before them” (emphasis added)).

We need not, and do not, decide, however, whether this particular McWilliams claim is correct. As discussed above, *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively “assist in evaluation, preparation, and presentation of the defense.” *Id.*, at 83. As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 8–35 (describing practice in capital-active jurisdictions); Tr. of Oral Arg. 40 (respondents conceding that “this issue really has been mooted over the last 30-some-odd years because of statutory changes”). It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*’s demands in this way. That is because Alabama here did not meet even *Ake*’s most basic requirements.

The dissent calls our unwillingness to resolve the broader question whether *Ake* clearly established a right to an expert independent from the prosecution a “most unseemly maneuver.” *Post*, at 201 (opinion of ALITO, J.). We do not

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agree. We recognize that we granted petitioner’s first question presented—which addressed whether *Ake* clearly established a right to an independent expert—and not his second, which raised more case-specific concerns. See Pet. for Cert. i. Yet that does not bind us to issue a sweeping ruling when a narrow one will do. As we explain below, our determination that *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively “assist in evaluation, preparation, and presentation of the defense,” 470 U. S., at 83, is sufficient to resolve the case. We therefore need not decide whether *Ake* clearly established more. (Nor do we agree with the dissent that our approach is “acutely unfair to Alabama” by not “giv[ing] the State a fair chance to respond.” *Post*, at 211. In fact, the State devoted an entire section of its merits brief to explaining why it thought that “[n]o matter how the Court resolves the [independent expert] question, the court of appeals correctly denied the habeas petition.” Brief for Respondents 50. See also *id.*, at 14, 52 (referring to the lower courts’ case-specific determinations that McWilliams got all the assistance *Ake* requires).)

The Alabama appeals court held that “the requirements of *Ake v. Oklahoma* . . . are met when the State provides the [defendant] with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine [McWilliams].” *McWilliams*, 640 So. 2d, at 991. This was plainly incorrect. *Ake* does not require just an examination. Rather, it requires the State to provide the defense with “access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense.” *Ake*, *supra*, at 83 (emphasis added).

We are willing to assume that Alabama met the *examination* portion of this requirement by providing for Dr. Goff’s

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examination of McWilliams. See *supra*, at 190. But what about the other three parts? Neither Dr. Goff nor any other expert helped the defense evaluate Goff’s report or McWilliams’ extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams’ purported malingering was not necessarily inconsistent with mental illness (as an expert later testified in postconviction proceedings, see P. C. T. 936–943). Neither Dr. Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself.

The dissent emphasizes that Dr. Goff was never ordered to do any of these things by the trial court. See *post*, at 212, n. 5. But that is precisely the point. The relevant court order did not ask Dr. Goff or anyone else to provide the defense with help in evaluating, preparing, and presenting its case. It only required “the Department of Corrections” to “complete neurological and neuropsychological testing on the Defendant . . . and send all test materials, results and evaluations to the Clerk of the Court.” T. 1612. Nor did the short timeframe allow for more expert assistance. (Indeed, given that timeframe, we do not see how Dr. Goff or any other expert could have satisfied the latter three portions of *Ake*’s requirements even had he been instructed to do so.) Then, when McWilliams asked for the additional assistance to which he was constitutionally entitled at the sentencing hearing, the judge rebuffed his requests. See *supra*, at 191–193.

Since Alabama’s provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming McWilliams’ conviction and sentence was “contrary to, or involved an unreasonable application of, clearly established Federal law.” 28 U. S. C. § 2254(d)(1).

ALITO, J., dissenting

IV

The Eleventh Circuit held in the alternative that, even if the Alabama courts clearly erred in their application of federal law, their “error” nonetheless did not have the “substantial and injurious effect or influence” required to warrant a grant of habeas relief, *Davis v. Ayala*, 576 U. S. 257, 268 (2015) (internal quotation marks omitted). See 634 Fed. Appx., at 707. In reaching this conclusion, however, the Eleventh Circuit only considered whether “[a] few additional days to review Dr. Goff’s findings” would have made a difference. *Ibid.* It did not specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered. There is reason to think that it could have. For example, the trial judge relied heavily on his belief that McWilliams was malingering. See App. 188a, 211a. If McWilliams had the assistance of an expert to explain that “[m]alingering is not inconsistent with serious mental illness,” Brief for American Psychiatric Association et al. as *Amici Curiae* 20, he might have been able to alter the judge’s perception of the case.

Since “we are a court of review, not of first view,” *Cutter v. Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), we do not now resolve this question. Rather we leave it to the lower courts to decide in the first instance.

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

We granted review in this case to decide a straightforward legal question on which the lower courts are divided: whether our decision in *Ake v. Oklahoma*, 470 U. S. 68 (1985), clearly established that an indigent defendant whose mental health will be a significant factor at trial is entitled to the

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assistance of a psychiatric expert who is a member of the defense team instead of a neutral expert who is available to assist both the prosecution and the defense.¹

The answer to that question is plain: *Ake* did not clearly establish that a defendant is entitled to an expert who is a member of the defense team. Indeed, “*Ake* appears to have been written so as to be deliberately ambiguous on this point, thus leaving the issue open for future consideration.” W. LaFare, *Criminal Law* § 8.2(d), p. 449 (5th ed. 2010) (LaFare). Accordingly, the proper disposition of this case is to affirm the judgment below.

The Court avoids that outcome by means of a most unseemly maneuver. The Court declines to decide the question on which we granted review and thus leaves in place conflicting lower court decisions regarding the meaning of a 32-year-old precedent.² That is bad enough. But to make matters worse, the Court achieves this unfortunate result by deciding a separate question *on which we expressly declined review*. And the Court decides that fact-bound question without giving Alabama a fair opportunity to brief the issue.

I

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas relief cannot be awarded

¹The question was worded as follows: “When this Court held in *Ake* that an indigent defendant is entitled to meaningful expert assistance for the ‘evaluation, preparation, and presentation of the defense,’ did it clearly establish that the expert should be independent of the prosecution?”

²Defending its approach, the Court says that it had no need to decide the “sweeping” question on which review was granted “when a narrow one will do.” *Ante*, at 198. Narrow holdings have their place, but here: (1) We denied review of the narrow question; (2) the question decided is not just narrow, it is the sort of fact-bound question as to which review is disfavored, see this Court’s Rule 10; (3) the narrow question is not fairly included in the question presented, see this Court’s Rule 14(a); (4) deciding the case on this narrow ground leaves in place the conflict in the lower courts that supported the grant of certiorari; and (5) the parties were not given notice of this possible disposition, and the Court was thus deprived of the benefit of full briefing and argument on the issue.

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on a claim that a state court decided on the merits unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). That standard, by design, is "difficult to meet." *White v. Woodall*, 572 U. S. 415, 419 (2014) (internal quotation marks omitted). It requires habeas petitioners to "show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U. S. 86, 103 (2011). Put another way, "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U. S. 312, 316 (2015) (*per curiam*).

In *Ake*, we held that a defendant must be provided "access to a competent psychiatrist" in two circumstances: first, "when [the] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial," and, second, at the sentencing phase of a capital trial, "when the State presents psychiatric evidence of the defendant's future dangerousness." 470 U. S., at 83.

The question that we agreed to review concerns the type of expert that must be provided. Did *Ake* clearly establish that a defendant in the two situations just noted must be provided with the services of an expert who functions solely as a dedicated member of the defense team as opposed to a neutral expert who examines the defendant, reports his or her conclusions to the court and the parties, and is available to assist and testify for both sides? Did *Ake* speak with such clarity that it ruled out "any possibility for fairminded disagreement"? *Harrington, supra*, at 103. The answer is "no." *Ake* provides no clear guidance one way or the other.

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A

It is certainly true that there is language in *Ake* that points toward the position that a defense-team psychiatrist should be provided. Explaining the need for the appointment of a psychiatric expert, *Ake* noted that a psychiatrist can “assist in preparing the cross-examination of a State’s psychiatric witnesses” and would “know the probative questions to ask of the opposing party’s psychiatrists and how to interpret their answers.” 470 U. S., at 82, 80. And when *Ake* discussed expert assistance during capital sentencing, the Court said that it is important for a defendant to “offer a well-informed expert’s opposing view” in the form of “responsive psychiatric testimony.” *Id.*, at 84. *Ake* also explained that factfinding is improved when evidence is offered by “psychiatrists for each party.” *Id.*, at 81. While it is possible for a neutral expert to provide these services, in our adversary system they are customarily performed by an expert working exclusively for one of the parties.

Other language in *Ake*, however, points at least as strongly in the opposite direction. *Ake* was clear that an indigent defendant does not have a constitutional right to “choose a psychiatrist of his personal liking or . . . receive funds to hire his own.” *Id.*, at 83. Instead, the Court held only that a defendant is entitled to have “access” to “one competent psychiatrist” chosen by the trial judge. *Id.*, at 83, 79.

These limitations are at odds with the defense-expert model, which McWilliams characterizes as “the norm in our adversarial system.” Reply Brief 3. As McWilliams explains, “other litigants of means” screen experts to find one whose tentative views are favorable, and they often hire both consulting and testifying experts. *Id.*, at 2–3. But the *Ake* Court was clear that it was not holding “that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy.” 470 U. S., at 77. On the contrary, *Ake* expressly stated that a State need only

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provide for a single psychiatric expert to be selected by the trial judge. Thus, *Ake* does not give the defense the right to interview potential experts, to seek out an expert who offers a favorable preliminary diagnosis, or to hire more than one expert. And if the court-appointed expert reaches a conclusion unfavorable to the defendant on the issue of sanity or future dangerousness, *Ake* requires the defense team to live with the expert's unfavorable conclusions. As McWilliams concedes, when the only expert available to indigent defendants is one selected by the trial court, these defendants "face a risk that their expert will ultimately be unwilling or unable to offer testimony that will advance their cause." Reply Brief 3.

Ake also acknowledged that one of our prior cases, *United States ex rel. Smith v. Baldi*, 344 U. S. 561 (1953), "support[ed] the proposition" that due process is satisfied if a defendant merely has access to a psychiatrist "not beholden to the prosecution." 470 U. S., at 85. While *Ake* also declared that *Baldi* did not limit the Court "in considering whether fundamental fairness today requires a different result," 470 U. S., at 85, *Ake* did not explicitly overrule *Baldi*, and ultimately its treatment of that case was "most ambiguous," LaFave §8.2, at 450, n. 124.

It is also significant that the *Ake* Court had no need to decide whether due process requires the appointment of a defense-team expert as opposed to a neutral expert because *Ake* was denied the assistance of *any* psychiatrist—*neutral or otherwise*—for purposes of assessing his sanity at the time of the offense or his mental state as it related to capital sentencing. 470 U. S., at 71–73 (state experts who examined *Ake* and testified he was dangerous evaluated him only in connection with his competency to stand trial). As *Ake*'s counsel explained at argument, the Court could rule in his client's favor without accepting his client's "primary submission" that due process requires the appointment of a defense-team expert. Tr. of Oral Arg. in No. 83–5424, p. 21 (arguing that *Ake*'s rights were violated even under *Baldi*).

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In short, *Ake* is ambiguous, perhaps “deliberately” so. LaFave § 8.2(d), at 449; see *ibid.* (“[C]omments supporting a move in either direction appear throughout the majority opinion in the case”). If the Justices who joined Justice Marshall’s opinion for the Court had agreed that a defense-team expert must be appointed, it would have been a simple matter for the Court to say so expressly. Justice Marshall demonstrated this a few years later when he dissented from the denial of certiorari in a case that presented the very issue that the Court now dodges. *Granviel v. Texas*, 495 U. S. 963 (1990). There, Justice Marshall stated unambiguously that “*Ake* mandates the provision of a psychiatrist who will be part of the defense team and serve the defendant’s interests in the context of our adversarial system.” *Ibid.* If all the Justices who joined the opinion of the Court in *Ake* had shared this view, there is no obvious reason for the absence of the sort of clear statement that Justice Marshall would later provide when he wrote only for himself. The opinion in *Ake* has all the hallmarks of a compromise.

The Court’s actions in the aftermath of *Ake* lend support to this conclusion. The Court repeatedly denied certiorari in cases that would have permitted it to resolve this question or others left open by *Ake*. See, e. g., *Norris v. Starr*, 513 U. S. 995 (1994); *Vickers v. Arizona*, 497 U. S. 1033 (1990); *Brown v. Dodd*, 484 U. S. 874 (1987); *Johnson v. Oklahoma*, 484 U. S. 878 (1987); *Granviel, supra*, at 963. And in many of these cases (*Vickers, Dodd, Johnson, and Granviel*), Justice Marshall dissented. The most reasonable conclusion to draw from the Court’s silence is that the exact type of expert required by *Ake* has remained “an open question in our jurisprudence.” *Carey v. Musladin*, 549 U. S. 70, 76 (2006).

B

When the lower courts have “diverged widely” in assessing whether our precedents dictate a legal rule, that is a sign that the rule is not clearly established, *ibid.*, and that is the situation here. At the time the Alabama court addressed

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McWilliams's *Ake* claim on the merits, some courts had held that *Ake* requires the appointment of a defense-team expert. See, e.g., *Smith v. McCormick*, 914 F. 2d 1153, 1156–1160 (CA9 1990); *United States v. Sloan*, 776 F. 2d 926, 929 (CA10 1985). But others disagreed. The Fifth Circuit had held that a defense-team expert is not required. *Granviel v. Lynaugh*, 881 F. 2d 185, 191–192 (1989), cert. denied, 495 U. S. 963 (1990). And the Oklahoma courts in *Ake itself* also interpreted our holding this way. *Ake v. State*, 778 P. 2d 460, 465 (Okla. Crim. App. 1989) (“[D]ue process does not entitle [Ake] to a state-funded psychiatric expert to support his claim; rather, due process requires that he have access to a competent and impartial psychiatrist”). So had at least seven other state high courts. *Willie v. State*, 585 So. 2d 660, 671 (Miss. 1991); *State v. Hix*, 38 Ohio St. 3d 129, 131–132, 527 N. E. 2d 784, 787 (1988); *Dunn v. State*, 291 Ark. 131, 132–134, 722 S. W. 2d 595, 595–596 (1987); *State v. Indvik*, 382 N. W. 2d 623, 625–626 (N. D. 1986); *Palmer v. State*, 486 N. E. 2d 477, 481–482 (Ind. 1985); *State v. Smith*, 217 Mont. 453, 457–460, 705 P. 2d 1110, 1113–1114 (1985); *State v. Hoopii*, 68 Haw. 246, 248–251, 710 P. 2d 1193, 1195–1196 (1985).

Other courts struggled to reach agreement on the question. Two Eleventh Circuit panels held that a neutral expert suffices, see *Magwood v. Smith*, 791 F. 2d 1438, 1443 (1986) (*Ake* satisfied where neutral, court-appointed experts examined the defendant and testified); *Clisby v. Jones*, 907 F. 2d 1047, 1050 (1990) (*per curiam*) (“The state provided a duly qualified psychiatrist not beholden to the prosecution and, therefore, met its obligation under *Ake*”), reh’g en banc, 960 F. 2d 925, 928–934 (1992) (rejecting *Ake* claim on other grounds). But another Eleventh Circuit panel disagreed. *Cowley v. Stricklin*, 929 F. 2d 640, 644 (1991) (holding that due process requires more than a neutral expert). A Sixth Circuit panel held that *Ake* does not require appointment of a defense-team expert. *Kordenbrock v. Scroggy*, 889 F. 2d 69, 75 (1989). And when the Sixth Circuit reviewed that

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decision en banc, its holding was fractured, but 7 of the 13 judges expressed the view that *Ake* requires only a neutral, court-appointed expert.³ 919 F. 2d 1091, 1110, 1117–1120, 1131–1132 (1990).

Ake's ambiguity has been noted time and again by commentators. See, e.g., LaFave §8.2(d), at 449 (*Ake* appears to be “deliberately ambiguous”); Mosteller, The Sixth Amendment Right to Fairness: The Touchstone of Effectiveness and Pragmatism, 45 Tex. Tech. L. Rev. 1, 16 (2012) (*Ake* held that “the defense had the right of access to an expert, but the Court did not conclude that access had to be a defense expert”); Greeley, The Plight of Indigent Defendants in a Computer-Based Age: Maintaining the Adversarial System by Granting Defendants Access to Computer Experts, 16 Va. J. L. & Tech. 400, 426 (2011) (“[T]he Supreme Court should affirmatively state whether a defendant is entitled to a neutral expert working for the defense and the government, or an expert advocating for the defense”); Groendyke, *Ake v. Oklahoma*: Proposals for Making the Right a Reality, 10 N. Y. U. J. Legis. & Pub. Pol'y 367, 383 (2007) (“The intentions of the *Ake* Court regarding the role of the expert are not obvious from the opinion”); Giannelli, *Ake v. Oklahoma*: The Right to Expert Assistance in a Post-*Daubert*, Post-

³The Sixth Circuit's experience, standing alone, is a telling reflection of *Ake*'s ambiguity. Years after *Kordenbrock*, a Sixth Circuit panel held that *Ake* requires a defense expert. *Powell v. Collins*, 332 F. 3d 376, 392 (2003). A later panel disagreed. *Smith v. Mitchell*, 348 F. 3d 177, 207–208, and n. 10 (2003). A different panel concluded three years later that the Circuit had “extend[ed] *Ake*” to require a defense expert. *Carter v. Mitchell*, 443 F. 3d 517, 526 (2006). A later panel insisted that “*Ake* does not entitle [defendants] to . . . an [independent psychiatric] expert,” but to “a ‘friend of the court’ appointment.” *Wogenstahl v. Mitchell*, 668 F. 3d 307, 340 (2012). The Sixth Circuit ultimately concluded that *Ake* did not itself clearly compel an answer to this question for AEDPA purposes. *Miller v. Colson*, 694 F. 3d 691, 698 (2012) (“[O]ur own internal conflict about the scope of *Ake* evidences the reasonableness of the state court decision”).

