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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2012

JUNE 17 THROUGH OCTOBER 1, 2013

END OF TERM

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

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ERRATUM

556 U. S. 194, line 11: "fail-safe" should be "fail safe".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
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ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
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ELENA KAGAN, ASSOCIATE JUSTICE.

RETIRED

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SCOTT S. HARRIS, CLERK.[2]
CHRISTINE LUCHOK FALLON, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
LINDA S. MASLOW, LIBRARIAN.

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* For notes, see p. IV.

NOTES

[1] Mr. Suter retired as Clerk effective August 31, 2013. See *post*, p. VII.

[2] Mr. Harris was appointed Clerk on July 22, 2013, effective September 1, 2013. See *post*, p. 935.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

RETIREMENT OF CLERK OF THE COURT

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JUNE 26, 2013

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

THE CHIEF JUSTICE said:

Our Clerk, William K. Suter, who has sat next to the bench for the past 22 years and has heard more than 1,700 arguments, has announced his retirement, effective August 31st of this year. General Suter had a distinguished military career before coming to the Court, and he will retire from this position with more than 51 years of government service.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2012

ARIZONA ET AL. *v.* INTER TRIBAL COUNCIL OF ARIZONA, INC., ET AL.

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

No. 12–71. Argued March 18, 2013—Decided June 17, 2013

The National Voter Registration Act of 1993 (NVRA) requires States to "accept and use" a uniform federal form to register voters for federal elections. 42 U. S. C. § 1973gg–4(a)(1). That "Federal Form," developed by the federal Election Assistance Commission (EAC), requires only that an applicant aver, under penalty of perjury, that he is a citizen. Arizona law, however, requires voter-registration officials to "reject" any application for registration, including a Federal Form, that is not accompanied by documentary evidence of citizenship. Respondents, a group of individual Arizona residents and a group of nonprofit organizations, sought to enjoin that Arizona law. Ultimately, the District Court granted Arizona summary judgment on respondents' claim that the NVRA pre-empts Arizona's requirement. The Ninth Circuit affirmed in part but reversed as relevant here, holding that the state law's documentary-proof-of-citizenship requirement is pre-empted by the NVRA.

Held: Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the NVRA's mandate that States "accept and use" the Federal Form. Pp. 7–20.

(a) The Elections Clause imposes on States the duty to prescribe the time, place, and manner of electing Representatives and Senators, but

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it confers on Congress the power to alter those regulations or supplant them altogether. See *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 804–805. This Court has said that the terms "Times, Places, and Manner" "embrace authority to provide a complete code for congressional elections," including regulations relating to "registration." *Smiley* v. *Holm*, 285 U. S. 355, 366. Pp. 7–9.

(b) Because "accept and use" are words "that can have more than one meaning," they "are given content . . . by their surroundings." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 466. Reading "accept" merely to denote willing receipt seems out of place in the context of an official mandate to accept and use something for a given purpose. The implication of such a mandate is that its object is to be accepted as sufficient for the requirement it is meant to satisfy. Arizona's reading is also difficult to reconcile with neighboring NVRA provisions, such as § 1973gg–6(a)(1)(B) and § 1973gg–4(a)(2).

Arizona's appeal to the presumption against pre-emption invoked in this Court's Supremacy Clause cases is inapposite. The power the Elections Clause confers is none other than the power to pre-empt. Because Congress, when it acts under this Clause, is always on notice that its legislation will displace some element of a pre-existing legal regime erected by the States, the reasonable assumption is that the text of Elections Clause legislation accurately communicates the scope of Congress's pre-emptive intent.

Nonetheless, while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from "deny[ing] registration based on information in their possession establishing the applicant's ineligibility." Pp. 9–15.

(c) Arizona is correct that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them. The latter is the province of the States. See U. S. Const., Art. I, § 2, cl. 1; Amdt. 17. It would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications. The NVRA can be read to avoid such a conflict, however. Section 1973gg–7(b)(1) permits the EAC to include on the Federal Form information "necessary to enable the appropriate State election official to assess the eligibility of the applicant." That validly conferred discretionary executive authority is properly exercised (as the Government has proposed) to require the inclusion of Arizona's concrete-evidence requirement if such evidence is necessary to enable Arizona to enforce its citizenship qualification.

The NVRA permits a State to request the EAC to include state-specific instructions on the Federal Form, see 42 U. S. C. § 1973gg–7(a)(2), and a State may challenge the EAC's rejection of that request

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(or failure to act on it) in a suit under the Administrative Procedure Act. That alternative means of enforcing its constitutional power to determine voting qualifications remains open to Arizona here. Should the EAC reject or decline to act on a renewed request, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete-evidence requirement on the Federal Form. Pp. 15–20.

677 F. 3d 383, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined, and in which KENNEDY, J., joined in part. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 20. THOMAS, J., *post*, p. 22, and ALITO, J., *post*, p. 38, filed dissenting opinions.

Thomas C. Horne, Attorney General of Arizona, argued the cause for petitioners. With him on the briefs for state petitioners were *David R. Cole*, Solicitor General, *Paula S. Bickett*, *Thomas M. Collins*, Assistant Attorney General, *Melissa G. Iyer*, and *M. Miller Baker*. *M. Colleen Connor* filed a brief for petitioners Twenty-six County Recorders and Election Directors.

Patricia A. Millett argued the cause for respondents. With her on the brief for respondents Inter Tribal Council of Arizona, Inc., et al. were *Jon M. Greenbaum*, *Mark A. Posner*, *Michael C. Small*, *Christopher M. Egleson*, *David J. Bodney*, *David B. Rosenbaum*, *Thomas L. Hudson*, *Joe P. Sparks*, *Laughlin McDonald*, and *Daniel B. Kohrman*. *Thomas A. Saenz*, *Nina Perales*, and *Karl J. Sandstrom* filed a brief for respondents Gonzalez et al.

Deputy Solicitor General Srinivasan argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Perez*, *John F. Bash*, *Diana K. Flynn*, and *Holly A. Thomas*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Luther Strange*, Attorney General of Alabama, *John C. Neiman, Jr.*, Solicitor General, and *Andrew L. Brasher*, Deputy Solicitor

JUSTICE SCALIA delivered the opinion of the Court.

The National Voter Registration Act requires States to "accept and use" a uniform federal form to register voters for federal elections. The contents of that form (colloquially known as the Federal Form) are prescribed by a federal agency, the Election Assistance Commission. The Federal Form developed by the EAC does not require documentary evidence of citizenship; rather, it requires only that an appli-

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General, and by the Attorneys General for their respective States as follows: *Samuel S. Olens* of Georgia, *Derek Schmidt* of Kansas, *Bill Schuette* of Michigan, *E. Scott Pruitt* of Oklahoma, and *Greg Abbott* of Texas; for the American Civil Rights Union et al. by *Peter J. Ferrara*; for the American Unity Legal Defense Fund by *Barnaby W. Zall*; for the Eagle Forum Education & Legal Defense Fund, Inc., by *Lawrence J. Joseph*; for the Landmark Legal Foundation by *Richard P. Hutchison*; for Members of Congress by *Daniel E. Lungren*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for Kris W. Kobach, Kansas Secretary of State, by *Mr. Kobach*, *pro se*, and *Ryan A. Kriegshauser*; and for Arizona State Senator Russell Pearce by *James F. Peterson*.

Briefs of *amici curiae* urging affirmance were filed for the Asian American Legal Defense and Education Fund et al. by *Michael D. Nolan*; for Community Voter Registration Organizations by *Walter Dellinger*, *Jonathan D. Hacker*, *Loren L. Alikhan*, *Brenda Wright*, and *Lisa J. Danetz*; for Constitutional Law Professors by *Douglas T. Kendall*, *Elizabeth B. Wydra*, *David H. Gans*, *Wendy R. Weiser*, and *Myrna Pérez*; for Election Administrators by *David W. Ogden* and *Daniel S. Volchok*; for LatinoJustice PRLDEF et al. by *Michael Dore*, *Catherine Weiss*, *Natalie J. Kraner*, *Lawrence Bluestone*, and *Juan Cartagena*; for the League of Women Voters by *Paul M. Smith*, *Michael B. DeSanctis*, *Jessica Ring Amunson*, and *Lloyd Leonard*; for Members of Congress by *Charles A. Rothfeld* and *Brian J. Wong*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *Debo P. Adegbile*, *Elise C. Boddie*, *Ryan P. Haygood*, *Joshua Civin*, *Michael B. de Leeuw*, *Wade Henderson*, *Lisa M. Bornstein*, *Steven M. Freeman*, *Jerome Gotkin*, and *Michael Arnold*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Judith A. Scott*, *Walter Kamiat*, *Mark Schneider*, *John J. Sullivan*, and *William Lurye*; and for the Overseas Vote Foundation et al. by *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *Kevin K. Russell*.

John Eastman, *Anthony T. Caso*, and *Edwin Meese III* filed a brief for the Center for Constitutional Jurisprudence as *amicus curiae*.

cant aver, under penalty of perjury, that he is a citizen. Arizona law requires voter-registration officials to "reject" any application for registration, including a Federal Form, that is not accompanied by concrete evidence of citizenship. The question is whether Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is preempted by the Act's mandate that States "accept and use" the Federal Form.

I

Over the past two decades, Congress has erected a complex superstructure of federal regulation atop state voter-registration systems. The National Voter Registration Act of 1993 (NVRA), 107 Stat. 77, as amended, 42 U. S. C. § 1973gg *et seq.*, "requires States to provide simplified systems for registering to vote in *federal* elections." *Young* v. *Fordice*, 520 U. S. 273, 275 (1997). The Act requires each State to permit prospective voters to "register to vote in elections for Federal office" by any of three methods: simultaneously with a driver's license application, in person, or by mail. § 1973gg–2(a).

This case concerns registration by mail. Section 1973gg–2(a)(2) of the Act requires a State to establish procedures for registering to vote in federal elections "by mail application pursuant to section 1973gg–4 of this title." Section 1973gg–4, in turn, requires States to "accept and use" a standard federal registration form. § 1973gg–4(a)(1). The Election Assistance Commission is invested with rulemaking authority to prescribe the contents of that Federal Form. § 1973gg–7(a)(1); see § 15329.[1] The EAC is explicitly instructed, however, to develop the Federal Form "in consultation with the chief election officers of the States." § 1973gg–7(a)(2). The Federal Form thus contains a number

[1] The Help America Vote Act of 2002 transferred this function from the Federal Election Commission to the EAC. See § 802, 116 Stat. 1726, codified at 42 U. S. C. §§ 15532, 1973gg–7(a).

of state-specific instructions, which tell residents of each State what additional information they must provide and where they must submit the form. See National Mail Voter Registration Form, pp. 3–20, online at http://www.eac.gov (all Internet materials as visited June 11, 2013, and available in Clerk of Court's case file); 11 CFR §9428.3 (2012). Each state-specific instruction must be approved by the EAC before it is included on the Federal Form.

To be eligible to vote under Arizona law, a person must be a citizen of the United States. Ariz. Const., Art. VII, §2; Ariz. Rev. Stat. Ann. §16–101(A) (West 2006). This case concerns Arizona's efforts to enforce that qualification. In 2004, Arizona voters adopted Proposition 200, a ballot initiative designed in part "to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day." *Purcell* v. *Gonzalez*, 549 U. S. 1, 2 (2006) (*per curiam*).[2] Proposition 200 amended the State's election code to require county recorders to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. §16–166(F) (West Cum. Supp. 2012). The proof-of-citizenship requirement is satisfied by (1) a photocopy of the applicant's passport or birth certificate, (2) a driver's license number, if the license states that the issuing authority verified the holder's U. S. citizenship, (3) evidence of naturalization, (4) tribal identification, or (5) "[o]ther documents or methods of proof . . . established pursuant to the Immigration Reform and Control Act of 1986." *Ibid.* The EAC did not grant Arizona's request to include this new requirement among the state-specific instructions for Arizona on the Federal Form. App. 225. Consequently, the Federal Form includes a statutorily required attestation, subscribed to under penalty of

[2] In May 2005, the United States Attorney General precleared under §5 of the Voting Rights Act of 1965 the procedures Arizona adopted to implement Proposition 200. *Purcell*, 549 U. S., at 3.

perjury, that an Arizona applicant meets the State's voting requirements (including the citizenship requirement), see § 1973gg–7(b)(2), but does not require concrete evidence of citizenship.

The two groups of plaintiffs represented here—a group of individual Arizona residents (dubbed the Gonzalez plaintiffs, after lead plaintiff Jesus Gonzalez) and a group of nonprofit organizations led by the Inter Tribal Council of Arizona (ITCA)—filed separate suits seeking to enjoin the voting provisions of Proposition 200. The District Court consolidated the cases and denied the plaintiffs' motions for a preliminary injunction. App. to Pet. for Cert. 1g. A two-judge motions panel of the Court of Appeals for the Ninth Circuit then enjoined Proposition 200 pending appeal. *Purcell*, 549 U. S., at 3. We vacated that order and allowed the impending 2006 election to proceed with the new rules in place. *Id.*, at 5–6. On remand, the Court of Appeals affirmed the District Court's initial denial of a preliminary injunction as to respondents' claim that the NVRA pre-empts Proposition 200's registration rules. *Gonzales* v. *Arizona*, 485 F. 3d 1041, 1050–1051 (2007). The District Court then granted Arizona's motion for summary judgment as to that claim. App. to Pet. for Cert. 1e, 3e. A panel of the Ninth Circuit affirmed in part but reversed as relevant here, holding that "Proposition 200's documentary proof of citizenship requirement conflicts with the NVRA's text, structure, and purpose." *Gonzales* v. *Arizona*, 624 F. 3d 1162, 1181 (2010). The en banc Court of Appeals agreed. *Gonzalez* v. *Arizona*, 677 F. 3d 383, 403 (2012). We granted certiorari. 568 U. S. 962 (2012).

II

The Elections Clause, Art. I, § 4, cl. 1, provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress

> may at any time by Law make or alter such Regulations, except as to the places of chusing Senators."

The Clause empowers Congress to pre-empt state regulations governing the "Times, Places and Manner" of holding congressional elections. The question here is whether the federal statutory requirement that States "accept and use" the Federal Form pre-empts Arizona's state-law requirement that officials "reject" the application of a prospective voter who submits a completed Federal Form unaccompanied by documentary evidence of citizenship.

A

The Elections Clause has two functions. Upon the States it imposes the duty ("*shall* be prescribed") to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether. See *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 804–805 (1995); *id.*, at 862 (THOMAS, J., dissenting). This grant of congressional power was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress. "[E]very government ought to contain in itself the means of its own preservation," and "an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs." The Federalist No. 59, pp. 362–363 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). That prospect seems fanciful today, but the widespread, vociferous opposition to the proposed Constitution made it a very real concern in the founding era.

The Clause's substantive scope is broad. "Times, Places, and Manner," we have written, are "comprehensive words," which "embrace authority to provide a complete code for con-

gressional elections," including, as relevant here and as petitioners do not contest, regulations relating to "registration." *Smiley* v. *Holm*, 285 U. S. 355, 366 (1932); see also *Roudebush* v. *Hartke*, 405 U. S. 15, 24–25 (1972) (recounts); *United States* v. *Classic*, 313 U. S. 299, 320 (1941) (primaries). In practice, the Clause functions as "a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." *Foster* v. *Love*, 522 U. S. 67, 69 (1997) (citation omitted). The power of Congress over the "Times, Places and Manner" of congressional elections "is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." *Ex parte Siebold*, 100 U. S. 371, 392 (1880).

B

The straightforward textual question here is whether Ariz. Rev. Stat. Ann. § 16–166(F), which requires state officials to "reject" a Federal Form unaccompanied by documentary evidence of citizenship, conflicts with the NVRA's mandate that Arizona "accept and use" the Federal Form. If so, the state law, "so far as the conflict extends, ceases to be operative." *Siebold*, *supra*, at 384. In Arizona's view, these seemingly incompatible obligations can be read to operate harmoniously: The NVRA, it contends, requires merely that a State receive the Federal Form willingly and use that form as one element in its (perhaps lengthy) transaction with a prospective voter.

Taken in isolation, the mandate that a State "accept and use" the Federal Form is fairly susceptible of two interpretations. It might mean that a State must accept the Federal Form as a complete and sufficient registration application; or it might mean that the State is merely required to receive the form willingly and use it *somehow* in its voter-

registration process. Both readings—"receive willingly" and "accept as sufficient"—are compatible with the plain meaning of the word "accept." See 1 Oxford English Dictionary 70 (2d ed. 1989) ("To take or receive (a thing offered) willingly"; "To receive as sufficient or adequate"); Webster's New International Dictionary 14 (2d ed. 1954) ("To receive (a thing offered to or thrust upon one) with a consenting mind"; "To receive with favor; to approve"). And we take it as self-evident that the "elastic" verb "use," read in isolation, is broad enough to encompass Arizona's preferred construction. *Smith* v. *United States*, 508 U. S. 223, 241 (1993) (SCALIA, J., dissenting). In common parlance, one might say that a restaurant accepts and uses credit cards even though it requires customers to show matching identification when making a purchase. See also Brief for State Petitioners 40 ("An airline may advertise that it 'accepts and uses' e-tickets . . . , yet may still require photo identification before one could board the airplane").

"Words that can have more than one meaning are given content, however, by their surroundings." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 466 (2001); see also *Smith*, *supra*, at 241 (SCALIA, J., dissenting). And reading "accept" merely to denote willing receipt seems out of place in the context of an official mandate to accept and use something for a given purpose. The implication of such a mandate is that its object is to be accepted *as sufficient* for the requirement it is meant to satisfy. For example, a government *diktat* that "civil servants shall accept government IOUs for payment of salaries" does not invite the response, "sure, we'll accept IOUs—if you pay us a ten percent down payment in cash." Many federal statutes contain similarly phrased commands, and they contemplate more than mere willing receipt. See, *e. g.*, 5 U. S. C. §8332(b), (m)(3) ("The Office [of Personnel Management] shall accept the certification of" various officials concerning creditable service toward civilian-employee retirement); 12 U. S. C.

§ 2605(*l*)(2) ("A servicer of a federally related mortgage shall accept any reasonable form of written confirmation from a borrower of existing insurance coverage"); 16 U. S. C. § 1536(p) (Endangered Species Committee "shall accept the determinations of the President" with respect to whether a major disaster warrants an exception to the Endangered Species Act's requirements); § 4026(b)(2), 118 Stat. 3725, note following 22 U. S. C. § 2751, p. 925 (FAA Administrator "shall accept the certification of the Department of Homeland Security that a missile defense system is effective and functional to defend commercial aircraft against" man-portable surface-to-air missiles); 25 U. S. C. § 1300h–6(a) ("For the purpose of proceeding with the per capita distribution" of certain funds, "the Secretary of the Interior shall accept the tribe's certification of enrolled membership"); 30 U. S. C. § 923(b) (the Secretary of Labor "shall accept a board certified or board eligible radiologist's interpretation" of a chest X ray used to diagnose black lung disease); 42 U. S. C. § 1395w–21(e)(6)(A) ("[A] Medicare+Choice organization . . . shall accept elections or changes to elections during" specified periods).[3]

Arizona's reading is also difficult to reconcile with neighboring provisions of the NVRA. Section 1973gg–6(a)(1)(B) provides that a State shall "ensure that any eligible applicant is registered to vote in an election . . . if the *valid voter registration form* of the applicant is postmarked" not later than a specified number of days before the election. (Emphasis added.) Yet Arizona reads the phrase "accept and use" in § 1973gg–4(a)(1) as permitting it to *reject* a completed

[3] The dissent accepts that a State may not impose additional requirements that render the Federal Form *entirely* superfluous; it would require that the State "us[e] the form as a meaningful part of the registration process." *Post*, at 44 (opinion of ALITO, J.). The dissent does not tell us precisely how large a role for the Federal Form suffices to make it "meaningful": One step out of two? Three? Ten? There is no easy answer, for the dissent's "meaningful part" standard is as indeterminate as it is atextual.

Federal Form if the applicant does not submit additional information required by state law. That reading can be squared with Arizona's obligation under § 1973gg–6(a)(1) only if a completed Federal Form is not a "valid voter registration form," which seems unlikely. The statute empowers the EAC to create the Federal Form, § 1973gg–7(a), requires the EAC to prescribe its contents within specified limits, § 1973gg–7(b), and requires States to "accept and use" it, § 1973gg–4(a)(1). It is improbable that the statute envisions a completed copy of the form it takes such pains to create as being anything less than "valid."

The Act also authorizes States, "*[i]n addition to* accepting and using the" Federal Form, to create their own, state-specific voter-registration forms, which can be used to register voters in both state and federal elections. § 1973gg–4(a)(2) (emphasis added). These state-developed forms may require information the Federal Form does not. (For example, unlike the Federal Form, Arizona's registration form includes Proposition 200's proof-of-citizenship requirement. See Arizona Voter Registration Form, p. 1, online at http://www.azsos.gov.) This permission works in tandem with the requirement that States "accept and use" the Federal Form. States retain the flexibility to design and use their own registration forms, but the Federal Form provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available.[4]

[4] In the face of this straightforward explanation, the dissent maintains that it would be "nonsensical" for a less demanding federal form to exist alongside a more demanding state form. *Post*, at 46 (opinion of ALITO, J.). But it is the dissent's alternative explanation for § 1973gg–4(a)(2) that makes no sense. The "purpose" of the Federal Form, it claims, is "to facilitate interstate voter registration drives. Thanks to the federal form, volunteers distributing voter registration materials at a shopping mall in Yuma can give a copy of the same form to every person they meet without attempting to distinguish between residents of Arizona and California." *Post*, at 46. But in the dissent's world, a volunteer in Yuma would have to give every prospective voter not only a Federal Form, but also a separate

Arizona's reading would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form. If that is so, the Federal Form ceases to perform any meaningful function, and would be a feeble means of "increas[ing] the number of eligible citizens who register to vote in elections for Federal office." § 1973gg(b).

Finally, Arizona appeals to the presumption against pre-emption sometimes invoked in our Supremacy Clause cases. See, *e. g.*, *Gregory* v. *Ashcroft*, 501 U. S. 452, 460–461 (1991). Where it applies, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). That rule of construction rests on an assumption about congressional intent: that "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." *Gregory*, *supra*, at 460. We have never mentioned such a principle in our Elections Clause cases.[5] *Siebold*, for example,

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set of either Arizona- or California-specific instructions detailing the additional information the applicant must submit to the State. In ours, every eligible voter can be assured that if he does what the Federal Form says, he will be registered. The dissent therefore provides yet another compelling reason to interpret the statute our way.

[5] *United States* v. *Gradwell*, 243 U. S. 476 (1917), on which the dissent relies, see *post*, at 40, n. 1 (opinion of ALITO, J.), is not to the contrary—indeed, it was not even a pre-emption case. In *Gradwell*, we held that a statute making it a federal crime "to defraud the United States" did not reach election fraud. 243 U. S., at 480, 483. The Court noted that the provision at issue was adopted in a tax-enforcement bill, and that Congress had enacted but then repealed *other* criminal statutes specifically covering election fraud. *Id.*, at 481–483.

The dissent cherry-picks some language from a sentence in *Gradwell*, see *post*, at 40, but the full sentence reveals its irrelevance to our case:

"With it thus clearly established that the policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws, administered by state officers, and that whenever it has assumed to regulate such elections it has done

simply said that Elections Clause legislation, "so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." 100 U. S., at 384. There is good reason for treating Elections Clause legislation differently: The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to "make or alter" state election regulations. Art. I, § 4, cl. 1. When Congress legislates with respect to the "Times, Places and Manner" of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States.[6] Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent. Moreover, the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker here. Unlike the States' "historic police powers," *Rice*, *supra*, at 230, the

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so by positive and clear statutes, such as were enacted in 1870, it would be a strained and unreasonable construction to apply to such elections this § 37, originally a law for the protection of the revenue and for now fifty years confined in its application to 'Offenses against the Operations of the Government' as distinguished from the processes by which men are selected to conduct such operations." 243 U. S., at 485.

Gradwell says nothing at all about pre-emption, or about how to construe statutes (like the NVRA) in which Congress has *indisputably* undertaken "to regulate such elections." *Ibid.*

[6] The dissent counters that this is so "whenever Congress legislates in an area of concurrent state and federal power." *Post*, at 42 (opinion of ALITO, J.). True, but irrelevant: Elections Clause legislation is unique precisely because it *always* falls within an area of concurrent state and federal power. Put differently, *all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that. By contrast, even laws enacted under the Commerce Clause (arguably the other enumerated power whose exercise is most likely to trench on state regulatory authority) will not always implicate concurrent state power—a prohibition on the interstate transport of a commodity, for example.

States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it "terminates according to federal law." *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 347 (2001). In sum, there is no compelling reason not to read Elections Clause legislation simply to mean what it says.

We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is "inconsistent with" the NVRA's mandate that States "accept and use" the Federal Form. *Siebold*, *supra*, at 397. If this reading prevails, the Elections Clause requires that Arizona's rule give way.

We note, however, that while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from "deny[ing] registration based on information in their possession establishing the applicant's ineligibility."[7] Brief for United States as *Amicus Curiae* 24. The NVRA clearly contemplates that not every submitted Federal Form will result in registration. See § 1973gg–7(b)(1) (Federal Form "may require only" information "necessary to enable the appropriate State election official to *assess the eligibility of the applicant*" (emphasis added)); § 1973gg–6(a)(2) (States must require election officials to "send notice to each applicant of the disposition of the application").

III

Arizona contends, however, that its construction of the phrase "accept and use" is necessary to avoid a conflict be-

[7] The dissent seems to think this position of ours incompatible with our reading of § 1973gg–6(a)(1)(B), which requires a State to "ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant is postmarked" by a certain date. See *post*, at 46–47 (opinion of ALITO, J.). What the dissent overlooks is that § 1973gg–6(a)(1)(B) only requires a State to register an "*eligible* applicant" who submits a timely Federal Form. (Emphasis added.)

tween the NVRA and Arizona's constitutional authority to establish qualifications (such as citizenship) for voting. Arizona is correct that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them. The Constitution prescribes a straightforward rule for the composition of the federal electorate. Article I, §2, cl. 1, provides that electors in each State for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," and the Seventeenth Amendment adopts the same criterion for senatorial elections. Cf. also Art. II, §1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors). One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. "It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *Oregon* v. *Mitchell*, 400 U. S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part); see also *U. S. Term Limits*, 514 U. S., at 833–834; *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 231–232 (1986) (Stevens, J., dissenting).[8]

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[8] In *Mitchell*, the judgment of the Court was that Congress could compel the States to permit 18-year-olds to vote in federal elections. Of the five Justices who concurred in that outcome, only Justice Black was of the view that congressional power to prescribe this age qualification derived from the Elections Clause, 400 U. S., at 119–125, while four Justices relied on the Fourteenth Amendment, *id.*, at 144 (opinion of Douglas, J.), 231 (joint opinion of Brennan, White, and Marshall, JJ.). That result, which lacked a majority rationale, is of minimal precedential value here. See *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 66 (1996); *Nichols* v. *United States*, 511 U. S. 738, 746 (1994); H. Black, Handbook on the Law of Judicial Precedents 135–136 (1912). Five Justices took the position that the Elections Clause did *not* confer upon Congress the power to regulate voter qualifica-

Prescribing voting qualifications, therefore, "forms no part of the power to be conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." The Federalist No. 60, at 371 (A. Hamilton); see also *id.*, No. 52, at 326 (J. Madison). This allocation of authority sprang from the Framers' aversion to concentrated power. A Congress empowered to regulate the qualifications of its own electorate, Madison warned, could "by degrees subvert the Constitution." 2 Records of the Federal Convention of 1787, p. 250 (M. Farrand rev. 1966). At the same time, by tying the federal franchise to the state franchise instead of simply placing it within the unfettered discretion of state legislatures, the Framers avoided "render-[ing] too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone." The Federalist No. 52, at 326 (J. Madison).

Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.[9]

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tions in federal elections. *Mitchell*, *supra*, at 143 (opinion of Douglas, J.), 210 (opinion of Harlan, J.), 288 (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.). (Justices Brennan, White, and Marshall did not address the Elections Clause.) This last view, which commanded a majority in *Mitchell*, underlies our analysis here. See also *U. S. Term Limits*, 514 U. S., at 833. Five Justices also agreed that the Fourteenth Amendment did not empower Congress to impose the 18-year-old-voting mandate. See *Mitchell*, *supra*, at 124–130 (opinion of Black, J.), 155 (opinion of Harlan, J.), 293–294 (opinion of Stewart, J.).

[9] In their reply brief, petitioners suggest for the first time that "registration is itself a qualification to vote." Reply Brief for State Petitioners 24 (emphasis deleted); see also *post*, at 23, 37 (opinion of THOMAS, J.); cf. *Voting Rights Coalition* v. *Wilson*, 60 F. 3d 1411, 1413, and n. 1 (CA9 1995), cert. denied, 516 U. S. 1093 (1996); *Association of Community Organizations for Reform Now (ACORN)* v. *Edgar*, 56 F. 3d 791, 793 (CA7 1995). We

If, but for Arizona's interpretation of the "accept and use" provision, the State would be precluded from obtaining information necessary for enforcement, we would have to determine whether Arizona's interpretation, though plainly not the best reading, is at least a possible one. Cf. *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932) (the Court will "ascertain whether a construction of the statute *is fairly possible* by which the [constitutional] question may be avoided" (emphasis added)). Happily, we are spared that necessity, since the statute provides another means by which Arizona may obtain information needed for enforcement.

Section 1973gg–7(b)(1) of the Act provides that the Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." At oral argument, the United States expressed the view that the phrase "may require only" in § 1973gg–7(b)(1) means that the EAC "*shall require* information that's necessary, but may only require that information." Tr. of Oral Arg. 52 (emphasis added); see also Brief for ITCA Respondents 46; Tr. of Oral Arg. 37–39 (ITCA Respondents' counsel). That is to say, § 1973gg–7(b)(1) acts as both a ceiling and a floor with respect to the contents of the Federal Form. We need not consider the Government's contention that despite the statute's statement that the EAC "may" require on the Federal Form information "necessary to enable the appropriate State election official to assess the eligibility of the applicant," other provisions of the Act indicate that such action is statutorily required. That is because we think that—by analogy to the rule of statutory interpreta-

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resolve this case on the theory on which it has hitherto been litigated: that *citizenship* (not registration) is the voter qualification Arizona seeks to enforce. See Brief for State Petitioners 50.

tion that avoids questionable constitutionality—validly conferred discretionary executive authority is properly exercised (as the Government has proposed) to avoid serious constitutional doubt. That is to say, it is surely permissible if not requisite for the Government to say that necessary information which *may* be required *will* be required.

Since, pursuant to the Government's concession, a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility, see § 1973gg–7(a)(2); Tr. of Oral Arg. 55 (United States), and may challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act, see 5 U. S. C. §§ 701–706, no constitutional doubt is raised by giving the "accept and use" provision of the NVRA its fairest reading. That alternative means of enforcing its constitutional power to determine voting qualifications remains open to Arizona here. In 2005, the EAC divided 2-to-2 on the request by Arizona to include the evidence-of-citizenship requirement among the state-specific instructions on the Federal Form, App. 225, which meant that no action could be taken, see 42 U. S. C. § 15328 ("Any action which the Commission is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members"). Arizona did not challenge that agency action (or rather inaction) by seeking APA review in federal court, see Tr. of Oral Arg. 11–12 (Arizona), but we are aware of nothing that prevents Arizona from renewing its request.[10] Should the

[10] We are aware of no rule promulgated by the EAC preventing a renewed request. Indeed, the whole request process appears to be entirely informal, Arizona's prior request having been submitted by e-mail. See App. 181.

The EAC currently lacks a quorum—indeed, the Commission has not a single active Commissioner. If the EAC proves unable to act on a renewed request, Arizona would be free to seek a writ of mandamus to "compel agency action unlawfully withheld or unreasonably delayed." 5 U. S. C. § 706(1). It is a nice point, which we need not resolve here, whether a court can compel agency action that the agency itself, for lack

EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete-evidence requirement on the Federal Form. See 5 U. S. C. § 706(1). Arizona might also assert (as it has argued here) that it would be arbitrary for the EAC to refuse to include Arizona's instruction when it has accepted a similar instruction requested by Louisiana.[11]

* * *

We hold that 42 U. S. C. § 1973gg–4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself. Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedure Act.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

The opinion for the Court insists on stating a proposition that, in my respectful view, is unnecessary for the proper disposition of the case and is incorrect in any event. The Court concludes that the normal "starting presumption that

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of the statutorily required quorum, is incapable of taking. If the answer to that is no, Arizona might then be in a position to assert a constitutional right to demand concrete evidence of citizenship apart from the Federal Form.

[11] The EAC recently approved a state-specific instruction for Louisiana requiring applicants who lack a Louisiana driver's license, ID card, or Social Security number to attach additional documentation to the completed Federal Form. See National Mail Voter Registration Form, p. 9; Tr. of Oral Arg. 57 (United States).

Congress does not intend to supplant state law," *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 654 (1995), does not apply here because the source of congressional power is the Elections Clause and not some other provision of the Constitution. See *ante*, at 13–15.

There is no sound basis for the Court to rule, for the first time, that there exists a hierarchy of federal powers so that some statutes pre-empting state law must be interpreted by different rules than others, all depending upon which power Congress has exercised. If the Court is skeptical of the basic idea of a presumption against pre-emption as a helpful instrument of construction in express pre-emption cases, see *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 545 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part), it should say so and apply that skepticism across the board.

There are numerous instances in which Congress, in the undoubted exercise of its enumerated powers, has stated its express purpose and intent to pre-empt state law. But the Court has nonetheless recognized that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc.* v. *Good*, 555 U. S. 70, 77 (2008) (quoting *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 449 (2005)). This principle is best understood, perhaps, not as a presumption but as a cautionary principle to ensure that pre-emption does not go beyond the strict requirements of the statutory command. The principle has two dimensions: Courts must be careful not to give an unduly broad interpretation to ambiguous or imprecise language Congress uses. And they must confine their opinions to avoid overextending a federal statute's pre-emptive reach. Error on either front may put at risk the validity and effectiveness of laws that Congress did not intend to disturb and that a State has deemed important to its scheme of governance. That

concern is the same regardless of the power Congress invokes, whether it is, say, the commerce power, the war power, the bankruptcy power, or the power to regulate federal elections under Article I, § 4.

Whether the federal statute concerns congressional regulation of elections or any other subject proper for Congress to address, a court must not lightly infer a congressional directive to negate the States' otherwise proper exercise of their sovereign power. This case illustrates the point. The separate States have a continuing, essential interest in the integrity and accuracy of the process used to select both state and federal officials. The States pay the costs of holding these elections, which for practical reasons often overlap so that the two sets of officials are selected at the same time, on the same ballots, by the same voters. It seems most doubtful to me to suggest that States have some lesser concern when what is involved is their own historic role in the conduct of elections. As already noted, it may be that a presumption against pre-emption is not the best formulation of this principle, but in all events the State's undoubted interest in the regulation and conduct of elections must be taken into account and ought not to be deemed by this Court to be a subject of secondary importance.

Here, in my view, the Court is correct to conclude that the National Voter Registration Act of 1993 is unambiguous in its pre-emption of Arizona's statute. For this reason, I concur in the judgment and join all of the Court's opinion except its discussion of the presumption against pre-emption. See *ante*, at 13–15.

JUSTICE THOMAS, dissenting.

This case involves the federal requirement that States "accept and use," 42 U. S. C. § 1973gg–4(a)(1), the federal voter registration form created pursuant to the National Voter Registration Act (NVRA). The Court interprets "accept and use," with minor exceptions, to require States to regis-

ter any individual who completes and submits the federal form. It, therefore, holds that § 1973gg–4(a)(1) pre-empts an Arizona law requiring additional information to register. As the majority recognizes, *ante*, at 16–18, its decision implicates a serious constitutional issue—whether Congress has power to set qualifications for those who vote in elections for federal office.

I do not agree, and I think that both the plain text and the history of the Voter Qualifications Clause, U. S. Const., Art. I, § 2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied. To avoid substantial constitutional problems created by interpreting § 1973gg–4(a)(1) to permit Congress to effectively countermand this authority, I would construe the law as only requiring Arizona to accept and use the form as part of its voter registration process, leaving the State free to request whatever additional information it determines is necessary to ensure that voters meet the qualifications it has the constitutional authority to establish. Under this interpretation, Arizona did "accept and use" the federal form. Accordingly, there is no conflict between Ariz. Rev. Stat. Ann. § 16–166(F) (West Cum. Supp. 2012) and § 1973gg–4(a)(1) and, thus, no pre-emption.

I

In 2002, Congress created the Election Assistance Commission (EAC), 42 U. S. C. § 15321 *et seq.*, and gave it the ongoing responsibility of "develop[ing] a mail voter registration application form for elections for Federal office" "in consultation with the chief election officers of the States." § 1973gg–7(a)(2). Under the NVRA, "[e]ach State shall accept and use the mail voter registration application form" the EAC develops. § 1973gg–4(a)(1). The NVRA also states in a subsequent provision that "[i]n addition to accepting and using the form described in paragraph (1), a State

may develop and use a mail voter registration form . . . for the registration of voters in elections for Federal office" so long as it satisfies the same criteria as the federal form. § 1973gg–4(a)(2).

Section 1973gg–7(b) enumerates the criteria for the federal form. The form "may require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." § 1973gg–7(b)(1). The federal form must also "specif[y] each eligibility requirement (including citizenship)," "contai[n] an attestation that the applicant meets each such requirement," and "requir[e] the signature of the applicant, under penalty of perjury." §§ 1973gg–7(b)(2)(A)–(C). Insofar as citizenship is concerned, the standard federal form contains the bare statutory requirements; individuals seeking to vote need only attest that they are citizens and sign under penalty of perjury.

Arizona has had a citizenship requirement for voting since it became a State in 1912. See Ariz. Const., Art. VII, § 2. In 2004, Arizona citizens enacted Proposition 200, the law at issue in this case. Proposition 200 provides that "[t]he county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16–166(F). The law sets forth several examples of satisfactory evidence, including driver's license number, birth certificate, U. S. passport, naturalization documents, and various tribal identification documents for Indians. §§ 16–166(F)(1)–(6).

Respondents, joined by the United States, allege that these state requirements are pre-empted by the NVRA's mandate that all States "accept and use" the federal form promulgated by the EAC. § 1973gg–4(a)(1). They contend that the phrase "accept and use" requires a State presented with a completed federal form to register the individual to vote without requiring any additional information.

Arizona advances an alternative interpretation. It argues that § 1973gg–4(a)(1) is satisfied so long as the State "accept[s] and use[s]" the federal form as *part* of its voter qualification process. For example, a State "accept[s] and use[s]" the federal form by allowing individuals to file it, even if the State requires additional identifying information to establish citizenship. In Arizona's view, it "accepts and uses" the federal form in the same way that an airline "accepts and uses" electronic tickets but also requires an individual seeking to board a plane to demonstrate that he is the person named on the ticket. Brief for State Petitioners 40. See also 677 F. 3d 383, 446 (CA9 2012) (Rawlinson, J., concurring in part and dissenting in part) ("[M]erchants may accept and use credit cards, but a customer's production of a credit card in and of itself may not be sufficient. The customer must sign and may have to provide photo identification to verify that the customer is eligible to use the credit card").

JUSTICE ALITO makes a compelling case that Arizona's interpretation is superior to respondents'. See *post*, at 44–47 (dissenting opinion). At a minimum, however, the interpretations advanced by Arizona and respondents are both plausible. See 677 F. 3d, at 439 (Kozinski, C. J., concurring) (weighing the arguments). The competing interpretations of § 1973gg–4(a)(1) raise significant constitutional issues concerning Congress' power to decide who may vote in federal elections. Accordingly, resolution of this case requires a better understanding of the relevant constitutional provisions.

II

A

The Voter Qualifications Clause, U. S. Const., Art. I, § 2, cl. 1, provides that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in elections for the federal

House of Representatives. The Seventeenth Amendment, which provides for direct election of Senators, contains an identical clause. That language is susceptible of only one interpretation: States have the authority "to control who may vote in congressional elections" so long as they do not "establish special requirements that do not apply in elections for the state legislature." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 864–865 (1995) (THOMAS, J., dissenting); see also The Federalist No. 57, p. 349 (C. Rossiter ed. 2003) (J. Madison) ("The electors . . . are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State"). Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which are not at issue here. This power is instead expressly reposed in the States.

1

The history of the Voter Qualifications Clause's enactment confirms this conclusion. The Framers did not intend to leave voter qualifications to Congress. Indeed, James Madison explicitly rejected that possibility:

> "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. *To have left it open for the occasional regulation of the Congress would have been improper.*" The Federalist No. 52, at 323 (emphasis added).

Congressional legislation of voter qualifications was not part of the Framers' design.

The Constitutional Convention did recognize a danger in leaving Congress "too dependent on the State governments" by allowing States to define congressional elector qualifica-

tions without limitation. *Ibid.* To address this concern, the Committee of Detail that drafted Article I, § 2, "weighed the possibility of a federal property requirement, as well as several proposals that would have given the federal government the power to impose its own suffrage laws at some future time." A. Keyssar, The Right To Vote 18 (rev. ed. 2009) (hereinafter Keyssar); see also 2 Records of the Federal Convention of 1787, pp. 139–140, 151, 153, 163–165 (M. Farrand rev. ed. 1966) (text of several voter qualification provisions considered by the Committee of Detail).

These efforts, however, were ultimately abandoned. Even if the convention had been able to agree on a uniform federal standard, the Framers knew that state ratification conventions likely would have rejected it. Madison explained that "reduc[ing] the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention." The Federalist No. 52, at 323; see also J. Story, Commentaries on the Constitution of the United States 217 (abr. ed. 1833) (same). Justice Story elaborated that setting voter qualifications in the Constitution could have jeopardized ratification, because it would have been difficult to convince States to give up their right to set voting qualifications. *Id.*, at 216, 218–219. See also Keyssar 306–313 (Tables A.1 and A.2) (state-by-state analysis of 18th- and 19th-century voter qualifications, including property, taxpaying, residency, sex, and race requirements).

The Convention, thus, chose to respect the varied state voting rules and instead struck the balance enshrined in Article I, § 2's requirement that federal electors "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." That compromise gave States free reign over federal voter qualifications but protected Congress by prohibiting States from changing the qualifications for federal electors unless they also altered qualifications for their own legislatures. See The Federalist

No. 52, at 323. This balance left the States with nearly complete control over voter qualifications.

2

Respondents appear to concede that States have the sole authority to establish voter qualifications, see, *e. g.*, Brief for Gonzalez Respondents 63, but nevertheless argue that Congress can determine whether those qualifications are satisfied. See, *e. g.*, *id.*, at 61. The practical effect of respondents' position is to read Article I, § 2, out of the Constitution. As the majority correctly recognizes, "the power to establish voting requirements is of little value without the power to enforce those requirements." *Ante*, at 17. For this reason, the Voter Qualifications Clause gives States not only the authority to set qualifications but also the power to verify whether those qualifications are satisfied.

This understanding of Article I, § 2, is consistent with powers enjoyed by the States at the founding. For instance, ownership of real or personal property was a common prerequisite to voting, see Keyssar 306–313 (Tables A.1 and A.2). To verify that this qualification was satisfied, States might look to proof of tax payments. See C. Williamson, American Suffrage From Property to Democracy, 1760–1860, p. 32 (1960). In other instances, States relied on personal knowledge of fellow citizens to verify voter eligibility. Keyssar 24 ("In some locales, particularly in the South, voting was still an oral and public act: men assembled before election judges, waited for their names to be called, and then announced which candidates they supported"). States have always had the power to ensure that only those qualified under state law to cast ballots exercised the franchise.

Perhaps in part because many requirements (such as property ownership or taxpayer status) were independently documented and verifiable, States in 1789 did not generally "register" voters using highly formalized procedures. See *id.*, at 122. Over time, States replaced their informal sys-

tems for determining eligibility with more formalized pre-voting registration regimes. See An Act in Addition to the Several Acts for Regulating Elections, 1800 Mass. Acts ch. 74, in Acts and Laws of the Commonwealth of Massachusetts 96 (1897) (Massachusetts' 1801 voter registration law). But modern voter registration serves the same basic purpose as the practices used by States in the Colonies and early Federal Republic. The fact that States have liberalized voting qualifications and streamlined the verification process through registration does not alter the basic fact that States possess broad authority to set voter qualifications and to verify that they are met.

B

Both text and history confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied. The United States nevertheless argues that Congress has the authority under Article I, § 4, "to set the rules for voter registration in federal elections." Brief for United States as *Amicus Curiae* 33 (hereafter Brief for United States). Neither the text nor the original understanding of Article I, § 4, supports that position.

1

Article I, § 4, gives States primary responsibility for regulating the "Times, Places and Manner of holding Elections" and authorizes Congress to "at any time by Law make or alter such Regulations."[1] Along with the Seventeenth Amendment, this provision grants Congress power only over the "when, where, and how" of holding congressional elections. T. Parsons, Notes of Convention Debates, Jan. 16, 1788, in 6 Documentary History of the Ratification of the

[1] The majority refers to Article I, § 4, cl. 1, as the "Elections Clause." See, *e. g.*, *ante*, at 7. Since there are a number of Clauses in the Constitution dealing with elections, I refer to it using the more descriptive term, Times, Places and Manner Clause.

Constitution 1211 (J. Kaminski & G. Saladino eds. 2000) (hereinafter Documentary History) (Massachusetts ratification delegate Sedgwick) (emphasis deleted); see also *ante*, at 16 ("Arizona is correct that [Article I, §4,] empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them").

Prior to the Constitution's ratification, the phrase "manner of election" was commonly used in England, Scotland, Ireland, and North America to describe the entire election process. Natelson, The Original Scope of the Congressional Power To Regulate Elections, 13 U. Pa. J. Constitutional L. 1, 10–18 (2010) (citing examples). But there are good reasons for concluding that Article I, §4's use of "Manner" is considerably more limited. *Id.*, at 20. The Constitution does not use the word "Manner" in isolation; rather, "after providing for qualifications, times, and places, the Constitution described the residuum as 'the Manner of holding Elections.' This precise phrase seems to have been newly coined to denote a subset of traditional 'manner' regulation." *Ibid.* (emphasis deleted; footnote omitted). Consistent with this view, during the state ratification debates, the "Manner of holding Elections" was construed to mean the circumstances under which elections were held and the mechanics of the actual election. See 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 71 (J. Elliot 2d ed. 1863) (hereinafter Elliot's Debates) ("The power over the manner of elections does not include that of saying who shall vote[;] . . . the power over the manner only enables them to determine *how* those electors shall elect—whether by ballot, or by vote, or by any other way" (John Steele at the North Carolina ratification debates)); A Pennsylvanian to the New York Convention, Pennsylvania Gazette, June 11, 1788, in 20 Documentary History 1145 (J. Kaminski, G. Saladino, R. Leffler, & C. Schoenleber eds. 2004) (same); Brief for Center for Constitutional Jurisprudence as *Amicus Curiae*

6–7 (same, citing state ratification debates). The text of the Times, Places and Manner Clause, therefore, cannot be read to authorize Congress to dictate voter eligibility to the States.

2

Article I, §4, also cannot be read to limit a State's authority to set voter qualifications because the more specific language of Article I, §2, expressly gives that authority to the States. See *ante*, at 16 ("One cannot read [Article I, §4,] as treating implicitly what [Article I, §2, and Article II, §1,] regulate explicitly"). As the Court observed just last Term, "[a] well established canon of statutory interpretation succinctly captures the problem: '[I]t is a commonplace of statutory construction that the specific governs the general.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 645 (2012) (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384 (1992); second alteration in original). The Court explained that this canon is particularly relevant where two provisions "'are interrelated and closely positioned, both in fact being parts of [the same scheme.]'" 566 U. S., at 645 (quoting *HCSC-Laundry* v. *United States*, 450 U. S. 1, 6 (1981) (*per curiam*)). Here, the general Times, Places and Manner Clause is textually limited by the directly applicable text of the Voter Qualification Clause.

The ratification debates over the relationship between Article I, §§2 and 4, demonstrate this limitation. Unlike Article I, §2, the Times, Places and Manner Clause was the subject of extensive ratification controversy. Antifederalists were deeply concerned with ceding authority over the conduct of elections to the Federal Government. Some Antifederalists claimed that the "'wealthy and the well-born'" might abuse the Times, Places and Manner Clause to ensure their continuing power in Congress. The Federalist No. 60, at 368. Hamilton explained why Article I, §2's Voter Qualifications Clause foreclosed this argument:

> "The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *Id.*, at 369.

Ratification debates in several States echoed Hamilton's argument. The North Carolina debates provide a particularly direct example. There, delegate John Steele relied on the established "maxim of universal jurisprudence, of reason and common sense, that an instrument or deed of writing shall be construed as to give validity to all parts of it, if it can be done without involving any absurdity" in support of the argument that Article I, §2's grant of voter qualifications to the States required a limited reading of Article I, §4. 4 Elliot's Debates 71.

This was no isolated view. See 2 *id.*, at 50–51 (Massachusetts delegate Rufus King observing that "the power of control given by [Article I, §4,] extends to the *manner* of election, not the *qualifications* of the electors"); 4 *id.*, at 61 (same, North Carolina's William Davie); 3 *id.*, at 202–203 (same, Virginia delegate Edmund Randolph); Roger Sherman, A Citizen of New Haven: Observations on the New Federal Constitution, Connecticut Courant, Jan. 7, 1788, in 15 Documentary History 282 (J. Kaminski & G. Saladino eds. 1983) (same); A Freeman [Letter] II (Tench Coxe), Pennsylvania Gazette, Jan. 30, 1788, in *id.*, at 508 (same). It was well understood that congressional power to regulate the "Manner" of elections under Article I, §4, did not include the power to override state voter qualifications under Article I, §2.

3

The concern that gave rise to Article I, §4, also supports this limited reading. The Times, Places and Manner Clause

was designed to address the possibility that States might refuse to hold any federal elections at all, eliminating Congress, and by extension the Federal Government. As Hamilton explained, "every government ought to contain in itself the means of its own preservation." The Federalist No. 59, at 360 (emphasis deleted); see also *U. S. Term Limits, Inc.*, 514 U. S., at 863 (THOMAS, J., dissenting) (Article I, § 4, designed "to ensure that the States hold congressional elections in the first place, so that Congress continues to exist"); *id.*, at 863, and n. 10 (same, citing ratification era sources). Reflecting this understanding of the reasoning behind Article I, § 4, many of the original 13 States proposed constitutional amendments that would have strictly cabined the Times, Places and Manner Clause to situations in which state failure to hold elections threatened the continued existence of Congress. See 2 Elliot's Debates 177 (Massachusetts); 18 Documentary History 71–72 (J. Kaminski & G. Saladino eds. 1995) (South Carolina); *id.*, at 187–188 (New Hampshire); 3 Elliot's Debates 661 (Virginia); Ratification of the Constitution by the State of New York (July 26, 1788) (New York), online at http://avalon.law.yale.edu/18th_century/ratny.asp (all Internet materials as visited June 6, 2013, and available in Clerk of Court's case file); 4 Elliot's Debates 249 (North Carolina); Ratification of the Constitution by the State of Rhode Island (May 29, 1790) (Rhode Island), online at http://avalon.law.yale.edu/18th_century/ratri.asp. Although these amendments were never enacted, they underscore how narrowly the ratification conventions construed Congress' power under the Times, Places and Manner Clause. In contrast to a state refusal to hold federal elections at all, a state decision to alter the qualifications of electors for state legislature (and thereby for federal elections as well) does not threaten Congress' very existence.

C

Finding no support in the historical record, respondents and the United States instead chiefly assert that this Court's

precedents involving the Times, Places and Manner Clause give Congress authority over voter qualifications. See, *e. g.*, Brief for Respondent Inter Tribal Council of Arizona, Inc. (ITCA), et al. 30–31, 48–50 (hereinafter Brief for ITCA Respondents); Brief for Gonzalez Respondents 44–50; Brief for United States 24–27, 31–33. But this Court does not have the power to alter the terms of the Constitution. Moreover, this Court's decisions do not support the respondents' and the Government's position.

Respondents and the United States point out that *Smiley* v. *Holm*, 285 U. S. 355 (1932), mentioned "registration" in a list of voting-related subjects it believed Congress could regulate under Article I, § 4. *Id.*, at 366 (listing "notices, *registration*, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns" (emphasis added)). See Brief for ITCA Respondents 49; Brief for Gonzalez Respondents 48; Brief for United States 21. But that statement was dicta because *Smiley* involved congressional redistricting, not voter registration. 285 U. S., at 361–362. Cases since *Smiley* have similarly not addressed the issue of voter qualifications but merely repeated the word "registration" without further analysis. See *Cook* v. *Gralike*, 531 U. S. 510, 523 (2001); *Roudebush* v. *Hartke*, 405 U. S. 15, 24 (1972).