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DNA World, 89 Cornell L. Rev. 1305, 1399 (2004) (“It is uncertain from *Ake* whether the appointment of a neutral expert (who reports to the court) is sufficient or whether a ‘partisan’ defense expert is required”); Bailey, *Ake v. Oklahoma* and an Indigent Defendant’s ‘Right’ to an Expert Witness: A Promise Denied or Imagined? 10 Wm. & Mary Bill Rts. J. 401, 403 (2002) (“[C]ourts have struggled with whether an indigent is entitled to his own independent advocate or a neutral expert provided by the state,” and the Supreme Court “has . . . failed to confront this ambiguity”); Sullivan, Psychiatric Defenses in Arkansas Criminal Trials, 48 Ark. L. Rev. 439, 492 (1995) (“The issue left unresolved in *Ake*” is whether the defendant has “merely the right to an evaluation by a neutral mental health expert”); Giannelli et al., The Constitutional Right to Defense Experts, 16 Pub. Def. Rptr. 3 (Summer 1993) (“*Ake* fails to specify clearly the role of the expert—whether the appointment of a neutral expert, who reports to the court, satisfies due process, or whether a partisan defense expert is required”); Note, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of *Ake*, 30 Am. Crim. L. Rev. 1329, 1356 (1993) (calling this the “preeminent ambiguity” in the opinion); Harris, *Ake* Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent, 68 N. C. L. Rev. 763, 768, n. 44 (1990) (“The Court gave mixed signals concerning the psychiatrist’s role with regard to a criminal defendant, resulting in lower court disagreement on the proper interpretation of *Ake* on this point”); Comment, A Question of Competence: The Indigent Criminal Defendant’s Right to Adequate and Competent Psychiatric Assistance After *Ake v. Oklahoma*, 14 Vt. L. Rev. 121, 127 (1989) (*Ake* “left unanswered many questions,” including “whether the defendant is entitled to ‘neutral’ or ‘partisan’ assistance”); Dubia, The Defense Right to Psychiatric Assistance in Light of *Ake v. Oklahoma*, 1987 Army Lawyer 15, 19–20 (*Ake* “did not define clearly the role of the state-supplied psychiatrist,” and “[a]

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strong case can be made that *Ake* requires only access to an independent psychiatric examination”); Note, Due Process and Psychiatric Assistance: *Ake v. Oklahoma*, 21 Tulsa L. J. 121, 143 (1985) (“The Court is unclear as to the exact nature and scope of the substantive right it has created”); Sallet, Book Review, After Hinckley: The Insanity Defense Reexamined, 94 Yale L. J. 1545, 1551, n. 18 (1985) (predicting that “whether the Constitution requires one psychiatrist or rather one defense-oriented psychiatrist” would “likely be the next constitutional issue adjudicated”).

In this case, the Alabama courts held that *Ake* is satisfied by the appointment of a neutral expert, and it is impossible to say that “there could be no reasonable dispute that they were wrong.” *Donald*, 575 U. S., at 316.

II

McWilliams’s petition for certiorari asked us to decide two questions. Pet. for Cert. i. The first was the legal question discussed above; the second raised an issue that is tied to the specific facts of McWilliams’s case: whether the neutral expert appointed in this case failed to provide the assistance that *Ake* requires because he “distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records.” Pet. for Cert. i. Our Rules and practice disfavor questions of this nature, see this Court’s Rule 10, and we denied review. Heeding our decision, the parties briefed the first question but scarcely mentioned anything related to the second.

The Court, however, feels no similar obligation to abide by the Rules. The Court refuses to decide the legal question on which we granted review and instead decides the question on which review was denied. The Court holds that “Alabama here did not meet even *Ake*’s most basic requirements.” *Ante*, at 197. In support of this conclusion, the Court states that neither Dr. Goff (the expert appointed by the trial judge) nor any other expert provided assistance in

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understanding and evaluating medical reports and records, preparing a legal strategy, presenting evidence, or preparing to cross-examine witnesses. *Ante*, at 199. The Court does not question Dr. Goff’s qualifications or his objectivity. Instead, the crux of the Court’s complaint is that Dr. Goff merely submitted his report and did not provide further assistance to the defense. *Ibid.* But as far as the record shows, Dr. Goff was never asked and never refused to provide assistance to McWilliams. He did not provide the assistance that the Court finds essential because his report was not given to the parties until two days before sentencing, and arrangements were not made for him to provide the assistance during that brief interlude. Thus, the question that the Court decides is precisely the question *on which we denied review*: namely, whether Dr. Goff’s assistance was deficient because he “distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records.” Pet. for Cert. i

Our Rules instruct litigants that we will consider only the questions on which review was granted and “subsidiary question fairly included therein.” This Court’s Rule 14.1(a); *Yee v. Escondido*, 503 U. S. 519, 535 (1992) (The Court will consider an “unpresented question” only in “the most exceptional cases” (internal quotation marks omitted)); see also this Court’s Rule 24.1(a) (parties may not change the substance of the question presented once granted). And we have not hesitated to enforce these Rules when petitioners who “persuaded us to grant certiorari” on one question instead “chose to rely on a different argument in their merits briefing.” *Visa, Inc. v. Osborn*, 580 U. S. 993 (2016) (internal quotation marks omitted) (dismissing cases as improvidently granted on this ground).

These Rules exist for good reasons. Among other things, they give the parties notice of the question to be decided and ensure that we receive adversarial briefing, see *Yee, supra*, at 536, which in turns helps the Court reach sound decisions.

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But in this case, the Court feels free to disregard our Rules and long-established practice. If McWilliams, after inducing us to grant certiorari on the first question presented, had decided to ignore that question and instead brief a fact-specific alternative theory, we would have dismissed the case as improvidently granted. We do not tolerate this sort of bait-and-switch tactic from litigants, and we should not engage in it ourselves.

The Court's approach is acutely unfair to Alabama. The State surely believed that it did not need to brief the second question presented in McWilliams's petition. The State vigorously opposed review of that question, calling it "an invitation to conduct factbound error correction," Brief in Opposition 13, and we denied review. It will come as a nasty surprise to Alabama that the Court has ruled against it on the very question we declined to review—and without giving the State a fair chance to respond.⁴

It is worth remembering that today's ruling requires the Court to conclude that the state court's treatment of McWilliams's *Ake* claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U. S., at 103. This "standard is difficult to meet," *id.*, at 102, and Alabama would surely have appreciated the opportunity to contest whether McWilliams has met

⁴The Court is incorrect in suggesting that Alabama "devoted an entire section of its merits brief" to the question that the Court decides. *Ante*, at 198. In the section to which the Court refers, Alabama argued that even if McWilliams was entitled to relief under *Ake* to a partisan expert, no relief was warranted because he "had a consulting expert that did not report to the State," *i. e.*, "a psychologist employed at the University of Alabama," and because the trial court ordered every form of testing that the defense requested. Brief for Respondents 50–52. Exactly six sentences of the State's briefing in this section, *id.*, at 52, touch on the services provided by Dr. Goff and the trial court's denial of a continuance. The State's inclusion of this fleeting discussion cannot justify a decision based on a question on which review was denied.

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it. Denying Alabama that chance does not show “[a] proper respect for AEDPA’s high bar for habeas relief,” which counsels restraint in “disturbing the State’s significant interest in repose for concluded litigation, denying society the right to punish some admitted offenders, and intruding on state sovereignty to a degree matched by few exercises of federal authority.” *Virginia v. LeBlanc*, *ante*, at 96 (*per curiam*) (alterations and internal quotation marks omitted).

It is debatable whether the Court has even answered question two correctly (and, of course, meaningful briefing by the parties would have allowed the Court to answer the question with more confidence).⁵ But the fundamental point is that the Court should not have addressed this question at all.

III

Having completed an arduous detour around the question that we agreed to decide, the majority encounters an inconvenient roadblock: The Court of Appeals has already determined that any error of the sort the majority identifies today

⁵The Court never even recites the applicable standard: whether the Alabama courts erred beyond fairminded disagreement in rejecting McWilliams’s claim under *Ake v. Oklahoma*, 470 U. S. 68 (1985). *Harrington v. Richter*, 562 U. S. 86, 103 (2011). This bar is difficult for a habeas petitioner to hurdle, and it is far from clear that McWilliams has done so. The Court says that Dr. Goff did not play the role *Ake* requires of an expert because he only examined McWilliams and reported his findings to the trial court. *Ante*, at 198–199. But *that is exactly what the trial court (at McWilliams’s request) ordered him to do*. Rec. 1615, 1616. The Court briskly concludes that Dr. Goff did not assist the defense in understanding his report prior to the hearing or testify for McWilliams at the judicial sentencing hearing. *Ante*, at 199. But the Alabama Court of Criminal Appeals found “no indication in the record that [McWilliams] could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings.” *McWilliams v. State*, 640 So. 2d 982, 991 (1991). And the Eleventh Circuit saw no reason why McWilliams’s defense team could not have been in contact with Dr. Goff while he was preparing the report. *McWilliams v. Commissioner, Ala. Dept. of Corrections*, 634 Fed. Appx. 698, 706–707 (2015) (*per curiam*).

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was harmless. So the majority relies on the thinnest of reasons to require the Eleventh Circuit to redo its analysis. That conclusion is unwarranted, and nothing in the majority opinion prevents the Court of Appeals from reaching the same result on remand.

The majority claims that the Court of Appeals did not “specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered.” *Ante*, at 200. But the Court of Appeals concluded that, even if Dr. Goff’s performance did not satisfy *Ake*, the error did not have a substantial and injurious effect on the outcome of the sentencing proceeding. *McWilliams v. Commissioner, Ala. Dept. of Corrections*, 634 Fed. Appx. 698, 706–707 (CA11 2015) (*per curiam*). Thus, the Court of Appeals specifically addressed the very question that the majority instructs it to consider on remand.

If the majority disagrees with the Court of Appeals’ decision on that question, it should explain its reasons, but the majority is unwilling to tackle that matter and instead recites that “we are a court of review, not of first view.” *Ante*, at 200 (internal quotation marks omitted). The Court’s invocation of this oft-used formulation is utterly inapt because the Eleventh Circuit has already reviewed the question of harmless error. Moreover, unlike the question that the majority does decide, the harmless-error issue was at least briefed in a meaningful way by the parties. Brief for Petitioner 41–46; Brief for Respondents 52–56; Reply Brief 14–16.

Had the Court confronted the harmless-error issue, it would have found it difficult to reject the Court of Appeals’ conclusion that any *Ake* error here was harmless. In 1984, *McWilliams* “raped, robbed, and murdered Patricia Vallery Reynolds.” *McWilliams v. State*, 640 So. 2d 982, 986 (Ala. Crim. App. 1991) (internal quotation marks omitted). Reynolds was a clerk at a convenience store in Tuscaloosa,

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Alabama. *Ibid.* McWilliams robbed the store, brutally raped Reynolds in a back room, then left her on the floor to die after shooting her six times execution style with a .38-caliber pistol. *Ibid.* After McWilliams was apprehended, he bragged to other jail inmates about what he had done. *Id.*, at 987. The jury needed less than an hour of deliberation to find him guilty, and it recommended the death penalty by a 10-to-2 vote the following day. *Id.*, at 986.

Agreeing with the jury's nonbinding recommendation, the trial court imposed the death penalty based on three aggravating circumstances. McWilliams had prior violent felony convictions for first-degree robbery and first-degree rape. App. 182a–183a. He murdered Reynolds in the course of committing a robbery and rape. *Id.*, at 183a. And his crime “was especially heinous, atrocious, or cruel”: He executed the only potential eyewitness to his robbery, and his conduct during and after the crime showed an “obvious lack of regard or compassion for the life and human dignity of the victim.” *Id.*, at 184a. Balanced against these three aggravators was McWilliams's claim that he was psychotic and suffered from organic brain dysfunction—the mitigating evidence that Dr. Goff's report supposedly would have supported. But the sentencing court concluded that this evidence “d[id] not rise to the level of a mitigating circumstance,” in part because of the extensive evidence that McWilliams was feigning symptoms. *Id.*, at 188a. And in any event, the sentencing court found that “*the aggravating circumstances would far outweigh this as a mitigating circumstance.*” *Ibid.* (emphasis added).

The majority hints that the sentencing court's weighing might have been different if McWilliams had been afforded more time to work with Dr. Goff to prepare a mitigation presentation and to introduce Dr. Goff's testimony at the sentencing hearing. But there is little basis for this belief. The defense would have faced potential rebuttal testimony from three doctors who evaluated McWilliams and firmly

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concluded that McWilliams’s mental state did not reduce his responsibility for his actions. Rec. 1545 (Dr. Yumul) (McWilliams “was responsible and free of mental illness at the time of the alleged offense”); *id.*, at 1546 (Dr. Nagi) (McWilliams “was not suffering from a mental illness” at the time of the crime and “[t]here see[m] to be no mitigating circumstances involved in [his] case”); *ibid.* (Dr. Bryant) (finding no “evidence of psychiatric symptoms of other illness that would provide a basis for mitigating factors at the time of the alleged crime”). One of these psychiatrists also concluded that McWilliams was “grossly exaggerating his psychological symptoms to mimic mental illness” and that he “obviously” did so “to evade criminal prosecution.” *Ibid.* (Dr. Nagi). Even Dr. Goff found it “quite obvious” that McWilliams’s “symptoms of psychiatric disturbance [were] quite exaggerated and, perhaps, feigned.” *Id.*, at 1635. In light of all this, the defense would have faced an uphill battle in convincing the sentencing judge that, despite McWilliams’s consistent malingering, his mental health was so impaired that it constituted a mitigating circumstance and that it outweighed the three aggravators the State proved. If the sentencing judge had thought that there was a possibility that hearing from Dr. Goff would change his evaluation of aggravating and mitigating factors, he could have granted a continuance and called for Dr. Goff to appear. But he did not do so.

The majority also ignores the fact that McWilliams has already had the chance to show that the outcome of the sentencing proceeding would have been different if he had been given more expert assistance. In state postconviction proceedings, McWilliams argued that he was denied effective assistance of counsel because his lawyers did not obtain an expert who would have fully probed his mental state for purposes of mitigation. McWilliams called an expert, Dr. Woods, who offered the opinion that McWilliams suffered from bipolar disorder at the time of the crime and testified that McWilliams’s exaggeration of symptoms was not incon-

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sistent with psychiatric problems. But Dr. Woods also acknowledged that McWilliams “tr[ie]d to malingering for purposes of making himself look worse than he is,” agreed that this malingering could have been done for the purpose of avoiding the death penalty, and declined to say that McWilliams’s disorder explains why he raped and murdered Reynolds. Rec. 1002–1005, 1022–1023. Dr. Woods even endorsed Dr. Goff’s conclusion that McWilliams “exaggerated certain aspects of his impairment.” *Id.*, at 955 (“I think Dr. Goff did an excellent job of attempting to separate out what were in fact exaggerations and what was real impairment”). The State introduced a psychologist of its own (Dr. Kirkland) who strenuously disagreed with Dr. Woods’s diagnosis and concluded that nothing “indicate[s] that Mr. McWilliams was mentally impaired on the night of the offense.” *Id.*, at 1088. At the end of a lengthy hearing in which both experts addressed the malingering issue (see, *e. g.*, *id.*, at 935–943, 955, 964–966, 1076–1077), the state postconviction court found that “McWilliams’s claims based upon the testimony of Dr. Woods are without merit.” *Id.*, at 1810. It credited the “consensus opinion” reached by the three neutral state psychiatrists, who observed and evaluated McWilliams for over a month before his trial and concluded that he “did not suffer from a mental illness.” *Id.*, at 1812. It expressly found that “both the credibility of Dr. Woods and the reliability of his findings are questionable.” *Id.*, at 1814. And even if Dr. Woods’s diagnosis was accurate, the court stated, it “[would] not find that a failure to present” evidence of this sort “made a difference in the outcome.” *Id.*, 1815.⁶ The

⁶ Dr. Goff was notably absent from the postconviction proceeding. McWilliams’s failure to call him as a witness there creates a “void in the record” that prevents McWilliams from carrying his burden of showing “how additional time with Dr. Goff (and his report) would have benefited the defense.” 634 Fed. Appx., at 712 (Jordan, J., concurring). It also suggests that, to McWilliams’s postconviction counsel, Dr. Goff’s diagnosis and the opportunity to present it to the sentencer was not as important as McWilliams suggests.

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Alabama Court of Criminal Appeals affirmed, *McWilliams v. State*, 897 So. 2d 437 (2004), and the Alabama Supreme Court denied review. I see no ground for disturbing the Eleventh Circuit’s decision on harmless error.⁷

* * *

The Court’s decision represents an inexcusable departure from sound practice. I would affirm the judgment below, and I therefore respectfully dissent.

⁷ McWilliams’s entitlement to relief under *Ake* is questionable for an additional reason. *Ake* held that the right to a psychiatric expert at capital sentencing comes into play “when the State presents psychiatric evidence of the defendant’s future dangerousness.” 470 U. S., at 83–84, 86. Here, the State did not introduce such evidence because future dangerousness was not an aggravator under Alabama law. See App. 182a–184a. As lower courts have noted, we have never held that a capital defendant is entitled to the assistance of a psychiatric expert at sentencing where future dangerousness is not in issue and the State does not introduce psychiatric evidence to prove it. See, e. g., *Revilla v. Gibson*, 283 F. 3d 1203, 1220–1221 (CA10 2002) (“*Ake* held only that an indigent capital defendant must, upon request, be provided an expert for the penalty phase when the State presents psychiatric evidence of the defendant’s future dangerousness” (internal quotation marks omitted)); *Ramdass v. Angelone*, 187 F. 3d 396, 409 (CA4 1999) (“*Ake* provides a right to assistance of a mental health expert only if . . . , in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony”); *Goodwin v. Johnson*, 132 F. 3d 162, 189 (CA5 1997), as amended Jan. 15, 1998 (“*Ake* only creates an entitlement to the assistance of a psychiatrist during sentencing when the state offers psychiatric evidence of the defendant’s future dangerousness” (emphasis deleted)).

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MATAL, INTERIM DIRECTOR, UNITED STATES
PATENT AND TRADEMARK OFFICE *v.* TAMCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

No. 15–1293. Argued January 18, 2017—Decided June 19, 2017

Simon Tam, lead singer of the rock group “The Slants,” chose this moniker in order to “reclaim” the term and drain its denigrating force as a derogatory term for Asian persons. Tam sought federal registration of the mark “THE SLANTS.” The Patent and Trademark Office (PTO) denied the application under a Lanham Act provision prohibiting the registration of trademarks that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead.” 15 U.S.C. § 1052(a). Tam contested the denial of registration through the administrative appeals process, to no avail. He then took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment’s Free Speech Clause.

Held: The judgment is affirmed.

808 F. 3d 1321, affirmed.

JUSTICE ALITO delivered the opinion of the Court with respect to Parts I, II, and III–A, concluding:

1. The disparagement clause applies to marks that disparage the members of a racial or ethnic group. Tam’s view, that the clause applies only to natural or juristic persons, is refuted by the plain terms of the clause, which uses the word “persons.” A mark that disparages a “substantial” percentage of the members of a racial or ethnic group necessarily disparages many “persons,” namely, members of that group. Tam’s narrow reading also clashes with the breadth of the disparagement clause, which by its terms applies not just to “persons,” but also to “institutions” and “beliefs.” § 1052(a). Had Congress wanted to confine the reach of the clause, it could have used the phrase “particular living individual,” which it used in neighboring § 1052(c). Tam contends that his interpretation is supported by legislative history and by the PTO’s practice for many years of registering marks that plainly denigrated certain groups. But an inquiry into the meaning of the statute’s text ceases when, as here, “the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (internal quotation marks omitted). Even if resort to legislative history and early enforcement practice were appropriate, Tam has presented nothing showing a congressional intent to

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adopt his interpretation, and the PTO's practice in the years following the disparagement clause's enactment is unenlightening. Pp. 230–233.

2. The disparagement clause violates the First Amendment's Free Speech Clause. Contrary to the Government's contention, trademarks are private, not government, speech. Because the "Free Speech Clause . . . does not regulate government speech," *Pleasant Grove City v. Summum*, 555 U. S. 460, 467, the government is not required to maintain viewpoint neutrality on its own speech. This Court exercises great caution in extending its government-speech precedents, for if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.