Moreover, in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), a majority of this Court "took the position that [Article I, § 4,] did *not* confer upon Congress the power to regulate voter qualifications in federal elections," as the majority recognizes. *Ante*, at 16–17, n. 8. See *Mitchell*, 400 U. S., at 288 (Stewart, J., concurring in part and dissenting in part); *id.*, at 210–212 (Harlan, J., concurring in part and dissenting in part); *id.*, at 143 (opinion of Douglas, J.). And even the majority's decision in *U. S. Term Limits*, from which I dissented, recognized that Madison's Federalist No. 52 "explicitly contrasted the *state control over the qualifications of*

electors" with what it believed was "the lack of state control over the qualifications of the elected." 514 U. S., at 806 (emphasis added). Most of the remaining cases cited by respondents and the Government merely confirm that Congress' power to regulate the "Manner of holding Elections" is limited to regulating events surrounding the when, where, and how of actually casting ballots. See, *e. g.*, *United States* v. *Classic*, 313 U. S. 299 (1941) (upholding federal regulation of ballot fraud in primary voting); *Ex parte Yarbrough*, 110 U. S. 651 (1884) (upholding federal penalties for intimidating voter in congressional election); see also *Foster* v. *Love*, 522 U. S. 67 (1997) (overturning Louisiana primary system whose winner was deemed elected if he received a majority of votes in light of federal law setting the date of federal general elections); *Roudebush*, *supra* (upholding Indiana ballot recount procedures in close Senate election as within state power under Article I, § 4). It is, thus, difficult to maintain that the Times, Places and Manner Clause gives Congress power beyond regulating the casting of ballots and related activities, even as a matter of precedent.[2]

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[2] Article I, §§ 2 and 4, and the Seventeenth Amendment concern congressional elections. The NVRA's "accept and use" requirement applies to *all* federal elections, even Presidential elections. See § 1973gg–4(a)(1). This Court has recognized, however, that "the state legislature's power to select the manner for appointing [Presidential] electors is plenary; it may, if it chooses, select the electors itself." *Bush* v. *Gore*, 531 U. S. 98, 104 (2000) (*per curiam*) (citing U. S. Const., Art. II, § 1, and *McPherson* v. *Blacker*, 146 U. S. 1, 35 (1892)). As late as 1824, six state legislatures chose electoral college delegates, and South Carolina continued to follow this model through the 1860 election. 1 Guide to U. S. Elections 821 (6th ed. 2010). Legislatures in Florida in 1868 and Colorado in 1876 chose delegates, *id.*, at 822, and in recent memory, the Florida Legislature in 2000 convened a special session to consider how to allocate its 25 electoral votes if the winner of the popular vote was not determined in time for delegates to participate in the electoral college, see James, Election 2000: Florida Legislature Faces Own Disputes Over Electors, Wall Street Journal, Dec. 11, 2000, p. A16, though it ultimately took no action. See Florida's Senate Adjourns Without Naming Electors, Wall Street Journal, Dec. 15, 2000,

III

A

Arizona has not challenged the constitutionality of the NVRA itself in this case. Nor has it alleged that Congress lacks authority to direct the EAC to create the federal form. As a result, I need not address those issues. Arizona did, however, argue that respondents' interpretation of § 1973gg–4(a)(1) would raise constitutional concerns. As discussed *supra*, I too am concerned that respondents' interpretation of § 1973gg–4(a)(1) would render the statute unconstitutional under Article I, § 2. Accordingly, I would interpret § 1973gg–4(a)(1) to avoid the constitutional problems discussed above. See *Zadvydas* v. *Davis*, 533 U. S. 678, 689 (2001) ("'[I]t is a cardinal principle' of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'" (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932))).

I cannot, therefore, adopt the Court's interpretation that § 1973gg–4(a)(1)'s "accept and use" provision requires States to register anyone who completes and submits the form. Arizona sets citizenship as a qualification to vote, and it wishes to verify citizenship, as it is authorized to do under Article 1, § 2. It matters not whether the United States has specified one way in which *it* believes Arizona might be able to verify citizenship; Arizona has the independent constitutional authority to verify citizenship in the way it deems necessary. See Part II–A–2, *supra*. By requiring Arizona to register people who have not demonstrated to Arizona's satisfaction that they meet its citizenship qualification for voting, the NVRA, as interpreted by the Court, would ex-

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p. A6. Constitutional avoidance is especially appropriate in this area because the NVRA purports to regulate Presidential elections, an area over which the Constitution gives Congress no authority whatsoever.

ceed Congress' powers under Article I, § 4, and violate Article 1, § 2.

Fortunately, Arizona's alternative interpretation of § 1973gg–4(a)(1) avoids this problem. It is plausible that Arizona "accept[s] and use[s]" the federal form under § 1973gg–4(a)(1) so long as it receives the form and considers it as part of its voter application process. See *post*, at 44–47 (ALITO, J., dissenting); 677 F. 3d, at 444 (Rawlinson, J., concurring in part and dissenting in part); 624 F. 3d 1162, 1205–1208 (CA9 2010) (Kozinski, C. J., dissenting in part), reh'g en banc granted, 649 F. 3d 953 (2011); 677 F. 3d, at 439 (Kozinski, C. J., concurring) (same). Given States' exclusive authority to set voter qualifications and to determine whether those qualifications are met, I would hold that Arizona may request whatever additional information it requires to verify voter eligibility.

B

The majority purports to avoid the difficult constitutional questions implicated by the Voter Qualifications Clause. See *ante*, at 16–18. It nevertheless adopts respondents' reading of § 1973gg–4(a)(1) because it interprets Article I, § 2, as giving Arizona the right only to "obtai[n] information necessary for enforcement" of its voting qualifications. *Ante*, at 18. The majority posits that Arizona may pursue relief by making an administrative request to the EAC that, if denied, could be challenged under the Administrative Procedure Act (APA). *Ante*, at 18–20.

JUSTICE ALITO is correct to point out that the majority's reliance on the EAC is meaningless because the EAC has no members and no current prospects of new members. *Post*, at 43 (dissenting opinion). Offering a nonexistent pathway to administrative relief is an exercise in futility, not constitutional avoidance.

Even if the EAC were a going concern instead of an empty shell, I disagree with the majority's application of the constitutional avoidance canon. I would not require Arizona to

seek approval for its registration requirements from the Federal Government, for, as I have shown, the Federal Government does not have the constitutional authority to withhold such approval. Accordingly, it does not have the authority to command States to seek it. As a result, the majority's proposed solution does little to avoid the serious constitutional problems created by its interpretation.

* * *

Instead of adopting respondents' definition of "accept and use" and offering Arizona the dubious recourse of bringing an APA challenge within the NVRA framework, I would adopt an interpretation of § 1973gg–4(a)(1) that avoids the constitutional problems with respondents' interpretation. The States, not the Federal Government, have the exclusive right to define the "Qualifications requisite for Electors," U. S. Const., Art. I, § 2, cl. 1, which includes the corresponding power to verify that those qualifications have been met. I would, therefore, hold that Arizona may "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship," as defined by Arizona law. Ariz. Rev. Stat. Ann. § 16–166(F).

I respectfully dissent.

JUSTICE ALITO, dissenting.

The Court reads an ambiguous federal statute in a way that brushes aside the constitutional authority of the States and produces truly strange results.

Under the Constitution, the States, not Congress, have the authority to establish the qualifications of voters in elections for Members of Congress. See Art. I, § 2, cl. 1 (House); Amdt. 17 (Senate). The States also have the default authority to regulate federal voter registration. See Art. I, § 4, cl. 1. Exercising its right to set federal voter qualifications, Arizona, like every other State, permits only U. S. citizens to vote in federal elections, and Arizona has concluded that

this requirement cannot be effectively enforced unless applicants for registration are required to provide proof of citizenship. According to the Court, however, the National Voter Registration Act of 1993 (NVRA) deprives Arizona of this authority. I do not think that this is what Congress intended.

I also doubt that Congress meant for the success of an application for voter registration to depend on which of two valid but substantially different registration forms the applicant happens to fill out and submit, but that is how the Court reads the NVRA. The Court interprets one provision, 42 U. S. C. § 1973gg–6(a)(1)(B), to mean that, if an applicant fills out the federal form, a State must register the applicant without requiring proof of citizenship. But the Court does not question Arizona's authority under another provision of the NVRA, § 1973gg–4(a)(2), to create its own application form that demands proof of citizenship; nor does the Court dispute Arizona's right to refuse to register an applicant who submits that form without the requisite proof. I find it very hard to believe that this is what Congress had in mind.

These results are not required by the NVRA. Proper respect for the constitutional authority of the States demands a clear indication of a congressional intent to pre-empt state laws enforcing voter qualifications. And while the relevant provisions of the NVRA are hardly models of clarity, their best reading is that the States need not treat the federal form as a complete voter registration application.

I

A

In light of the States' authority under the Elections Clause of the Constitution, Art. I, § 4, cl. 1, I would begin by applying a presumption against pre-emption of the Arizona law requiring voter registration applicants to submit proof of citizenship. Under the Elections Clause, the States have the authority to specify the times, places, and manner of federal

elections except to the extent that Congress chooses to provide otherwise. And in recognition of this allocation of authority, it is appropriate to presume that the States retain this authority unless Congress has clearly manifested a contrary intent. The Court states that "[w]e have never mentioned [the presumption against pre-emption] in our Elections Clause cases," *ante*, at 13, but in *United States* v. *Gradwell*, 243 U. S. 476 (1917), we read a federal statute narrowly out of deference to the States' traditional authority in this area. In doing so, we explained that "the policy of Congress for [a] great . . . part of our constitutional life has been . . . to leave the conduct of the election of its members to state laws, administered by state officers, and that *whenever it has assumed to regulate such elections it has done so by positive and clear statutes*." *Id.*, at 485 (emphasis added).[1] The presumption against pre-emption applies with full force when Congress legislates in a "field which the States have traditionally occupied," *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947), and the NVRA was the first significant federal regulation of voter registration enacted under the Elections Clause since Reconstruction.

The Court has it exactly backwards when it declines to apply the presumption against pre-emption because "the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker" in an Elections Clause case like this one. *Ante*, at 14. To the contrary, Arizona has a "'compelling interest in preserving the integrity of its election process'" that the Constitution recognizes and

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[1] The Court argues that *Gradwell* is irrelevant, observing that there was no state law directly at issue in that case, which concerned a prosecution under a federal statute. *Ante*, at 13–14, n. 5. But the same is true of *Ex parte Siebold*, 100 U. S. 371 (1880), on which the Court relies in the very next breath. In any event, it is hard to see why a presumption about the effect of federal law on the conduct of congressional elections should have less force when the federal law is alleged to conflict with a state law. If anything, one would expect the opposite to be true.

that the Court's reading of the NVRA seriously undermines. *Purcell* v. *Gonzalez*, 549 U. S. 1, 4 (2006) (*per curiam*) (quoting *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 231 (1989)).

By reserving to the States default responsibility for administering federal elections, the Elections Clause protects several critical values that the Court disregards. First, as Madison explained in defense of the Elections Clause at the Virginia Convention, "[i]t was found necessary to leave the regulation of [federal elections], in the first place, to the state governments, as being best acquainted with the situation of the people." 3 Records of the Federal Convention of 1787, p. 312 (M. Farrand ed. 1911). Because the States are closer to the people, the Framers thought that state regulation of federal elections would "in ordinary cases . . . be both more convenient and more satisfactory." The Federalist No. 59, p. 363 (C. Rossiter ed. 1961) (A. Hamilton).

Second, as we have previously observed, the integrity of federal elections is a subject over which the States and the Federal Government "are mutually concerned." *Ex parte Siebold*, 100 U. S. 371, 391 (1880). By giving States a role in the administration of federal elections, the Elections Clause reflects the States' interest in the selection of the individuals on whom they must rely to represent their interests in the National Legislature. See *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 858–859 (1995) (THOMAS, J., dissenting).

Third, the Elections Clause's default rule helps to protect the States' authority to regulate state and local elections. As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections.

Needless to say, when Congress believes that some overriding national interest justifies federal regulation, it has the

power to "make or alter" state laws specifying the "Times, Places and Manner" of federal elections. Art. I, §4, cl. 1. But we should expect Congress to speak clearly when it decides to displace a default rule enshrined in the text of the Constitution that serves such important purposes.

The Court answers that when Congress exercises its power under the Elections Clause "it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Ante*, at 14. But the same is true whenever Congress legislates in an area of concurrent state and federal power. A federal law regulating the operation of grain warehouses, for example, necessarily alters the "pre-existing legal regime erected by the States," see *Rice*, *supra*, at 229–230—even if only by regulating an activity the States had chosen not to constrain.[2] In light of Arizona's constitutionally codified interest in the integrity of its federal elections, "it is incumbent upon the federal courts to be certain" that Congress intended to pre-empt Arizona's law. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 243 (1985).

B

The canon of constitutional avoidance also counsels against the Court's reading of the Act. As the Court acknowledges, the Constitution reserves for the States the power to decide who is qualified to vote in federal elections. *Ante*, at 15–18; see *Oregon* v. *Mitchell*, 400 U. S. 112, 210–211 (1970) (Harlan,

[2] The Court observes that the Commerce Clause, unlike the Elections Clause, empowers Congress to legislate in areas that do not implicate concurrent state power. *Ante*, at 14, n. 6. Apparently the Court means that the presumption against pre-emption only applies in those unusual cases in which it is unclear whether a federal statute even touches on subject matter that the States may regulate under their broad police powers. I doubt that the Court is prepared to abide by this cramped understanding of the presumption against pre-emption. See, *e. g.*, *Hillman* v. *Maretta*, 569 U. S. 483, 490 (2013) ("There is therefore 'a presumption against pre-emption' of state laws governing domestic relations" (quoting *Egelhoff* v. *Egelhoff*, 532 U. S. 141, 151 (2001))).

J., concurring in part and dissenting in part). The Court also recognizes that, although Congress generally has the authority to regulate the "Times, Places and Manner of holding" such elections, Art. I, § 4, cl. 1, a federal law that frustrates a State's ability to enforce its voter qualifications would be constitutionally suspect. *Ante*, at 17; see *ante*, at 25–36 (THOMAS, J., dissenting). The Court nevertheless reads the NVRA to restrict Arizona's ability to enforce its law providing that only United States citizens may vote. See Ariz. Const., Art. VII, § 2. We are normally more reluctant to interpret federal statutes as upsetting "the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991); see Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 540 (1947) ("[W]hen the Federal Government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit").

In refusing to give any weight to Arizona's interest in enforcing its voter qualifications, the Court suggests that the State could return to the Election Assistance Commission and renew its request for a change to the federal form. *Ante*, at 19–20. But that prospect does little to assuage constitutional concerns. The EAC currently has no members, and there is no reason to believe that it will be restored to life in the near future. If that situation persists, Arizona's ability to obtain a judicial resolution of its constitutional claim is problematic. The most that the Court is prepared to say is that the State "might" succeed by seeking a writ of mandamus and, failing that, "might" be able to mount a constitutional challenge. *Ante*, at 20, n. 10. The Court sends the State to traverse a veritable procedural obstacle course in the hope of obtaining a judicial decision on the constitutionality of the relevant provisions of the NVRA. A sensible interpretation of the NVRA would obviate these difficulties.

II

The NVRA does not come close to manifesting the clear intent to pre-empt that we should expect to find when Congress has exercised its Elections Clause power in a way that is constitutionally questionable. Indeed, even if neither the presumption against pre-emption nor the canon of constitutional avoidance applied, the better reading of the NVRA would be that Arizona is free to require those who use the federal form to supplement their applications with proof of citizenship.

I agree with the Court that the phrase "accept and use," when read in isolation, is ambiguous, *ante*, at 9–10, but I disagree with the Court's conclusion that § 1973gg–4(a)(1)'s use of that phrase means that a State must treat the federal form as a complete application and must either grant or deny registration without requiring that the applicant supply additional information. Instead, I would hold that a State "accept[s] and use[s]" the federal form so long as it uses the form as a meaningful part of the registration process.

The Court begins its analysis of § 1973gg–4(a)(1)'s context by examining unrelated uses of the word "accept" elsewhere in the United States Code. *Ante*, at 10–11. But a better place to start is to ask what it normally means to "accept and use" an application form. When the phrase is used in that context, it is clear that an organization can "accept and use" a form that it does not treat as a complete application. For example, many colleges and universities accept and use the Common Application for Undergraduate College Admission but also require that applicants submit various additional forms or documents. See Common Application, 2012–2013 College Deadlines, Fees, and Requirements, https://www.commonapp.org/CommonApp/MemberRequirements.aspx (all Internet materials as visited June 10, 2013, and available in Clerk of Court's case file). Similarly, the Social Security Administration undoubtedly "accepts and uses" its Social Security card application form

even though someone applying for a card must also prove that he or she is a citizen or has a qualifying immigration status. See Application for a Social Security Card, Form SS–5 (2011), http://www.socialsecurity.gov/online/ss-5.pdf. As such examples illustrate, when an organization says that it "accepts and uses" an application form, it does not necessarily mean that the form constitutes a complete application.

That is not to say that the phrase "accept and use" is meaningless when issued as a "government *diktat*" in § 1973gg–4(a)(1). *Ante*, at 10. Arizona could not be said to "accept and use" the federal form if it required applicants who submit that form to provide all the same information a second time on a separate state form. But Arizona does nothing of the kind. To the contrary, the entire basis for respondents' suit is that Proposition 200 mandates that applicants provide information that does not appear on a a completed federal form. Although § 1973gg–4(a)(1) prohibits States from requiring applicants who use the federal form to submit a duplicative state form, nothing in that provision's text prevents Arizona from insisting that federal form applicants supplement their applications with additional information.

That understanding of § 1973gg–4(a)(1) is confirmed by § 1973gg–4(a)(2), which allows States to design and use their own voter registration forms "[i]n addition to accepting and using" the federal form. The NVRA clearly permits States to require proof of citizenship on their own forms, see §§ 1973gg–4(a)(2) and 1973gg–7(b)—a step that Arizona has taken and that today's decision does not disturb. Thus, under the Court's approach, whether someone can register to vote in Arizona without providing proof of citizenship will depend on the happenstance of which of two alternative forms the applicant completes. That could not possibly be what Congress intended; it is as if the Internal Revenue Service issued two sets of personal income tax forms with different tax rates.

We could avoid this nonsensical result by holding that the NVRA lets the States decide for themselves what information "is necessary . . . to assess the eligibility of the applicant"—both by designing their own forms and by requiring that federal form applicants provide supplemental information when appropriate. § 1973gg–7(b)(1). The Act's provision for state forms shows that the purpose of the federal form is not to supplant the States' authority in this area but to facilitate interstate voter registration drives. Thanks to the federal form, volunteers distributing voter registration materials at a shopping mall in Yuma can give a copy of the same form to every person they meet without attempting to distinguish between residents of Arizona and California. See H. R. Rep. No. 103–9, p. 10 (1993) ("Uniform mail forms will permit voter registration drives through a regional or national mailing, or for more than one State at a central location, such as a city where persons from a number of neighboring States work, shop or attend events"). The federal form was meant to facilitate voter registration drives, not to take away the States' traditional authority to decide what information registrants must supply.[3]

The Court purports to find support for its contrary approach in § 1973gg–6(a)(1)(B), which says that a State must "ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant is postmarked" within a specified period. *Ante*, at 11–12. The Court understands § 1973gg–6(a)(1)(B) to mean that a State must register an eligible applicant if he or she submits a "'valid voter registration form.'" *Ante*, at 12. But when read in context, that provision simply identifies the

[3] The Court argues that the federal form would not accomplish this purpose under my interpretation because "a volunteer in Yuma would have to give every prospective voter not only a Federal Form, but also a separate set of either Arizona- or California-specific instructions." *Ante*, at 12, n. 4. But this is exactly what Congress envisioned. Eighteen of the federal form's 23 pages are state-specific instructions.

time within which a State must process registration applications; it says nothing about whether a State may require the submission of supplemental information. The Court's more expansive interpretation of § 1973gg–6(a)(1)(B) sneaks in a qualification that is nowhere to be found in the text. The Court takes pains to say that a State need not register an applicant who properly completes and submits a federal form but is known by the State to be ineligible. See *ante*, at 15. But the Court takes the position that a State may not demand that an applicant supply any additional information to confirm voting eligibility. Nothing in § 1973gg–6(a)(1)(B) supports this distinction.

What is a State to do if it has reason to doubt an applicant's eligibility but cannot be sure that the applicant is ineligible? Must the State either grant or deny registration without communicating with the applicant? Or does the Court believe that a State may ask for additional information in individual cases but may not impose a categorical requirement for all applicants? If that is the Court's position, on which provision of the NVRA does it rely? The Court's reading of § 1973gg–6(a)(1)(B) is atextual and makes little sense.

* * *

Properly interpreted, the NVRA permits Arizona to require applicants for federal voter registration to provide proof of eligibility. I therefore respectfully dissent.

Syllabus

MARACICH ET AL. *v.* SPEARS ET AL.

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

No. 12–25. Argued January 9, 2013—Decided June 17, 2013

Respondent attorneys submitted several state Freedom of Information Act requests to the South Carolina Department of Motor Vehicles (DMV) seeking names and addresses of thousands of individuals in order to solicit clients for a lawsuit they had pending against several South Carolina car dealerships for violation of a state law that protects car purchasers from dealership actions that are "arbitrary, in bad faith, or unconscionable." Using the personal information provided by the DMV, respondents sent over 34,000 car purchasers letters, which were headed "ADVERTISING MATERIAL," explained the lawsuit, and asked recipients to return an enclosed reply card if they wanted to participate in the case. Petitioners, South Carolina residents, sued respondents for violating the federal Driver's Privacy Protection Act of 1994 (DPPA) by obtaining, disclosing, and using petitioners' personal information from motor vehicle records for bulk solicitation without their express consent. Respondents moved to dismiss, claiming that the information was properly released under a DPPA exception permitting disclosure of personal information "for use in connection with any civil, criminal, administrative, or arbitral proceeding," including "investigation in anticipation of litigation." 18 U. S. C. § 2721(b)(4). The District Court held that respondents' letters were not solicitations and that the use of information fell within (b)(4)'s litigation exception. The Fourth Circuit affirmed, concluding that the letters were solicitation, but that the solicitation was intertwined with conduct that satisfied the (b)(4) exception.

Held: An attorney's solicitation of clients is not a permissible purpose covered by the (b)(4) litigation exception. Pp. 57–78.

(a) State DMVs generally require someone seeking a driver's license or registering a vehicle to disclose detailed personal information such as name, address, telephone number, Social Security number, and medical information. The DPPA—responding to a threat from stalkers and criminals who could acquire state DMV information, and concerns over the States' common practice of selling such information to direct marketing and solicitation businesses—bans disclosure, absent a driver's consent, of "personal information," *e. g.*, names, addresses, or telephone numbers, as well as "highly restricted personal information," *e. g.*, pho-

tographs, Social Security numbers, and medical or disability information, § 2725(4), unless 1 of 14 exemptions applies. Subsection (b)(4) permits disclosure of both personal information and highly restricted personal information, while subsection (b)(12) permits disclosure only of personal information. Pp. 57–58.

(b) Respondents' solicitation of prospective clients is neither a use "in connection with" litigation nor "investigation in anticipation of litigation" under (b)(4). Pp. 58–65.

(1) The phrase "in connection with" provides little guidance without a limiting principle consistent with the DPPA's purpose and its other provisions. See *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 656. Such a consistent interpretation is also required because (b)(4) is an exception to both the DPPA's general ban on disclosure of "personal information" and the ban on release of "highly restricted personal information." An exception to a general policy statement is "usually read . . . narrowly in order to preserve the [provision's] primary operation." *Commissioner* v. *Clark*, 489 U. S. 726, 739. Reading (b)(4) to permit disclosure of personal information when there is any connection between protected information and a potential legal dispute would substantially undermine the DPPA's purpose of protecting a right to privacy in motor vehicle records. Subsection (b)(4)'s "in connection with" language must have a limit, and a logical and necessary conclusion is that an attorney's solicitation of prospective clients falls outside of that limit. Pp. 59–61.

(2) An attorney's solicitation of new clients is distinct from an attorney's conduct on behalf of his client or the court. Solicitation "by a lawyer of remunerative employment is a business transaction," *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 457, and state bars treat solicitation as discrete professional conduct. Excluding solicitation from the meaning of "in connection with" litigation draws support from (b)(4)'s examples of permissible litigation uses—"service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders"—which all involve an attorney's conduct as an officer of the court, not a commercial actor. Similarly, "investigation in anticipation of litigation" is best understood to allow background research to determine if there is a supportable theory for a complaint or a theory sufficient to avoid sanctions for filing a frivolous lawsuit, or to help locate witnesses for deposition or trial. Pp. 61–64.

(3) This reading is also supported by the fact that (b)(4) allows use of the most sensitive personal information. Permitting its use in solicitation is so substantial an intrusion on privacy it must not be assumed, without clear and explicit language, absent here, that Congress intended to exempt attorneys from DPPA liability in this regard. Pp. 64–65.

Syllabus

(c) Limiting (b)(4)'s reach also respects the statutory purpose and design evident in subsection (b)(12), which allows solicitation only of persons who have given express consent to have their names and addresses disclosed for this purpose. Subsection (b)(12) implements an important objective of the DPPA—to restrict disclosure of personal information in motor vehicle records to businesses for the purpose of direct marketing and solicitation. Other exceptions should not be construed to interfere with this objective unless the text commands it. Reading (b)(4)'s "in connection with" phrase to include solicitation would permit an attorney to use personal information from the state DMV to send bulk solicitations to prospective clients without their express consent, thus creating significant tension between the DPPA's litigation and solicitation exceptions. Pp. 65–68.

(d) Such a reading of (b)(4) could also affect the interpretation of the (b)(6) exception, which allows an insurer and certain others to obtain DMV information for use "in connection with . . . underwriting," and the (b)(10) exception, which permits disclosure and use of personal information "in connection with" the operation of private toll roads. Pp. 68–70.

(e) Respondents contend that a line can be drawn between mere trolling for clients and their solicitation, which was tied to a specific legal dispute, but that is not a tenable distinction. The DPPA supports drawing the line at solicitation. Solicitation can aid an attorney in bringing a lawsuit or increasing its size, but the question is whether or not lawyers can use personal information protected under the DPPA for this purpose. The mere fact that respondents complied with state bar rules governing solicitations also does not resolve whether they were entitled to access personal information from the state DMV database for that purpose. In determining whether obtaining, using, or disclosing personal information is for the prohibited purpose of solicitation, the proper inquiry is whether the defendant's purpose was to solicit, which might be evident from the communication itself or from the defendant's course of conduct. When that is the predominant purpose, (b)(4) does not entitle attorneys to DPPA-protected information even when solicitation is to aggregate a class action. Attorneys also have other alternatives to aggregate a class, including, *e. g.*, soliciting plaintiffs through traditional and permitted advertising. And they may obtain DPPA-protected information for a proper investigative use.

Although the Fourth Circuit held that the letters here were solicitations, it found the communications nonetheless exempt under (b)(4) because they were "inextricably intertwined" with permissible litigation purposes. If, however, the use of DPPA-protected personal information has the predominant purpose of solicitation, it would not be protected by (b)(4). A remand is necessary for the court to apply the

proper standard to determine the predominant purpose of respondents' letters. Pp. 70–75.

(f) There is no work for the rule of lenity to do here, because the DPPA's text and structure resolve any ambiguity in (b)(4)'s phrases "in connection with" and "investigation in anticipation of litigation." Pp. 75–76.

(g) On remand, the courts below must determine whether respondents' letters, viewed objectively, had the predominant purpose of solicitation, and may address whether respondents' conduct was permissible under (b)(1)'s governmental-function exception and any other defenses that have been properly preserved. Pp. 76–78.

675 F. 3d 281, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, and ALITO, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which SCALIA, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 81.

Joseph R. Guerra argued the cause for petitioners. With him on the briefs were *Jay T. Jorgensen*, *Eric D. McArthur*, *Ryan C. Morris*, *Philip N. Elbert*, *James G. Thomas*, *Elizabeth S. Tipping*, and *Gary L. Compton*.

Paul D. Clement argued the cause for respondents. With him on the brief were *Erin E. Murphy*, *M. Dawes Cooke*, *John William Fletcher*, *Curtis W. Dowling*, and *Matthew G. Gerrald*.*

JUSTICE KENNEDY delivered the opinion of the Court.

Concerned that personal information collected by States in the licensing of motor vehicle drivers was being

*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Jonathan F. Mitchell*, Solicitor General, and *Daniel T. Hodge*, First Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Sam Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Greg Zoeller* of Indiana, *Bill Schuette* of Michigan, *Jon Bruning* of Nebraska, *Gary K. King* of New Mexico, *Michael DeWine* of Ohio, and *Alan Wilson* of South Carolina; for the Electronic Frontier Foundation by *Arlene Fickler* and *Hanni M. Fakhoury*; and for the Electronic Privacy Information Center et al. by *Marc Rotenberg*.

released—even sold—with resulting loss of privacy for many persons, Congress provided federal statutory protection. It enacted the Driver's Privacy Protection Act of 1994, referred to here as the DPPA or Act. See 18 U. S. C. §§ 2721–2725.

The DPPA regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs). Disclosure of personal information is prohibited unless for a purpose permitted by an exception listed in 1 of 14 statutory subsections. See §§ 2721(b)(1)–(14). This case involves the interpretation of one of those exceptions, subsection (b)(4). The exception in (b)(4) permits obtaining personal information from a state DMV for use "in connection with" judicial and administrative proceedings, including "investigation in anticipation of litigation." § 2721(b)(4). The question presented is whether an attorney's solicitation of clients for a lawsuit falls within the scope of (b)(4).

Respondents are trial lawyers licensed to practice in South Carolina. They obtained names and addresses of thousands of individuals from the South Carolina DMV in order to send letters to find plaintiffs for a lawsuit they had filed against car dealers for violations of South Carolina law. Petitioners, South Carolina residents whose information was obtained and used without their consent, sued respondents for violating the DPPA. Respondents claimed the solicitation letters were permitted under subsection (b)(4). In light of the text, structure, and purpose of the DPPA, the Court now holds that an attorney's solicitation of clients is not a permissible purpose covered by the (b)(4) litigation exception.

I

A

The State of South Carolina, to protect purchasers of motor vehicles, enacted the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (MDDA). In June 2006, respondent attorneys were approached by car

purchasers who complained about administrative fees charged by car dealerships in certain South Carolina counties, allegedly in violation of the MDDA. The state statute prohibits motor vehicle dealers from engaging in "any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S. C. Code Ann. §56–15–40(1) (2006). The MDDA provides that "one or more may sue for the benefit of the whole" where an action is "one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court." §56–15–110(2).

On June 23, 2006, one of the respondent attorneys submitted a state Freedom of Information Act (FOIA) request to the South Carolina DMV to determine if charging illegal administrative fees was a common practice so that a lawsuit could be brought as a representative action under the MDDA. The attorney's letter to the DMV requested information regarding "[p]rivate purchases of new or used automobiles in Spartanburg County during the week of May 1–7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase." App. 57. The letter explained that the request was made "in anticipation of litigation . . . pursuant to the exception in 18 USC §2721(b)(4) of the Driver's Privacy Protection Act." *Ibid.* The South Carolina DMV provided the requested information. On August 24, 2006, respondents submitted a second FOIA request to the DMV, also asserting that it was made "in anticipation of litigation . . . pursuant to the exception in 18 USC §2721(b)(4)" for car purchasers in five additional counties during the same week. *Id.*, at 67.

On August 29, 2006, respondents filed suit in South Carolina state court on behalf of four of the consumers who originally contacted them. The case is referred to here, and by the parties, as the *Herron* suit. The complaint in the *Herron* suit named 51 dealers as defendants and invoked the

MDDA's "group action" provision to assert claims "for the benefit of all South Carolina car buyers wh[o] paid administrative fees," App. 128, to those dealers during the same time period.

Some of the dealer defendants in the *Herron* suit filed motions to dismiss for lack of standing because none of the named plaintiffs purchased cars from them. On October 26, 2006, while the motions to dismiss were pending, respondents submitted a new FOIA request to the South Carolina DMV. That request, again citing subsection (b)(4) of the DPPA, sought to locate additional car buyers who could serve as plaintiffs against the dealers who had moved to dismiss. On October 31, 2006, respondents filed an amended complaint, which added four named plaintiffs and increased the number of defendant dealers from 51 to 324. As before, defendant dealerships that had not engaged in transactions with any of the now eight named plaintiffs filed motions to dismiss for lack of standing.

On January 3, 2007, using the personal information they had obtained from the South Carolina DMV, respondents sent a mass mailing to find car buyers to serve as additional plaintiffs in the litigation against the dealers. Later in January, respondents made three more FOIA requests to the South Carolina DMV seeking personal information concerning people who had purchased cars from an additional 31 dealerships, again citing the (b)(4) exception. The South Carolina DMV granted all the requests. On January 23, respondents mailed a second round of letters to car buyers whose personal information had been disclosed by the DMV. Respondents sent additional rounds of letters on March 1, March 5, and May 8. Each of the five separate mailings was sent to different recipients. In total, respondents used the information obtained through their FOIA requests to send letters to over 34,000 car purchasers in South Carolina. This opinion refers to the communications sent by respondents simply as the "letters."

The letters, all essentially the same, had the heading "ADVERTISING MATERIAL." The letters explained the lawsuit against the South Carolina dealers and asked recipients to contact the respondent-lawyers if interested in participating in the case. Attached to the letter was a reply card that asked a few questions about the recipient's contact information and car purchase and ended with the sentence "I am interested in participating" followed by a signature line. The text of the letter and reply are set out in full in the Appendix, *infra*.

In accordance with South Carolina Rule of Professional Conduct 7.3 (2012), which regulates the solicitation of prospective clients, respondents filed a copy of the letter and a list of recipients' names and addresses with the South Carolina Office of Disciplinary Counsel.

In June 2007, respondents sought to amend their complaint to add 247 plaintiffs. The court denied leave to amend and held the named plaintiffs had standing to sue only those dealerships from which they had purchased automobiles and any alleged co-conspirators. In September 2007, respondents filed two new lawsuits on behalf of the additional car buyers. Those subsequent cases were consolidated with the *Herron* suit. All claims against dealerships without a corresponding plaintiff-purchaser were dropped.

B

In the case now before the Court, petitioners are South Carolina residents whose personal information was obtained by respondents from the South Carolina DMV and used without their consent to send solicitation letters asking them to join the lawsuits against the car dealerships. Petitioner Edward Maracich received one of the letters in March 2007. While his personal information had been disclosed to respondents because he was one of many buyers from a particular dealership, Maracich also happened to be the dealership's director of sales and marketing. Petitioners Mar-

tha Weeks and John Tanner received letters from respondents in May 2007. In response to the letter, Tanner called Richard Harpootlian, one of the respondent attorneys listed on the letter. According to Tanner, Harpootlian made an aggressive sales pitch to sign Tanner as a client for the lawsuit without asking about the circumstances of his purchase.

In 2009, petitioners filed the instant putative class-action lawsuit in the United States District Court for the District of South Carolina. The complaint alleged that respondents had violated the DPPA by obtaining, disclosing, and using personal information from motor vehicle records for bulk solicitation without the express consent of petitioners and the other class members.

Respondents moved to dismiss. The information, they contended, was subject to disclosure because it falls within two statutory exceptions in the DPPA: (b)(1), pertaining to governmental functions, and (b)(4), pertaining to litigation. On cross-motions for summary judgment, the District Court held as a matter of law that respondents' letters were not solicitations and that the use of information fell within the (b)(4) litigation exception. App. to Pet. for Cert. 61a. The District Court also found that respondents' use of personal information was permitted under the (b)(1) governmental-function exception.

The Court of Appeals for the Fourth Circuit affirmed. Unlike the District Court, it found that the letters were "solicitation[s]" within the meaning of the DPPA; but it held further that when "solicitation is an accepted and expected element of, and is inextricably intertwined with, conduct satisfying the litigation exception under the DPPA, such solicitation is not actionable." 675 F. 3d 281, 284 (2012). This Court granted certiorari to address whether the solicitation of clients is a permissible purpose for obtaining personal information from a state DMV under the DPPA's (b)(4) exception. 567 U. S. 968 (2012).

II

To obtain a driver's license or register a vehicle, state DMVs, as a general rule, require an individual to disclose detailed personal information, including name, home address, telephone number, Social Security number, and medical information. See *Reno* v. *Condon*, 528 U. S. 141, 143 (2000). The enactment of the DPPA responded to at least two concerns over the personal information contained in state motor vehicle records. The first was a growing threat from stalkers and criminals who could acquire personal information from state DMVs. The second concern related to the States' common practice of selling personal information to businesses engaged in direct marketing and solicitation. To address these concerns, the DPPA "establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." *Id.*, at 144.

The DPPA provides that, unless one of its exceptions applies, a state DMV "shall not knowingly disclose or otherwise make available" "personal information" and "highly restricted personal information." §§ 2721(a)(1)–(2). "[P]ersonal information" is "information that identifies an individual, including [a] . . . driver identification number, name, address . . . , [or] telephone number, . . . but does not include information on vehicular accidents, driving violations, and driver's status." § 2725(3). "[H]ighly restricted personal information" is defined as "an individual's photograph or image, social security number, [and] medical or disability information." § 2725(4). The DPPA makes it unlawful "for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title." § 2722(a). A person "who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains." § 2724(a).

The DPPA's disclosure ban is subject to 14 exceptions set forth in § 2721(b), for which personal information "may be disclosed." The two exceptions most relevant for the purpose of this case are the litigation exception in subsection (b)(4) and the solicitation exception in (b)(12).

The (b)(4) litigation exception is one of the four provisions permitting disclosure not only of personal information but also of highly restricted personal information. § 2721(b)(4); § 2725(4). It provides that information may be disclosed:

> "For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court."

The (b)(12) solicitation exception provides that certain personal information, not including highly restricted personal information, may be disclosed:

> "For bulk distribution for surveys, marketing, or solicitations if the State has obtained the express consent of the person to whom such personal information pertains."

The solicitation exception was originally enacted as an opt-out provision, allowing state DMVs to disclose personal information for purposes of solicitation only if the DMV gave individuals an opportunity to prohibit such disclosures. § 2721(b)(12) (1994 ed.). In 1999, Congress changed to an opt-in regime, requiring a driver's affirmative consent before solicitations could be sent. See *Condon*, *supra*, at 144–145.

III

Respondents' liability depends on whether their use of personal information acquired from the South Carolina DMV

to solicit clients constitutes a permissible purpose under the DPPA. The District Court held that respondents' conduct was permissible both under the (b)(1) and (b)(4) exceptions. The Court of Appeals ruled that the conduct here was permissible under (b)(4); but, unlike the District Court, it did not address the alternative argument that the conduct was also permissible under (b)(1). As in the Court of Appeals, only the (b)(4) exception is discussed here.

A

Respondents claim they were entitled to obtain and use petitioners' personal information based on two of the phrases in (b)(4). First, disclosure of personal information is permitted for use "in connection with any civil, criminal, administrative, or arbitral proceeding." § 2721(b)(4). Second, a use in connection with litigation includes "investigation in anticipation of litigation." *Ibid.* Respondents contend that the solicitation of prospective clients, especially in the circumstances of this case, is both a use "in connection with" litigation and "investigation in anticipation of litigation."

1

If considered in isolation, and without reference to the structure and purpose of the DPPA, (b)(4)'s exception allowing disclosure of personal information "for use in connection with any civil, criminal, administrative, or arbitral proceeding," and for "investigation in anticipation of litigation," is susceptible to a broad interpretation. That language, in literal terms, could be interpreted to its broadest reach to include the personal information that respondents obtained here. But if no limits are placed on the text of the exception, then all uses of personal information with a remote relation to litigation would be exempt under (b)(4). The phrase "in connection with" is essentially "indeterminat[e]" because connections, like relations, "'stop nowhere.'" *New York State Conference of Blue Cross & Blue Shield Plans* v. *Trav-*

elers Ins. Co., 514 U. S. 645, 655 (1995). So the phrase "in connection with" provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions. See *id.*, at 656 ("We simply must go beyond the unhelpful text and the frustrating difficulty of defining ['connection with'], and look instead to the objectives of the ERISA statute"); see also *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 335 (1997) ("But applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").

An interpretation of (b)(4) that is consistent with the statutory framework and design is also required because (b)(4) is an exception to both the DPPA's general prohibition against disclosure of "personal information" and its ban on release of "highly restricted personal information." §§ 2721(a)(1)–(2). An exception to a "general statement of policy" is "usually read . . . narrowly in order to preserve the primary operation of the provision." *Commissioner* v. *Clark*, 489 U. S. 726, 739 (1989). It is true that the DPPA's 14 exceptions permit disclosure of personal information in a range of circumstances. Unless commanded by the text, however, these exceptions ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design. Cf. *Cowan* v. *Ernest Codelia, P. C.*, 149 F. Supp. 2d 67 (SDNY 2001) (rejecting an argument by defense counsel that obtaining from the DMV the home address of the assistant district attorney to send her a harassing letter was a permissible use "in connection with" the ongoing criminal proceeding under (b)(4)).

If (b)(4) were read to permit disclosure of personal information whenever any connection between the protected information and a potential legal dispute could be shown, it would undermine in a substantial way the DPPA's purpose of protecting an individual's right to privacy in his or her

motor vehicle records. The "in connection with" language in (b)(4) must have a limit. A logical and necessary conclusion is that an attorney's solicitation of prospective clients falls outside of that limit.

The proposition that solicitation is a distinct form of conduct, separate from the conduct in connection with litigation permitted under (b)(4) is demonstrated: by the words of the statute itself; by formal rules issued by bar organizations and governing boards; and by state statutes and regulations that govern and direct attorneys with reference to their duties in litigation, to their clients, and to the public. As this opinion explains in more detail, the statute itself, in (b)(12), treats bulk solicitation absent consent as a discrete act that the statute prohibits. And the limited examples of permissible litigation purposes provided in (b)(4) are distinct from the ordinary commercial purpose of solicitation. Canons of ethics used by bar associations treat solicitation as a discrete act, an act subject to specific regulation. And state statutes, including statutes of the State of South Carolina, treat solicitation as a discrete subject for regulation and governance of the profession. It would contradict the idea that solicitation is defined conduct apart from litigation to treat it as simply another aspect of the litigation duties set out in (b)(4).

2

An attorney's solicitation of new clients is distinct from other aspects of the legal profession. "It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Cohen* v. *Hurley*, 366 U. S. 117, 124 (1961), overruled on other grounds, *Spevack* v. *Klein*, 385 U. S. 511 (1967). Unlike an attorney's conduct performed on behalf of his client or the court, "solicitation by a lawyer of remunerative employment is a business transaction." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 457 (1978);

see also *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 637 (1985) (attorney solicitation " 'propose[s] a commercial transaction' "). The "pecuniary motivation of the lawyer who solicits a particular representation" may even "create special problems of conflict of interest." *Ohralik*, *supra*, at 461, n. 19.

The distinction between solicitation and an attorney's other duties is also recognized and regulated by state bars or their governing bodies, which treat solicitation as discrete professional conduct. See, *e. g.*, Cal. Rule Prof. Conduct 1–400 (2013); N. Y. Rule Prof. Conduct 7.3 (2012–2013); Tex. Disciplinary Rules Prof. Conduct 7.02–7.03 (2013); Va. Rule Prof. Conduct 7.3 (Supp. 2012). That, indeed, was true here. Respondents were required by the South Carolina rules of ethics to include certain language in their solicitation letters and to file copies with the South Carolina Office of Disciplinary Counsel. See S. C. Rule Prof. Conduct 7.3. Given the difference between an attorney's commercial solicitation of clients and his duties as an officer of the court, the proper reading of (b)(4) is that solicitation falls outside of the litigation exception. And when (b)(4) is interpreted not to give attorneys the privilege of using protected personal information to propose a commercial transaction, the statute is limited by terms and categories that have meaning in the regular course of professional practice.

The exclusion of solicitation from the meaning of "in connection with" litigation draws further support from the examples of permissible litigation uses in (b)(4). The familiar canon of *noscitur a sociis*, the interpretive rule that "words and people are known by their companions," *Gutierrez* v. *Ada*, 528 U. S. 250, 255 (2000), provides instruction in this respect. Under this rule, the phrases "in connection with" and "investigation in anticipation of litigation," which are "capable of many meanings," *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961), can be construed in light of their accompanying words in order to avoid giving the statutory

exception "unintended breadth," *ibid.*; see also *United States* v. *Williams*, 553 U. S. 285, 294 (2008) (the canon of *noscitur a sociis* "counsels that a word is given more precise content by the neighboring words with which it is associated").

The examples of uses "in connection with" litigation that Congress provided in (b)(4) include "the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court." § 2721(b)(4). These uses involve an attorney's conduct when acting in the capacity as an officer of the court, not as a commercial actor. The listed examples are steps that ensure the integrity and efficiency of an existing or imminent legal proceeding. This may include contacting persons who are already involved in the litigation or who are necessary parties or witnesses. These steps are different from the ordinary business purpose of solicitation. Here, as will be the case for most solicitations, the attorneys acted without court authorization or supervision and cast a wide net, sending letters to over 30,000 car purchasers to let them know the attorneys' names and the attorneys' interest in performing legal services for them.

The examples in (b)(4) confirm, and are all consistent with, protecting the professional responsibilities that counsel, or the court, must discharge in the proper conduct of litigation. These are quite distinct from the separate subject, the separate professional conduct, of soliciting clients. The examples suggest that the litigation exception has a limited scope to permit the use of highly restricted personal information when it serves an integral purpose in a particular legal proceeding. In light of the types of conduct permitted by the subsection, the "in connection with" language should not be read to include commercial solicitations by an attorney.

Similarly, "investigation in anticipation of litigation" is best understood to allow background research to determine whether there is a supportable theory for a complaint, a theory sufficient to avoid sanctions for filing a frivolous lawsuit,

or to locate witnesses for deposition or trial testimony. An interpretation of "investigation" to include commercial solicitation of new clients would expand the language in a way inconsistent with the limited uses given as examples in the statutory text. It must be noted also that the phrase "in anticipation of litigation" is not a standalone phrase. It modifies, and necessarily narrows, the word "investigation." To use the phrase "in anticipation of litigation" without that qualification is to extend the meaning of the statute far beyond its text.

3

An additional reason to hold that (b)(4) does not permit solicitation of clients is because the exception allows use of the most sensitive kind of information, including medical and disability history and Social Security numbers. To permit this highly personal information to be used in solicitation is so substantial an intrusion on privacy it must not be assumed, without language more clear and explicit, that Congress intended to exempt attorneys from DPPA liability in this regard.

Subsection (b)(4) is one of only four exceptions in the statute that permit disclosure of "highly restricted personal information," including a person's image, Social Security number, and medical and disability information. See § 2721(a)(2); § 2725(4). The other three exceptions that permit access to highly restricted personal information include: use by the government, including law enforcement, see § 2721(b)(1); use by an insurer in claim investigation and antifraud activities, see § 2721(b)(6); and use by an employer to obtain or verify information as required by law, see § 2721(b)(9). None of these exceptions are written to authorize private individuals to acquire the most restricted personal information in bulk merely to propose a commercial transaction for their own financial benefit. If (b)(4) permitted access to highly restricted personal information for an attorney's own commercial ends without governmental au-

thorization or without consent of the holder of the driver's license, the result would be so significant a departure from these other exceptions that it counsels against adopting this interpretation of the statute.

While the (b)(4) exception allows this sensitive information to be used for investigation in anticipation of litigation and in the litigation itself, there is no indication Congress wanted to provide attorneys with a special concession to obtain medical information and Social Security numbers for the purpose of soliciting new business.

B

Limiting the reach of (b)(4) to foreclose solicitation of clients also respects the statutory design of the DPPA. The use of protected personal information for the purpose of bulk solicitation is addressed explicitly by the text of (b)(12). Congress was aware that personal information from motor vehicle records could be used for solicitation, and it permitted it in circumstances that it defined, with the specific safeguard of consent by the person contacted. So the absence of the term "solicitation" in (b)(4) is telling. Subsection (b)(12) allows solicitation only of those persons who have given express consent to have their names and addresses disclosed for this purpose. If (b)(4) were to be interpreted to allow solicitation without consent, then the structure of the Act, and the purpose of (b)(12), would be compromised to a serious degree.

It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning. *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 455 (1993) ("'[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'" (quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849))). The "in connection with" language of (b)(4) therefore must

be construed within the context of the DPPA as a whole, including its other exceptions.

This is not to say, as petitioners contend, that this is a straightforward application of the specific (qualified solicitation permission in (b)(12)) controlling the general (the undefined reach of "in connection with" and "investigation in anticipation of litigation" in (b)(4)). As between the two exceptions at issue here, it is not clear that one is always more specific than the other. For while (b)(12) is more specific with respect to solicitation, (b)(4) is more specific with respect to litigation. The DPPA's 14 permissible use exceptions, moreover, are not in all contexts mutually exclusive. The better reading is that each exception addresses different conduct which may, on occasion, overlap. For example, certain uses of personal information by a court may be exempt either under (b)(1) or (b)(4). If conduct falls within the explicit or unambiguous scope of one exception, all other potentially applicable exceptions need not be satisfied.

So the question is not which of the two exceptions controls but whether respondents' conduct falls within the litigation exception at all. As to this question, petitioners are correct that the existence of the separate provision governing solicitation provides necessary context for defining the scope of (b)(4). As discussed above, the text of (b)(4) indicates that the exception is best read not to include solicitation as a use "in connection with" litigation. But even if there were any doubt on this point, the statutory design of the DPPA as a whole, including the (b)(12) exception governing solicitations, provides additional instruction for construing this provision. For this reason, it is relevant that "'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 645 (2012).

Subsection (b)(12) implements an important objective of the DPPA—to restrict disclosure of personal information contained in motor vehicle records to businesses for the pur-

pose of direct marketing and solicitation. The DPPA was enacted in part to respond to the States' common practice of selling personal information to businesses that used it for marketing and solicitations. See *Condon*, 528 U. S., at 143 ("Congress found that many States . . . sell this personal information to individuals and businesses"); *id.*, at 148 ("The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations"). Congress chose to protect individual privacy by requiring a state DMV to obtain the license holder's express consent before permitting the disclosure, acquisition, and use of personal information for bulk solicitation. The importance of the consent requirement is highlighted by Congress' decision in 1999 to change the statutory mechanism that allowed individuals protected by the Act to opt out to one requiring them to opt in. See *id.*, at 144–145; see also §§ 350(c)–(e), 113 Stat. 1025.

Direct marketing and solicitation present a particular concern not only because these activities are of the ordinary commercial sort but also because contacting an individual is an affront to privacy even beyond the fact that a large number of persons have access to the personal information. The DPPA's (b)(5) exception illustrates this concern by permitting disclosure of personal information for use in research activities "so long as the personal information is not published, redisclosed, or used to contact individuals." § 2721(b)(5).

Because (b)(12) represents Congress' decision to target the problem of bulk solicitation with the requirement of express consent, other exceptions should not be construed to interfere with this statutory mechanism unless the text commands it. This is not to suggest that (b)(12) is an overriding rule that controls all other exceptions. It would not be necessary to consider (b)(12) if another statutory exception applied to the relevant conduct. The relevance of (b)(12), how-

ever, is that it can be used as additional evidence of the DPPA's statutory design to interpret exceptions whose breadth and application are uncertain.

Here, the phrase "in connection with" litigation in the (b)(4) exception, as a matter of normal usage and common understanding, does not encompass an attorney's commercial use of DPPA-protected personal information to solicit new clients. This and the other reasons given above lead to the conclusion that it would be incorrect to interpret the text of this exception to include an attorney's commercial solicitation as a use "in connection with" litigation. And, unlike (b)(12), the (b)(4) exception does not require obtaining an individual's express consent before disclosing and using personal information contained in state motor vehicle records. If the "in connection with" language of (b)(4) were read broadly to include solicitation, an attorney could acquire personal information from the state DMV to send bulk solicitations to prospective clients without their express consent. This would create significant tension in the DPPA between the litigation and solicitation exceptions. That inconsistency and the concomitant undermining of the statutory design are avoided by interpreting (b)(4) so it does not authorize the use of personal information for the purpose of soliciting clients. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously").

C

If the phrase "in connection with" in (b)(4) included solicitation by lawyers, then a similar reach for that phrase could apply to other exceptions, resulting in further frustration of the Act's design. Subsection (b)(6) allows an insurer and certain other parties to obtain DMV information for use "in

connection with . . . underwriting." § 2721(b)(6). If that phrase extended to solicitation, then personal information protected by the DPPA could be used to solicit new customers for underwriting without their consent. It is most doubtful that Congress intended to exempt insurers from the consent requirement for bulk solicitations.

The DPPA, in subsection (b)(10), permits disclosure and use of personal information "in connection with" the operation of private toll roads. If the phrase were interpreted to extend to all solicitations without consent, then the owner of a private toll road could send targeted mass advertisings or direct marketing letters by using the protected personal information obtained from state motor vehicle records. This, too, would take away much of the force and effect of the (b)(12) restriction on bulk solicitation without the express consent of the person contacted.

When Congress did intend the phrase "in connection with" to permit conduct otherwise subject to the express consent requirement in (b)(12), it did so in explicit terms. An illustration can be found in the interplay between (b)(2) and (b)(12) of the DPPA. As has been noted, (b)(12) prohibits disclosure of protected personal information for the purpose of sending bulk distribution of surveys without the express consent of the recipients. Subsection (b)(2), however, permits disclosure of personal information "[f]or use in connection with matters of . . . motor vehicle market research activities, including survey research." § 2721(b)(2). So what the DPPA prohibits in (b)(12) it explicitly allows in (b)(2), but it does so by repeating the same word, "survey," in the text of both provisions. If the "in connection with" language alone were sufficient to include "surveys" within (b)(2), the phrase "survey research" would be mere surplusage. Instead, the explicit reference to "survey" in (b)(2) was necessary to make clear that Congress had created an exception to the (b)(12)'s consent requirement for one particular type of survey. When it comes to the prohibition on "solicitations" in (b)(12),

however, that word is not repeated in the text of (b)(4). This leads to the inference that Congress did not intend (b)(4) to include "solicitations" and thus to override the express consent requirement of (b)(12).

IV

A

Respondents concede that (b)(4) does not permit attorneys to use personal information acquired from a state DMV to find new business in the absence of any connection to a particular transaction, occurrence, or defect. They contend, however, that a line can be drawn between mere trolling for clients (which is not permitted) and solicitation tied to a specific legal dispute (which, respondents argue, is permitted). While some solicitations may have a close relationship with existing proceedings, there is no principled way to classify some solicitations as acceptable and others as unacceptable for the purpose of (b)(4). Even if solicitation were permitted only after a lawyer has a client or filed a lawsuit, attorneys would be able to circumvent this limitation with ease by the simple device of filing a placeholder lawsuit. All an attorney would need is one friend or family member as his client before being able to gain access to DPPA-protected personal information to solicit persons to fill in as plaintiffs. Solicitation of new plaintiffs to keep defendants in a lawsuit that would otherwise be dismissed for lack of standing is no different in substance from solicitation to initiate a lawsuit. Here, at any rate, the state court found that plaintiffs had standing to sue the dealerships from which they had purchased automobiles and any alleged co-conspirators. See 675 F. 3d, at 287, n. 3. This can undermine the argument that solicitation of additional plaintiffs was somehow necessary for the lawsuit to continue.