The Federal Government does not dream up the trademarks registered by the PTO. Except as required by § 1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. If the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. And once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. It is thus far-fetched to suggest that the content of a registered mark is government speech, especially given the fact that if trademarks become government speech when they are registered, the Federal Government is babbling prodigiously and incoherently. And none of this Court's government-speech cases supports the idea that registered trademarks are government speech. *Johanns v. Livestock Marketing Assn.*, 544 U. S. 550; *Pleasant Grove City v. Summum*, *supra*; and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200, distinguished. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine, for other systems of government registration (such as copyright) could easily be characterized in the same way. Pp. 233–239.

JUSTICE ALITO, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE BREYER, concluded in Parts III–B, III–C, and IV:

(a) The Government's argument that this case is governed by the Court's subsidized-speech cases is unpersuasive. Those cases all involved cash subsidies or their equivalent, *e. g.*, funds to private parties for family planning services in *Rust v. Sullivan*, 500 U. S. 173, and cash grants to artists in *National Endowment for Arts v. Finley*, 524 U. S. 569. The federal registration of a trademark is nothing like these programs. The PTO does not pay money to parties seeking registration of a mark; it requires the payment of fees to file an application and to maintain the registration once it is granted. The Government responds that registration provides valuable non-monetary benefits traceable to

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the Government's resources devoted to registering the marks, but nearly every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e. g.*, the adjudication of private lawsuits and the use of public parks and highways. Pp. 239–241.

(b) Also unpersuasive is the Government's claim that the disparagement clause is constitutional under a "government-program" doctrine, an argument which is based on a merger of this Court's government-speech cases and subsidy cases. It points to two cases involving a public employer's collection of union dues from its employees, *Davenport v. Washington Ed. Assn.*, 551 U. S. 177, and *Ysursa v. Pocatello Ed. Assn.*, 555 U. S. 353, but these cases occupy a special area of First Amendment case law that is far removed from the registration of trademarks. Cases in which government creates a limited public forum for private speech, thus allowing for some content- and speaker-based restrictions, see, *e. g.*, *Good News Club v. Milford Central School*, 533 U. S. 98, 106–107; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831, are potentially more analogous. But even in those cases, viewpoint discrimination is forbidden. The disparagement clause denies registration to any mark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint. The "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U. S. 576, 592. Pp. 241–244.

(c) The dispute between the parties over whether trademarks are commercial speech subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 557, need not be resolved here because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve "a substantial interest" and be "narrowly drawn." *Id.*, at 564–565 (internal quotation marks omitted). One purported interest is in preventing speech expressing ideas that offend, but that idea strikes at the heart of the First Amendment. The second interest asserted is protecting the orderly flow of commerce from disruption caused by trademarks that support invidious discrimination; but the clause, which reaches any trademark that disparages *any person, group, or institution*, is not narrowly drawn. Pp. 244–247.

JUSTICE KENNEDY, joined by JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, agreed that 15 U. S. C. § 1052(a) constitutes viewpoint discrimination, concluding:

(a) With few narrow exceptions, a fundamental principle of the First Amendment is that the government may not punish or suppress speech

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based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829. The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. Here, the disparagement clause identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols,” §1052(a); and within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination. The Government’s arguments in defense of the statute are unpersuasive. Pp. 248–251.

(b) Regardless of whether trademarks are commercial speech, the viewpoint based discrimination here necessarily invokes heightened scrutiny. See *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 566. To the extent trademarks qualify as commercial speech, they are an example of why that category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. To permit viewpoint discrimination in this context is to permit Government censorship. Pp. 251–253.

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined except for Part II, and an opinion with respect to Parts III–B, III–C, and IV, in which ROBERTS, C. J., and THOMAS and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 247. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 254. GORSUCH, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Stewart argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Gershengorn, Principal Deputy Assistant Attorney General Mizer, Nicole A. Saharsky, Douglas N. Letter, Mark R. Freeman, Daniel Tenny, Joshua M. Salzman, Sarah Harris, Nathan K. Kelley, Thomas W. Krause, Christina J. Hiefer, Thomas L. Casagrande, Molly R. Silfen, and Mary Beth Walker.*

Counsel

John C. Connell argued the cause for respondent. With him on the brief were *Joel G. MacMull*, *Stuart Banner*, and *Eugene Volokh*.*

*Briefs of *amici curiae* urging reversal were filed for the Fred T. Korematsu Center for Law and Equity et al. by *William C. Rava* and *Elvira Castillo*; for Law Professors by *Christine Haight Farley* and *Rebecca Tushet*; for Native American Organizations by *Charles A. Rothfeld*, *Andrew J. Pincus*, *Paul W. Hughes*, *Michael B. Kimberly*, *Richard A. Guest*, and *Larry S. Gondelman*; and for Amanda Blackhorse et al. by *Jesse A. Witten*.

Briefs of *amici curiae* urging affirmance were filed for the Alliance Defending Freedom by *Kristen Waggoner*, *Kevin H. Theriot*, *David A. Cortman*, and *Rory T. Gray*; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for the American Civil Liberties Union et al. by *Lee Rowland* and *Esha Bhandari*; for the American Jewish Committee by *Kannon K. Shanmugam* and *Allison Jones Rushing*; for the Becket Fund for Religious Liberty by *Mark L. Rienzi* and *Adele Auxier Keim*; for the Cato Institute et al. by *Ilya Shapiro*; for the Chamber of Commerce of the United States of America by *Eugene Scalia*, *Amir C. Tayrani*, *Michael R. Huston*, *Lily Fu Claffee*, *Kate Comerford Todd*, and *Warren Postman*; for Constitutional Law Professors by *Floyd Abrams* and *Rodney A. Smolla*; for the First Amendment Lawyers Association by *Marc J. Randazza*; for the International Trademark Association by *Anthony J. Dreyer*, *Andrew L. Green*, *Lawrence K. Nodine*, and *Robert D. Carroll*; for the Justice and Freedom Fund by *James L. Hirszen* and *Deborah J. Dewart*; for the Pacific Legal Foundation by *Joshua P. Thompson*; for Pro-Football, Inc., by *Lisa S. Blatt*, *Robert A. Garrett*, *Robert L. Raskoff*, *Todd Anten*, and *Jessica A. Rose*; for The Rutherford Institute et al. by *Megan L. Brown*, *Joshua S. Turner*, *Christopher J. Kelly*, *Dwayne D. Sam*, and *John W. Whitehead*; for the San Francisco Dykes on Bikes Women's Motorcycle Contingent, Inc., by *Mark A. Lemley*, *Michael A. Feldman*, *Brooke Oliver*, and *Tobias Barrington Wolf*; for the Thomas Jefferson Center for the Protection of Free Expression et al. by *J. Joshua Wheeler*, *Clayton N. Hansen*, *David Greene*, and *Daniel Nazer*; for Erik Brunetti by *John R. Sommer*; for Gregory Dolin et al. by *Matthew Dowd*; for Hugh C. Hansen by *Mr. Hansen, pro se*; and for Edward Lee, by *Mr. Lee, pro se*.

Briefs of *amici curiae* were filed for the American Bar Association by *Linda A. Klein*, *Theodore H. Davis*, and *Thomas H. Davis, Jr.*; for the American Intellectual Property Law Association by *Paul M. Smith* and

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JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Parts III–B, III–C, and IV, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE BREYER join.

This case concerns a dance-rock band’s application for federal trademark registration of the band’s name, “The Slants.” “Slants” is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to “reclaim” the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may “disparage . . . or bring . . . into contempt[t] or disrepute” any “persons, living or dead.” 15 U. S. C. §1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.

I

A

“The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan’s goods from those of others.” *B&B Hardware, Inc. v. Hargis Industries, Inc.*,

Mark L. Whitaker; for the Asian Americans Advancing Justice | AAJC et al. by *Daniel J. Kornstein* and *Cecelia Chang*; for Certain Members of Congress by *John Dragseth* and *John T. Johnson*; for the New York Intellectual Property Law Association by *Dyan Finguera-DuCharme*, *Walter E. Hanley, Jr.*, *David P. Goldberg*, *Pina M. Campagna*, *Robert J. Rando*, *William Thomashower*, and *Robert M. Isackson*; for Public Citizen, Inc., by *Scott L. Nelson*, *Allison M. Zieve*, and *Julie A. Murray*; and for Public Knowledge by *Phillip R. Malone* and *Charles Duan*.

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575 U. S. 138, 142 (2015); see also *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U. S. 205, 212 (2000). A trademark “designate[s] the goods as the product of a particular trader” and “protect[s] his good will against the sale of another’s product as his.” *United Drug Co. v. Theodore Rectanus Co.*, 248 U. S. 90, 97 (1918); see also *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 412–413 (1916). It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid. See *Wal-Mart Stores, supra*, at 212–213; *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985).

“[F]ederal law does not create trademarks.” *B&B Hardware, supra*, at 142. Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country. 3 J. McCarthy, *Trademarks and Unfair Competition* § 19:8 (4th ed. 2017) (hereinafter McCarthy); 1 *id.*, §§ 5:1, 5:2, 5:3; Pattishall, *The Constitutional Foundations of American Trademark Law*, 78 *Trademark Rep.* 456, 457–458 (1988); Pattishall, *Two Hundred Years of American Trademark Law*, 68 *Trademark Rep.* 121, 121–123 (1978); see *Trade-Mark Cases*, 100 U. S. 82, 92 (1879). For most of the 19th century, trademark protection was the province of the States. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U. S. 763, 780–782 (1992) (Stevens, J., concurring in judgment); *id.*, at 785 (THOMAS, J., concurring in judgment). Eventually, Congress stepped in to provide a degree of national uniformity, passing the first federal legislation protecting trademarks in 1870. See Act of July 8, 1870, §§ 77–84, 16 Stat. 210–212. The foundation of current federal trademark law is the Lanham Act, enacted in 1946. See Act of July 5, 1946, ch. 540, 60 Stat. 427. By that time, trademark had expanded far beyond phrases that do no more than identify a good or service. Then, as now, trademarks often consisted of catchy phrases that convey a message.

Under the Lanham Act, trademarks that are “used in commerce” may be placed on the “principal register,” that is,

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they may be federally registered. 15 U.S.C. §1051(a)(1). And some marks “capable of distinguishing [an] applicant’s goods or services and not registrable on the principal register . . . which are in lawful use in commerce by the owner thereof” may instead be placed on a different federal register: the supplemental register. §1091(a). There are now more than 2 million marks that have active federal certificates of registration. PTO Performance and Accountability Report, Fiscal Year 2016, p. 192 (Table 15), <https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf> (all Internet materials as last visited June 16, 2017). This system of federal registration helps to ensure that trademarks are fully protected and supports the free flow of commerce. “[N]ational protection of trademarks is desirable,” we have explained, “because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.” *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 531 (1987) (internal quotation marks omitted); see also *Park ’N Fly, Inc., supra*, at 198 (“The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers”).

B

Without federal registration, a valid trademark may still be used in commerce. See 3 McCarthy §19:8. And an unregistered trademark can be enforced against would-be infringers in several ways. Most important, even if a trademark is not federally registered, it may still be enforceable under §43(a) of the Lanham Act, which creates a federal cause of action for trademark infringement. See *Two Pesos, supra*, at 768 (“Section 43(a) prohibits a broader range of practices than does §32, which applies to registered marks, but it is common ground that §43(a) protects qualifying unregistered trademarks” (internal quotation marks and cita-

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tion omitted)).¹ Unregistered trademarks may also be entitled to protection under other federal statutes, such as the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d). See 5 *McCarthy* §25A:49, at 25A-198 (“[T]here is no requirement [in the Anticybersquatting Act] that the protected ‘mark’ be registered: unregistered common law marks are protected by the Act”). And an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State’s registration system. See 3 *id.*, § 19:3, at 19-23 (explaining that “[t]he federal system of registration and protection does not preempt parallel state law protection, either by state common law or state registration,” and “[i]n the vast majority of situations, federal and state trademark law peacefully co-exist”); *id.*, § 22:1 (discussing state trademark registration systems).

Federal registration, however, “confers important legal rights and benefits on trademark owners who register their marks.” *B&B Hardware*, 575 U.S., at 142 (internal quotation marks omitted). Registration on the principal register (1) “serves as ‘constructive notice of the registrant’s claim of ownership’ of the mark,” *ibid.* (quoting 15 U.S.C. § 1072); (2) “is ‘prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s own-

¹ In the opinion below, the Federal Circuit opined that although “[s]ection 43(a) allows for a federal suit to protect an unregistered trademark,” “it is not at all clear” that respondent could bring suit under § 43(a) because “there is no authority extending § 43(a) to marks denied under § 2(a)’s disparagement provision.” *In re Tam*, 808 F.3d 1321, 1344-1345, n. 11 (en banc), as corrected (Feb. 11, 2016). When drawing this conclusion, the Federal Circuit relied in part on our statement in *Two Pesos* that “the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a).” 505 U.S., at 768. We need not decide today whether respondent could bring suit under § 43(a) if his application for federal registration had been lawfully denied under the disparagement clause.

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ership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate,” *B&B Hardware*, 575 U. S., at 142–143 (quoting § 1057(b)); and (3) can make a mark “incontestable” “once a mark has been registered for five years,” *id.*, at 143 (quoting §§ 1065, 1115(b)); see *Park ’N Fly*, 469 U. S., at 193. Registration also enables the trademark holder “to stop the importation into the United States of articles bearing an infringing mark.” 3 *McCarthy* § 19:9, at 19–38; see 15 U. S. C. § 1124.

C

The Lanham Act contains provisions that bar certain trademarks from the principal register. For example, a trademark cannot be registered if it is “merely descriptive or deceptively misdescriptive” of goods, § 1052(e)(1), or if it is so similar to an already registered trademark or trade name that it is “likely . . . to cause confusion, or to cause mistake, or to deceive,” § 1052(d).

At issue in this case is one such provision, which we will call “the disparagement clause.” This provision prohibits the registration of a trademark “which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” § 1052(a).² This clause appeared in the original Lanham Act and has remained the same to this day. See § 2(a), 60 Stat. 428.

When deciding whether a trademark is disparaging, an examiner at the PTO generally applies a “two-part test.” The examiner first considers “the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services.” Trademark Manual of

²The disparagement clause also prevents a trademark from being registered on the supplemental register. § 1091(a).

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Examining Procedure § 1203.03(b)(i) (Apr. 2017), p. 1200–150, <http://tmep.uspto.gov>. “If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols,” the examiner moves to the second step, asking “whether that meaning may be disparaging to a substantial composite³ of the referenced group.” *Ibid.* If the examiner finds that a “substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark . . . to be disparaging in the context of contemporary attitudes,” a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. *Ibid.* What is more, the PTO has specified that “[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable.” *Ibid.*

D

Simon Tam is the lead singer of “The Slants.” *In re Tam*, 808 F. 3d 1321, 1331 (CA Fed. 2015) (en banc), as corrected (Feb. 11, 2016). He chose this moniker in order to “reclaim” and “take ownership” of stereotypes about people of Asian ethnicity. *Ibid.* (internal quotation marks omitted). The group “draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes” and has given its albums names such as “The Yellow Album” and “Slanted Eyes, Slanted Hearts.” *Ibid.*

Tam sought federal registration of “THE SLANTS” on the principal register, App. 17, but an examining attorney at the PTO rejected the request, applying the PTO’s two-part framework and finding that “there is . . . a substantial composite of persons who find the term in the applied-for mark offensive.” *Id.*, at 30. The examining attorney relied in part on the fact that “numerous dictionaries define ‘slants’

³By “composite,” we assume the PTO means component.

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or ‘slant-eyes’ as a derogatory or offensive term.” *Id.*, at 29. The examining attorney also relied on a finding that “the band’s name has been found offensive numerous times”—citing a performance that was canceled because of the band’s moniker and the fact that “several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive.” *Id.*, at 29–30.

Tam contested the denial of registration before the examining attorney and before the PTO’s Trademark Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment’s Free Speech Clause. The majority found that the clause engages in viewpoint-based discrimination, that the clause regulates the expressive component of trademarks and consequently cannot be treated as commercial speech, and that the clause is subject to and cannot satisfy strict scrutiny. See 808 F. 3d, at 1334–1339. The majority also rejected the Government’s argument that registered trademarks constitute government speech, as well as the Government’s contention that federal registration is a form of government subsidy. See *id.*, at 1339–1355. And the majority opined that even if the disparagement clause were analyzed under this Court’s commercial-speech cases, the clause would fail the “intermediate scrutiny” that those cases prescribe. See *id.*, at 1355–1357.

Several judges wrote separately, advancing an assortment of theories. Concurring, Judge O’Malley agreed with the majority’s reasoning but added that the disparagement clause is unconstitutionally vague. See *id.*, at 1358–1363. Judge Dyk concurred in part and dissented in part. He argued that trademark registration is a government subsidy and that the disparagement clause is facially constitutional, but he found the clause unconstitutional as applied to THE SLANTS because that mark constitutes “core expression” and was not adopted for the purpose of disparaging Asian-

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Americans. See *id.*, at 1363–1374. In dissent, Judge Lourie agreed with Judge Dyk that the clause is facially constitutional but concluded for a variety of reasons that it is also constitutional as applied in this case. See *id.*, at 1374–1376. Judge Reyna also dissented, maintaining that trademarks are commercial speech and that the disparagement clause survives intermediate scrutiny because it “directly advances the government’s substantial interest in the orderly flow of commerce.” See *id.*, at 1376–1382.

The Government filed a petition for certiorari, which we granted in order to decide whether the disparagement clause “is facially invalid under the Free Speech Clause of the First Amendment.” Pet. for Cert. i; see *sub nom. Lee v. Tam*, 579 U. S. 969 (2016).

II

Before reaching the question whether the disparagement clause violates the First Amendment, we consider Tam’s argument that the clause does not reach marks that disparage racial or ethnic groups. The clause prohibits the registration of marks that disparage “persons,” and Tam claims that the term “persons” “includes only natural and juristic persons,” not “non-juristic entities such as racial and ethnic groups.” Brief for Respondent 46.

Tam never raised this argument before the PTO or the Federal Circuit, and we declined to grant certiorari on this question when Tam asked us to do so, see Brief in Response to Pet. for Cert., pp. i, 17–21. Normally, that would be the end of the matter in this Court. See, e. g., *Yee v. Escondido*, 503 U. S. 519, 534–538 (1992); *Freytag v. Commissioner*, 501 U. S. 868, 894–895 (1991) (Scalia, J., concurring in part and concurring in judgment).

But as the Government pointed out in connection with its petition for certiorari, accepting Tam’s statutory interpretation would resolve this case and leave the First Amendment question for another day. See Reply to Brief in Response 9. “[W]e have often stressed” that it is “importan[t to] avoi[d]

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the premature adjudication of constitutional questions,” *Clinton v. Jones*, 520 U. S. 681, 690 (1997), and that “we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable,” *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101, 105 (1944). See also *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 461 (1945); *Burton v. United States*, 196 U. S. 283, 295 (1905). We thus begin by explaining why Tam’s argument about the definition of “persons” in the Lanham Act is meritless.