Drawing the line between solicitations related to an existing proceeding and those that are not is not a tenable distinction. The proper solution is to draw the line at solicitation

itself. The structure of the DPPA supports this distinction. If solicitation were deemed a permissible purpose under (b)(4), even when limited to a particular lawsuit, tension would remain between the (b)(12) solicitation exception, which requires express consent, and the (b)(4) litigation exception, which does not. The two statutory provisions are consistent if solicitation is excluded from the activity permitted in (b)(4).

Of course solicitation can aid an attorney in bringing a lawsuit or in increasing its size. The question, however, is whether or not lawyers can use personal information protected under the DPPA for this purpose. Petitioners and other state residents have no real choice but to disclose their personal information to the state DMV, including highly restricted personal information. The use of that information by private actors to send direct commercial solicitations without the license holder's consent is a substantial intrusion on the individual privacy the Act protects. For the reasons already discussed, a proper interpretation of a use "in connection with" litigation under (b)(4) in light of the DPPA's text and structure does not include solicitation.

The fact that an attorney complies with state bar rules governing solicitations also does not resolve whether he is entitled to access the state DMV database for that purpose under the DPPA. There is no provision of South Carolina law that either permits or requires attorneys to use DPPA-protected information to solicit potential clients. Even if such a provision existed, under the Supremacy Clause, it would not protect respondents from DPPA liability unless their conduct fell within one of the Act's exceptions.

A person is liable under the DPPA if he "knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted" by one of the statutory exceptions. §2724(a). In determining whether obtaining, using, or disclosing the personal information is for the prohibited purpose of solicitation, the proper inquiry is

whether the defendant had the predominant purpose to solicit. Because, in some cases, a communication sent with DPPA-protected information may serve more than one objective, a court must discern whether solicitation is its predominant purpose. That purpose might be evident from the communication itself. In other instances the defendant's whole course of conduct will be relevant in determining whether solicitation was the predominant purpose of the act alleged to be wrongful.

Close cases may arise. Where a communication seeks to provide class notice or locate a witness, for example, the fact that the attorney provides contact information for a reply likely would not make the communication an improper solicitation. And the fact that a letter follows the state bar rules governing attorney solicitations, although relevant, will not be dispositive. For example, if the predominant purpose of a letter was not to solicit a new client, but rather to ask a witness investigatory questions or to secure her testimony at trial, adherence to state bar solicitation rules would not subject the sender to DPPA liability. Subsequent conduct, in some cases, may show that solicitation in fact was the predominant purpose of an earlier act; and, of course, even if an initial request was proper, a later use may be a violation. Where a reasonable observer could discern that the predominant purpose of obtaining, using, or disclosing protected personal information was to initiate or propose a business transaction with a prospective client, (b)(4) does not exempt the solicitation.

Respondents contend that even if solicitation of clients is impermissible as a general rule, solicitation to aggregate a class-action suit is permitted under (b)(4). Where the predominant purpose is solicitation, however, (b)(4) does not entitle attorneys to obtain and use DPPA-protected information. To the extent the solicitation of plaintiffs can help attorneys bring a larger class action, there are alternatives that do not sacrifice an individual's privacy in his or her motor vehicle records. An attorney, pursuant to a court

order, could send class notice. Class notice may prompt a class member to join the lawsuit, but it also serves the important purpose of protecting the rights of absent class members and ensures that any decision will be binding on the class. Class notice sent on the instruction of the court also does not raise the same concerns that attorneys are acting only in their own commercial interest. But respondents here did not obtain or use the protected personal information to send class notices or comply with a court order. The letters made no mention of ethical obligations to outstanding group members or the consequences of not joining the suit. As the Court of Appeals noted, respondents "failed to indicate to recipients that they may already be *de facto* clients of the Lawyers, that is, persons whose interests were already protected by the senders." 675 F. 3d, at 293. Had respondents received a court order, they might have been able to rely on the explicit language in (b)(4) permitting uses of information "pursuant to an order of a Federal, State, or local court." § 2721(b)(4). But because respondents had no court order authorizing their conduct, this opinion need not address whether it would be proper for a court to order attorneys to obtain DPPA-protected personal information to solicit plaintiffs.

Attorneys are free to solicit plaintiffs through traditional and permitted advertising without obtaining personal information from a state DMV. Here, the attorneys could also have complied with (b)(12) and limited their solicitation to those individuals who had expressly consented, or respondents could have requested consent through the DPPA's waiver procedure. See § 2721(d).

In light of these and other alternatives, attorneys are not without the necessary means to aggregate a class of plaintiffs. What they may not do, however, is acquire highly restricted personal information from state DMV records to send bulk solicitations without express consent from the targeted recipients.

This is not to suggest that attorneys may not obtain DPPA-protected personal information for a proper investigatory purpose. Where respondents obtained petitioners' personal information to discern the extent of the alleged misconduct or identify particular defendants, those FOIA requests appear permissible under (b)(4) as "investigation in anticipation of litigation." Solicitation of new business, however, is not "investigation" within the meaning of (b)(4). And acquiring petitioners' personal information for a legitimate investigatory purpose does not entitle respondents to then use that same information to send direct solicitations. Each distinct disclosure or use of personal information acquired from a state DMV must be permitted by the DPPA. See § 2724(a) ("A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains"); see also § 2721(c). If the statute were to operate otherwise, obtaining personal information for one permissible use would entitle attorneys to use that same information at a later date for any other purpose. For example, a lawyer could obtain personal information to locate witnesses for a lawsuit and then use those same names and addresses later to send direct marketing letters about a book he wrote.

B

The Court of Appeals held that the letters here were solicitations, finding that "a reasonable recipient would almost certainly have understood the message to be a solicitation from a lawyer." *Id.*, at 293. The court noted as relevant that respondents themselves took steps to follow South Carolina bar rules governing attorney solicitations and rejected respondents' description of the letters as investigatory in nature, given that "[n]o mention was made of an investigation into certain practices other than the implicit suggestion of investigation during a 'free consultation.'" *Ibid.* The in-

cluded reply card did not alter the Court of Appeals' finding that the communications were solicitations rather than investigation. Only those interested in joining the lawsuit were directed to fill out the card and the only place to sign the card was under the phrase "I am interested in participating." See Appendix, *infra*, at 80. The card asked for data regarding vehicle purchases relevant to initiate the representation of the prospective clients.

But although the Court of Appeals found that the letters were solicitations, it held the communications nonetheless exempt under (b)(4) because they were "inextricably intertwined" with permissible litigation purposes. 675 F. 3d, at 284. As explained above, however, if the use of DPPA-protected personal information has the predominant purpose of solicitation, that use is not protected by (b)(4). A remand is necessary for application of the proper standard because the Court of Appeals could conclude, in light of the content of the communications, taken with other evidence in the record, that respondents' letters had the predominant purpose to solicit clients.

On remand, the Court of Appeals should determine whether the record shows that the communications sought, or were used, to develop the factual basis of the *Herron* complaint, locate witnesses, identify additional defendants, or perform any other investigative function related to the litigation. Even if so, the question is whether solicitation was the predominant purpose for sending the letters.

V

This case does not involve the statutory section imposing criminal liability, which is written in different terms than the civil remedies provision. See § 2723(a) ("A person who knowingly violates this chapter shall be fined under this title"). As to civil liability, the amount of damages sought in the complaint is based on the number of persons, over 30,000 individuals, whose personal and highly sensitive infor-

mation was disclosed and who were solicited. Whether the civil damages provision in § 2724, after a careful and proper interpretation, would permit an award in this amount, and if so whether principles of due process and other doctrines that protect against excessive awards would come into play, is not an issue argued or presented in this case.

In this framework, there is no work for the rule of lenity to do. This Court has held that "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 560 U. S. 474, 488 (2010) (citation and internal quotation marks omitted). But here, as discussed, the surrounding text and structure of the DPPA resolve any ambiguity in phrases "in connection with" and "investigation in anticipation of litigation" in (b)(4). Only where "the language or history of [the statute] is uncertain" after looking to "the particular statutory language, . . . the design of the statute as a whole and to its object and policy," does the rule of lenity serve to give further guidance. *Crandon* v. *United States*, 494 U. S. 152, 158 (1990). "The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." See *Callanan* v. *United States*, 364 U. S. 587, 596 (1961). There is no room for the rule of lenity where the text and structure of the DPPA require an interpretation of (b)(4) that does not reach out to include an attorney's solicitation of clients.

VI

Solicitation of prospective clients is not a permissible use "in connection with" litigation or "investigation in anticipation of litigation" under (b)(4) of the DPPA. As a result, the Court of Appeals erred in granting respondents summary judgment without first determining whether the communications had the predominant purpose of solicitation. And

since the solicited persons did not give express consent to the disclosure or use of their personal information for this purpose, the (b)(12) exception does not apply.

On remand, the Court of Appeals, or the District Court, must determine whether respondents' letters, viewed objectively, had the predominant purpose of solicitation. The Court of Appeals' finding that these letters were solicitations can be the basis for the further conclusion that solicitation was the predominant purpose of their transmission. Because the Court of Appeals applied the wrong standard in finding these solicitations exempt under (b)(4), however, the Court remands for application of the proper standard.

Further proceedings also may be required to determine whether the initial act of obtaining petitioners' personal information was permitted under the DPPA. The Court of Appeals and the District Court seem to have agreed that the first two FOIA requests were made in order for respondents to decide whether to file the MDDA lawsuit as a group action and to identify the highest volume dealers. App. 39. If, in light of this opinion, the courts on remand adhere to the determination that the first two FOIA requests were exempt under (b)(4), the later uses and disclosures of that information, nevertheless, may be independent violations of the DPPA.

If the use of petitioners' personal information to send the letters in this case is deemed to be a violation of the Act, then the courts can decide if it remains relevant and necessary, for liability and damages purposes, to determine whether the last four FOIA requests were also in violation of the DPPA. Assuming violations of the DPPA are established, questions regarding the calculation and assessment of damages then can be considered.

Neither this Court nor the Court of Appeals has considered whether respondents' conduct was permissible under the (b)(1) governmental-function exception. Whether solicitation would be permitted conduct under (b)(1) is not re-

solved by this case. This case turns on the interpretation of "in connection with" litigation and "investigation in anticipation of litigation," phrases not included in (b)(1). Where personal information is used for the predominant purpose of solicitation, the fact that the solicitation itself may serve a governmental function is not relevant to the interpretation of (b)(4). It may, however, be relevant to the (b)(1) inquiry. Respondents' argument that they were authorized under state law to act as private attorneys general on behalf of the State is properly addressed under (b)(1). Arguments related to (b)(1) and other defenses, to the extent they have been preserved and are still proper to consider, must be for further proceedings on remand.

This Court now holds that sending communications for the predominant purpose of solicitation is not a use of personal information exempt from DPPA liability under (b)(4).

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

From the Law Firms of

Michael E. Spears, PA Michael E. Spears Post Office 5806 Spartanburg, SC 29304 (864) 583-3535 (888) 583-3588.	Gedney M. Howe, III, PA Gedney M. Howe, III Post Office Box 1034 Charleston, SC 29402 (843)722-8048	Richard A. Harpootlian, PA Richard A. Harpootlian P.O. Box 1090 Columbia, SC 29202 (803)252-4848 (866) 706-3997	Lewis & Babcock, L.L.P. A. Camden Lewis Post Office Box 11208 Columbia, SC 29211 (803)771-8000

ADVERTISING MATERIAL

May 8, 2007

Dear Sir/Madam:

We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee". We believe that these fees are being charged in violation of South Carolina law.

We understand that you may have been charged one of these fees on your recent purchase of an automobile. **We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.**

The exact nature of your legal situation will depend on facts not known to us at this time. You should understand that the advice and information in this communication is general and that your own situation may vary. However, we would like the opportunity discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.

You may wish to consult your lawyer or another lawyer instead of us. You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer.

Sincerely,

Richard A. Harpootlian

ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO COMMISSION ON LAWYER CONDUCT, POST OFFICE BOX 11330, COLUMBIA, SOUTH CAROLINA, 29211 – TELEPHONE NUMBER 803-734-2038.

Appendix to opinion of the Court

PLEASE COMPLETE THE FOLLOWING:

NAME: _____ DATE: _____

ADDRESS: _____

_____

TELEPHONE #: _____

DEALERSHIP: _____

TYPE OF CAR: _____

ADMINISTRATIVE FEE OR PROCESSING FEE: $_____ (Amount as shown on invoice)

DATE OF PURCHASE: _____

I am interested in participating.

SIGNATURE: _____

LEWIS & BABCOCK, L.L.P.
Attention: A. Camden Lewis, Esquire
1513 Hampton Street
Columbia, South Carolina 29201

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

Respondents are lawyers who served as counsel in a representative action against South Carolina car dealers alleged to have charged car buyers unlawful administrative fees. In connection with that litigation, the lawyers obtained from South Carolina's Department of Motor Vehicles (DMV) information identifying buyers who may have been charged unlawful fees and dealers who may have conspired to exact those fees. The lawyers subsequently sent letters to the identified buyers inquiring whether they had been charged administrative fees, informing them of the litigation, and inviting them to join as plaintiffs. The courts below determined that the lawyers' requests for the information and their use of it fell squarely within the litigation exception to the Driver's Privacy Protection Act of 1994 (DPPA), 18 U. S. C. § 2721(b)(4), and that the Act's limitation on solicitation, § 2721(b)(12), did not override the litigation exception. I would affirm that sound judgment. As the Fourth Circuit explained, respondents "did what any good lawyer would have done." 675 F. 3d 281, 298 (2012). This Court's holding, exposing respondents not only to astronomical liquidated damages, § 2724(b)(1), but to criminal fines as well, § 2723(a), is scarcely what Congress ordered in enacting the DPPA.

Respondent-lawyers obtained and used DMV information for "investigation in anticipation of litigation" and for communications "in connection with" a civil action. I would read that statutory language to permit use of DMV information tied to a specific, concrete proceeding, imminent or ongoing, with identified parties on both sides of the controversy. So read, § 2721(b)(4) permitted the lawyers' conduct. Neither § 2721(b)(12) nor any other provision of the DPPA warrants the massive liability this Court's judgment authorizes.

I

Public concern regarding the ability of criminals and stalkers to obtain information about potential victims prompted Congress, in 1994, to enact the DPPA. A particular spur to action was the 1989 murder of the television actress Rebecca Schaeffer by a fan who had obtained her address from the California DMV. *Taylor* v. *Acxiom Corp.*, 612 F. 3d 325, 336 (CA5 2010); Electronic Privacy Information Center, The Drivers Privacy Protection Act (DPPA) and the Privacy of Your State Motor Vehicle Record, http://www.epic.org/privacy/drivers/ (as visited June 14, 2013, and available in Clerk of Court's case file). See also 139 Cong. Rec. 29470 (1993) (remarks of Sen. Biden). Congress sought to close what it saw as a loophole caused by state laws allowing requesters to gain access to personal information without a legitimate purpose. Addressing that problem, Congress established a "regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." *Ante*, at 57 (internal quotation marks omitted).

The DPPA generally prohibits any state DMV from "knowingly disclos[ing] or otherwise mak[ing] available to any person" personal information about any individual. 18 U. S. C. § 2721(a). This prohibition is subject to a number of statutory exceptions, including stated purposes for which the DPPA requires disclosure and 14 purposes for which the DPPA permits disclosure. § 2721(b). The 14 permitted uses of DMV data are designed to "strik[e] a critical balance between an individual's fundamental right to privacy and safety and the legitimate governmental and business needs for th[e] information." 140 Cong. Rec. 7925 (1994) (remarks of Rep. Moran). State DMVs may release information for any one of these permitted purposes, but they are not required to do so.

This case arises from a state-court lawsuit—the *Herron* litigation—to enforce the South Carolina Regulation of

Manufacturers, Distributors, and Dealers Act (MDDA), S. C. Code Ann. §56–15–10 *et seq.* (2006 and Cum. Supp. 2011). Respondent-lawyers were approached by a number of recent car purchasers who complained that they had been charged unlawful fees. On behalf of the car purchasers, the lawyers filed a complaint alleging that the car dealerships had violated state law. The initial complaint identified four purchasers as named plaintiffs and 51 dealers as defendants; the pleading was soon amended to name eight plaintiffs and, as defendants, 324 dealers. 675 F. 3d, at 285. The complaint invoked the MDDA's representative action provision, which allows an individual to act as a private attorney general bringing suit "for the benefit of the whole." S. C. Code Ann. §56–15–110(2). Ultimately, the *Herron* litigation yielded a declaratory judgment that the dealers had indeed violated state law. Subsequent settlements gained monetary relief for over 30,000 overcharged car purchasers. The state court found that the *Herron* plaintiffs, "as private attorneys general, [had] represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices." App. 253–254.

Respondent-lawyers obtained and used information from the state DMV both shortly before filing suit and during the pendency of the state-court litigation. Before filing suit, they asked the DMV for information about recent car purchases in six South Carolina counties. These requests explained that respondent-lawyers represented a group of "plaintiffs who have complained of certain conduct as a result of their transactions with car dealers," and that the lawyers were "attempting to determine if this [conduct was] a common practice." 675 F. 3d, at 284 (internal quotation marks omitted).

After the lawsuit was filed, respondent-lawyers obtained the names of persons who had purchased cars from the dealers they had identified as defendants and mailed letters to

those purchasers. *Ante*, at 54. These dispatches are the actions that, in the Court's view, render respondent-lawyers potentially liable for violating the DPPA. To determine whether the DPPA authorized the respondent-lawyers' uses of DMV information, I first consider the posture of the *Herron* litigation at the time of the mailings to car purchasers. The complaint filed by respondent-lawyers on behalf of the car purchasers alleged that the dealers were involved in a conspiracy to charge unlawful fees. App. 138–139. In a competitive market, the lawyers urged, such conduct can succeed only when done in concert with other dealers; otherwise, consumers would take their business elsewhere. Meanwhile, the dealers moved to dismiss the conspiracy claim and argued there was no party with standing to sue those dealers who had not sold a car to a named plaintiff. *Id.*, at 155.

The state court denied the dealers' motion to dismiss, stating that the complaint alleged sufficient facts "supporting standing of the plaintiffs to proceed" against all defendants, and that there were "sufficient allegations of civil conspiracy" to avoid threshold dismissal of that claim. *Id.*, at 212. At a subsequent hearing, the state court clarified that respondent-lawyers could "go forward with eight people [the named plaintiffs]" and the court would consider the standing issue raised in the dealers' motion to dismiss "when all the discovery is in and it comes to dispositive motions." Record in No. 7:09–cv–1651–HMH (D SC), Doc. 78–9, p. 50.[1] The state court's initial ruling, in other words, was that the complaint filed by respondent-lawyers was sufficient under state law to mount a concrete dispute between their clients and *all* the overcharging dealers, and to enable the lawyers to proceed to discovery. But in view of the *Herron* defendants'

[1] The Court is thus incorrect to suggest that, early on in the state-court litigation, plaintiffs' standing to sue all dealers was definitively settled. See *ante*, at 70. In fact, the state court left room for the dealer-defendants to renew their standing objection on completion of discovery.

insistence that a dealer could not be sued absent a named plaintiff who purchased from that dealer,[2] respondent-lawyers understandably sought to identify, and add to the roster of plaintiffs, a purchaser from each named defendant. In that endeavor, as the Fourth Circuit recognized, they "did what any good lawyer would have done." 675 F. 3d, at 298.

This context illuminates how the letters at issue in this case—which were mailed after the complaint was filed and while the dealers' motion to dismiss was pending—served to advance the representative character of the suit during a critical time in the *Herron* litigation. The letters included a card asking recipients to respond by stating the type of car they had purchased, the name of the dealer and date of purchase, whether they had been charged the allegedly unlawful fee and, if so, the amount of the fee, and whether they were interested in participating in the lawsuit. See, *e. g.*, App. 93, 106. These questions served an investigative purpose: to gather information about the fees charged by dealers with whom the *Herron* plaintiffs claimed to have a concrete dispute.[3] They also served to identify additional

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[2] The *dealers* thus were urging that additional plaintiffs were "necessary" to the maintenance of the dealer-conspiracy charge. Cf. *ante*, at 63 ((b)(4) permits contacting persons "who are necessary parties").

[3] The *Herron* litigation targeted a conspiracy to overcharge. Inquiries geared to discovering the victims of the conspiracy cannot plausibly be written off as entirely noninvestigative in character. The Fourth Circuit so comprehended: "[T]he [l]awyers were looking to build and bolster a case against the dealerships if their initial information from consumers proved the existence of plausibly systemic violations of the Dealers Act." 675 F. 3d 281, 299 (2012). The Court asserts that the Court of Appeals "rejected respondents' description of the letters as investigatory in nature." *Ante*, at 74. That tells half the story. True, the Fourth Circuit disagreed with the District Court's determination that "the [l]awyers were not engaged in [any] solicitation." 675 F. 3d, at 293. But the appeals court twice clarified that, in developing the suit against the car dealers, the respondent-lawyers engaged in both investigation and solicitation; indeed, the Fourth Circuit described the two as "inextricably intertwined." *Id.*, at 294, 300. No place did the Court of Appeals find that

persons who might wish to be named as plaintiffs in the group action, persons whose joinder would defeat or diminish the dealers' insistence that plaintiffs could sue only dealers from whom they personally purchased cars. See 675 F. 3d, at 285–286; *ante*, at 55 (faced with that insistence, respondent-lawyers eventually dropped "[a]ll claims against dealerships without a corresponding plaintiff-purchaser").

II

The DPPA permits disclosure of personal information:

> "For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court." 18 U. S. C. § 2721(b)(4).

Respondent-lawyers' use of the DMV-supplied information falls within the plain language of this provision. The Court's attempt to read a solicitation-specific limitation into this provision has no mooring in § 2721(b)(4)'s text and misperceives the structure of the DPPA.

A

Congress used expansive language in framing the § 2721(b)(4) exception, starting with the words "in connection with" and thrice repeating the word "any." See *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 383 (1992) ("The ordinary meaning of th[e] words ['relating to'] is a broad one."); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U. S. 1, 10 (2011) ("[T]he phrase '*any* complaint' suggests a broad interpretation."). Notably, the Court acknowledges that (b)(4) is "susceptible to a broad interpretation," and, "in

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the communications were solicitations only, not at all "investigative." In asserting otherwise, *ante*, at 76, the Court indulges in wishful thinking.

literal terms," could be read "to include the personal information that [respondent-lawyers] obtained here." *Ante*, at 59.

This case should therefore be easy. One need not strain to see the connection between the respondent-lawyers' conduct and a specific civil proceeding. No attenuated chain of connection need be established. All the uses of DMV information at issue took place when a concrete civil action between identified parties was either imminent or pending. Thus, the uses were indisputably "in connection with" a civil proceeding.

The Court apparently recognizes that the initial requests for DMV information—to investigate the vitality of the claims before filing suit—were in connection with the litigation. See *ante*, at 77–78. But if anything, the later requests and the letters mailed to car purchasers were even more closely tied to the case. The letters were sent *after* litigation commenced, when the respondent-lawyers, on behalf of their clients, were pursuing conspiracy claims against each of the defendant car dealers. Of equal importance, because the suit qualified under state law as a representative action, respondent-lawyers represented and were obligated to serve the interests of all car purchasers affected by the charged illegal conduct. Respondent-lawyers' uses of DMV information in aid of the *Herron* litigation facilitated the discharge of their professional obligations to the court, their individual clients, and the "whole" group of named and unnamed purchasers that state law required the lawyers to serve. S. C. Code Ann. § 56–15–110(2).

It would be extraordinary for Congress to pass a law disturbing the processes of a state court in such a case. "[T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States," and this includes a general "deference to the state adjudicative process."

Levin v. *Commerce Energy, Inc.*, 560 U. S. 413, 431, 432 (2010) (quoting *Younger* v. *Harris*, 401 U. S. 37, 44 (1971)). We have taken special care to emphasize "the State's strong interest in regulating members of the Bar," *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 467 (1978), and have cautioned against undue "Federal interference with a State's traditional regulation of [the legal] profession," *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 362 (1977). One would therefore expect Congress to speak clearly if it intended to trench on state control in this domain.

I find no such clear statement in the DPPA. Quite the contrary, the DPPA instructs that "use [of DMV information] in connection with any civil . . . proceeding in any . . . State . . . court" is permissible under federal law. § 2721(b)(4).

B

Rather than adopt a straightforward interpretation of the statute, the Court labors to justify reading a limitation into (b)(4) that has no basis in the text of that provision. Solicitation, the Court says, is not permissible under (b)(4) even if it targets a specific civil proceeding. The Court offers two primary arguments for this conclusion. First, the Court contends, a bar on solicitation must be read into (b)(4) lest that provision permit all uses "with a remote relation to litigation." *Ante,* at 59. Second, the Court asserts, its interpretation is necessary to respect the "structure and purpose of the DPPA" and the "objective" of subsection (b)(12). *Ante,* at 59, 66. Neither argument is persuasive.

I agree with the Court that the words "in connection with" must be contained within reasonable bounds. But the Court immediately jumps from this premise to the conclusion that "an attorney's solicitation of prospective clients falls outside of [any reasonable] limit." *Ante,* at 61; *ante,* at 61, 63 (solicitation, a "discrete act" prohibited by the statute, allows no exception for conduct "in connection with litigation" (internal quotation marks omitted)). The leap is startling. In

prior decisions, when the Court has sought a limiting principle for similar statutory language, it has done so to prevent the application of a statute to matters with "only a tenuous, remote, or peripheral connection" to the statute's core purpose. *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 661 (1995) (quoting *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U. S. 125, 130, n. 1 (1992)). The focus, in other words, has been on the degree of connection between the concerns central to the law and the disputed application of the measure.

The majority's focus on solicitation, however, tells us almost nothing about the degree of connection between the use of DMV information and a civil proceeding. It matters not to the Court whether a solicitation is of vital importance to an ongoing proceeding or far removed from any proceeding which may or may not be brought. A rule barring any communication for which solicitation is a predominant purpose bears no logical relationship to the § 2721(b)(4) phrase "in connection with." And the majority's concentration on solicitation is uninformative on the degree of connection to a civil proceeding needed for uses of DMV information that do not involve solicitation.

The majority's sojourn away from § 2721(b)(4)'s text in search of a limiting principle is unwarranted. A limit to the scope of (b)(4) can be readily identified by attending to the phrasing of the provision and its focus on a "proceeding." Congress used similar language in the obstruction of justice statute, which criminalizes various attempts to interfere with a "proceeding." 18 U. S. C. § 1512. The Court had no difficulty identifying a limiting principle in this term; it held that the statute applies only to persons who "have in contemplation any particular official proceeding." *Arthur Andersen LLP* v. *United States*, 544 U. S. 696, 708 (2005). By the same token, (b)(4) is best interpreted to permit only uses tied to a concrete, particular proceeding.

Congress' use of the phrase "in anticipation of litigation" provides further support for this interpretation. The phrase is hardly unique to (b)(4); it is commonly used to refer to the time at which the work-product privilege attaches to an attorney's work for a client and the time at which a party has a duty to preserve material evidence. See, *e. g.*, Fed. Rule Civ. Proc. 26(b)(3) ("documents and other tangible things that are prepared in anticipation of litigation" are not discoverable); *Silvestri* v. *General Motors Corp.*, 271 F. 3d 583, 592 (CA4 2001) (plaintiff had "failed to preserve material evidence in anticipation of litigation"). Both now and when the DPPA was enacted, courts have understood this phrase to require a concrete dispute between parties, and to exclude the abstract possibility of a hypothetical lawsuit. See, *e. g.*, *National Union Fire Ins. Co.* v. *Murray Sheet Metal Co.*, 967 F. 2d 980, 984 (CA4 1992) (the "general possibility of litigation" is not enough; a document is prepared in anticipation of litigation when there is "an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation"); *Gould Inc.* v. *Mitsui Mining & Smelting Co.*, 825 F. 2d 676, 680 (CA2 1987) (application of Rule 26(b)(3) "depends upon the existence of a real, rather than speculative, concern").

Usage of the same words in other prescriptions indicates that (b)(4) is indeed limited by its text. A hypothetical case without identified adverse parties is not encompassed by (b)(4). To anticipate a particular civil proceeding, a lawyer must have a client whose claim presents a genuine controversy.[4] Trolling for prospective clients with no actual or

[4] Respondent-lawyers propose a broader reading of (b)(4), arguing that any use tied to an identified "transaction, occurrence, [or] defect" should be permissible. Tr. of Oral Arg. 58. Their reading, however, fails to account for all the words in (b)(4), most notably the provision's focus on a "proceeding." See *Arthur Andersen LLP* v. *United States*, 544 U. S. 696, 707–708, and n. 10 (2005) (destroying evidence of suspicious transactions

imminent proceeding, involving already identified adverse parties, in sight—apparently, the Court's primary concern—would not be a permissible use.[5] Affirming the judgment below, the Court fears, would permit lawyers to bring placeholder lawsuits on behalf of "friend[s] or family member[s]," then use DMV data to solicit plaintiffs for "a lawsuit that would otherwise be dismissed for lack of standing." *Ante*, at 70. This is a canard. No court would hold such a case a genuine controversy. The Court's hypothetical bears not even a remote resemblance to the facts of this case. The state court here *denied* the defendants' motion to dismiss the conspiracy claim on standing grounds. *Supra*, at 84. See also *ante*, at 55 (describing the state court's ruling that the named plaintiffs had standing to sue the "dealerships from which they had purchased automobiles *and any alleged co-conspirators*" (emphasis added)).

This case is squarely within the metes and bounds of (b)(4). The letters advanced the concrete interests of the respondent-lawyers' clients within a pending adversarial civil proceeding in state court. Just as the letters at issue in this case would be in contemplation of a particular "proceeding" as that term is used in 18 U. S. C. § 1512, and would be "in anticipation of litigation" as Rule 26(b)(3) employs that term, they fall within the very same language as it appears in § 2721(b)(4).

The Court's second argument is no more convincing. A severe limit must be read into (b)(4), the Court urges, to respect the structure of the statute. Specifically, the Court spotlights that another permissible use, (b)(12), allows "bulk

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could not give rise to liability under 18 U. S. C. § 1512 unless done in contemplation of a particular proceeding).

[5] Furthermore, a use consistent with federal law may nevertheless be impermissible. The State makes the ultimate choice whether to release DMV information for any purpose under (b)(4). See Tr. of Oral Arg. 42. States are well suited to policing attorney conduct, a sphere of traditional state authority.

distribution for surveys, marketing or solicitations," but only to individuals who have consented to allow use of their information for this purpose. Petitioners here devoted much of their briefing to arguing that (b)(12) is somehow more "specific" than (b)(4), see Brief for Petitioners 18–31; Reply Brief 3–12, but the Court rightly rejects that reasoning, *ante*, at 66. Neither provision is more specific than the other; the two simply cover different subjects.

Without the specific-governs-the-general canon, the case for using (b)(12) to interpret (b)(4) evaporates. The Court suggests there would be "tension" between the two provisions if a use of DMV information were permitted by (b)(4) but not permitted by (b)(12). *Ante*, at 71. Every permissible use of DMV information, however, is permitted by some—often just one—of the 14 enumerated exceptions and not permitted by others. The DPPA surely does not convey that every time a person obtains DMV information in accord with one exception, that exception comes into conflict with other exceptions under which the information could not be obtained. Indeed, it is the Court's opinion that creates tension, by taking a use that would be permissible under (b)(4)—and therefore permissible under the DPPA—and importing into it a restriction delineated in an entirely different exception.

If applied generally to § 2721(b), the Court's approach would frustrate the evident congressional purpose to provide a set of separate exceptions, any one of which makes permissible the uses therein. Consider a consulting company hired by a State to conduct research into motor vehicle safety. Depending on the particulars of the research project, the company might seek to obtain DMV information under the uses listed in (b)(1), (2), (5), (12), or (14).[6] These exceptions

[6] The exception in (b)(1) covers uses by a State or entity acting on behalf of a State; (b)(2) covers uses for matters of motor vehicle or driver safety; (b)(5) covers uses in research activities; (b)(12) covers uses for surveys; and (b)(14) covers uses related to the operation of a motor vehicle or public

entail different requirements, so the project might well fit within one or two of them but not the others. It would be ludicrous to treat the fact that the project did not fit within one exception as establishing that the project should not be allowed under any other exception. Construing the DPPA in that manner would render the statute totally unworkable. The majority does not take that outlandish position with respect to all the exceptions. *Ante*, at 66. Instead, without any congressional instruction to do so, the Court reads (b)(12)—the 12th on a list of 14 permissible uses—as so central a part of the DPPA that it alone narrows the scope of other exceptions.

III

Under the most sensible reading of § 2721(b)(4), see *supra*, at 86–87, the uses of DMV information at issue here would be permissible. The dispositive question should be: Is the use tied to a concrete civil action between identified parties that is ongoing or impending? Even if the statute could be viewed as ambiguous, there is ample reason to adopt that straightforward reading. The alternative reading embraced by the Court generates uncertainty regarding the scope of other uses enumerated in § 2721(b); creates difficult line-drawing problems; and imposes criminal and draconian civil liability, at odds with the principle of lenity.

First, the Court's reading clouds other uses the DPPA permits. According to the Court, the exceptions in § 2721(b) should be construed so as not to "interfere" with (b)(12), which "implements an important objective of the DPPA." *Ante*, at 66.[7] Therefore, (b)(12) is "relevan[t]" in inter-

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safety, if authorized by state law. The degree of overlap among these provisions undermines the Court's suggestion that the list should be read to avoid surplusage. *Ante*, at 69–70.

[7] The placement of (b)(12) toward the end of a list of 14 hardly signals its special importance. The Court cites *Reno* v. *Condon*, 528 U. S. 141, 143, 148 (2000), but the cited passages do not so much as suggest that (b)(12) is more central to the congressional purpose than other excep-

preting those "exceptions whose breadth and application are uncertain." *Ante*, at 67–68. Little light is cast on which enumerated exceptions fit that description. Subsection (b)(4) fits, the Court asserts, but (b)(1) apparently does not. See *ibid.* But what makes (b)(1) clear, while (b)(4) is uncertain? The Court provides no answer, not even a clue. Lower courts will be left to puzzle over when (b)(12) comes to the fore, rendering impermissible uses that otherwise fit within another exception.

The Court sows further confusion by narrowly construing the four exceptions that permit disclosure of information the DPPA ranks as "highly restricted personal information." § 2721(a)(2); see *ante*, at 64. These exceptions apply to uses by the government, (b)(1); court operations, (b)(4); use by insurance companies, entities pervasively regulated by the States, (b)(6); and commercial driver's licenses, which are regulated by the Federal Government and administered by the States, (b)(9).[8]

A common thread unites the four categories: All involve the functioning or oversight of state governments on matters important to the State and persons within the State's governance. For uses of this genre, the need for the information can be especially high, and the likelihood of misuse, especially low. Congress therefore took care to authorize broad access to DMV information for uses these exceptions allow. I would read § 2721(b) as according the States ample leeway to use and authorize use of their own DMV information in these areas of traditional state authority.

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tions. From the text and history of the DPPA, it would be fair to say that the driving purpose of the Act was to prevent access to information by criminals and stalkers, while allowing access for legitimate governmental and business purposes. See *supra*, at 82. Giving primacy to (b)(12) is all the more questionable, for that exception was included not to proscribe, but to *allow*, some direct marketing. See Brief for Respondents 29. Absent the provision, the DPPA would permit no such use.

[8] See 49 U. S. C. § 31308.

Second, the Court's holding is hard to grasp and will be difficult to apply. The Court first suggests that "[t]he proper solution is to draw the line at solicitation itself," to "exclud[e] [solicitation] from the activity permitted in (b)(4)." *Ante*, at 71. Backing away from this clear, if erroneous, solution, the Court settles on an inquiry into "whether obtaining, using, or disclosing the personal information . . . had the predominant purpose to solicit." *Ante*, at 71–72. The Court's cryptic discussion of its "predominant purpose" test inspires little confidence. See *ante*, at 72 (the purpose "might be evident from the communication itself," but "[c]lose cases may arise"). In truth, however, the line between a lawyer's function as an officer of the court and her notice to, and solicitation of, new clients may be indistinct. See *infra*, at 96, n. 10.

Consider an attorney whose client has been the victim of a hit-and-run. The victim recalls the license plate of another car at the scene, which was also hit by the offending driver. In order to investigate her client's case, and to ensure that "there is a supportable theory for a complaint," *ante*, at 63, a responsible attorney would contact this second victim, who may be able to provide useful information about the incident. But the second victim is also a potential plaintiff in her own right. A communication might therefore be viewed by the state bar as falling within the rules for solicitation. See S. C. Rule of Professional Conduct 7.3(d) (2012) (solicitation rule applies to communications between an attorney and "a prospective client known to be in need of legal services in a particular matter").[9] Under today's decision, the attorney will be in an impossible position. Her duties to her client—and to the court to conduct a reasonable investigation before filing a lawsuit—instruct her to contact the potential witness. To avoid running afoul of the state bar's rules, however, she may need to label any communication

[9] Beyond debate, the solicitation here was permissible under South Carolina's ethics rules. Petitioners do not argue otherwise. The Court considers this a "relevant," but not "dispositive," factor. *Ante*, at 72.

with the witness as a solicitation. But if she does that, today's ruling would expose her to liability under the DPPA.

This example is not so far removed from the facts of this case. Petitioners conceded, both in their briefs and at oral argument, that the DPPA would have permitted respondents to contact the purchasers of cars to ask them whether they paid the unlawful fees. Brief for Petitioners 48; Tr. of Oral Arg. 14–15. Indeed, such an investigation was critical to pursuit and resolution of the *Herron* litigation. See *supra*, at 85–86. But in this case, as in the hypothetical case just posed, investigating the facts involved contacting people who might potentially become parties. And professional rules regarding solicitation may well apply to such communications.

Reality thus belies the Court's pretense that a bright line separates solicitation from other aspects of a lawyer's role as officer of the court. Perhaps aware that, in many cases, the line will be hazy or hard to find, the Court resorts to inapposite comparisons. The Court notes, for example, that it would be impermissible for a lawyer to use information obtained from the DMV to send out advertisements for "a book he wrote." *Ante*, at 74. But no one would confuse bookselling with investigation in anticipation of litigation; such a use would be impermissible under any reading of (b)(4).

The Court's disposition will require lower courts to parse whether every communication using DMV information in the course of litigation has solicitation as a "predominant purpose." *Ante*, at 72. The holding in Maracich's case, I fear, will, at a minimum, impede the efficient administration of state-court litigation and may well prove infeasible.[10] Cf.

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[10] Suppose the state court had ordered respondents, as a condition of retaining certain defendant-dealers in the suit, to bring in purchasers from those dealers. Cf. *supra*, at 84. Under today's decision, the lawyers' compliance with the court's order would place them at risk of liability under the DPPA. See *ante*, at 72–73 (recognizing that (b)(4) would permit an attorney to send class notice "pursuant to a court order," but expressing uncertainty whether even a court order would permit the mailings here at issue). Congress could hardly have intended to create such a conflict.

United States v. *Jicarilla Apache Nation*, 564 U. S. 162, 182 (2011) (rejecting as unworkable a "case-by-case inquiry into the purpose of each communication" involving government attorneys in the administration of tribal trusts).

This case illustrates the problem. In truth, the letters served both as an investigative tool and as an invitation to car purchasers to join the *Herron* suit. How is the fact-finder to determine which purpose was predominant? Toss a coin when the trier finds the answer is: "six of one, half dozen of the other"? As the Court of Appeals recognized, the use here, although qualifying as a solicitation, "was inextricably intertwined with investigation and prosecution of the *Herron* litigation." 675 F. 3d, at 300.

Finally, the rule of lenity requires that we resolve any residual ambiguity in respondents' favor. Petitioners sought $2,500 in statutory damages for every letter mailed—a total of some $200 million—and punitive damages to boot. Brief for Respondents 15. Such damages cannot possibly represent a legislative judgment regarding average actual damage. The Court's opinion is wrong to suggest that the rule of lenity does not apply to governmental penalties so long as they are payable to private individuals and labeled "liquidated damages," rather than "criminal fines." Moreover, the DPPA, which appears in Title 18 of the United States Code, imposes criminal liability for a knowing violation of its provisions. 18 U. S. C. § 2723(a). Because this is a civil case, I need not consider what defenses respondent-lawyers might have were they criminally prosecuted. But because we are interpreting a criminal statute, "it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage," even in a civil case. *Crandon* v. *United States*, 494 U. S. 152, 158 (1990). See also *Leocal* v. *Ashcroft*, 543 U. S. 1, 12, n. 8 (2004) (explaining that, if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context");

Scheidler v. *National Organization for Women, Inc.*, 537 U. S. 393, 408–409 (2003) (applying rule of lenity in civil case asserting claims under Hobbs Act); *United States* v. *Thompson/Center Arms Co.*, 504 U. S. 505, 518 (1992) (plurality opinion) (applying rule of lenity in tax case); *id.*, at 519 (SCALIA, J., joined by THOMAS, J., concurring in judgment) (agreeing with plurality's application of rule of lenity); *Acxiom Corp.*, 612 F. 3d, at 332, n. 5 (recognizing DPPA should be construed in light of rule of lenity).

The Court recognizes that there may be ambiguity in the (b)(4) phrases "in connection with" and "investigation in anticipation of litigation." *Ante*, at 76. But it finds any ambiguity in these phrases resolved by the structure of the DPPA. *Ibid.* What "structure," one may ask, other than an enumeration of 14 discrete exceptions, each permitting disclosure? See *supra*, at 92. The DPPA has been in effect for over 15 years, and yet the Court points to no judicial decision interpreting the statute in the way it does today. We should hesitate to adopt a novel interpretation of a federal statute that subjects parties to crushing liability. "[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931) (opinion for the Court by Holmes, J.). Respondent-lawyers were given no such fair warning.

IV

The Court today exposes lawyers whose conduct meets state ethical requirements to huge civil liability and potential criminal liability. It does so by adding to the DPPA's litigation exception a solicitation bar Congress did not place in that exception. Because respondent-lawyers' use of DMV information fits within the exception delineated in § 2721(b)(4), I would affirm the Fourth Circuit's judgment.

Syllabus

ALLEYNE *v.* UNITED STATES

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

No. 11–9335. Argued January 14, 2013—Decided June 17, 2013

Petitioner Alleyne was charged, as relevant here, with using or carrying a firearm in relation to a crime of violence, 18 U. S. C. § 924(c)(1)(A), which carries a 5-year mandatory minimum sentence, § 924(c)(1)(A)(i), that increases to a 7-year minimum "if the firearm is brandished," § 924(c)(1)(A)(ii), and to a 10-year minimum "if the firearm is discharged," § 924(c)(1)(A)(iii). In convicting Alleyne, the jury form indicated that he had "[u]sed or carried a firearm during and in relation to a crime of violence," but not that the firearm was "[b]randished." When the presentence report recommended a 7-year sentence on the § 924(c) count, Alleyne objected, arguing that the verdict form clearly indicated that the jury did not find brandishing beyond a reasonable doubt and that raising his mandatory minimum sentence based on a sentencing judge's finding of brandishing would violate his Sixth Amendment right to a jury trial. The District Court overruled his objection, relying on this Court's holding in *Harris* v. *United States*, 536 U. S. 545, that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. The Fourth Circuit affirmed, agreeing that Alleyne's objection was foreclosed by *Harris*.

Held: The judgment is vacated, and the case is remanded. Pp. 111–118.

457 Fed. Appx. 348, vacated and remanded.

JUSTICE THOMAS delivered the opinion of the Court with respect to Parts I, III–B, III–C, and IV, concluding:

1. Because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Accordingly, *Harris* is overruled. Pp. 111–117.

(a) *Apprendi* v. *New Jersey*, 530 U. S. 466, concluded that any "'facts that increase the prescribed range of penalties to which a criminal defendant is exposed'" are elements of the crime, *id.*, at 490, and thus the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt, *id.*, at 484. *Apprendi*'s principle applies with equal force to facts increasing the mandatory minimum, for a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed. *Id.*, at

Syllabus

490. Because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense. It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. The fact that criminal statutes have long specified both the floor and ceiling of sentence ranges is evidence that both define the legally prescribed penalty. It is also impossible to dispute that the facts increasing the legally prescribed floor aggravate the punishment, heightening the loss of liberty associated with the crime. Defining facts that increase a mandatory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment, see *id.*, at 478–479, and preserves the jury's historic role as an intermediary between the State and criminal defendants, see *United States* v. *Gaudin*, 515 U. S. 506, 510–511. In reaching a contrary conclusion, *Harris* relied on the fact that the 7-year minimum sentence could have been imposed with or without a judicial finding of brandishing, because the jury's finding authorized a sentence of five years to life, 536 U. S., at 561, but that fact is beside the point. The essential Sixth Amendment inquiry is whether a fact is an element of the crime. Because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury, regardless of what sentence the defendant might have received had a different range been applicable. There is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum. Pp. 111–116.

(b) This ruling does not mean that any fact that influences judicial discretion must be found by a jury. This Court has long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e. g.*, *Dillon* v. *United States*, 560 U. S. 817, 828–829. Pp. 116–117.

2. Here, the sentencing range supported by the jury's verdict was five years' imprisonment to life, but the judge, rather than the jury, found brandishing. This increased the penalty to which Alleyne was subjected and violated his Sixth Amendment rights. Pp. 117–118.

JUSTICE THOMAS, joined by JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, concluded in Parts II and III–A:

1. The Sixth Amendment right to trial "by an impartial jury," in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *Gaudin*, *supra*, at 510. Several divided opinions of this Court have addressed the constitutional status of a "sentencing factor." In *McMillan* v. *Pennsylvania*, 477 U. S. 79, 86, the Court held that facts found to in-

crease a mandatory minimum sentence are sentencing factors that a judge could find by a preponderance of the evidence. In *Apprendi*, however, the Court declined to extend *McMillan* to a New Jersey statute that increased the maximum term of imprisonment if the trial judge found that the crime was committed with racial bias, 530 U. S., at 470, finding that any fact that increased the prescribed statutory maximum sentence must be an "element" of the offense to be found by the jury, *id.*, at 483, n. 10, 490. Two years later in *Harris*, the Court declined to apply *Apprendi* to facts that increased the mandatory minimum sentence but not the maximum sentence. 536 U. S., at 557. Pp. 104–107.

2. The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" of the charged offense. *United States* v. *O'Brien*, 560 U. S. 218, 224. *Apprendi*'s definition necessarily includes not only facts that increase the ceiling, but also those that increase the floor. At common law, the relationship between crime and punishment was clear. A sentence was prescribed for each offense, leaving judges with little sentencing discretion. If a fact was by law essential to the penalty, it was an element of the offense. There was a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment. And this understanding was reflected in contemporaneous court decisions and treatises. Pp. 107–111.

JUSTICE BREYER, agreeing that *Harris* v. *United States*, 536 U. S. 545, should be overruled, concluded that he continues to disagree with *Apprendi* v. *New Jersey*, 530 U. S. 466, because it fails to recognize the law's traditional distinction between elements of a crime and sentencing facts, but finds it highly anomalous to read *Apprendi* as insisting that juries find sentencing facts that *permit* a judge to impose a higher sentence while not insisting that juries find sentencing facts that *require* a judge to impose a higher sentence. Overruling *Harris* and applying *Apprendi*'s basic jury-determination rule to mandatory minimum sentences would erase that anomaly. Where a *maximum* sentence is at issue, *Apprendi* means that a judge who *wishes* to impose a higher sentence cannot do so unless a jury finds the requisite statutory factual predicate. Where a *mandatory minimum* sentence is at issue, *Apprendi* would mean that the government cannot force a judge who *does not wish* to impose a higher sentence to do so unless a jury finds the requisite statutory factual predicate. Pp. 122–124.

THOMAS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, III–C, and IV, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined, and an opinion

with respect to Parts II and III–A, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 118. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 122. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and KENNEDY, JJ., joined, *post*, p. 124. ALITO, J., filed a dissenting opinion, *post*, p. 132.

Mary E. Maguire argued the cause for petitioner. With her on the briefs were *Patrick L. Bryant*, *Frances H. Pratt*, and *Michael S. Nachmanoff*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, and *Eric J. Feigin*.*

JUSTICE THOMAS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, III–C, and IV, and an opinion with respect to Parts

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*Briefs of *amici curiae* urging reversal were filed for the Center on the Administration of Criminal Law by *Anthony S. Barkow*, *Rachel E. Barkow*, *Samuel L. Feder*, and *Matthew S. Hellman*; for Families Against Mandatory Minimums by *Gregory G. Rapawy*, *Mary Price*, and *Peter Goldberger*; for the National Association of Criminal Defense Lawyers et al. by *John B. Owens*, *Daniel B. Levin*, *Jonathan D. Hacker*, and *Sarah S. Gannett*; for the New York Council of Defense Lawyers by *Marc L. Greenwald*, *Douglas A. Berman*, and *Alexandra A. E. Shapiro*; and for the Sentencing Project et al. by *Alison Siegler*, *Steven R. Shapiro*, and *Ezekiel R. Edwards*.

A brief of *amici curiae* urging affirmance was filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Jonathan F. Mitchell*, Solicitor General, and *Daniel T. Hodge*, First Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Sam Olens* of Georgia, *David M. Louie* of Hawaii, *Derek Schmidt* of Kansas, *William J. Schneider* of Maine, *Bill Schuette* of Michigan, *Chris Koster* of Missouri, *Jeffrey S. Chiesa* of New Jersey, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, and *Robert M. McKenna* of Washington.

II and III–A, in which JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join.

In *Harris* v. *United States*, 536 U. S. 545 (2002), this Court held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. We granted certiorari to consider whether that decision should be overruled. 568 U. S. 936 (2012).

Harris drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. See *id.*, at 483, n. 10, 490. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Accordingly, *Harris* is overruled.

I

Petitioner Allen Ryan Alleyne and an accomplice devised a plan to rob a store manager as he drove the store's daily deposits to a local bank. By feigning car trouble, they tricked the manager to stop. Alleyne's accomplice approached the manager with a gun and demanded the store's deposits, which the manager surrendered. Alleyne was later charged with multiple federal offenses, including robbery affecting interstate commerce, 18 U. S. C. § 1951(a), and using or carrying a firearm in relation to a crime of violence, § 924(c)(1)(A). Section 924(c)(1)(A) provides, in relevant part, that anyone who "uses or carries a firearm" in relation to a "crime of violence" shall:

> "(i) be sentenced to a term of imprisonment of not less than 5 years;

> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."

The jury convicted Alleyne. The jury indicated on the verdict form that Alleyne had "[u]sed or carried a firearm during and in relation to a crime of violence," but did not indicate a finding that the firearm was "[b]randished." App. 40.

The presentence report recommended a 7-year sentence on the § 924(c) count, which reflected the mandatory minimum sentence for cases in which a firearm has been "brandished," § 924(c)(1)(A)(ii). Alleyne objected to this recommendation. He argued that it was clear from the verdict form that the jury did not find brandishing beyond a reasonable doubt and that he was subject only to the 5-year minimum for "us[ing] or carr[ying] a firearm." Alleyne contended that raising his mandatory minimum sentence based on a sentencing judge's finding that he brandished a firearm would violate his Sixth Amendment right to a jury trial.

The District Court overruled Alleyne's objection. It explained that, under *Harris*, brandishing was a sentencing factor that the court could find by a preponderance of evidence without running afoul of the Constitution. It found that the evidence supported a finding of brandishing, and sentenced Alleyne to seven years' imprisonment on the § 924(c) count. The Court of Appeals affirmed, likewise noting that Alleyne's objection was foreclosed by *Harris*. 457 Fed. Appx. 348 (CA4 2011) (*per curiam*).

II

The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *United States* v. *Gaudin*, 515 U. S. 506, 510 (1995); *In re Winship*, 397 U. S. 358, 364 (1970). The substance and scope of this right depend upon the

proper designation of the facts that are elements of the crime.

A

The question of how to define a "crime"—and, thus, how to determine what facts must be submitted to the jury—has generated a number of divided opinions from this Court. The principal source of disagreement is the constitutional status of a special sort of fact known as a "sentencing factor." This term was first used in *McMillan* v. *Pennsylvania*, 477 U. S. 79, 86 (1986), to refer to facts that are not found by a jury but that can still increase the defendant's punishment. Following *McMillan*'s introduction of this term, this Court has made a number of efforts to delimit its boundaries.

McMillan initially invoked the distinction between "elements" and "sentencing factors" to reject a constitutional challenge to Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982). That law provided that anyone convicted of certain felonies would be subject to a mandatory minimum sentence if the judge found, by a preponderance of evidence, that the person "'visibly possessed a firearm'" in the course of committing specified crimes. 477 U. S., at 81, n. 1. While the Court acknowledged that there were constitutional limits to the State's ability to "defin[e] crimes and prescrib[e] penalties," it found that the Commonwealth had permissibly defined visible possession as a sentencing factor, rather than an element. *Id.*, at 86. In the Court's view, this allowed the judge, rather than the jury, to find this fact by a preponderance of evidence without violating the Constitution.

McMillan did not address whether legislatures' freedom to define facts as sentencing factors extended to findings that increased the *maximum* term of imprisonment for an offense. We foreshadowed an answer to this question in *Jones* v. *United States*, 526 U. S. 227, 243, n. 6 (1999), but did not resolve the issue until *Apprendi*. There, we identified a concrete limit on the types of facts that legislatures may designate as sentencing factors.