As noted, the disparagement clause prohibits the registration of trademarks “which may disparage . . . persons, living or dead.” 15 U. S. C. § 1052(a). Tam points to a definition of “person” in the Lanham Act, which provides that “[i]n the construction of this chapter, unless the contrary is plainly apparent from the context . . . [t]he term ‘person’ and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person.” § 1127. Because racial and ethnic groups are neither natural nor “juristic” persons, Tam asserts, these groups fall outside this definition. Brief for Respondent 46–48.

Tam’s argument is refuted by the plain terms of the disparagement clause. The clause applies to marks that disparage “persons.” A mark that disparages a “substantial” percentage of the members of a racial or ethnic group, Trademark Manual § 1203.03(b)(i), at 1200–150, necessarily disparages many “persons,” namely, members of that group. Tam’s argument would fail even if the clause used the singular term “person,” but Congress’ use of the plural “persons” makes the point doubly clear.⁴

⁴Tam advances a convoluted textual argument that goes as follows. The definition of a “person” in 15 U. S. C. § 1127 does not include a “non-juristic person,” *i. e.*, a group that cannot sue or be sued in its own right. Brief for Respondent 46–47. Such groups consist of multiple natural per-

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Tam's narrow reading of the term "persons" also clashes with the breadth of the disparagement clause. By its terms, the clause applies to marks that disparage not just "persons" but also "institutions" and "beliefs." 15 U. S. C. § 1052(a). It thus applies to the members of any group whose members share particular "beliefs," such as political, ideological, and religious groups. It applies to marks that denigrate "institutions," and on Tam's reading, it also reaches "juristic" persons such as corporations, unions, and other unincorporated associations. See § 1127. Thus, the clause is not limited to marks that disparage a particular natural person. If Congress had wanted to confine the reach of the disparagement clause in the way that Tam suggests, it would have been easy to do so. A neighboring provision of the Lanham Act denies registration to any trademark that "[c]onsists of or comprises a name, portrait, or signature identifying a *particular living individual* except by his written consent." § 1052(c) (emphasis added).

Tam contends that his interpretation of the disparagement clause is supported by its legislative history and by the PTO's willingness for many years to register marks that plainly denigrated African-Americans and Native Americans. These arguments are unpersuasive. As always, our inquiry into the meaning of the statute's text ceases when "the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co.*, 534 U. S. 438, 450 (2002) (internal quotation marks omitted). Here, it is clear that the prohibition against registering trademarks "which may disparage . . . persons,"

sons. Therefore, the members of such groups are not "persons" under the disparagement clause. *Id.*, at 46–48.

This argument leads to the absurd result that no person is a "person" within the meaning of the disparagement clause. This is so because every person is a member of a "non-juristic" group, *e. g.*, right-handers, left-handers, women, men, people born on odd-numbered days, people born on even-numbered days.

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§ 1052(a), prohibits registration of terms that disparage persons who share a common race or ethnicity.

Even if resort to legislative history and early enforcement practice were appropriate, we would find Tam’s arguments unconvincing. Tam has not brought to our attention any evidence in the legislative history showing that Congress meant to adopt his interpretation. And the practice of the PTO in the years following the enactment of the disparagement clause is unenlightening. The admitted vagueness of the disparagement test⁵ and the huge volume of applications have produced a haphazard record of enforcement. (Even today, the principal register is replete with marks that many would regard as disparaging to racial and ethnic groups.⁶) Registration of the offensive marks that Tam cites is likely attributable not to the acceptance of his interpretation of the clause but to other factors—most likely the regrettable attitudes and sensibilities of the time in question.

III

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends

⁵The PTO has acknowledged that the guidelines “for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is necessarily a highly subjective one.” *In re In Over Our Heads, Inc.*, 16 USPQ 2d 1653, 1654 (TTAB 1990) (brackets and internal quotation marks omitted). The PTO has similarly observed that whether a mark is disparaging “is highly subjective and, thus, general rules are difficult to postulate.” *Harjo v. Pro-Football Inc.*, 50 USPQ 2d 1705, 1737 (TTAB 1999), rev’d, 284 F. Supp. 2d 96 (DC 2003), rev’d and remanded in part, 415 F. 3d 44 (CADC 2005) (*per curiam*).

⁶See, e. g., App. to Brief for Pro-Football, Inc., as *Amicus Curiae*.

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(1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new “government-program” doctrine. We address each of these arguments below.

A

The First Amendment prohibits Congress and other government entities and actors from “abridging the freedom of speech”; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that “[t]he Free Speech Clause . . . does not regulate government speech.” *Pleasant Grove City v. Summum*, 555 U. S. 460, 467 (2009); see *Johanns v. Livestock Marketing Assn.*, 544 U. S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny”); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 235 (2000).

As we have said, “it is not easy to imagine how government could function” if it were subject to the restrictions that the First Amendment imposes on private speech. *Summum*, *supra*, at 468; see *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200, 207–208 (2015). “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,” *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384, 394 (1993), but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint-neutrality when its officers and employees speak about that venture.

Here is a simple example. During the Second World War, the Federal Government produced and distributed millions

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of posters to promote the war effort.⁷ There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources.⁸ These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.

But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here, 15 U. S. C. §1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register. Instead, if the mark meets the Lanham Act’s viewpoint-neutral requirements, registration is mandatory. *Ibid.* (requiring that “[n]o trademark . . . shall be refused registration on the principal register on account of its nature unless” it falls within an enumerated statutory exception). And if an examiner finds that a mark is eligible for placement on the principal register, that decision is not reviewed by any higher official unless the registration is challenged. See

⁷ See, e. g., D. Nelson, *The Posters That Won the War* (1991).

⁸ *Ibid.*

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§§ 1062(a), 1071; 37 CFR § 41.31(a) (2016). Moreover, once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. See 15 U. S. C. §§ 1058(a), 1059, 1064; 37 CFR §§ 2.111(b), 2.160.

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. See App. to Brief for Pro-Football, Inc., as *Amicus Curiae*. It is expressing contradictory views.⁹ It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to “make.believe” (Sony),¹⁰ “Think different” (Apple),¹¹ “Just do it” (Nike),¹² or “Have it your way” (Burger King)¹³? Was the Government warning about a coming disaster when it registered the mark “EndTime Ministries”¹⁴?

⁹ Compare “Abolish Abortion,” Registration No. 4,935,774 (Apr. 12, 2016), with “I Stand With Planned Parenthood,” Registration No. 5,073,573 (Nov. 1, 2016); compare “Capitalism Is Not Moral, Not Fair, Not Freedom,” Registration No. 4,696,419 (Mar. 3, 2015), with “Capitalism Ensuring Innovation,” Registration No. 3,966,092 (May 24, 2011); compare “Global Warming Is Good,” Registration No. 4,776,235 (July 21, 2015), with “A Solution to Global Warming,” Registration No. 3,875,271 (Nov. 10, 2010).

¹⁰ “make.believe,” Registration No. 4,342,903 (May 28, 2013).

¹¹ “Think Different,” Registration No. 2,707,257 (Apr. 15, 2003).

¹² “Just Do It,” Registration No. 1,875,307 (Jan. 25, 1995).

¹³ “Have It Your Way,” Registration No. 0,961,016 (June 12, 1973).

¹⁴ “EndTime Ministries,” Registration No. 4,746,225 (June 2, 2015).

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The PTO has made it clear that registration does not constitute approval of a mark. See *In re Old Glory Condom Corp.*, 26 USPQ 2d 1216, 1220, n. 3 (TTAB 1993) (“[I]ssuance of a trademark registration . . . is not a government imprimatur”). And it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means. See *Application of National Distillers & Chemical Corp.*, 49 C. C. P. A. (Pat.) 854, 863, 297 F. 2d 941, 949 (1962) (Rich, J., concurring) (“The purchasing public knows no more about trademark registrations than a man walking down the street in a strange city knows about legal title to the land and buildings he passes” (emphasis deleted)).

None of our government-speech cases even remotely supports the idea that registered trademarks are government speech. In *Johanns*, we considered advertisements promoting the sale of beef products. A federal statute called for the creation of a program of paid advertising “to advance the image and desirability of beef and beef products.” 544 U. S., at 561 (quoting 7 U. S. C. §2902(13)). Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad. 544 U. S., at 561. Noting that “[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government,” we held that the ads were government speech. *Id.*, at 560–561. The Government’s involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered.

Our decision in *Summum* is similarly far afield. A small city park contained 15 monuments. 555 U. S., at 464. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. *Id.*, at 464–465. A religious group claimed that the city, by accepting donated mon-

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uments, had created a limited public forum for private speech and was therefore obligated to place in the park a monument expressing the group's religious beliefs.

Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; “[p]ublic parks are often closely identified in the public mind with the government unit that owns the land”; and “[t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message.” *Id.*, at 472.

Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U. S. C. § 1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.

This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. 576 U. S., at 209–210. First, license plates have long been used by the States to convey state messages. *Id.*, at 210–212. Second, license plates “are often closely identified in the public mind” with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of “government ID.” *Id.*, at 212 (internal quotation marks omitted). Third, Texas “maintain[ed] direct control over the messages conveyed on its specialty plates.” *Id.*, at 213. As explained above, none of these factors are present in this case.

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In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way.

Perhaps the most worrisome implication of the Government's argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation? See 808 F. 3d, at 1346 (explaining that if trademark registration amounts to government speech, "then copyright registration" which "has identical accoutrements" would "likewise amount to government speech").

The Government attempts to distinguish copyright on the ground that it is "the engine of free expression," Brief for Petitioner 47 (quoting *Eldred v. Ashcroft*, 537 U. S. 186, 219 (2003)), but as this case illustrates, trademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words.

Trademarks are private, not government, speech.

B

We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law. "[W]e have held that the Government 'may not deny a bene-

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fit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.’” *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, 570 U. S. 205, 214 (2013) (some internal quotation marks omitted). But at the same time, government is not required to subsidize activities that it does not wish to promote. *Id.*, at 215. Determining which of these principles applies in a particular case “is not always self-evident,” *id.*, at 217, but no difficult question is presented here.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust v. Sullivan*, 500 U. S. 173 (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts v. Finley*, 524 U. S. 569 (1998), cash grants were awarded to artists. And federal funding for public libraries was at issue in *United States v. American Library Assn., Inc.*, 539 U. S. 194 (2003). In other cases, we have regarded tax benefits as comparable to cash subsidies. See *Regan v. Taxation With Representation of Wash.*, 461 U. S. 540 (1983); *Cammarano v. United States*, 358 U. S. 498 (1959).

The federal registration of a trademark is nothing like the programs at issue in these cases. The PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee of \$225–\$600. 37 CFR §2.6(a)(1). (Tam submitted a fee of \$275 as part of his application to register THE SLANTS. App. 18.) And to maintain federal registration, the holder of a mark must pay a fee of \$300–\$500 every 10 years. §2.6(a)(5); see also 15 U. S. C. §1059(a). The Federal Circuit concluded that these fees have fully supported the registration system for the past 27 years. 808 F. 3d, at 1353.

The Government responds that registration provides valuable non-monetary benefits that “are directly traceable to the

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resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks.” Brief for Petitioner 27. But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e. g.*, the adjudication of private lawsuits and the use of public parks and highways.

Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests; they issue driver’s licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits.

Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

C

Finally, the Government urges us to sustain the disparagement clause under a new doctrine that would apply to “government-program” cases. For the most part, this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks. The only new element in this construct consists of two cases involving a public employer’s collection of union dues from its employees. But those cases occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks.

In *Davenport v. Washington Ed. Assn.*, 551 U. S. 177, 181–182 (2007), a Washington law permitted a public employer automatically to deduct from the wages of employees who chose not to join the union the portion of union dues used for activities related to collective bargaining. But unless these employees affirmatively consented, the law did not allow the

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employer to collect the portion of union dues that would be used in election activities. *Id.*, at 180–182. A public employee union argued that this law unconstitutionally restricted its speech based on its content; that is, the law permitted the employer to assist union speech on matters relating to collective bargaining but made it harder for the union to collect money to support its election activities. *Id.*, at 188. Upholding this law, we characterized it as imposing a “modest limitation” on an “extraordinary benefit,” namely, taking money from the wages of non-union members and turning it over to the union free of charge. *Id.*, at 184. Refusing to confer an even greater benefit, we held, did not upset the marketplace of ideas and did not abridge the union’s free speech rights. *Id.*, at 189–190.

Ysursa v. Pocatello Ed. Assn., 555 U. S. 353 (2009), is similar. There, we considered an Idaho law that allowed public employees to elect to have union dues deducted from their wages but did not allow such a deduction for money remitted to the union’s political action committee. *Id.*, at 355. We reasoned that the “the government [was] not required to assist others in funding the expression of particular ideas.” *Id.*, at 358; see also *id.*, at 355 (“The First Amendment . . . does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression”).

Davenport and *Ysursa* are akin to our subsidy cases. Although the laws at issue in *Davenport* and *Ysursa* did not provide cash subsidies to the unions, they conferred a very valuable benefit—the right to negotiate a collective-bargaining agreement under which non-members would be obligated to pay an agency fee that the public employer would collect and turn over to the union free of charge. As in the cash subsidy cases, the laws conferred this benefit because it was thought that this arrangement served important government interests. See *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209, 224–226 (1977). But the challenged laws did not

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go further and provide convenient collection mechanisms for money to be used in political activities. In essence, the Washington and Idaho lawmakers chose to confer a substantial non-cash benefit for the purpose of furthering activities that they particularly desired to promote but not to provide a similar benefit for the purpose of furthering other activities. Thus, *Davenport* and *Ysursa* are no more relevant for present purposes than the subsidy cases previously discussed.¹⁵

Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, e.g., *Good News Club v. Milford Central School*, 533 U. S. 98, 106–107 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995); *Lamb’s Chapel*, 508 U. S., at 392–393. See also *Legal Services Corporation v. Velazquez*, 531 U. S. 533, 541–544 (2001). When government creates such a forum, in either a literal or “metaphysical” sense, see *Rosenberger*, 515 U. S., at 830, some content- and speaker-based restrictions may be allowed, see *id.*, at 830–831. However, even in such cases, what we have termed “viewpoint discrimination” is forbidden. *Id.*, at 831.

Our cases use the term “viewpoint” discrimination in a broad sense, see *ibid.*, and in that sense, the disparagement clause discriminates on the bases of “viewpoint.” To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

¹⁵ While these cases resemble subsidy cases insofar as the free speech rights of unions and their members are concerned, arrangements like those in these cases also implicate the free speech rights of non-union members. Our decision here has no bearing on that issue.

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We have said time and again that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U. S. 576, 592 (1969). See also *Texas v. Johnson*, 491 U. S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 55–56 (1988); *Coates v. Cincinnati*, 402 U. S. 611, 615 (1971); *Bachellar v. Maryland*, 397 U. S. 564, 567 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 509–514 (1969); *Cox v. Louisiana*, 379 U. S. 536, 551 (1965); *Edwards v. South Carolina*, 372 U. S. 229, 237–238 (1963); *Terminiello v. Chicago*, 337 U. S. 1, 4–5 (1949); *Cantwell v. Connecticut*, 310 U. S. 296, 311 (1940); *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 161 (1939); *De Jonge v. Oregon*, 299 U. S. 353, 365 (1937).

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.¹⁶

IV

Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government’s proposed “government-program” doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557 (1980). The Government and *amici* supporting its position argue that all trademarks are commercial speech. They note that the central purposes of trademarks are com-

¹⁶We leave open the question whether this is the appropriate framework for analyzing free speech challenges to provisions of the Lanham Act.

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mercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his *amici*, on the other hand, contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name “The Slants” not only identifies the band but expresses a view about social issues.

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review.¹⁷ Under *Central Hudson*, a restriction of speech must serve “a substantial interest,” and it must be “narrowly drawn.” *Id.*, at 564–565 (internal quotation marks omitted). This means, among other things, that “[t]he regulatory technique may extend only as far as the interest it serves.” *Id.*, at 565. The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing “‘underrepresented groups’” from being “‘bombarded with demeaning messages in commercial advertising.’” Brief for Petitioner 48 (quoting 808 F. 3d, at 1364 (Dyk, J., concurring in part and dissenting in part)). An *amicus* supporting the Government refers to “encouraging racial tolerance and protecting the privacy and welfare of individuals.” Brief for Native American Organizations as *Amici Curiae* 21. But no mat-

¹⁷ As with the framework discussed in Part III–C of this opinion, we leave open the question whether *Central Hudson* provides the appropriate test for deciding free speech challenges to provisions of the Lanham Act. And nothing in our decision should be read to speak to the validity of state unfair competition provisions or product libel laws that are not before us and differ from § 1052(d)’s disparagement clause.

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ter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.” *United States v. Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. See 808 F. 3d, at 1379–1381 (Reyna, J., dissenting); Brief for Petitioner 49; Brief for Native American Organizations as *Amici Curiae* 18–21. Commerce, we are told, is disrupted by trademarks that “involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification.” 808 F. 3d, at 1380–1381 (opinion of Reyna, J.). Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce. See *ibid.*; Brief for Petitioner 49; Brief for Native American Organizations as *Amici Curiae* 18–20.

A simple answer to this argument is that the disparagement clause is not “narrowly drawn” to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*. It applies to trademarks like the following: “Down with racists,” “Down with sexists,” “Down with homophobes.” It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.

The clause is far too broad in other ways as well. The clause protects every person living or dead as well as every institution. Is it conceivable that commerce would be disrupted by a trademark saying: “James Buchanan was a disastrous president” or “Slavery is an evil institution”?

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There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social “volatility,” free speech would be endangered.

* * *

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. The judgment of the Federal Circuit is affirmed.

It is so ordered.

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

JUSTICE KENNEDY, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and concurring in the judgment.

The Patent and Trademark Office (PTO) has denied the substantial benefits of federal trademark registration to the mark THE SLANTS. The PTO did so under the mandate of the disparagement clause in 15 U. S. C. § 1052(a), which prohibits the registration of marks that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead, institutions, beliefs, or national symbols.”

As the Court is correct to hold, § 1052(a) constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government’s action and the statute on which it is based cannot survive this scrutiny.

The Court is correct in its judgment, and I join Parts I, II, and III–A of its opinion. This separate writing explains in greater detail why the First Amendment’s protections

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against viewpoint discrimination apply to the trademark here. It submits further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

I

Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition. See *United States v. Stevens*, 559 U.S. 460, 468 (2010). Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–829 (1995).

The First Amendment guards against laws “targeted at specific subject matter,” a form of speech suppression known as content based discrimination. *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015). This category includes a subtype of laws that go further, aimed at the suppression of “particular views . . . on a subject.” *Rosenberger*, 515 U.S., at 829. A law found to discriminate based on viewpoint is an “egregious form of content discrimination,” which is “‘presumptively unconstitutional.’” *Id.*, at 829–830.

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985) (“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject”). In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as “persons, living or dead, institutions, beliefs, or na-

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tional symbols.” 15 U.S.C. §1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.