In *Apprendi*, the defendant was sentenced to 12 years' imprisonment under a New Jersey statute that increased the maximum term of imprisonment from 10 years to 20 years if the trial judge found that the defendant committed his crime with racial bias. 530 U. S., at 470. In defending its sentencing scheme, the State of New Jersey argued that, under *McMillan*, the legislature could define racial bias as a sentencing factor to be found by the judge. We declined to extend *McMillan* that far. We explained that there was no "principled basis for treating" a fact increasing the maximum term of imprisonment differently from the facts constituting the base offense. 530 U. S., at 476. The historic link between crime and punishment, instead, led us to conclude that any fact that increased the prescribed statutory maximum sentence must be an "element" of the offense to be found by the jury. *Id.*, at 483, n. 10, 490. We, thus, found that Apprendi's sentence had been unconstitutionally enhanced by the judge's finding of racial bias by a preponderance of evidence. *Id.*, at 491–492.

B

While *Apprendi* only concerned a judicial finding that increased the statutory maximum, the logic of *Apprendi* prompted questions about the continuing vitality, if not validity, of *McMillan*'s holding that facts found to increase the mandatory minimum sentence are sentencing factors and not elements of the crime. We responded two years later in *Harris* v. *United States*, 536 U. S. 545, where we considered the same statutory provision and the same question before us today.

In *Harris*, the defendant was charged, under § 924(c)(1)(A), with carrying a firearm in the course of committing a drug trafficking crime. The mandatory minimum sentence based on the jury's verdict alone was five years, but the District Court imposed a 7-year mandatory minimum sentence based on its finding, by a preponderance of evidence, that the defendant also brandished the firearm. As in this case,

Harris challenged his sentence on the ground that the 7-year mandatory minimum sentence was unconstitutional under *Apprendi*, even though the judge's finding did not alter the maximum sentence to which he was exposed. *Harris*, *supra*, at 551.

The Court declined to apply *Apprendi* to facts that increased the mandatory minimum sentence but not the maximum sentence. 536 U. S., at 557 (plurality opinion); *id.*, at 570 (BREYER, J., concurring in part and concurring in judgment). In the plurality's view, judicial factfinding that increased the mandatory minimum did not implicate the Sixth Amendment. Because the jury's verdict "authorized the judge to impose the minimum with or without the finding," *id.*, at 557, the plurality was of the view that the factual basis for increasing the minimum sentence was not "'essential'" to the defendant's punishment, *id.*, at 560–561. Instead, it merely limited the judge's "choices within the authorized range." *Id.*, at 567. From this, the plurality drew a distinction between "facts increasing the defendant's minimum sentence and facts extending the sentence beyond the statutory maximum," *id.*, at 566. The Court limited *Apprendi*'s holding to instances where the factual finding increases the statutory maximum sentence.

III

Alleyne contends that *Harris* was wrongly decided and that it cannot be reconciled with our reasoning in *Apprendi*. We agree.

A

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense. *United States* v. *O'Brien*, 560 U. S. 218, 224 (2010); *Apprendi*, *supra*, at 483, n. 10; J. Archbold, Pleading and Evidence in Criminal Cases 52 (5th Am. ed. 1846) (hereinafter Archbold). In *Apprendi*, we held that a fact is by definition

an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. 530 U. S., at 483, n. 10. While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. 530 U. S., at 483, n. 10; *Harris*, *supra*, at 579 (THOMAS, J., dissenting). Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.

1

At common law, the relationship between crime and punishment was clear. As discussed in *Apprendi*, "[t]he substantive criminal law tended to be sanction-specific," meaning "it prescribed a particular sentence for each offense." Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700–1900, p. 36 (A. Schioppa ed. 1987) (quoted in *Apprendi*, *supra*, at 479). The system left judges with little sentencing discretion: Once the facts of the offense were determined by the jury, the "judge was meant simply to impose [the prescribed] sentence." Langbein, *supra*, at 36–37; see also 3 W. Blackstone, Commentaries on the Laws of England 396 (1768) ("THE judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law" (emphasis deleted)). This Court has recognized that the same was true, in many instances, early on in this country. *United States* v. *Grayson*, 438 U. S. 41, 45 (1978); see, *e. g.*, *Commonwealth* v. *Smith*, 1 Mass. 245 (1804) (describing state law that specified a punishment for larceny of damages *three times* the value of the stolen goods). While some early American statutes

provided *ranges* of permissible sentences, K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998), the ranges themselves were linked to particular facts constituting the elements of the crime, *e. g.*, *Lacy* v. *State*, 15 Wis. 13 (1862) (discussing arson statute that provided for a sentence of 7 to 14 years where the house was occupied at the time of the offense, but a sentence of 3 to 10 if it was not); Ga. Penal Code §§ 4324–4325 (1867) (robbery "by open force or violence" was punishable by 4 to 20 years' imprisonment, while "[r]obbery by intimidation, or without using force and violence," was punishable by 2 to 5 years' imprisonment). This linkage of facts with particular sentence ranges (defined by both the minimum and the maximum) reflects the intimate connection between crime and punishment.

Consistent with this connection between crime and punishment, various treatises defined "crime" as consisting of every fact which "is in law essential to the punishment sought to be inflicted," 1 J. Bishop, Criminal Procedure 50 (2d ed. 1872) (hereinafter Bishop), or the whole of the wrong "to which the law affixes . . . punishment," *id.*, § 80, at 51. See also 1 J. Bishop, New Criminal Procedure § 84, p. 49 (4th ed. 1895) (defining crime as "that wrongful aggregation [of elements] out of which the punishment proceeds"); Archbold 128 (defining crime to include any fact that "annexes a higher degree of punishment"). Numerous high courts agreed that this formulation "accurately captured the common-law understanding of what facts are elements of a crime." *Apprendi*, 530 U. S., at 511–512 (THOMAS, J., concurring) (collecting cases). If a fact was by law essential to the penalty, it was an element of the offense.

2

From these widely recognized principles followed a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing

or increasing punishment. While an exhaustive history need not be recounted here, see *id.*, at 501–509 (THOMAS, J., concurring) (detailing practices of American courts from the 1840's onward), a few particularly salient examples illustrate the point. In *Hope* v. *Commonwealth*, 50 Mass. 134 (1845), the defendant was indicted for (and convicted of) larceny. The larceny statute established two levels of sentencing based on whether the value of the stolen property exceeded $100. Because punishment varied with value, the state high court found that value was an element of the offense:

> "Our statutes, it will be remembered, prescribe the punishment for larceny, with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long established practice, the court are of [the] opinion that the value of the property alleged to be stolen must be set forth in the indictment." *Id.*, at 137.

Numerous other contemporaneous court decisions reflect this same understanding. See, *e. g.*, *Ritchey* v. *State*, 7 Blackf. 168, 169 (Ind. 1844) (holding that indictment for arson must allege value of property destroyed, because statute set punishment based on value); *United States* v. *Fisher*, 25 F. Cas. 1086 (No. 15,102) (CC Ohio 1849) (McLean, J.) ("A carrier of the mail is subject to a higher penalty where he steals a letter out of the mail, which contains an article of value. And when this offense is committed, the indictment must allege the letter contained an article of value, which aggravates the offense and incurs a higher penalty").

A number of contemporaneous treatises similarly took the view that a fact that increased punishment must be charged in the indictment. As one 19th-century commentator explained:

> "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in

> order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170]." Archbold 51 (15th ed. 1862).

Another explained that "the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." Bishop § 81, at 51. This rule "enabled [the defendant] to determine the species of offence" with which he was charged "in order that he may prepare his defence accordingly . . . and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted." Archbold 44 (emphasis added). As the Court noted in *Apprendi*, "[t]he defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime." 530 U. S., at 478.

B

Consistent with common-law and early American practice, *Apprendi* concluded that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. *Id.*, at 490 (internal quotation marks omitted); *id.*, at 483, n. 10 ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense").[1] We held that the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt. *Id.*, at 484. While *Harris* limited *Apprendi* to facts increasing the statutory maximum,

[1] In *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.

the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum.

It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed. *Apprendi*, *supra*, at 490; *Harris*, 536 U. S., at 575, 582 (THOMAS, J., dissenting). But for a finding of brandishing, the penalty is five years to life in prison; with a finding of brandishing, the penalty becomes seven years to life. Just as the maximum of life marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range *is* the penalty affixed to the crime, *infra* this page, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense. *Apprendi*, *supra*, at 501 (THOMAS, J., concurring); see also Bishop § 598, at 360–361 (if "a statute prescribes a *particular punishment* to be inflicted on those who commit it under special circumstances which it mentions, or with particular aggravations," then those special circumstances must be specified in the indictment (emphasis added)); 1 F. Wharton, Criminal Law § 371, p. 291 (rev. 7th ed. 1874) (similar).

It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. See *Harris*, *supra*, at 569 (opinion of BREYER, J.) (facts increasing the minimum and facts increasing the maximum cannot be distinguished "in terms of logic"). Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty. See, *e. g.*, *supra*, at 108–109; N. Y. Penal Code §§ 231–232, p. 70 (1882) (punishment for first-degree robbery was 10 to 20 years' imprisonment; second-degree robbery was 5 to 15 years); Va. Code ch. 192, §§ 1–2, p. 787 (2d ed. 1860) (arson committed at night was punishable by 5 to 10 years; arson committed during the day was 3 to 10 years). This historical practice allowed those who violated the law to know, *ex ante*, the contours of the penalty that the legislature affixed

to the crime—and comports with the obvious truth that the floor of a mandatory range is as relevant to wrongdoers as the ceiling. A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense.

Moreover, it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment. *Harris*, *supra*, at 579 (THOMAS, J., dissenting); *O'Brien*, 560 U. S., at 240–241 (THOMAS, J., concurring in judgment). Elevating the low end of a sentencing range heightens the loss of liberty associated with the crime: The defendant's "expected punishment has increased as a result of the narrowed range" and "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." *Apprendi*, *supra*, at 522 (THOMAS, J., concurring). Why else would Congress link an increased mandatory minimum to a particular aggravating fact other than to heighten the consequences for that behavior? See *McMillan*, 477 U. S., at 88, 89 (twice noting that a mandatory minimum "'ups the ante'" for a criminal defendant); *Harris*, *supra*, at 580 (THOMAS, J., dissenting). This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.[2]

Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the

[2] Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment "within limits fixed by law." *Williams* v. *New York*, 337 U. S. 241, 246 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing. *Infra*, at 116–117, and n. 6.

face of the indictment. See *Apprendi*, 530 U. S., at 478–479. It also preserves the historic role of the jury as an intermediary between the State and criminal defendants. See *United States* v. *Gaudin*, 515 U. S., at 510–511 ("This right was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties' " (quoting 2 J. Story, Commentaries on the Constitution of the United States §§ 1779, 1780, pp. 540–541 (4th ed. 1873))); *Williams* v. *Florida*, 399 U. S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in [its] interposition between the accused and his accuser"); *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government").

In adopting a contrary conclusion, *Harris* relied on the fact that the 7-year minimum sentence could have been imposed with or without a judicial finding of brandishing, because the jury's finding already authorized a sentence of five years to life. 536 U. S., at 561. The dissent repeats this argument today. See *post*, at 128 (opinion of ROBERTS, C. J.) ("The jury's verdict authorized the judge to impose the precise sentence he imposed for the precise factual reason he imposed it"). While undoubtedly true, this fact is beside the point.[3]

As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a

[3] *Apprendi* v. *United States*, 530 U. S. 466 (2000), rejected an argument similar to the one advanced in *Harris*. In *Apprendi*, the State of New Jersey argued that increasing the defendant's statutory maximum on the challenged count did not violate the Sixth Amendment because "the judge could have imposed consecutive sentences," in conjunction with other counts, to produce the sentence that the defendant actually received on the count at issue. 530 U. S., at 474. We found that this possibility did not preclude a Sixth Amendment violation. *Ibid.*

new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

Similarly, because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury, regardless of what sentence the defendant *might* have received if a different range had been applicable. Indeed, if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range (*i. e.*, the range applicable without that aggravating fact). Cf. *Hobbs* v. *State*, 44 Tex. 353 (1875) (reversing conviction where the defendant was indicted for a crime punishable by 2 to 5 years and sentenced to 3 years because the trial court improperly instructed the jury to sentence the defendant between 2 to 10 years if it found a particular aggravating fact); *State* v. *Callahan*, 109 La. 946, 33 So. 931 (1903) (finding *ex post facto* violation where a newly enacted law increased the range of punishment, even though defendant was sentenced within the range established by the prior law).[4] The essen-

[4] Many criminal statutes allow for this possibility. For example, an Illinois law provides for a sentence of 2 to 10 years' imprisonment for intimidation, Ill. Comp. Stat., ch. 720, § 5/12–6(b) (West 2010), and 3 to 14 years for aggravated intimidation, § 5/12–6.2(b). The elements of aggravated intimidation include all the elements of intimidation plus one enumerated aggravating fact. Under this statute, if a jury found each element of intimidation, but the judge purported to find a fact that elevated the offense to aggravated intimidation, the Sixth Amendment would most certainly be violated, even if the defendant received a sentence that fell within both ranges. See also La. Rev. Stat. Ann. §§ 14:51, 14:52 (West 2007) (sentenc-

tial point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt.

Because there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum, *Harris* was inconsistent with *Apprendi*. It is, accordingly, overruled.[5]

C

In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e. g.*, *Dillon* v. *United States*, 560 U. S. 817, 828–829 (2010) ("[W]ithin established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted; internal quotation marks omitted)); *Apprendi*, *supra*, at 481 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute").[6] This

ing range for simple arson is 2 to 15 years; sentencing range for aggravated arson is 6 to 20 years); Mont. Code Ann. §§ 45–5–302(2), 45–5–303(2) (2011) (sentencing range for kidnaping is 2 to 10 years, but 2 to life for aggravated kidnaping).

[5] The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections. Because *Harris* is irreconcilable with the reasoning of *Apprendi* and the original meaning of the Sixth Amendment, we follow the latter.

[6] See also *United States* v. *Tucker*, 404 U. S. 443, 446 (1972) (judges may exercise sentencing discretion through "an inquiry broad in scope, largely

position has firm historical roots as well. As Bishop explained:

> "[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment." Bishop § 85, at 54.

"[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Apprendi*, 530 U. S., at 519 (THOMAS, J., concurring). Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law.

IV

Here, the sentencing range supported by the jury's verdict was five years' imprisonment to life. The District Court imposed the 7-year mandatory minimum sentence based on its finding by a preponderance of evidence that the firearm was "brandished." Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt. The judge, rather than the jury, found brandishing, thus violating petitioner's Sixth Amendment rights.

Accordingly, we vacate the Fourth Circuit's judgment with respect to Alleyne's sentence on the § 924(c)(1)(A) conviction

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unlimited either as to the kind of information [they] may consider, or the source from which it may come"); *Williams*, 337 U. S., at 246 ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law").

and remand the case for resentencing consistent with the jury's verdict.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, concurring.

I join the opinion of the Court, which persuasively explains why *Harris* v. *United States*, 536 U. S. 545 (2002), and *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), were wrongly decided. Under the reasoning of our decision in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and the original meaning of the Sixth Amendment, facts that increase the statutory minimum sentence (no less than facts that increase the statutory maximum sentence) are elements of the offense that must be found by a jury and proved beyond a reasonable doubt. *Ante*, at 103.

Of course, under our doctrine of *stare decisis*, establishing that a decision was wrong does not, without more, justify overruling it. While *stare decisis* is not an "inexorable command," *Hohn* v. *United States*, 524 U. S. 236, 251 (1998) (internal quotation marks omitted), it is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion,'" *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989) (quoting The Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). We generally adhere to our prior decisions, even if we question their soundness, because doing so "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). To protect these important values, we require a "'"special justification"'" when departing from precedent. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000).

A special justification is present here. As an initial matter, when procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced. See *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995); *Payne*, 501 U. S., at 828. And any reliance interest that the Federal Government and state governments might have is particularly minimal here because prosecutors are perfectly able to "charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury." *Harris*, 536 U. S., at 581 (THOMAS, J., dissenting). Indeed, even with *Harris* in place, prosecutors already sometimes charge such facts and seek to prove them to a jury. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 26. That is precisely what happened here, where the verdict form allowed the jury to find whether petitioner had brandished a firearm yet the jury declined to make such a finding. *Ante*, at 104.

In this context, *stare decisis* does not compel adherence to a decision whose "underpinnings" have been "eroded" by subsequent developments of constitutional law. *Gaudin*, 515 U. S., at 521. In rejecting a constitutional challenge to a state statute that increased a defendant's minimum sentence based on judicial factfinding, *McMillan* relied on a distinction between "elements" and "sentencing factors." 477 U. S., at 86. That distinction was undermined by *Apprendi*, where we held that a legislature may not "remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 530 U. S., at 490 (internal quotation marks omitted).

In *Harris*, we squarely confronted the question whether "*McMillan* stands after *Apprendi*." 536 U. S., at 550. Five Members of the Court recognized that the cases were in fact incompatible. See *id.*, at 569 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 572, 583 (THOMAS, J., dissenting) ("[O]nly a minority of the Court em-

brac[es] the distinction between *McMillan* and *Apprendi* that forms the basis of today's holding"). In the controlling opinion, JUSTICE BREYER nevertheless declined to apply *Apprendi* to mandatory minimums because, though he found no way to distinguish sentencing floors from sentencing ceilings, he could not "yet accept" *Apprendi* itself. 536 U. S., at 569; see also *post*, at 122 (BREYER, J., concurring in part and concurring in judgment).

We have said that a decision may be "of questionable precedential value" when "a majority of the Court expressly disagreed with the rationale of [a] plurality." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 66 (1996). And *Harris* has stood on especially weak ground because its vitality depended upon the possibility that the Court might retreat from *Apprendi*. See *Harris*, 536 U. S., at 569–570 (opinion of BREYER, J.). That has not happened. Instead, while individual Members of this Court have continued to question *Apprendi*, see *post*, at 122–123 (opinion of BREYER, J.); *post*, at 133–134 (ALITO, J., dissenting), its rule has become even more firmly rooted in the Court's Sixth Amendment jurisprudence in the decade since *Harris*. We have applied *Apprendi* to strike down mandatory sentencing systems at the state and federal levels. See *Cunningham* v. *California*, 549 U. S. 270 (2007); *United States* v. *Booker*, 543 U. S. 220 (2005); *Blakely* v. *Washington*, 542 U. S. 296 (2004). And just last Term, we recognized that *Apprendi*'s reasoning extends to criminal fines. See *Southern Union Co.* v. *United States*, 567 U. S. 343 (2012).

As a result of these decisions, *Harris* has become even more of an outlier. For that reason, I agree that it is appropriate for the Court to "overrule *Harris* and to apply *Apprendi*'s basic jury-determination rule to mandatory minimum sentences" in order to "erase th[is] anomaly" in our case law. *Post*, at 123 (opinion of BREYER, J.). I do not suggest that every single factor that supports the overruling of precedent is present here. *Post*, at 134–135, n. (ALITO, J.,

dissenting). But particularly in a case where the reliance interests are so minimal, and the reliance interests of private parties are nonexistent, *stare decisis* cannot excuse a refusal to bring "coherence and consistency," *Patterson*, 491 U. S., at 173, to our Sixth Amendment law.

If any doubt remained, our decision in *Ring* v. *Arizona*, 536 U. S. 584 (2002), should remove it. *Ring* considered an *Apprendi* challenge to Arizona's capital sentencing system. There, as here, the government urged us to adhere to a pre-*Apprendi* decision upholding that scheme. See *Walton* v. *Arizona*, 497 U. S. 639 (1990). And there, as here, we resisted that plea. *Ring*, 536 U. S., at 609. This case differs in only one respect: our post-*Apprendi* consideration of the issue in *Harris*. But for the reasons given, *Harris* in no way strengthens the force of *stare decisis* in this case. With *Apprendi* now firmly rooted in our jurisprudence, the Court simply gives effect to what five Members of the Court recognized in *Harris*: "[*McMillan*] and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both." 536 U. S., at 609.

JUSTICE ALITO is therefore mistaken when he suggests that the Court overrules *Harris* because "there are currently five Justices willing to vote to" do so. *Post*, at 135, n. No doubt, it would be illegitimate to overrule a precedent simply because the Court's current membership disagrees with it. But that is not a plausible account of the decision today. The Court overrules *McMillan* and *Harris* because the reasoning of those decisions has been thoroughly undermined by intervening decisions and because no significant reliance interests are at stake that might justify adhering to their result. Likewise, JUSTICE ALITO exaggerates when he suggests that this case creates an important "precedent about precedent." *Post*, at 134. Rarely will a claim for *stare decisis* be as weak as it is here, where a constitutional rule of criminal procedure is at issue that a majority of the Court has previously recognized is incompatible with our broader

jurisprudence. And finally, JUSTICE ALITO's contention that *Apprendi* and *Harris* stand on equal footing for *stare decisis* purposes, *post*, at 133–134, 134–135, n., is simply inconsistent with our last decade of Sixth Amendment jurisprudence.

Because I believe that the Court's decision to apply *Apprendi* to mandatory minimums is consistent with *stare decisis* principles, I join the opinion of the Court.

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

Eleven years ago, in *Harris* v. *United States*, 536 U. S. 545 (2002), I wrote that "I cannot easily distinguish *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), from this case in terms of logic." *Id.*, at 569 (opinion concurring in part and concurring in judgment). I nonetheless accepted *Harris*' holding because I could "[n]ot yet accept [*Apprendi*'s] rule." *Ibid.* I continue to disagree with *Apprendi*. See 536 U. S., at 569–570; *United States* v. *Booker*, 543 U. S. 220, 326 (2005) (opinion dissenting in part); *Blakely* v. *Washington*, 542 U. S. 296, 328 (2004) (dissenting opinion); *Apprendi* v. *New Jersey*, 530 U. S. 466, 555 (2000) (same). But *Apprendi* has now defined the relevant legal regime for an additional decade. And, in my view, the law should no longer tolerate the anomaly that the *Apprendi*/*Harris* distinction creates.

The Court's basic error in *Apprendi*, I believe, was its failure to recognize the law's traditional distinction between elements of a crime (facts constituting the crime, typically for the jury to determine) and sentencing facts (facts affecting the sentence, often concerning, *e. g.*, the manner in which the offender committed the crime, and typically for the judge to determine). The early historical references that this Court's opinions have set forth in favor of *Apprendi* refer to *offense elements*, not to *sentencing facts*. Thus, when Justice Story wrote that the Sixth Amendment's guarantee of trial by jury offered "'securit[y] against the prejudices of judges,'" *post*, at 127 (ROBERTS, C. J., dissenting) (quoting

Commentaries on the Constitution of the United States § 924, p. 657 (Abr. 1833)), he was likely referring to elements of a crime; and the best answer to JUSTICE SCALIA's implicit question in *Apprendi*—what, exactly, does the "right to trial by jury" guarantee?—is that it guarantees a jury's determination of facts that constitute the elements of a crime, 530 U. S., at 498–499 (concurring opinion).

Although I have set forth these minority views before, see *Booker*, *supra*, at 326 (opinion dissenting in part); *Blakely*, *supra*, at 328 (dissenting opinion); *Apprendi*, *supra*, at 555 (same), I repeat this point now to make clear why I cannot accept the dissent's characterization of the Sixth Amendment as simply seeking to prevent "judicial overreaching" when sentencing facts are at issue, *post*, at 127 (opinion of ROBERTS, C. J.). At the very least, the Amendment seeks to protect defendants against "the wishes and opinions of the government" as well. *Ibid.* (quoting Story, *supra*, § 924, at 657). And, that being so, it seems to me highly anomalous to read *Apprendi* as insisting that juries find sentencing facts that *permit* a judge to impose a higher sentence while not insisting that juries find sentencing facts that *require* a judge to impose a higher sentence. See *Harris*, *supra*, at 569–570 (opinion of BREYER, J.).

To overrule *Harris* and to apply *Apprendi*'s basic jury-determination rule to mandatory minimum sentences would erase that anomaly. Where a *maximum* sentence is at issue, *Apprendi* means that a judge who *wishes* to impose a higher sentence cannot do so unless a jury finds the requisite statutory factual predicate. Where a *mandatory minimum* sentence is at issue, application of *Apprendi* would mean that the government cannot force a judge who *does not wish* to impose a higher sentence to do so unless a jury finds the requisite statutory factual predicate. In both instances the matter concerns higher sentences; in both instances factfinding must trigger the increase; in both instances jury-based factfinding would act as a check: in the first instance, against

a sentencing judge wrongly imposing the higher sentence that the judge believes is appropriate, and in the second instance, against a sentencing judge wrongly being required to impose the higher sentence that the judge believes is inappropriate.

While *Harris* has been the law for 11 years, *Apprendi* has been the law for even longer; and I think the time has come to end this anomaly in *Apprendi*'s application. Consequently, I vote to overrule *Harris*. I join Parts I, III–B, III–C, and IV of the Court's opinion and concur in its judgment.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

Suppose a jury convicts a defendant of a crime carrying a sentence of five to ten years. And suppose the judge says he would sentence the defendant to five years, but because he finds that the defendant used a gun during the crime, he is going to add two years and sentence him to seven. No one thinks that this violates the defendant's right to a jury trial in any way.

Now suppose the legislature says that two years should be added to the five year minimum, if the judge finds that the defendant used a gun during the crime. Such a provision affects the role of the judge—limiting his discretion—but has no effect on the role of the jury. And because it does not affect the jury's role, it does not violate the jury trial guarantee of the Sixth Amendment.

The Framers envisioned the Sixth Amendment as a protection for defendants from the power of the Government. The Court transforms it into a protection for judges from the power of the legislature. For that reason, I respectfully dissent.

I

In a steady stream of cases decided over the last 15 years, this Court has sought to identify the historical understand-

ing of the Sixth Amendment jury trial right and determine how that understanding applies to modern sentencing practice. Our key sources in this task have been 19th-century treatises and common law cases identifying which facts qualified as "elements" of a crime, and therefore had to be alleged in the indictment and proved to a jury beyond a reasonable doubt. See, *e. g.*, *Apprendi* v. *New Jersey*, 530 U. S. 466, 476–483, 489–490, n. 15 (2000) (collecting sources); *id.*, at 501–518 (THOMAS, J., concurring) (same). With remarkable uniformity, those authorities provided that an element was "whatever is in law essential to the punishment sought to be inflicted." 1 J. Bishop, Criminal Procedure 50 (2d ed. 1872); see also *Apprendi*, *supra*, at 489, n. 15 ("'[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted'" (quoting *United States* v. *Reese*, 92 U. S. 214, 232 (1876) (Clifford, J., dissenting))); 1 Bishop, *supra*, § 87, at 55 (an indictment must include "any particular fact which the law makes essential to the punishment").

Judging that this common law rule best reflects what the Framers understood the Sixth Amendment jury right to protect, we have struck down sentencing schemes that were inconsistent with the rule. In *Apprendi*, for example, the defendant pleaded guilty to a crime that carried a maximum sentence of ten years. After his plea, however, the trial judge determined that the defendant had committed the crime with a biased purpose. Under a New Jersey law, that finding allowed the judge to impose up to ten additional years in prison. Exercising that authority, the judge sentenced the defendant to 12 years. 530 U. S., at 469–471.