The Government disputes this conclusion. It argues, to begin with, that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. Cf. *Rosenberger, supra*, at 831–832 (“The . . . declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways”). The logic of the Government’s rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment’s viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The Government next suggests that the statute is viewpoint neutral because the disparagement clause applies to trademarks regardless of the applicant’s personal views or reasons for using the mark. Instead, registration is denied based on the expected reaction of the applicant’s audience. In this way, the argument goes, it cannot be said that Government is acting with hostility toward a particular point of view. For example, the Government does not dispute that respondent seeks to use his mark in a positive way. Indeed, respondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor

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to make it a badge of pride. Respondent's application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian-Americans.

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience. The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, *Reed, supra*, at 169–170, but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.

Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. See *ante*, at 244 (collecting examples).

The Government's argument in defense of the statute assumes that respondent's mark is a negative comment. In addressing that argument on its own terms, this opinion is not intended to imply that the Government's interpretation is accurate. From respondent's submissions, it is evident he would disagree that his mark means what the Government says it does. The trademark will have the effect, respond-

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ent urges, of reclaiming an offensive term for the positive purpose of celebrating all that Asian-Americans can and do contribute to our diverse Nation. Brief for Respondent 1–4, 42–43. While thoughtful persons can agree or disagree with this approach, the dissonance between the trademark’s potential to teach and the Government’s insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute.

II

The parties dispute whether trademarks are commercial speech and whether trademark registration should be considered a federal subsidy. The former issue may turn on whether certain commercial concerns for the protection of trademarks might, as a general matter, be the basis for regulation. However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny.

“Commercial speech is no exception,” the Court has explained, to the principle that the First Amendment “requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.” *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 566 (2011) (internal quotation marks omitted). Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context. See *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 65, 71–72 (1983).

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality. Justice Holmes’ reference to the “free trade in ideas” and the “power of . . . thought to get itself accepted in the competition of the market,” *Abrams v. United States*, 250 U. S. 616, 630 (1919) (dis-

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senting opinion), was a metaphor. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. See *ante*, at 224. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. See Brief for Pro-Football, Inc., as *Amicus Curiae* 8 (collecting examples). Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. See *id.*, at 8–9 (collecting examples). To permit viewpoint discrimination in this context is to permit Government censorship.

This case does not present the question of how other provisions of the Lanham Act should be analyzed under the First Amendment. It is well settled, for instance, that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners. See, *e. g.*, *FTC v. Winsted Hosiery Co.*, 258 U. S. 483, 493 (1922) (“The labels in question are literally false, and . . . palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public”). This case also does not involve laws related to product labeling or otherwise designed to protect consumers. See *Sorrell*, *supra*, at 579 (“[T]he government’s legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech” (internal quotation marks omitted)). These considerations, however, do not alter the speech principles that bar the viewpoint discrimination embodied in the statutory provision at issue here.

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It is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. See *Legal Services Corporation v. Velazquez*, 531 U. S. 533, 540–542 (2001); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229, 235 (2000); *Rosenberger*, 515 U. S., at 833. The exception is necessary to allow the government to stake out positions and pursue policies. See *Southworth*, *supra*, at 235; see also *ante*, at 234–235. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment. These cases have identified a number of factors that, if present, suggest the government is speaking on its own behalf; but none are present here. See *ante*, at 236–239.

There may be situations where private speakers are selected for a government program to assist the government in advancing a particular message. That is not this case either. The central purpose of trademark registration is to facilitate source identification. To serve that broad purpose, the Government has provided the benefits of federal registration to millions of marks identifying every type of product and cause. Registered trademarks do so by means of a wide diversity of words, symbols, and messages. Whether a mark is disparaging bears no plausible relation to that goal. While defining the purpose and scope of a federal program for these purposes can be complex, see, *e. g.*, *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 570 U. S. 205, 214–215 (2013), our cases are clear that viewpoint discrimination is not permitted where, as here, the Government “expends funds to encourage a diversity of views from private speakers,” *Velazquez*, *supra*, at 542 (internal quotation marks omitted).

* * *

A law that can be directed against speech found offensive to some portion of the public can be turned against minority

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and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

For these reasons, I join the Court's opinion in part and concur in the judgment.

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

I join the opinion of JUSTICE ALITO, except for Part II. Respondent failed to present his statutory argument either to the Patent and Trademark Office or to the Court of Appeals, and we declined respondent's invitation to grant certiorari on this question. *Ante*, at 230. I see no reason to address this legal question in the first instance. See *Star Athletica, L. L. C. v. Varsity Brands, Inc.*, 580 U. S. 405, 413 (2017).

I also write separately because "I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'" *Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525, 572 (2001) (THOMAS, J., concurring in part and concurring in judgment); see also, *e. g.*, *44 Liquor-mart, Inc. v. Rhode Island*, 517 U. S. 484, 518 (1996) (same). I nonetheless join Part IV of JUSTICE ALITO's opinion because it correctly concludes that the disparagement clause, 15 U. S. C. § 1052(a), is unconstitutional even under the less stringent test announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980).

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BRISTOL-MYERS SQUIBB CO. *v.* SUPERIOR COURT
OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 16–466. Argued April 25, 2017—Decided June 19, 2017

A group of plaintiffs, most of whom are not California residents, sued Bristol-Myers Squibb Company (BMS) in California state court, alleging that the pharmaceutical company's drug Plavix had damaged their health. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Although it engages in business activities in California and sells Plavix there, BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in the State. And the nonresident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.

The California Superior Court denied BMS's motion to quash service of summons on the nonresidents' claims for lack of personal jurisdiction, concluding that BMS's extensive activities in the State gave the California courts general jurisdiction. Following this Court's decision in *Daimler AG v. Bauman*, 571 U. S. 117, the State Court of Appeal found that the California courts lacked general jurisdiction. But the Court of Appeal went on to find that the California courts had specific jurisdiction over the claims brought by the nonresident plaintiffs. Affirming, the State Supreme Court applied a "sliding scale approach" to specific jurisdiction, concluding that BMS's "wide ranging" contacts with the State were enough to support a finding of specific jurisdiction over the claims brought by the nonresident plaintiffs. That attenuated connection was met, the court held, in part because the nonresidents' claims were similar in many ways to the California residents' claims and because BMS engaged in other activities in the State.

Held: California courts lack specific jurisdiction to entertain the nonresidents' claims. Pp. 261–269.

(a) The personal jurisdiction of state courts is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U. S. 915, 918. This Court's decisions have recognized two types of personal jurisdiction: general and specific. For general jurisdiction, the "paradigm forum" is an "individual's domicile," or, for corporations, "an equivalent

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place, one in which the corporation is fairly regarded as at home.” *Id.*, at 924. Specific jurisdiction, however, requires “the suit” to “aris[e] out of or relat[e] to the defendant’s contacts with the forum.” *Daimler, supra*, at 127 (internal quotation marks omitted).

The “primary concern” in assessing personal jurisdiction is “the burden on the defendant.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. At times, “the Due Process Clause, acting as an instrument of interstate federalism, may . . . divest the State of its power to render a valid judgment.” *Id.*, at 294. Pp. 261–263.

(b) Settled principles of specific jurisdiction control this case. For a court to exercise specific jurisdiction over a claim there must be an “affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.” *Goodyear, supra*, at 919 (internal quotation marks and brackets omitted). When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State. The California Supreme Court’s “sliding scale approach”—which resembles a loose and spurious form of general jurisdiction—is thus difficult to square with this Court’s precedents. That court found specific jurisdiction without identifying any adequate link between the State and the nonresidents’ claims. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California does not allow the State to assert specific jurisdiction over the nonresidents’ claims. Nor is it sufficient (or relevant) that BMS conducted research in California on matters unrelated to Plavix. What is needed is a connection between the forum and the specific claims at issue. Cf. *Walden v. Fiore*, 571 U. S. 277. Pp. 264–266.

(c) The nonresident plaintiffs’ reliance on *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770, and *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, is misplaced. *Keeton* concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as here, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. And *Shutts*, which concerned the due process rights of *plaintiffs*, has no bearing on the question presented here. Pp. 266–267.

(d) BMS’s decision to contract with McKesson, a California company, to distribute Plavix nationally does not provide a sufficient basis for personal jurisdiction. It is not alleged that BMS engaged in relevant acts together with McKesson in California or that BMS is derivatively

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liable for McKesson's conduct in California. The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State. P. 268.

(e) The Court's decision will not result in the parade of horrors that respondents conjure up. It does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. Alternatively, the nonresident plaintiffs could probably sue together in their respective home States. In addition, since this decision concerns the due process limits on the exercise of specific jurisdiction by a State, the question remains open whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. Pp. 268–269.

1 Cal. 5th 783, 377 P. 3d 874, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 269.

Neal Kumar Katyal argued the cause for petitioner. With him on the briefs were *Jessica L. Ellsworth*, *Frederick Liu*, *Sean Marotta*, *Sara Solow*, *Anand Agneshwar*, and *Daniel S. Pariser*.

Rachel P. Kovner argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*, and *Michael S. Raab*.

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Eric F. Citron*, *Charles H. Davis*, *Paul J. Napoli*, *Hunter J. Shkolnik*, and *Marie Napoli*.*

*Briefs of *amici curiae* urging reversal were filed for the Atlantic Legal Foundation et al. by *Martin S. Kaufman* and *Mary-Christine Sungaila*; for the Chamber of Commerce of the United States of America et al. by *Andrew J. Pincus*, *Archis A. Parasharami*, *Matthew A. Waring*, *Kate Comerford Todd*, and *Sheldon Gilbert*; for DRI—The Voice of the Defense Bar by *Lawrence S. Ebner* and *John E. Cuttino*; for GlaxoSmithKline LLC by *Jeffrey S. Bucholtz* and *Ethan P. Davis*; for MoneyMutual LLC by *Jonathan S. Massey*, *Marc A. Goldman*, *Donald J. Putterman*, and *Thomas H. Boyd*; for Pharmaceutical Research and Manufacturers of America by *Mark Haddad*, *Alycia Degen*, *Naomi Igra*, *James C. Stansel*,

JUSTICE ALITO delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.

I

A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. 1 Cal. 5th 783, 790, 377 P. 3d 874, 879 (2016). Over 50 percent of BMS's work force in the United States is employed in those two States. *Ibid.*

BMS also engages in business activities in other jurisdictions, including California. Five of the company's research

Melissa B. Kimmell, Carter G. Phillips, and Rebecca K. Wood; for the Product Liability Advisory Council Inc. by Joel G. Pieper, William F. Womble, Jr., and James R. Morgan, Jr.; for the Reporters Committee for Freedom of the Press et al. by Thomas S. Leatherbury, Marc A. Fuller, and Megan M. Coker; for TV Azteca, S.A.B. de C.V. et al. by David C. Frederick and Derek T. Ho; and for the Washington Legal Foundation et al. by Richard A. Samp.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *Robert S. Peck* and *Julie Braman Kane*; for the Asbestos Disease Awareness Organization by *Brent M. Rosenthal*; for the Attorneys Information Exchange Group by *John Gsanger* and *Larry E. Coben*; for the California Constitution Center by *Erik S. Jaffe, David A. Carrillo, Stephen M. Duvernay, Mitchell Breit, Andy D. Birchfield, Jr., P. Leigh O'Dell, Peter W. Burg, George Fleming, Rand Nolen, G. Sean Jez, W. Mark Lanier, and John Boundas*; for the Center for Auto Safety by *Larry E. Coben*; for Civil Procedure Professors by *Pamela K. Bookman*; for Professors of Civil Procedure and Federal Courts by *Allan Ides*; for Public Justice, P. C., by *Louis M. Bograd, Rebecca L. Phillips, and Leslie A. Brueckner*; and for Alan B. Morrison by *Mr. Morrison, pro se.*

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and laboratory facilities, which employ a total of around 160 employees, are located there. *Ibid.* BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento. *Ibid.*

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. *Ibid.* BMS instead engaged in all of these activities in either New York or New Jersey. *Ibid.* But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than \$900 million from those sales. *Id.*, at 790–791, 377 P. 3d, at 879. This amounts to a little over 1 percent of the company’s nationwide sales revenue. *Id.*, at 790, 377 P. 3d, at 879.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. *Id.*, at 789, 377 P. 3d, at 878. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. *Ibid.* The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents’ claims, but the California Superior Court denied this motion, finding that the California courts had general jurisdiction over BMS “[b]ecause [it] engages in extensive activities in California.”

App. to Pet. for Cert. 150. BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler AG v. Bauman*, 571 U. S. 117 (2014), the California Supreme Court instructed the Court of Appeal “to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted.” App. 9–10.

The Court of Appeal then changed its decision on the question of general jurisdiction. 175 Cal. Rptr. 3d 412 (2014) (officially depublished). Under *Daimler*, it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents’ claims against BMS. 175 Cal. Rptr. 3d, at 425–439.

The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a “sliding scale approach to specific jurisdiction.” 1 Cal. 5th, at 806, 377 P. 3d, at 889. Under this approach, “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.” *Ibid.* (internal quotation marks omitted). Applying this test, the majority concluded that “BMS’s extensive contacts with California” permitted the exercise of specific jurisdiction “based on a less direct connection between BMS’s forum activities and plaintiffs’ claims than might otherwise be required.” *Ibid.* This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). *Id.*, at 803–806, 377 P. 3d, at 887–889. The court noted that “[b]oth the resident and nonresident plaintiffs’ claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product.” *Id.*, at 804, 377 P. 3d, at 888. And while acknowledging that “there is no claim that Plavix itself was designed

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and developed in [BMS’s California research facilities],” the court thought it significant that other research was done in the State. *Ibid.*

Three justices dissented. “The claims of . . . nonresidents injured by their use of Plavix they purchased and used in other states,” they wrote, “in no sense arise from BMS’s marketing and sales of Plavix in California,” and they found that the “mere similarity” of the residents’ and nonresidents’ claims was not enough. *Id.*, at 819, 377 P. 3d, at 898 (opinion of Werdegar, J.). The dissent accused the majority of “expand[ing] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction.” *Id.*, at 816, 377 P. 3d, at 896.

We granted certiorari to decide whether the California courts’ exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment. 580 U. S. 1097 (2017).¹

II

A

It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. See, e. g., *Daimler*, *supra*, at 125–132; *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 291 (1980); *International Shoe Co. v. Washington*, 326 U. S. 310, 316–317 (1945); *Pennoyer v. Neff*, 95 U. S. 714, 733 (1878). Because “[a] state court’s assertion of jurisdiction exposes defendants to the State’s coercive power,” it is “subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause,” *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U. S. 915, 918 (2011), which “limits the power of a state court to render a valid personal judgment against a nonresi-

¹ California law provides that its courts may exercise jurisdiction “on any basis not inconsistent with the Constitution . . . of the United States,” Cal. Civ. Proc. Code Ann. § 410.10 (West 2004); see *Daimler AG v. Bauman*, 571 U. S. 117, 125 (2014).

dent defendant,” *World-Wide Volkswagen, supra*, at 291. The primary focus of our personal jurisdiction inquiry is the defendant’s relationship to the forum State. See *Walden v. Fiore*, 571 U. S. 277, 283–286 (2014); *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, 806–807 (1985).

Since our seminal decision in *International Shoe*, our decisions have recognized two types of personal jurisdiction: “general” (sometimes called “all-purpose”) jurisdiction and “specific” (sometimes called “case-linked”) jurisdiction. *Goodyear*, 564 U. S., at 919. “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Id.*, at 924. A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State. *Id.*, at 919. But “only a limited set of affiliations with a forum will render a defendant amenable to” general jurisdiction in that State. *Daimler*, 571 U. S., at 137.

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, “the *suit*” must “aris[e] out of or relat[e] to the defendant’s contacts with the *forum*.” *Id.*, at 127 (internal quotation marks omitted; emphasis added); see *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 472–473 (1985); *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U. S. 408, 414 (1984). In other words, there must be “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.” *Goodyear*, 564 U. S., at 919 (internal quotation marks and brackets omitted). For this reason, “specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.” *Ibid.* (internal quotation marks omitted).

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B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include “the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice.” *Kulko v. Superior Court of Cal., City and County of San Francisco*, 436 U. S. 84, 92 (1978); see *Daimler, supra*, at 139–141, n. 20; *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113 (1987); *World-Wide Volkswagen*, 444 U. S., at 292. But the “primary concern” is “the burden on the defendant.” *Id.*, at 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction “are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.” *Hanson v. Denckla*, 357 U. S. 235, 251 (1958). “[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States.” *World-Wide Volkswagen*, 444 U. S., at 293. And at times, this federalism interest may be decisive. As we explained in *World-Wide Volkswagen*, “[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” *Id.*, at 294.

III

A

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an “affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.” *Goodyear*, 564 U.S., at 919 (internal quotation marks and brackets in original omitted). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State. See *id.*, at 931, n. 6 (“[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales”).

For this reason, the California Supreme Court’s “sliding scale approach” is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant’s general connections with the forum are not enough. As we have said, “[a] corporation’s ‘continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.’” *Id.*, at 927 (quoting *International Shoe*, 326 U.S., at 318).

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.

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The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims. As we have explained, “a defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.” *Walden*, 571 U. S., at 286. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Our decision in *Walden*, *supra*, illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and “suffered foreseeable harm in Nevada.” *Id.*, at 289. Because the “*relevant* conduct occurred entirely in Georgia, . . . the mere fact that [this] conduct affected plaintiffs with connections to the forum State d[id] not suffice to authorize jurisdiction.” *Id.*, at 291 (emphasis added).

In today’s case, the connection between the nonresidents’ claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden*, all the conduct giving rise to the nonresidents’ claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction. See *World-Wide Volkswagen*, *supra*, at 295 (finding no personal jurisdiction in Oklahoma because the defendant “carr[ied] on no activity whatsoever in Oklahoma” and dismissing “the fortuitous circumstance that a

single Audi automobile, sold [by defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma” as an “isolated occurrence”).

B

The nonresidents maintain that two of our cases support the decision below, but they misinterpret those precedents.

In *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770 (1984), a New York resident sued Hustler in New Hampshire, claiming that she had been libeled in five issues of the magazine, which was distributed throughout the country, including in New Hampshire, where it sold 10,000 to 15,000 copies per month. Concluding that specific jurisdiction was present, we relied principally on the connection between the circulation of the magazine in New Hampshire and damage allegedly caused within the State. We noted that “[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement.” *Id.*, at 776 (emphasis deleted). This factor amply distinguishes *Keeton* from the present case, for here the nonresidents’ claims involve no harm in California and no harm to California residents.

The nonresident plaintiffs in this case point to our holding in *Keeton* that there was jurisdiction in New Hampshire to entertain the plaintiff’s request for damages suffered outside the State, *id.*, at 774, but that holding concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff’s claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law. *Id.*, at 778, n. 9.

The Court’s decision in *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797 (1985), which involved a class action filed in Kansas, is even less relevant. The Kansas court exercised

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personal jurisdiction over the claims of nonresident class members, and the defendant, Phillips Petroleum, argued that this violated the due process rights of these class members because they lacked minimum contacts with the State.² According to the defendant, the out-of-state class members should not have been kept in the case unless they affirmatively opted in, instead of merely failing to opt out after receiving notice. *Id.*, at 812.

Holding that there had been no due process violation, the Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. *Id.*, at 808–812. Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here.

Respondents nevertheless contend that *Shutts* supports their position because, in their words, it would be “absurd to believe that [this Court] would have reached the exact opposite result if the petitioner [Phillips] had only invoked its own due-process rights, rather than those of the non-resident plaintiffs.” Brief for Respondents 28–29, n. 6 (emphasis deleted). But the fact remains that Phillips did not assert that Kansas improperly exercised personal jurisdiction over it, and the Court did not address that issue.³ Indeed, the Court stated specifically that its “discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class.” *Shutts, supra*, at 812, n. 3.

²The Court held that the defendant had standing to argue that the Kansas court had improperly exercised personal jurisdiction over the claims of the out-of-state class members because that holding materially affected the defendant’s own interests, specifically, the res judicata effect of an adverse judgment. 472 U. S., at 803–806.

³Petitioner speculates that Phillips did not invoke its own due process rights because it was believed at the time that the Kansas court had general jurisdiction. See Reply Brief 7, n. 1.

C

In a last ditch contention, respondents assert that BMS's "decision to contract with a California company [McKesson] to distribute [Plavix] nationally" provides a sufficient basis for personal jurisdiction. Tr. of Oral Arg. 32. But as we have explained, "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U. S. 320, 332 (1980); see *Walden*, 571 U. S., at 286 ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction"). In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California. And the nonresidents "have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them." 1 Cal. 5th, at 815, 377 P. 3d, at 895 (Werdegar, J., dissenting) (emphasis deleted). See Tr. of Oral Arg. 33 ("It is impossible to trace a particular pill to a particular person It's not possible for us to track particularly to McKesson"). The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up. See Brief for Respondents 38–47. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. See Brief for Petitioner 13. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision

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concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U. S. 97, 102, n. 5 (1987).

* * *

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

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman*, 571 U. S. 117 (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.

I

Bristol-Myers Squibb is a Fortune 500 pharmaceutical company incorporated in Delaware and headquartered in

New York. It employs approximately 25,000 people worldwide and earns annual revenues of over \$15 billion. In the late 1990's, Bristol-Myers began to market and sell a prescription blood thinner called Plavix. Plavix was advertised as an effective tool for reducing the risk of blood clotting for those vulnerable to heart attacks and to strokes. The ads worked: At the height of its popularity, Plavix was a blockbuster, earning Bristol-Myers billions of dollars in annual revenues.

Bristol-Myers' advertising and distribution efforts were national in scope. It conducted a single nationwide advertising campaign for Plavix, using television, magazine, and Internet ads to broadcast its message. A consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix. Bristol-Myers' distribution of Plavix also proceeded through nationwide channels: Consistent with its usual practice, it relied on a small number of wholesalers to distribute Plavix throughout the country. One of those distributors, McKesson Corporation, was named as a defendant below; during the relevant time period, McKesson was responsible for almost a quarter of Bristol-Myers' revenue worldwide.

The 2005 publication of an article in the *New England Journal of Medicine* questioning the efficacy and safety of Plavix put Bristol-Myers on the defensive, as consumers around the country began to claim that they were injured by the drug. The plaintiffs in these consolidated cases are 86 people who allege they were injured by Plavix in California and several hundred others who say they were injured by the drug in other States.¹ They filed their suits in California Superior Court, raising product-liability claims against Bristol-Myers and McKesson. Their claims are "materially

¹ Like the parties and the majority, I refer to these people as "residents" and "nonresidents" of California as a convenient shorthand. See *ante*, at 259; Brief for Petitioner 4–5, n. 1; Brief for Respondents 2, n. 1. For jurisdictional purposes, the important question is generally (as it is here) where a plaintiff was injured, not where he or she resides.

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identical,” as Bristol-Myers concedes. See Brief for Petitioner 4, n. 1. Bristol-Myers acknowledged it was subject to suit in California state court by the residents of that State. But it moved to dismiss the claims brought by the nonresident plaintiffs—respondents here—for lack of jurisdiction. The question here, accordingly, is not whether Bristol-Myers is subject to suit in California on claims that arise out of the design, development, manufacture, marketing, and distribution of Plavix—it is. The question is whether Bristol-Myers is subject to suit in California only on the residents’ claims, or whether a state court may also hear the nonresidents’ “identical” claims.

II

A

As the majority explains, since our pathmarking opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the touchstone of the personal jurisdiction analysis has been the question whether a defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Id.*, at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). For decades this Court has considered that question through two different jurisdictional frames: “general” and “specific” jurisdiction. See *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414, nn. 8–9 (1984). Under our current case law, a state court may exercise general, or all-purpose, jurisdiction over a defendant corporation only if its “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.” *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011).²

² Respondents do not contend that the California courts would be able to exercise general jurisdiction over Bristol-Myers—a concession that follows directly from this Court’s opinion in *Daimler AG v. Bauman*, 571 U.S. 117 (2014). As I have explained, I believe the restrictions the Court imposed on general jurisdiction in *Daimler* were ill advised. See *BNSF R. Co. v. Tyrrell*, 581 U.S. 402, 416–419 (2017) (SOTOMAYOR, J., concurring

If general jurisdiction is not appropriate, however, a state court can exercise only specific, or case-linked, jurisdiction over a dispute. *Id.*, at 923–924. Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. 4A C. Wright, A. Miller, & A. Steinman, *Federal Practice and Procedure* § 1069, pp. 22–78 (4th ed. 2015) (Wright); see also *id.*, at 22–27, n. 10 (collecting authority). First, the defendant must have “purposefully avail[ed] itself of the privilege of conducting activities within the forum State” or have purposefully directed its conduct into the forum State. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U. S. 873, 877 (2011) (plurality opinion) (quoting *Hanson v. Denckla*, 357 U. S. 235, 253 (1958)). Second, the plaintiff’s claim must “arise out of or relate to” the defendant’s forum conduct. *Helicopteros*, 466 U. S., at 414. Finally, the exercise of jurisdiction must be reasonable under the circumstances. *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113–114 (1987); *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 477–478 (1985). The factors relevant to such an analysis include “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.” *Id.*, at 477 (internal quotation marks omitted).

B

Viewed through this framework, the California courts appropriately exercised specific jurisdiction over respondents’ claims.

in part and dissenting in part); *Daimler*, 571 U. S., at 149–160 (SOTOMAYOR, J., concurring in judgment). But I accept respondents’ concession, for the purpose of this case, that Bristol-Myers is not subject to general jurisdiction in California.

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First, there is no dispute that Bristol-Myers “purposefully avail[ed] itself,” *Nicastro*, 564 U. S., at 877, of California and its substantial pharmaceutical market. Bristol-Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. *Ante*, at 258–259. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. *Supra*, at 270. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly \$1 billion during the period relevant to this suit.

Second, respondents’ claims “relate to” Bristol-Myers’ in-state conduct. A claim “relates to” a defendant’s forum conduct if it has a “connect[ion] with” that conduct. *International Shoe*, 326 U. S., at 319. So respondents could not, for instance, hale Bristol-Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no connection to acts Bristol-Myers took in California. But respondents’ claims against Bristol-Myers look nothing like such a claim. Respondents’ claims against Bristol-Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and not California, does not mean that their claims do not “relate to” the advertising and distribution efforts that Bristol-Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents’ claims is reasonable. Because Bristol-Myers already faces claims that are identical to the nonresidents’ claims in this suit, it will not be harmed by having to defend against respondents’

claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs’ “interest in obtaining convenient and effective relief,” *Burger King*, 471 U. S., at 477 (internal quotation marks omitted), is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. Cf. *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 245 (2013) (KAGAN., J., dissenting) (“No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands”). California, too, has an interest in providing a forum for mass actions like this one: Permitting the nonresidents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents’ claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol-Myers and resident ones like McKesson.

Nothing in the Due Process Clause prohibits a California court from hearing respondents’ claims—at least not in a case where they are joined to identical claims brought by California residents.

III

Bristol-Myers does not dispute that it has purposefully availed itself of California’s markets, nor—remarkably—did it argue below that it would be “unreasonable” for a California court to hear respondents’ claims. See 1 Cal. 5th 783, 799, n. 2, 377 P. 3d 874, 885, n. 2 (2016). Instead, Bristol-Myers contends that respondents’ claims do not “arise out of or relate to” its California conduct. The majority agrees, explaining that no “adequate link” exists “between the State and the nonresidents’ claims,” *ante*, at 264—a result that it says follows from “settled principles [of] specific jurisdic-

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tion,” *ibid.* But our precedents do not require this result, and common sense says that it cannot be correct.

A

The majority casts its decision today as compelled by precedent. *Ibid.* But our cases point in the other direction.

The majority argues at length that the exercise of specific jurisdiction in this case would conflict with our decision in *Walden v. Fiore*, 571 U. S. 277 (2014). That is plainly not true. *Walden* concerned the requirement that a defendant “purposefully avai[l]” himself of a forum State or “purposefully direc[t]” his conduct toward that State, *Nicastro*, 564 U. S., at 877, 883 not the separate requirement that a plaintiff’s claim “arise out of or relate to” a defendant’s forum contacts. The lower court understood the case that way. See *Fiore v. Walden*, 688 F. 3d 558, 576–582 (CA9 2012). The parties understood the case that way. See Brief for Petitioner 17–31, Brief for Respondents 20–44, Brief for United States as *Amicus Curiae* 12–18, in *Walden v. Fiore*, O. T. 2013, No. 12–574. And courts and commentators have understood the case that way. See, e. g., 4 Wright § 1067.1, at 388–389. *Walden* teaches only that a defendant must have purposefully availed itself of the forum, and that a plaintiff cannot rely solely on a defendant’s contacts with a forum resident to establish the necessary relationship. See 571 U. S., at 285 (“[T]he plaintiff cannot be the only link between the defendant and the forum”). But that holding has nothing to do with the dispute between the parties: Bristol-Myers has purposefully availed itself of California—to the tune of millions of dollars in annual revenue. Only if its language is taken out of context, *ante*, at 265–266, can *Walden* be made to seem relevant to the case at hand.

By contrast, our decision in *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770 (1984), suggests that there should be no such barrier to the exercise of jurisdiction here. In *Keeton*, a New York resident brought suit against an Ohio corpora-

tion, a magazine, in New Hampshire for libel. She alleged that the magazine's nationwide course of conduct—its publication of defamatory statements—had injured her in every State, including New Hampshire. This Court unanimously rejected the defendant's argument that it should not be subject to "nationwide damages" when only a small portion of those damages arose in the forum State, *id.*, at 781; exposure to such liability, the Court explained, was the consequence of having "continuously and deliberately exploited the New Hampshire market," *ibid.* The majority today dismisses *Keeton* on the ground that the defendant there faced one plaintiff's claim arising out of its nationwide course of conduct, whereas Bristol-Myers faces many more plaintiffs' claims. See *ante*, at 266. But this is a distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there is no unfairness in such a result.

The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do—trump even concerns about fairness to the parties. *Ante*, at 263. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which "the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation" but personal jurisdiction still will not lie. *Ibid.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 294 (1980)). But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents' claims that the other States do not share? I would measure jurisdiction

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first and foremost by the yardstick set out in *International Shoe*—“fair play and substantial justice,” 326 U. S., at 316 (internal quotation marks omitted). The majority’s opinion casts that settled principle aside.

B

I fear the consequences of the majority’s decision today will be substantial. Even absent a rigid requirement that a defendant’s in-state conduct must actually cause a plaintiff’s claim,³ the upshot of today’s opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured. That rule is likely to have consequences far beyond this case.

First, and most prominently, the Court’s opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant’s nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today’s opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol-Myers in New York or Delaware; could “probably” have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an “open . . . question”). *Ante*, at 268–269. Even setting aside the majority’s caveats, what is the pur-

³ Bristol-Myers urges such a rule upon us, Brief for Petitioner 14–37, but its adoption would have consequences far beyond those that follow from today’s factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State’s courts to redress his injuries—a result specifically contemplated by *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 297 (1980). See Brief for Civil Procedure Professors as *Amici Curiae* 14–18; see also *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U. S. 873, 906–907 (2011) (GINSBURG, J., dissenting). That question, and others like it, appears to await another case.

pose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is "essentially at home."⁴ See *Daimler*, 571 U.S., at 127. Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be farflung jurisdictions.

Second, the Court's opinion today may make it impossible to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are "at home," and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not "at home" in any State. Cf. *id.*, at 158–159 (SOTOMAYOR, J., concurring in judgment). Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, see *ibid.*, the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.

The majority chides respondents for conjuring a "parade of horrors," *ante*, at 268, but says nothing about how suits

⁴The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. Cf. *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002) ("Nonnamed class members . . . may be parties for some purposes and not for others"); see also Wood, Adjudicatory Jurisdiction and Class Actions, 62 Ind. L. J. 597, 616–617 (1987).

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like those described here will survive its opinion in this case. The answer is simple: They will not.

* * *

It “does not offend ‘traditional notions of fair play and substantial justice,’” *International Shoe*, 326 U. S., at 316, to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

Syllabus

JENKINS, WARDEN *v.* HUTTON

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

No. 16–1116. Decided June 19, 2017

An Ohio jury convicted respondent Percy Hutton of aggravated murder, attempted murder, and kidnaping. In connection with the aggravated murder conviction, the jury also made two additional findings: that Hutton engaged in a course of conduct designed to kill multiple people and that he committed kidnaping. Based on these aggravating factors, the State sought the death penalty. At the conclusion of the penalty phase of the trial, the trial court instructed the jury that it could recommend a death sentence only if it unanimously found that the State had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. The jury recommended death, and the trial court accepted that recommendation. The Ohio Court of Appeals and the Ohio Supreme Court affirmed. Hutton then sought federal habeas relief, arguing that the trial court gave the jurors insufficient guidance by failing to instruct them that, when weighing aggravating and mitigating factors, they could consider only the two aggravating factors they had found during the guilt phase. The District Court determined that Hutton's claim was procedurally defaulted because he failed to object to the trial court's instruction or to raise the argument on direct appeal. The Sixth Circuit reversed, concluding that notwithstanding the procedural default, Hutton had "show[n] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U. S. 333, 336.

Held: The Sixth Circuit was wrong to reach the merits of Hutton's claim. First, the jury found two aggravating circumstances during the guilt phase of the trial, each of which rendered Hutton death penalty eligible. The penalty phase instruction plainly had no effect on the jury's decision that those aggravating circumstances were present when Hutton committed the murder for which he was convicted. Second, assuming that the consequences of the trial court's alleged error excuses Hutton's procedural default, the Sixth Circuit should have asked whether, given proper instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating ones. Instead, the court considered whether, given the (alleged) improper instructions, the jury might have relied on

Per Curiam

invalid aggravating circumstances when it recommended a death sentence. That approach, which would justify excusing default whenever an instructional error could have been relevant to a jury's decision, is incompatible with *Sawyer*.

Certiorari granted; 839 F. 3d 486, reversed and remanded.

PER CURIAM.

Respondent Percy Hutton accused two friends, Derek Mitchell and Samuel Simmons, Jr., of stealing a sewing machine, in which he had hidden \$750. Mitchell and Simmons denied the accusation, but Hutton remained suspicious. On the night of September 16, 1985, he lured the pair into his car and, after pointing a gun at each, drove them around town in search of the machine. By night's end, Hutton had recovered his sewing machine, Simmons was in the hospital with two gunshot wounds to the head, and Mitchell was nowhere to be found. Simmons survived, but Mitchell was found dead a few weeks later, also having been shot twice.

More than 30 years ago, an Ohio jury convicted Hutton of aggravated murder, attempted murder, and kidnaping. In connection with the aggravated murder conviction, the jury made two additional findings: that Hutton engaged in "a course of conduct involving the . . . attempt to kill two or more persons," and that Hutton murdered Mitchell while "committing, attempting to commit, or fleeing immediately after . . . kidnaping," Ohio Rev. Code Ann. §§ 2929.04(A)(5), (7) (Lexis 1982). Because of these "aggravating circumstances," Ohio law required that Hutton be sentenced to "death, life imprisonment without parole, [or] life imprisonment with parole eligibility after" no fewer than 20 years in prison. § 2929.03(C)(2).

Several days after rendering its verdict, the jury reconvened for the penalty phase of the trial. The State argued for the death penalty. In opposition, Hutton gave an unsworn statement professing his innocence and presented evidence about his background and psychological profile. When the presentations concluded, the trial court instructed

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the jury that it could recommend a death sentence only if it unanimously found that the State had “prove[d] beyond a reasonable doubt that the aggravating circumstances, of which the Defendant was found guilty, outweigh[ed] the [mitigating factors].” *State v. Hutton*, 100 Ohio St. 3d 176, 184–185, 2003-Ohio-5607, 797 N. E. 2d 948, 958; see Ohio Rev. Code Ann. § 2929.03(D)(2). The jury deliberated and recommended death. The trial court accepted the recommendation after also finding, “beyond a reasonable doubt, . . . that the aggravating circumstances . . . outweigh[ed] the mitigating factors.” § 2929.03(D)(3).

The Ohio Court of Appeals and the Ohio Supreme Court affirmed Hutton’s death sentence. In doing so, both concluded that “the evidence support[ed] the finding of the aggravating circumstances.” § 2929.05(A); see *Hutton*, 100 Ohio St. 3d, at 187, 797 N. E. 2d, at 961; *State v. Hutton*, 72 Ohio App. 3d 348, 350, 594 N. E. 2d 692, 694 (1995). The courts also “independently weigh[ed] all of the facts . . . to determine whether the aggravating circumstances [Hutton] was found guilty of committing outweigh[ed] the mitigating factors.” Ohio Rev. Code Ann. § 2929.05(A). Both agreed with the jury and the trial court that “aggravating circumstances outweigh[ed] the mitigating factors,” and that a death sentence was warranted. *Hutton*, 100 Ohio St. 3d, at 191, 797 N. E. 2d, at 963–964; see *Hutton*, 72 Ohio App. 3d, at 352, 594 N. E. 2d, at 695.

The case before this Court concerns Hutton’s subsequent petition for federal habeas relief. In 2005, Hutton filed such a petition pursuant to 28 U.S.C. § 2254, arguing that the trial court violated his due process rights during the penalty phase of his trial. According to Hutton, the court gave the jurors insufficient guidance because it failed to tell them that, when weighing aggravating and mitigating factors, they could consider only the two aggravating factors they had found during the guilt phase. Hutton, however, had not objected to the trial court’s instruction or raised this argument

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on direct appeal, and the District Court on federal habeas concluded that his due process claim was procedurally defaulted. *Hutton v. Mitchell*, 2013 WL 2476333, *64 (ND Ohio, June 7, 2013); see *State v. Hutton*, 53 Ohio St. 3d 36, 39–40, n. 1, 559 N. E. 2d 432, 437–438, n. 1 (1990) (declining to address trial court’s instructions because Hutton “specifically declined to object . . . at trial, and ha[d] not raised or briefed the issue” on appeal).

The United States Court of Appeals for the Sixth Circuit reversed. The court concluded that, notwithstanding the procedural default, it could “reach the merits” of Hutton’s claim to “avoid a fundamental miscarriage of justice.” *Hutton v. Mitchell*, 839 F. 3d 486, 498 (2016) (internal quotation marks omitted). The Sixth Circuit began its analysis with *Sawyer v. Whitley*, 505 U. S. 333 (1992). In that decision, this Court established that a habeas petitioner may obtain review of a defaulted claim upon “show[ing] by clear and convincing evidence that, but for a constitutional error, no reasonable jury would have found [him] eligible for the death penalty under the applicable state law.” *Id.*, at 336.

Hutton had not argued that this exception to default applied to his case. Nonetheless, the Sixth Circuit held that the exception justified reviewing his claim. The court gave two reasons: First, Hutton was not eligible to receive a death sentence because “the jury had not made the necessary finding of the existence of aggravating circumstances.” 839 F. 3d, at 498–499. And second, since the trial court “gave the jury no guidance as to what to consider as aggravating circumstances” when weighing aggravating and mitigating factors, the record did not show that the jury’s death recommendation “was actually based on a review of any valid aggravating circumstances.” *Id.*, at 500. On the merits, the court concluded that the trial court violated Hutton’s constitutional rights by giving an erroneous jury instruction. Judge Rogers dissented on the ground that Hutton could not overcome the procedural default.

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The Sixth Circuit was wrong to reach the merits of Hutton's claim. The court's first reason for excusing default was that "the jury had not [found] the existence of aggravating circumstances." *Id.*, at 498–499. But it had, at the guilt phase of Hutton's trial. As Judge Rogers pointed out, "the jury found two such factors"—engaging in a course of conduct designed to kill multiple people and committing kidnapping—"in the process of convicting Hutton . . . of aggravated murder." *Id.*, at 511. Each of those findings "rendered Hutton eligible for the death penalty." *Ibid.* Hutton has not argued that the trial court improperly instructed the jury about aggravating circumstances at the guilt phase. Nor did the Sixth Circuit identify any such error. Instead, the instruction that Hutton contends is incorrect, and that the Sixth Circuit analyzed, was given at the *penalty* phase of trial. That penalty phase instruction plainly had no effect on the jury's decision—delivered after the *guilt* phase and pursuant to an unchallenged instruction—that aggravating circumstances were present when Hutton murdered Mitchell.

The Sixth Circuit's second reason for reaching the merits rests on a legal error. Under *Sawyer*, a court may review a procedurally defaulted claim if, "*but for a constitutional error*, no reasonable jury would have found the petitioner eligible for the death penalty." 505 U.S., at 336 (emphasis added). Here, the alleged error was the trial court's failure to specify that, when weighing aggravating and mitigating factors, the jury could consider only the aggravating circumstances it found at the guilt phase. Assuming such an error can provide a basis for excusing default, the Sixth Circuit should have considered the following: Whether, given *proper* instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances.

But the court did not ask that question. Instead, it considered whether, given the (alleged) *improper* instructions, the jury might have been relying on invalid aggravating cir-

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cumstances when it recommended a death sentence. See 839 F. 3d, at 500 (explaining that, because the trial court gave “no guidance as to what to consider as aggravating circumstances,” the court could not determine whether the death recommendation “was actually based on a review of any valid aggravating circumstances”). The court, in other words, considered whether the alleged error might have affected the jury’s verdict, not whether a properly instructed jury could have recommended death. That approach, which would justify excusing default whenever an instructional error could have been relevant to a jury’s decision, is incompatible with *Sawyer*.

Neither Hutton nor the Sixth Circuit has “show[n] by clear and convincing evidence that”—if properly instructed—“no reasonable juror would have” concluded that the aggravating circumstances in Hutton’s case outweigh the mitigating circumstances. *Sawyer, supra*, at 336. In fact, the trial court, Ohio Court of Appeals, and Ohio Supreme Court each independently weighed those factors and concluded that the death penalty was justified. On the facts of this case, the Sixth Circuit was wrong to hold that it could review Hutton’s claim under the miscarriage of justice exception to procedural default.

The petition for certiorari and motion for leave to proceed *in forma pauperis* are granted, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 285 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 12 THROUGH
JUNE 19, 2017

JUNE 12, 2017

Dismissal Under Rule 46

No. 16–1342. ANTHEM, INC. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court’s Rule 46. Reported below: 855 F. 3d 345.

Certiorari Granted—Vacated and Remanded

No. 16–1003. MCKNIGHT ET AL. *v.* PETERSEN, ON BEHALF OF L. P., A MINOR AND BENEFICIARY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PETERSEN. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *White v. Pauly*, 580 U.S. 73 (2017) (*per curiam*). Reported below: 663 Fed. Appx. 531.

No. 16–7234. MCINTOSH *v.* UNITED STATES. C. A. 4th Cir. Reported below: 660 Fed. Appx. 199; and

No. 16–7794. BROWN *v.* UNITED STATES. C. A. 3d Cir. Reported below: 661 Fed. Appx. 190. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Honeycutt v. United States*, 581 U.S. 443 (2017).

Certiorari Granted—Reversed. (See No. 16–1177, *ante*, p. 91.)

Certiorari Dismissed

No. 16–9107. MORROW *v.* BRENNAN, POSTMASTER GENERAL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8. Reported below: 676 Fed. Appx. 582.

Miscellaneous Orders

No. D–2977. IN RE DISCIPLINE OF CLARK. Thomas Andrew Clark, of Perth Amboy, N. J., is suspended from the practice of

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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-2978. *IN RE DISCIPLINE OF SMITH*. Allan Christopher Smith, of Morrisville, Pa., 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-2979. *IN RE DISCIPLINE OF BAILEY*. Kathy Dianne Bailey, of Alexandria, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D-2980. *IN RE DISCIPLINE OF FERRELL*. Ronald Tyson Ferrell, of Wilkesboro, 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-2981. *IN RE DISCIPLINE OF WALTON*. Elbert A. Walton, Jr., of St. Louis, Mo., 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-2982. *IN RE DISCIPLINE OF HESTERBERG*. Gregory Xavier Hesterberg, of Garden City, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-2983. *IN RE DISCIPLINE OF WROBLEWSKI*. David Raymond Wroblewski, of Mesa, Ariz., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-2984. *IN RE DISCIPLINE OF THORNSBURY*. Michael Thornsbery, of Lexington, Ky., 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.

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No. D-2985. *IN RE DISCIPLINE OF LONGMEYER*. Timothy Michael Longmeyer, of Louisville, Ky., 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-2986. *IN RE DISCIPLINE OF KUCHINSKY*. Neil Kuchinsky, of Colonial Heights, Va., 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-2987. *IN RE DISCIPLINE OF BELLO*. Thomas F. Bello, of Staten Island, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-2988. *IN RE DISCIPLINE OF BYRD*. Charles Grant Byrd, Jr., of Baltimore, Md., 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-2989. *IN RE DISCIPLINE OF BOISSEAU*. Eldon L. Boisseau, of Wichita, Kan., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 16-9150. *IN RE BRACKEN*;
No. 16-9189. *IN RE CONE*;
No. 16-9226. *IN RE MANNING*;
No. 16-9238. *IN RE LASSINGER*; and
No. 16-9239. *IN RE LOPEZ*. Petitions for writs of habeas corpus denied.

No. 16-9256. *IN RE DOWELL*. Petition for writ of habeas corpus denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

Certiorari Granted

No. 16-712. *OIL STATES ENERGY SERVICES, LLC v. GREENE'S ENERGY GROUP, LLC, ET AL.* C. A. Fed. Cir. Certiorari

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granted limited to Question 1 presented by the petition. Reported below: 639 Fed. Appx. 639.

Certiorari Denied

No. 16–1029. *BALL ET AL. v. MILWARD ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 3d 1207.

No. 16–1060. *KUTLAK v. COLORADO.* Ct. App. Colo. Certiorari denied.

No. 16–1062. *JEFFERS v. METROPOLITAN LIFE INSURANCE CO. ET AL.* C. A. 6th Cir. Certiorari denied.

No. 16–1074. *CARAFFA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CARAFFA v. CARNIVAL CORP.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 208 So. 3d 172.

No. 16–1092. *LOCKWOOD, ANDREWS & NEWMAN, P. C., ET AL. v. MASON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 3d 383.

No. 16–1201. *SCHOCKNER v. CASH, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 16–1209. *RIEMER v. OREGON ET AL.* Sup. Ct. Ore. Certiorari denied.

No. 16–1217. *TICHICH ET AL. v. CITY OF BLOOMINGTON, MINNESOTA, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 835 F. 3d 856.

No. 16–1223. *BLUE SPIKE, LLC v. GOOGLE INC.* C. A. Fed. Cir. Certiorari denied. Reported below: 669 Fed. Appx. 575.

No. 16–1228. *OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., ET AL. v. DEPARTMENT OF TRANSPORTATION ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 3d 879.

No. 16–1235. *FRANKLIN v. LAUGHLIN, DBA BWD PROPERTIES 2, LLC, ET AL.* Ct. App. Nev. Certiorari denied. Reported below: 132 Nev. 970.

No. 16–1247. *BARTH v. MCNEELY ET AL.* Sup. Ct. Fla. Certiorari denied.

No. 16–1249. *D. E. v. DOE ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 3d 723.

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No. 16–1266. *DIVERSIFIED INGREDIENTS, INC. v. TESTA, TAX COMMISSIONER OF OHIO*. C. A. 8th Cir. Certiorari denied. Reported below: 846 F. 3d 994.

No. 16–1270. *POPE v. GUNS ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 251.

No. 16–1282. *ADAMS v. NILES ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 674 Fed. Appx. 956.

No. 16–1317. *HERNANDEZ ET AL. v. AVERY*. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 3d 433.

No. 16–1325. *AKHTAR-ZAIDI ET AL. v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 422.

No. 16–1333. *NEASE ET UX. v. FORD MOTOR Co.* C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 3d 219.

No. 16–5895. *ZEBBS v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 16–7763. *PERRY v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 146.

No. 16–7775. *CUEVAS CABRERA v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. Reported below: 826 F. 3d 514.

No. 16–7776. *DAVIS v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 16–7855. *MILLER v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 662 Fed. Appx. 169.

No. 16–7857. *RAMIREZ-QUINTANILLA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 304.

No. 16–7991. *RODRIGUEZ-BERBAL v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 367.

No. 16–8212. *GARRITY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 889.

No. 16–8244. *RODRIGUEZ-LOPEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 273.

No. 16–8259. *CARTER v. THOMAS, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 657 Fed. Appx. 176.

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No. 16–8301. *HAYWARD v. KELLY, SUPERINTENDENT, OREGON STATE PENITENTIARY*. Ct. App. Ore. Certiorari denied. Reported below: 281 Ore. App. 113, 383 P. 3d 437.

No. 16–8459. *MALDONADO-JAIMES v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 441.

No. 16–8519. *WARDLOW v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 666 Fed. Appx. 861.

No. 16–8598. *KULKARNI v. UPASANI ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 937.

No. 16–8602. *VEGA v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 16–8615. *RAMNATH v. WANG*. Sup. Ct. Wash. Certiorari denied.

No. 16–8624. *BELLAMY v. MICHIGAN*. Sup. Ct. Mich. Certiorari denied. Reported below: 500 Mich. 881, 886 N. W. 2d 420.

No. 16–8626. *CORREA-AYALA v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 144 A. 3d 199.

No. 16–8631. *BONILLA v. CALIFORNIA*. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 16–8632. *LANGLEY v. UNKNOWN*. C. A. 4th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 138.

No. 16–8642. *ZEBBS v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 16–8643. *WOODSON v. WHITEHEAD ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 931.

No. 16–8650. *YANEY ET AL. v. SUPERIOR COURT OF CALIFORNIA, SAN BERNARDINO COUNTY, ET AL.* Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 16–8655. *SANCHO v. ANDERSON SCHOOL DISTRICT FOUR*. C. A. 4th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 204.

No. 16–8664. *MITCHELL v. WISCONSIN DEPARTMENT OF HEALTH SERVICES*. Ct. App. Wis. Certiorari denied.

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No. 16–8665. *PINKSTON v. UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES ET AL.* C. A. 11th Cir. Certiorari denied.

No. 16–8668. *JONES v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.* C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 3d 1299.

No. 16–8670. *COULSTON v. CAMERON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 651 Fed. Appx. 139.

No. 16–8673. *ALEXANDER v. LOUISIANA.* Sup. Ct. La. Certiorari denied. Reported below: 2015–1879 (La. 10/28/16), 202 So. 3d 990.

No. 16–8674. *PACK v. UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.* C. A. 4th Cir. Certiorari denied.

No. 16–8754. *EARL v. FOSTER, WARDEN.* C. A. 7th Cir. Certiorari denied.

No. 16–8759. *CONTRERAS v. BUTLER, WARDEN.* C. A. 7th Cir. Certiorari denied.

No. 16–8763. *RIVERA v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 679 Fed. Appx. 51.

No. 16–8799. *SCHessler v. McDONALD, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 16–8844. *HARRIS v. BUTLER, WARDEN.* Sup. Ct. Ill. Certiorari denied.

No. 16–8861. *BEAM v. UNITED STATES.* C. A. 3d Cir. Certiorari denied.

No. 16–8901. *FIELDS v. HARRIS, CLERK, SUPREME COURT OF THE UNITED STATES.* C. A. D. C. Cir. Certiorari denied. Reported below: 671 Fed. Appx. 808.

No. 16–8928. *SMITH v. SESSIONS, ATTORNEY GENERAL.* C. A. 3d Cir. Certiorari denied.

No. 16–8951. *FORTSON v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL.* C. A. 9th Cir. Certiorari denied.

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No. 16–8956. *EVANS v. CUNNINGHAM ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 157.

No. 16–8968. *ABDUL-HAQQ v. KAISER FOUNDATION HOSPITALS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 462.

No. 16–8994. *RAMIREZ TORRES v. SEIBEL, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 16–9026. *COLTER v. CHAPMAN CHEVROLET.* Ct. App. Ariz. Certiorari denied.

No. 16–9036. *BLOODMAN v. LIGON, EXECUTIVE DIRECTOR, ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT.* Sup. Ct. Ark. Certiorari denied.

No. 16–9045. *MACKEY v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 369.

No. 16–9051. *VANLAAR v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 269.

No. 16–9054. *WRIGHT v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 674 Fed. Appx. 567.

No. 16–9057. *MONTIEL-CORTES v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 849 F. 3d 221.

No. 16–9068. *MORENO v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 685 Fed. Appx. 474.

No. 16–9079. *CURRY v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 781.

No. 16–9080. *CLARK v. SPEER, ACTING SECRETARY OF THE ARMY.* C. A. 4th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 84.

No. 16–9083. *LAWRENCE v. UNITED STATES.* C. A. 4th Cir. Certiorari denied.

No. 16–9088. *SHEFFIELD v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 16–9090. *TUCKER v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 330.

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- No. 16–9092. *WOODARD v. UNITED STATES*; and
No. 16–9154. *ROBINSON v. UNITED STATES*. C. A. 11th Cir.
Certiorari denied. Reported below: 662 Fed. Appx. 854.
- No. 16–9095. *WHITE v. UNITED STATES*. C. A. 4th Cir. Cer-
tiorari denied. Reported below: 850 F. 3d 667.
- No. 16–9097. *WHOLERY v. UNITED STATES*. C. A. 3d Cir.
Certiorari denied.
- No. 16–9102. *RODRIGUEZ v. UNITED STATES*. C. A. 11th Cir.
Certiorari denied. Reported below: 673 Fed. Appx. 914.
- No. 16–9110. *SILER v. UNITED STATES*. C. A. 11th Cir. Cer-
tiorari denied. Reported below: 671 Fed. Appx. 739.
- No. 16–9111. *CARTER v. UNITED STATES*. C. A. 2d Cir. Cer-
tiorari denied. Reported below: 675 Fed. Appx. 100.
- No. 16–9114. *EVANS v. UNITED STATES*. C. A. 4th Cir. Cer-
tiorari denied. Reported below: 848 F. 3d 242.
- No. 16–9119. *MENDEZ-BELLO v. UNITED STATES*. C. A. 9th
Cir. Certiorari denied. Reported below: 678 Fed. Appx. 508.
- No. 16–9121. *BEAMON v. UNITED STATES*. C. A. 11th Cir.
Certiorari denied. Reported below: 678 Fed. Appx. 883.
- No. 16–9122. *PRYOR v. UNITED STATES*. C. A. 6th Cir. Cer-
tiorari denied. Reported below: 842 F. 3d 441.
- No. 16–9123. *LEWIS v. UNITED STATES*. C. A. 6th Cir. Cer-
tiorari denied. Reported below: 676 Fed. Appx. 440.
- No. 16–9127. *LASHER v. UNITED STATES*. C. A. 2d Cir.
Certiorari denied. Reported below: 661 Fed. Appx. 25.
- No. 16–9129. *KAHRE v. UNITED STATES*. C. A. 9th Cir. Cer-
tiorari denied.
- No. 16–9135. *JENKINS v. UNITED STATES*. C. A. 4th Cir.
Certiorari denied. Reported below: 677 Fed. Appx. 845.
- No. 16–9136. *WALLER v. COLORADO*. Ct. App. Colo. Certio-
rari denied. Reported below: 412 P. 3d 866.
- No. 16–9137. *TAYLOR v. UNITED STATES*. C. A. 1st Cir. Cer-
tiorari denied. Reported below: 848 F. 3d 476.

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No. 16–9142. *HOFFMAN v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 3d 878.

No. 16–9143. *FELIPE-DIEGO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 496.

No. 16–9161. *BUCZEK v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 16–810. *NACCHIO ET AL. v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. JUSTICE KAGAN and JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 824 F. 3d 1370.

No. 16–853. *JOHNSON v. FORD MOTOR CO. ET AL.* Ct. App. Ga. Certiorari denied. THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 335 Ga. App. XXIX.

No. 16–950. *JACOBS FIELD SERVICES NORTH AMERICA, INC. v. ACOSTA, SECRETARY OF LABOR*. C. A. 5th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 659 Fed. Appx. 181.

No. 16–1216. *DALY v. UNITED STATES ET AL.* C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 669 Fed. Appx. 19.

No. 16–1280. *TANNER SERVICES, LLC v. GUIDRY ET UX.* Sup. Ct. La. Motion of Stallion Oilfield Construction, LLC, et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 2016–2013 (La. 1/23/17), 209 So. 3d 90.

No. 16–8948. *GRIGSBY v. MARTEN, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, ET AL.* C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 670 Fed. Appx. 982.

No. 16–9106. *DARIO RAMIREZ v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 846 F. 3d 615.

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No. 16–9113. *DERROW v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 675 Fed. Appx. 481.

Rehearing Denied

No. 16–7414. *DAKER v. BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL.*, 580 U. S. 1174;

No. 16–7418. *TAYLOR v. UNITED STATES*, 580 U. S. 1174;

No. 16–7580. *WHITE v. EDS CARE MANAGEMENT LLC ET AL.*, 581 U. S. 941;

No. 16–7593. *WHITE ET UX. v. ATTORNEY GRIEVANCE COMMISSION OF MICHIGAN*, 581 U. S. 941;

No. 16–7709. *DAMJANOVIC v. CALIFORNIA*, 581 U. S. 907;

No. 16–7713. *PENDER v. MORRIS DUFFY ALONSO & FALEY, LLP*, 581 U. S. 907;

No. 16–7765. *SMITH v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*, 581 U. S. 908;

No. 16–7783. *HILL ET UX. v. DITECH FINANCIAL, LLC, ET AL.*, 581 U. S. 908;

No. 16–7880. *RAMIREZ v. BAUSCH & LOMB, INC.*, 581 U. S. 922;

No. 16–7901. *BENFORD v. CALIFORNIA*, 581 U. S. 923;

No. 16–7957. *CELESTINE v. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.*, 580 U. S. 1221;

No. 16–7960. *IN RE MARIE ET UX.*, 581 U. S. 938;

No. 16–8107. *SHEPPARD v. MEDEIROS, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK*, 581 U. S. 925;

No. 16–8145. *COWAN v. OKLAHOMA*, 581 U. S. 976;

No. 16–8168. *OLMOS MUNOZ v. UNITED STATES*, 581 U. S. 911;

No. 16–8252. *CONROY v. WALTON, WARDEN*, 581 U. S. 926;

No. 16–8253. *CONRAD v. UNITED STATES*, 581 U. S. 926; and

No. 16–8314. *IN RE CLAYBORNE*, 581 U. S. 917. Petitions for rehearing denied.

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Miscellaneous Orders

No. 16A1202 (16–649). *NORTH CAROLINA ET AL. v. COVINGTON ET AL.*, 581 U. S. 1015. Application for issuance of the judgment

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forthwith, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 16A1203 (16–1023). NORTH CAROLINA ET AL. *v.* COVINGTON ET AL., 581 U. S. 486. Application for issuance of judgment forthwith, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

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Certiorari Granted—Reversed and Remanded. (See No. 16–1116, *ante*, p. 280.)

Certiorari Granted—Vacated and Remanded

No. 15–734. MILBERG LLP ET AL. *v.* LABER. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Microsoft Corp. v. Baker*, *ante*, p. 23. Reported below: 801 F. 3d 1066.

Certiorari Dismissed

No. 16–9191. HINES *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8.

Miscellaneous Orders

No. D–2948. IN RE DISBARMENT OF DAVIDSON. Disbarment entered. [For earlier order herein, see 580 U. S. 1110.]

No. D–2950. IN RE DISBARMENT OF THOMPSON. Disbarment entered. [For earlier order herein, see 580 U. S. 1110.]

No. D–2954. IN RE DISBARMENT OF HARRINGTON. Disbarment entered. [For earlier order herein, see 580 U. S. 1194.]

No. D–2955. IN RE DISBARMENT OF SULLIVAN. Disbarment entered. [For earlier order herein, see 580 U. S. 1194.]

No. D–2956. IN RE DISBARMENT OF GOLDTHORPE. Disbarment entered. [For earlier order herein, see 580 U. S. 1194.]

No. D–2990. IN RE DISCIPLINE OF MOENNING. Richard Carl Moenning, of Evanston, Ill., 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.

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No. D-2991. IN RE DISCIPLINE OF COYLE. Francis Joseph Coyle, Jr., of Rock Island, Ill., 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-2992. IN RE DISCIPLINE OF PADGETT. Squire Padgett, Jr., of Alexandria, Va., 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-2993. IN RE DISCIPLINE OF CARTER. George R. Carter, of Las Vegas, Nev., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 16M139. CLINE *v.* BALL, SUPERINTENDENT, AVERY-MITCHELL CORRECTIONAL INSTITUTION; and

No. 16M140. WILLIAMS *v.* GROUNDS, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 16-1215. LAMAR, ARCHER & COFRIN, LLP *v.* APPLING. C. A. 11th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 16-8842. HERNANDEZ-GONZALEZ *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir.; and

No. 16-9213. FRANCISCO *v.* UNITED STATES. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 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. 16-1402. IN RE SINGLETON;

No. 16-9290. IN RE NEUMAN;

No. 16-9364. IN RE JOHNSON; and

No. 16-9386. IN RE BOSTON. Petitions for writs of habeas corpus denied.

No. 16-1281. IN RE TOBINICK ET AL.;

No. 16-8748. IN RE SOUTHGATE;

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No. 16–8767. *IN RE DAVIS*; and
No. 16–8778. *IN RE HOWELL*. Petitions for writs of mandamus denied.

No. 16–8716. *IN RE GLEIS*. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Postponed

No. 16–1161. *GILL ET AL. v. WHITFORD ET AL.* Appeal from D. C. W. D. Wis. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 218 F. Supp. 3d 837.

Certiorari Denied

No. 16–217. *LENZ v. UNIVERSAL MUSIC CORP. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 3d 1145.

No. 16–837. *LAUREL-ABARCA v. SESSIONS, ATTORNEY GENERAL.* C. A. 9th Cir. Certiorari denied.

No. 16–952. *SINGH v. SESSIONS, ATTORNEY GENERAL.* C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 3d 880.

No. 16–1016. *MACY’S, INC. v. NATIONAL LABOR RELATIONS BOARD.* C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 3d 557.

No. 16–1063. *WILCHCOMBE ET AL. v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 3d 1179.

No. 16–1068. *NORTHEAST OHIO COALITION FOR THE HOMELESS ET AL. v. HUSTED, OHIO SECRETARY OF STATE, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 3d 612.

No. 16–1082. *GARCIA ET AL. v. BLOOMBERG ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 662 Fed. Appx. 50.

No. 16–1085. *ULTRAFLO CORP. v. PELICAN TANK PARTS, INC., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 3d 652.

No. 16–1089. *NEW MIGHTY U. S. TRUST ET AL. v. YUEH-LAN WANG, BY AND THROUGH HER ATTORNEY-IN-FACT, WONG.* C. A. D. C. Cir. Certiorari denied. Reported below: 843 F. 3d 487.

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No. 16–1106. COX COMMUNICATIONS, INC., ET AL. *v.* SPRINT COMMUNICATION Co. LP ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 838 F. 3d 1224.

No. 16–1110. BLOOMINGDALE’S, INC. *v.* VITOLO. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 890.

No. 16–1113. MEYERS *v.* NICOLET RESTAURANT OF DE PERE, LLC. C. A. 7th Cir. Certiorari denied. Reported below: 843 F. 3d 724.

No. 16–1123. POLY-AMERICA, L. P. *v.* API INDUSTRIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 839 F. 3d 1131.

No. 16–1151. FLOCK ET AL. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 840 F. 3d 49.

No. 16–1155. MILLER *v.* STAMM, PERSONAL REPRESENTATIVE OF THE ESTATE OF STAMM. C. A. 6th Cir. Certiorari denied. Reported below: 657 Fed. Appx. 492.

No. 16–1157. ACTIVE LAF, LLC, DBA SKY ZONE LAFAYETTE, ET AL. *v.* DUHON; and ACTIVE LAF, LLC, *v.* ALICEA ET AL. (Reported below: 2016–0708 (La. 10/19/16), 218 So. 3d 1001). Sup. Ct. La. Certiorari denied.

No. 16–1178. DONZIGER ET AL. *v.* CHEVRON CORP. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 3d 74.

No. 16–1214. CONOVER ET AL. *v.* FISHER ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 229 Md. App. 720 and 722.

No. 16–1218. MARQUEZ ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, TULARE COUNTY, ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 16–1227. ROBERTSON *v.* EMI CHRISTIAN MUSIC GROUP, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 844 F. 3d 79.

No. 16–1229. MCKINLEY *v.* LEGRAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 610.

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No. 16–1232. *BACH v. LABOR AND INDUSTRY REVIEW COMMISSION ET AL.* Ct. App. Wis. Certiorari denied. Reported below: 2016 WI App 80, 372 Wis. 2d 184, 888 N. W. 2d 23.

No. 16–1234. *DAVIS ET AL. v. JPMORGAN CHASE BANK N. A.* App. Ct. Conn. Certiorari denied.

No. 16–1243. *JONES v. ADMINISTRATIVE OFFICE OF THE COURTS, MARYLAND JUDICIARY.* C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 160.

No. 16–1260. *R. J. REYNOLDS TOBACCO CO., AS SUCCESSOR IN INTEREST TO LORILLARD TOBACCO CO. v. MICHIGAN DEPARTMENT OF TREASURY.* Ct. App. Mich. Certiorari denied.

No. 16–1264. *LUCAS, INDIVIDUALLY, AS WIDOW AND WRONGFUL DEATH BENEFICIARY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCAS, DECEASED, ET AL. v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 333.

No. 16–1267. *NORBER v. FEDERAL AVIATION ADMINISTRATION.* C. A. 11th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 911.

No. 16–1269. *ZIOBER v. BLB RESOURCES, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 839 F. 3d 814.

No. 16–1272. *RAPLEE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAPLEE v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 3d 328.

No. 16–1273. *WIEST v. CINCINNATI BAR ASSN.* Sup. Ct. Ohio. Certiorari denied. Reported below: 148 Ohio St. 3d 683, 2016-Ohio-8166, 72 N. E. 3d 621.

No. 16–1315. *MELVIN v. NAYLOR ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 115.

No. 16–1326. *BRIGHAM ET AL. v. PATLA, STRAUS, ROBINSON & MOORE, P. A., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 168.

No. 16–1358. *DIETRICH v. SOO LINE RAILROAD, DBA CANADIAN PACIFIC.* C. A. 8th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 403.

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No. 16–1377. TRUSTEES OF THE UPSTATE NEW YORK ENGINEERS PENSION FUND *v.* IVY ASSET MANAGEMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 843 F. 3d 561.

No. 16–1383. SWECKER *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 16–7182. SULLIVAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 16–7662. PIPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 839 F. 3d 1261.

No. 16–7686. BREWTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 998.

No. 16–7689. HERNANDEZ-CIFUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 233.

No. 16–7756. DURHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 990.

No. 16–7869. HERNANDEZ-ESPINOZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 627 Fed. Appx. 210.

No. 16–7874. CANTU *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 665 Fed. Appx. 384.

No. 16–7883. FRITTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 3d 937.

No. 16–8003. HUNNICUTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 521.

No. 16–8054. MCCANDLESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 841 F. 3d 819.

No. 16–8072. SEABROOKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 839 F. 3d 1326.

No. 16–8186. CULBRETH *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

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No. 16–8192. *CERVANTES-SANDOVAL v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 315.

No. 16–8336. *PETERS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 3d 572.

No. 16–8357. *BURGENER v. CALIFORNIA*. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 5th 461, 376 P. 3d 659.

No. 16–8448. *GREENE v. NEVADA*. Sup. Ct. Nev. Certiorari denied. Reported below: 132 Nev. 973.

No. 16–8536. *SALDIERNA-ROJAS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 447.

No. 16–8689. *HOLMAN v. IOWA*. Ct. App. Iowa. Certiorari denied. Reported below: 888 N. W. 2d 902.

No. 16–8701. *KOBE v. MCMASTER, GOVERNOR OF SOUTH CAROLINA, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 666 Fed. Appx. 281.

No. 16–8706. *STEWART v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 141602–U.

No. 16–8711. *SCOTT v. WRIGHT ET AL.* Sup. Ct. Ga. Certiorari denied.

No. 16–8722. *SCHOONOVER v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 16–8727. *R. M. v. COMMITTEE ON CHARACTER AND FITNESS*. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 3d 950, 49 N. E. 3d 1205.

No. 16–8728. *WILLIAMS v. TEXAS*. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 499 S. W. 3d 498.

No. 16–8739. *CAMICK v. WATTLEY ET AL.* C. A. 10th Cir. Certiorari denied.

No. 16–8740. *BOSTICK v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 948.

No. 16–8741. *LEE v. MACOMBER*. C. A. 9th Cir. Certiorari denied.

No. 16–8743. *KEY v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

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No. 16–8750. *SAMPSON v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 16–8753. *CAISON v. FLORIDA*. Sup. Ct. Fla. Certiorari denied.

No. 16–8757. *WHITNUM-BAKER v. BAKER*. App. Ct. Conn. Certiorari denied. Reported below: 161 Conn. App. 227, 127 A. 3d 330.

No. 16–8779. *HESS v. WOODS, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 16–8797. *BYFORD v. NEVADA*. Sup. Ct. Nev. Certiorari denied. Reported below: 132 Nev. 951, 385 P. 3d 35.

No. 16–8806. *HARDY v. RIVARD, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 16–8818. *STAMPS, AKA STAMPS BEY v. HAAS, WARDEN*. Sup. Ct. Mich. Certiorari denied.

No. 16–8824. *ARMSTRONG v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA*. C. A. 11th Cir. Certiorari denied.

No. 16–8827. *FLOYD v. HOFFNER, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 16–8830. *LAMPKIN v. BROCK*. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 16–8845. *HART v. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY*. C. A. 6th Cir. Certiorari denied.

No. 16–8851. *MCKENZIE v. SESSIONS, ATTORNEY GENERAL*. C. A. 11th Cir. Certiorari denied.

No. 16–8859. *M. B. v. OHIO*. Ct. App. Ohio, 5th App. Dist., Ashland County. Certiorari denied. Reported below: 2016-Ohio-4780.

No. 16–8860. *C. B. v. OHIO*. Ct. App. Ohio, 5th App. Dist., Ashland County. Certiorari denied. Reported below: 2016-Ohio-4779.

No. 16–8890. *LYNCH v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 665 Fed. Appx. 607.

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No. 16–8903. *NUSHAWN W., AKA JOHNSON v. NEW YORK*. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 139 App. Div. 3d 1375, 31 N. Y. S. 3d 362.

No. 16–8932. *GILLILAND v. KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION*. C. A. 8th Cir. Certiorari denied.

No. 16–8938. *MALDONADO v. GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 16–8939. *ODUESO v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 369 N. C. 486, 795 S. E. 2d 367.

No. 16–8958. *COACH v. FLORIDA*. Sup. Ct. Fla. Certiorari denied.

No. 16–9004. *SIMPSON v. ECKSTEIN, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 16–9020. *TOWNSEND v. RICHARDSON, WARDEN*. Ct. App. Wis. Certiorari denied.

No. 16–9060. *OWEN v. OFFICE OF PERSONNEL MANAGEMENT*. C. A. Fed. Cir. Certiorari denied. Reported below: 659 Fed. Appx. 652.

No. 16–9117. *ESTRADA-JIMENEZ v. ECKSTEIN, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 16–9118. *SCHAEFER v. WISCONSIN*. Ct. App. Wis. Certiorari denied. Reported below: 2017 WI App 1, 372 Wis. 2d 833, 890 N. W. 2d 49.

No. 16–9131. *CLARDY v. NIKE, INC., ET AL.* Ct. App. Ore. Certiorari denied. Reported below: 279 Ore. App. 811, 381 P. 3d 1100.

No. 16–9133. *JONES v. NEVEN, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 490.

No. 16–9134. *JONES v. SKOLNIK ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 560.

No. 16–9144. *BARNETT v. GEORGIA*. Sup. Ct. Ga. Certiorari denied. Reported below: 300 Ga. 551, 796 S. E. 2d 653.

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No. 16–9148. *WRIGHT v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 3d 759.

No. 16–9152. *ROGERS v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS*. C. A. 10th Cir. Certiorari denied.

No. 16–9163. *STONE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 469.

No. 16–9164. *SCARLETT v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 848 F. 3d 524 and 677 Fed. Appx. 21.

No. 16–9166. *JENKINS v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 849 F. 3d 390.

No. 16–9172. *WILLIAMS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 684 Fed. Appx. 661.

No. 16–9174. *WILES v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 16–9176. *LEE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 16–9183. *BAUTISTA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 394.

No. 16–9184. *BLACKMON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 16–9185. *ROSALES-ACOSTA v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 860.

No. 16–9192. *HARRINGTON v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 814 F. 3d 896.

No. 16–9195. *NEMAN, AKA DAVATGARZADEH v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 649.

No. 16–9197. *LEWIS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 16–9204. *BEAR v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 3d 981.

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No. 16–9206. *ANDRADE v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 397.

No. 16–9209. *HELMER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 16–9210. *FERNANDEZ v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 636 Fed. Appx. 71.

No. 16–9211. *GODFREY v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 201.

No. 16–9212. *FRANCISCO HERRERA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 16–9223. *COOK v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 16–9225. *KRASNIQI ET AL. v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 16–9227. *MONSHIZADEH v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 359.

No. 16–9229. *GARCIA-MARTINEZ v. UNITED STATES* (Reported below: 680 Fed. Appx. 278); and *RIOS-OJEDA v. UNITED STATES* (677 Fed. Appx. 168). C. A. 5th Cir. Certiorari denied.

No. 16–866. *CONNECTICUT v. DICKSON*. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 322 Conn. 410, 141 A. 3d 810.

No. 16–1084. *FREDERICKSEN v. OLSEN ET AL.* Ct. App. Iowa. Motion of Concerned United Birthparents, Inc., for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 888 N. W. 2d 682.

No. 16–1224. *FLORIDA v. K. C., A CHILD*. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 207 So. 3d 951.

No. 16–1230. *CUNNINGHAM ET VIR v. JACKSON HOLE MOUNTAIN RESORT CORP.* C. A. 10th Cir. Certiorari denied. JUS-

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TICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 673 Fed. Appx. 841.

No. 16–1236. QUINN ET AL. *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Motion of Ad Hoc Committee of Allied Nevada, Inc., Shareholders for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 838 F. 3d 792.

No. 16–1252. FLORIDA *v.* JOHNSON. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 205 So. 3d 1285.

No. 16–1304. NTCH, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 841 F. 3d 497.

No. 16–1376. WHISENANT *v.* SHERIDAN PRODUCTION CO., LLC. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

No. 16–6786. VERDIN-GARCIA ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 824 F. 3d 1218.

No. 16–7953. GILMORE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 841 F. 3d 909.

No. 16–9214. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 16–1091. HILL *v.* SUWANNEE RIVER WATER MANAGEMENT DISTRICT, 581 U. S. 960;

No. 16–7610. MINARD *v.* WAL-MART STORES, INC., 580 U. S. 1206;

No. 16–7914. JOHNSON *v.* KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL., 581 U. S. 923;

No. 16–8010. BYERS *v.* UNITED STATES, 580 U. S. 1222;

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- No. 16–8144. *DUNLAP v. HORTON, WARDEN*, 581 U. S. 925;
No. 16–8175. *WILLIAMS v. PFISTER, WARDEN*, 581 U. S. 925;
No. 16–8221. *ANDREWS v. CASSADY, WARDEN*, 581 U. S. 963;
No. 16–8274. *JORDAN v. UNITED STATES*, 581 U. S. 927;
No. 16–8397. *MITCHELL v. NEW YORK UNIVERSITY ET AL.*,
581 U. S. 964; and
No. 16–8556. *IN RE RAY*, 581 U. S. 937. Petitions for rehear-
ing denied.