Because the sentence was two years longer than would have been possible without the finding of bias, that finding was "essential to the punishment" imposed. 1 Bishop, *supra*, at 50; see *Apprendi*, 530 U. S., at 491–492. Thus, in line with the common law rule, we held the New Jersey procedure unconstitutional. *Id.*, at 497.

Subsequent cases have worked out how this principle applies in other contexts, such as capital sentencing regimes, state and federal sentencing guidelines, or criminal fines. See *Ring* v. *Arizona*, 536 U. S. 584 (2002); *Blakely* v. *Washington*, 542 U. S. 296 (2004); *United States* v. *Booker*, 543 U. S. 220 (2005); *Southern Union Co.* v. *United States*, 567 U. S. 343 (2012). Through all of them, we have adhered to the rule, rooted in the common law understanding described above, that we laid down in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U. S., at 490; see *Blakely*, *supra*, at 301 (quoting above statement); *Booker*, *supra*, at 231 (same); *Southern Union Co.*, *supra*, at 348 (same); see also *Ring*, *supra*, at 588–589 (Sixth Amendment "does not permit a defendant to be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi*, *supra*, at 483; alterations in original)).

We have embraced this 19th-century common law rule based not only on a judgment that it reflects the understanding in place when the Sixth Amendment was ratified, but also on the "need to give intelligible content to the right of jury trial." *Blakely*, *supra*, at 305. As JUSTICE SCALIA wrote in *Apprendi*, it is unclear "what the right to trial by jury *does* guarantee if . . . it does not guarantee . . . the right to have a jury determine those facts that determine the maximum sentence the law allows." 530 U. S., at 498–499 (concurring opinion).

After all, if a judge's factfinding could authorize a sentence beyond that allowed by the jury's verdict alone, the jury trial would be "a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, *supra*, at 306–307. The Framers clearly envisioned

a more robust role for the jury. They appreciated the danger inherent in allowing "justices . . . named by the crown" to "imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). To guard against this "violence and partiality of judges appointed by the crown," the common law "wisely placed th[e] strong . . . barrier, of . . . trial by jury, between the liberties of the people, and the prerogative of the crown." *Ibid.* The Sixth Amendment therefore provided for trial by jury as a "double security, against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." J. Story, Commentaries on the Constitution of the United States § 924, p. 657 (Abr. 1833); see also The Federalist No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton) (discussing criminal jury trial as a protection against "judicial despotism"). Our holdings that a judge may not sentence a defendant to more than the jury has authorized properly preserve the jury right as a guard against judicial overreaching.

II

There is no such risk of judicial overreaching here. Under 18 U. S. C. § 924(c)(1)(A)(i), the jury's verdict fully authorized the judge to impose a sentence of anywhere from five years to life in prison. No additional finding of fact was "essential" to any punishment within the range. After rendering the verdict, the jury's role was completed, it was discharged, and the judge began the process of determining where within that range to set Alleyne's sentence.

Everyone agrees that in making that determination, the judge was free to consider any relevant facts about the offense and offender, including facts not found by the jury beyond a reasonable doubt.

> "[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams* v. *New York*, 337 U. S. 241, 246 (1949).

As *Apprendi* itself recognized, "nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." 530 U. S., at 481 (emphasis deleted); see also *Dillon* v. *United States*, 560 U. S. 817, 828–829 (2010). And the majority does not dispute the point. *Ante*, at 116 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury."). Thus, under the majority's rule, in the absence of a statutory mandatory minimum, there would have been no constitutional problem had the judge, exercising the discretion given him by the jury's verdict, decided that seven years in prison was the appropriate penalty for the crime *because of* his finding that the firearm had been brandished during the offense.

In my view, that is enough to resolve this case. The jury's verdict authorized the judge to impose the precise sentence he imposed for the precise factual reason he imposed it. As we have recognized twice before, the Sixth Amendment demands nothing more. See *Harris* v. *United States*, 536 U. S. 545, 568–569 (2002); *McMillan* v. *Pennsylvania*, 477 U. S. 79, 93 (1986).

III

This approach is entirely consistent with *Apprendi*. As I have explained, *Apprendi*'s constraint on the normal legislative control of criminal procedure draws its legitimacy from two primary principles: (1) common law understandings of

the "elements" of a crime, and (2) the need to preserve the jury as a "strong barrier" between defendants and the State. Neither of those principles supports the rule the majority adopts today.

First, there is no body of historical evidence supporting today's new rule. The majority does not identify a single case holding that a fact affecting only the sentencing floor qualified as an element or had to be found by a jury, nor does it point to any treatise language to that effect. *Ante*, at 109–111. To be sure, the relatively recent vintage of mandatory minimum sentencing enhancements means that few, if any, 19th-century courts would have encountered such a fact pattern. So I do not mean to suggest that the absence of historical condemnation of the practice conclusively establishes its constitutionality today. But given that *Apprendi*'s rule rests heavily on affirmative historical evidence about the practices to which we have previously applied it, the lack of such evidence on statutory minimums is a good reason not to extend it here.

Nor does the majority's extension of *Apprendi* do anything to preserve the role of the jury as a safeguard between the defendant and the State. That is because even if a jury does not find that the firearm was brandished, a judge can do so and impose a harsher sentence because of his finding, so long as that sentence remains under the statutory maximum. The question here is about the power of judges, not juries. Under the rule in place until today, a legislature could tell judges that certain facts carried certain weight, and require the judge to devise a sentence based on that weight—so long as the sentence remained within the range authorized by the jury. Now, in the name of the jury right that formed a barrier between the defendant and the State, the majority has erected a barrier between judges and legislatures, establishing that discretionary sentencing is the domain of judges. Legislatures must keep their respectful distance.

I find this new rule impossible to square with the historical understanding of the jury right as a defense *from* judges, not a defense *of* judges. See *Apprendi*, *supra*, at 498 (SCALIA, J., concurring) ("Judges, it is sometimes necessary to remind ourselves, are part of the State"). Just as the Sixth Amendment "limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury," *Blakely*, 542 U. S., at 308, so too it limits *legislative* power only to the extent *that* power infringes on the province of the jury. Because the claimed infringement here is on the province of the judge, not the jury, the jury right has no work to do.

IV

The majority offers several arguments to the contrary. I do not find them persuasive.

First, the majority asserts that "because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Ante*, at 112 (citation omitted). The syllogism trips out of the gate, for its first premise—that the constitutionally relevant "penalty" includes the bottom end of the statutory range—simply assumes the answer to the question presented. Neither of the historical sources to which the majority points gives an answer: The Bishop treatise speaks only to situations in which "a statute prescribes a particular punishment," not a range of possible punishments. 1 Bishop, Criminal Procedure § 598, at 360–361. The Wharton treatise is similarly unhelpful, focusing on statutes that change the maximum or alter the nature of the common law crime. See 1 F. Wharton, Criminal Law § 371, p. 291 (rev. 7th ed. 1874). The sources provided in the *Apprendi* concurrence offer no support, for as already discussed, we lack historical evidence about the treatment of facts that altered *only* the floor of a sentencing range.

Second, the majority observes that "criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty." *Ante*, at 112. Again, though, this simply assumes the core premise: that the constitutionally relevant "penalty" involves both the statutory minimum and the maximum. Unless one accepts that premise on faith, the fact that statutes have long specified both floor and ceiling is evidence of nothing more than that statutes have long specified both the floor and the ceiling. Nor does it help to say that "the floor of a mandatory range is as relevant to wrongdoers as the ceiling." *Ante*, at 113. The meaning of the Sixth Amendment does not turn on what wrongdoers care about most.

More importantly, legal rules frequently focus on the maximum sentence while ignoring the minimum, even though both are "relevant" to punishment. Closest to this case, the question whether the jury right applies at all turns on whether the *maximum* sentence exceeds six months—not, say, whether the minimum punishment involves time in prison. *Blanton* v. *North Las Vegas*, 489 U. S. 538, 543 (1989); see also *Lewis* v. *United States*, 518 U. S. 322, 326 (1996) ("In evaluating the seriousness of the offense, we place primary emphasis on the maximum prison term authorized"). Likewise, the rights to vote and to bear arms are typically denied to felons—that is, those convicted of a crime with a maximum sentence of more than one year in prison. See *Richardson* v. *Ramirez*, 418 U. S. 24, 48 (1974); *District of Columbia* v. *Heller*, 554 U. S. 570, 626 (2008); Black's Law Dictionary 694 (9th ed. 2009). Examples of other distinctions turning only on maximum penalties abound, as in cases of recidivism enhancements that apply only to prior convictions with a maximum sentence of more than a specified number of years. See, *e. g.*, 18 U. S. C. § 924(e)(2). That a minimum sentence is "relevant" to punishment, and that a statute defines it, does not mean it must be treated the same as the maximum sentence the law allows.

Third, the majority offers that "it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment." *Ante*, at 113. This argument proves too much, for it would apply with equal force to any fact which leads the judge, in the exercise of his own discretion, to choose a penalty higher than he otherwise would have chosen. The majority nowhere explains what it is about the jury right that bars a determination by Congress that brandishing (or any other fact) makes an offense worth two extra years, but not an identical determination by a judge. Simply calling one "aggravation" and the other "discretion" does not do the trick.

Fourth, the majority argues that "[i]t is no answer to say that the defendant could have received the same sentence with or without" a particular factual finding, pointing out "that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical." *Ante*, at 115. In that hypothetical case, the legislature has chosen to define two crimes with two different sets of elements. Courts must, of course, respect that legislative judgment. But that tells us nothing about when courts can override the legislature's decision *not* to create separate crimes, and instead to treat a particular fact as a trigger for a minimum sentence within the already-authorized range.

* * *

I will not quibble with the majority's application of our *stare decisis* precedents. But because I believe the majority's new rule—safeguarding the power of judges, not juries—finds no support in the history or purpose of the Sixth Amendment, I respectfully dissent.

JUSTICE ALITO, dissenting.

The Court overrules a well-entrenched precedent with barely a mention of *stare decisis*. See *ante*, at 116, n. 6.

Stare decisis is, of course, not an "inexorable command" in the field of constitutional law. *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). Nevertheless, the Court ought to be consistent in its willingness to reconsider precedent. If *Harris* v. *United States*, 536 U. S. 545 (2002), and *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), can be cast aside simply because a majority of this Court now disagrees with them, that same approach may properly be followed in future cases. See *Arizona* v. *Gant*, 556 U. S. 332, 358–364 (2009) (ALITO, J., dissenting).

If the Court is of a mind to reconsider existing precedent, a prime candidate should be *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). Although *Apprendi* purported to rely on the original understanding of the jury trial right, there are strong reasons to question the Court's analysis on that point. See, *e. g.*, Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097, 1123–1132 (2001) (critiquing the historical evidence relied upon by the *Apprendi* majority and concurrence, and concluding (1) that the "broad judicial discretion" characteristic of 18th-century common-law misdemeanor sentencing "undercuts the suggestion that sentencing was the sacred province of juries alone," (2) that even the "nineteenth-century tradition was not uniform, suggesting that the common law had no fixed rule on the subject," and (3) that "no eighteenth-century evidence link[ed] this [nineteenth-century] tradition back to the time of the Founding"); Little & Chen, The Lost History of *Apprendi* and the *Blakely* Petition for Rehearing, 17 Fed. Sentencing Rep. 69, 69–74 (2004) ("*Blakely* and *Apprendi* were undoubtedly founded on an erroneous historical understanding of the Framers' views in 1790 when they wrote the 6th Amendment's jury-trial guarantee. The fact that the Framers themselves wrote over a dozen indeterminate sentencing ranges in the first federal crime bill (*see* 1 Stat. 112–118 . . .), has simply been overlooked by the Court"); Mitchell, *Apprendi*'s Domain,

2006 S. Ct. Rev. 297, 298–299 (2006) (arguing, in the context of defending a broader conception of the jury right, that "*Apprendi*'s historical claim that sentencing enhancements were treated as 'elements' of offenses whenever they increased a defendant's maximum punishment is demonstrably mistaken" and that "the platitudes from Joel Prentiss Bishop's nineteenth-century treatises, which the pro-*Apprendi* Justices repeatedly invoke to support this assertion [that sentencing enhancements that increased a maximum punishment were treated as elements of the offense], are patently false and did not accurately describe the law in actual court decisions of that era" (footnotes omitted)).

The Court's decision creates a precedent about precedent that may have greater precedential effect than the dubious decisions on which it relies.*

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*Speaking for herself, JUSTICE GINSBURG, and JUSTICE KAGAN—but not for the Court—JUSTICE SOTOMAYOR argues that *Harris*' *stare decisis* value is undermined by the subsequent reasoning of the Court's *Apprendi* line of cases and by the fact that no one rationale in *Harris* commanded five votes. I disagree.

In my view, *Harris*' force is not vitiated by the Court's *Apprendi* line of cases, for two reasons. First, that line of cases is predicated on a purported Sixth Amendment requirement that juries find facts that increase maximum penalties, not mandatory minimums. Accordingly, as THE CHIEF JUSTICE's dissent persuasively explains, *ante*, at 124–130, *Apprendi* and its progeny have no impact on the distinct question resolved by *Harris*, which does not bear on the jury right. Second, the *Apprendi* line is now too intellectually incoherent to undermine any "contrary" precedents. If the rationale of *Apprendi*—which, as broadly construed by the Court in this case, is that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt," *ante*, at 103—were taken seriously, discretionary sentencing, as prescribed by 18 U. S. C. § 3553(a), should also be held to violate the Sixth Amendment. But a majority of the Court has not been willing to go where its reasoning leads.

Nor can it be correct to say that "*Harris* in no way strengthens the force of *stare decisis* in this case" because a "'majority of the Court expressly disagreed with the rationale of [a] plurality.'" *Ante*, at 120–121 (SOTOMAYOR, J., concurring) (quoting *Seminole Tribe of Fla.* v. *Florida*,

517 U. S. 44, 66 (1996)). Decisions in which no one rationale commands a majority of the Court—including prominent decisions based on the views of a single Justice—are often thought to have precedential effect. See, *e. g.*, *United States* v. *Booker*, 543 U. S. 220 (2005); *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 269–272 (1978) (opinion of Powell, J.). And, of course, if *Harris* is not entitled to *stare decisis* weight, then neither is the Court's opinion in this case. After all, only four Members of the Court think that the Court's holding is the correct reading of the Constitution. See *ante*, at 122–123 (BREYER, J., concurring in part and concurring in judgment).

As she concedes, *ante*, at 120–121, JUSTICE SOTOMAYOR's concurrence is necessarily selective in its discussion of the factors that the Court has previously found to be relevant to the application of *stare decisis*. For example, she does not argue—presumably because there is no good argument to be made—that *Harris* and *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) (which provide the framework under which criminal prosecutions have been carried out for at least the past 27 years) have proved "'unworkable.'" *Vieth* v. *Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991)). Nor does she contend that "circumstances" outside the Court "have changed so radically as to undermine [*Harris*'] critical factual assumptions." *Randall* v. *Sorrell*, 548 U. S. 230, 244 (2006) (plurality opinion). Indeed, no party or *amicus* has cited any such circumstances.

In short, other than the fact that there are currently five Justices willing to vote to overrule *Harris*, and not five Justices willing to overrule *Apprendi*, there is no compelling reason why the Court overrules the former rather than the latter. If the opportunity arises in the future to overrule *Apprendi* or the present case—both of which presumably involve "procedural rules . . . that do not govern primary conduct and do not implicate the reliance interests of private parties," *ante*, at 119 (SOTOMAYOR, J., concurring)—the precedent the Court sets today will be relevant to the issue of *stare decisis*.

Syllabus

FEDERAL TRADE COMMISSION *v.* ACTAVIS, INC., ET AL.

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

No. 12–416. Argued March 25, 2013—Decided June 17, 2013

The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act) creates special procedures for identifying and resolving patent disputes between brand-name and generic drug manufacturers, one of which requires a prospective generic manufacturer to assure the Food and Drug Administration (FDA) that it will not infringe the brand-name's patents. One way to provide such assurance (the "paragraph IV" route) is by certifying that any listed, relevant patent "is invalid or will not be infringed by the manufacture, use, or sale" of the generic drug. 21 U. S. C. § 355(j)(2)(A)(vii)(IV).

Respondent Solvay Pharmaceuticals obtained a patent for its approved brand-name drug AndroGel. Subsequently, respondents Actavis and Paddock filed applications for generic drugs modeled after AndroGel and certified under paragraph IV that Solvay's patent was invalid and that their drugs did not infringe it. Solvay sued Actavis and Paddock, claiming patent infringement. See 35 U. S. C. § 271(e)(2)(A). The FDA eventually approved Actavis' generic product, but instead of bringing its drug to market, Actavis entered into a "reverse payment" settlement agreement with Solvay, agreeing not to bring its generic to market for a specified number of years and agreeing to promote AndroGel to doctors in exchange for millions of dollars. Paddock made a similar agreement with Solvay, as did respondent Par, another manufacturer aligned in the patent litigation with Paddock.

The Federal Trade Commission (FTC) filed suit, alleging that respondents violated § 5 of the Federal Trade Commission Act by unlawfully agreeing to abandon their patent challenges, to refrain from launching their low-cost generic drugs, and to share in Solvay's monopoly profits. The District Court dismissed the complaint. The Eleventh Circuit concluded that as long as the anticompetitive effects of a settlement fall within the scope of the patent's exclusionary potential, the settlement is immune from antitrust attack. Noting that the FTC had not alleged that the challenged agreements excluded competition to a greater extent than would the patent, if valid, it affirmed the complaint's dismissal. It further recognized that if parties to this sort of case do

not settle, a court might declare a patent invalid. But since public policy favors the settlement of disputes, it held that courts could not require parties to continue to litigate in order to avoid antitrust liability.

Held: The Eleventh Circuit erred in affirming the dismissal of the FTC's complaint. Pp. 147–160.

(a) Although the anticompetitive effects of the reverse settlement agreement might fall within the scope of the exclusionary potential of Solvay's patent, this does not immunize the agreement from antitrust attack. For one thing, to refer simply to what the holder of a valid patent could do does not by itself answer the antitrust question. Here, the paragraph IV litigation put the patent's validity and preclusive scope at issue, and the parties' settlement—in which, the FTC alleges, the plaintiff agreed to pay the defendants millions to stay out of its market, even though the defendants had no monetary claim against the plaintiff—ended that litigation. That form of settlement is unusual, and there is reason for concern that such settlements tend to have significant adverse effects on competition. It would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, and not against procompetitive antitrust policies as well. Both are relevant in determining the scope of monopoly and antitrust immunity conferred by a patent, see, *e. g.*, *United States* v. *Line Material Co.*, 333 U. S. 287, 310, 311, and the antitrust question should be answered by considering traditional antitrust factors. For another thing, this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws. See, *e. g.*, *United States* v. *Singer Mfg. Co.*, 374 U. S. 174; *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371; *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163. Finally, the Hatch-Waxman Act's general procompetitive thrust—facilitating challenges to a patent's validity and requiring parties to a paragraph IV dispute to report settlement terms to federal antitrust regulators—suggests a view contrary to the Eleventh Circuit's. Pp. 147–153.

(b) While the Eleventh Circuit's conclusion finds some support in a general legal policy favoring the settlement of disputes, its related underlying practical concern consists of its fear that antitrust scrutiny of a reverse payment agreement would require the parties to engage in time-consuming, complex, and expensive litigation to demonstrate what would have happened to competition absent the settlement. However, five sets of considerations lead to the conclusion that this concern should not determine the result here and that the FTC should have been given the opportunity to prove its antitrust claim. First, the specific re-

Syllabus

straint at issue has the "potential for genuine adverse effects on competition." *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 460–461. Payment for staying out of the market keeps prices at patentee-set levels and divides the benefit between the patentee and the challenger, while the consumer loses. And two Hatch-Waxman Act features—the 180-day exclusive-right-to-sell advantage given to the first paragraph IV challenger to win FDA approval, § 355(j)(5)(B)(iv), and the roughly 30-month period that the subsequent manufacturers would be required to wait out before winning FDA approval, § 355(j)(5)(B)(iii)—mean that a reverse settlement agreement with the first filer removes from consideration the manufacturer most likely to introduce competition quickly. Second, these anticompetitive consequences will at least sometimes prove unjustified. There may be justifications for reverse payment that are not the result of having sought or brought about anticompetitive consequences, but that does not justify dismissing the FTC's complaint without examining the potential justifications. Third, where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely has the power to bring about that harm in practice. The size of the payment from a branded drug manufacturer to a generic challenger is a strong indicator of such power. Fourth, an antitrust action is likely to prove more feasible administratively than the Eleventh Circuit believed. It is normally not necessary to litigate patent validity to answer the antitrust question. A large, unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the patent's validity. Fifth, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuits. As in other industries, they may settle in other ways, *e. g.*, by allowing the generic manufacturer to enter the patentee's market before the patent expires without the patentee's paying the challenger to stay out prior to that point. Pp. 153–158.

(c) This Court declines to hold that reverse payment settlement agreements are presumptively unlawful. Courts reviewing such agreements should proceed by applying the "rule of reason," rather than under a "quick look" approach. See *California Dental Assn.* v. *FTC*, 526 U. S. 756, 775, n. 12. Pp. 158–160.

677 F. 3d 1298, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 160. ALITO, J., took no part in the consideration or decision of the case.

Counsel

Deputy Solicitor General Stewart argued the cause for petitioner. With him on the briefs were *Solicitor General Verrilli*, *Acting Assistant Attorney General Hesse*, *Benjamin J. Horwich*, *David C. Shonka*, *John F. Daly*, and *Mark S. Hegedus*.

Jeffrey I. Weinberger argued the cause for respondents. With him on the brief for respondent Solvay Pharmaceuticals, Inc., were *Stuart N. Senator*, *Adam R. Lawton*, *Rohit K. Singla*, and *Michelle T. Friedland*. *Clifford M. Sloan*, *Steven C. Sunshine*, *Julia K. York*, and *David A. Buchen* filed a brief for respondent Actavis, Inc. *Eric Grannon*, *J. Mark Gidley*, and *Ryan M. Christian* filed a brief for respondents Par Pharmaceutical Companies, Inc., et al.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Richard Dearing*, Deputy Solicitor General, *Elinor Hoffmann*, Assistant Attorney General, and *Andrew B. Ayers*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Tom C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Kamala D. Harris* of California, *John W. Suthers* of Colorado, *George Jepsen* of Connecticut, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Luis Sánchez Betances* of Puerto Rico, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *John E. Swallow* of Utah, *William H. Sorrell* of Vermont, *Robert W. Ferguson* of Washington, and *Gregory A. Phillips* of Wyoming; for AARP et al. by *Kenneth W. Zeller*, *Stuart R. Cohen*, and *Michael Schuster*; for Apotex, Inc., by *Robert B. Breisblatt*, *Howard R. Rubin*, *Robert T. Smith*, and *Howard Langer*; for Knowledge Ecology International by *Krista L. Cox*; for Louisiana Wholesale Drug Co., Inc., et al. by *Thomas C. Goldstein*, *Barry L. Refsin*, *Monica L. Rebuck*, *Bruce E. Gerstein*, *Joseph*

JUSTICE BREYER delivered the opinion of the Court.

Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars. Because

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Opper, *David F. Sorensen*, *Daniel C. Simons*, and *Scott E. Perwin*; for the Public Patent Foundation by *Daniel B. Ravicher*; for Representative Henry A. Waxman by *Scott L. Nelson* and *Allison M. Zieve*; and for 118 Law, Economics, and Business Professors et al. by *Mark A. Lemley*, *pro se*, *William H. Neukom*, and *Michael A. Carrier*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the American Intellectual Property Law Association by *Steven G. Bradbury* and *Jeffrey I. D. Lewis*; for Bayer AG et al. by *Phillip A. Proger*, *Kevin D. McDonald*, and *Lawrence D. Rosenberg*; for Enavail, LLC, by *Justin J. Hasford*; for Generic Manufacturer Upsher-Smith Laboratories, Inc., et al. by *Jay P. Lefkowitz*, *Karen N. Walker*, and *John C. O'Quinn*; for the Generic Pharmaceutical Association by *William M. Jay* and *Christopher T. Holding*; for Health Economics and Law Professors by *Stephen Cowen*; for the Intellectual Property Owners Association by *Robert P. Taylor*, *Diane E. Bieri*, *Richard F. Phillips*, and *Kevin H. Rhodes*; for Mediation and Negotiation Professionals by *Thomas A. Doyle*, *Michael A. Pollard*, and *Erin M. Maus*; for Merck & Co., Inc., by *Kannon K. Shanmugam*, *Adam L. Perlman*, *C. J. Mahoney*, *James M. McDonald*, *John W. Nields, Jr.*, *Alan M. Wiseman*, and *William J. O'Shaughnessy*; for the National Association of Manufacturers by *Martin S. Kaufman* and *Quentin Riegel*; for the New York Intellectual Property Law Association by *Thomas J. Kowalski*, *John C. Cleary*, *David F. Ryan*, *Charles R. Hoffmann*, and *Robert J. Rando*; for the Pharmaceutical Research and Manufacturers of America by *Douglas Hallward-Driemeier*, *Mark S. Popofsky*, *Melissa B. Kimmel*, and *Elizabeth N. Dewar*; for Shire plc by *Robert A. Long, Jr.*, *George F. Pappas*, and *Paul J. Berman*; for the Washington Legal Foundation by *Kevin D. McDonald*, *Cory L. Andrews*, and *Richard A. Samp*; and for Gregory Dolin et al. by *Edward G. Biester III* and *Robert Byer*.

Briefs of *amici curiae* were filed for America's Health Insurance Plans by *Richard W. Cohen*; for Antitrust Economists by *William F. Cavanaugh*, *Scott B. Howard*, *Leslie E. John*, and *Jason A. Leckerman*; for the National Association of Chain Drug Stores by *Steve D. Shadowen*, *Don L. Bell II*, and *Mary Ellen Fleck*; and for David W. Opderbeck et al. by *David E. De Lorenzi*.

the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement agreement is often called a "reverse payment" settlement agreement. And the basic question here is whether such an agreement can sometimes unreasonably diminish competition in violation of the antitrust laws. See, *e. g.*, 15 U. S. C. § 1 (Sherman Act prohibition of "restraint[s] of trade or commerce"). Cf. *Palmer* v. *BRG of Ga., Inc.*, 498 U. S. 46 (1990) (*per curiam*) (invalidating agreement not to compete).

In this case, the Eleventh Circuit dismissed a Federal Trade Commission (FTC or Commission) complaint claiming that a particular reverse payment settlement agreement violated the antitrust laws. In doing so, the Circuit stated that a reverse payment settlement agreement generally is "immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." *FTC* v. *Watson Pharmaceuticals, Inc.*, 677 F. 3d 1298, 1312 (2012). And since the alleged infringer's promise not to enter the patentee's market expired before the patent's term ended, the Circuit found the agreement legal and dismissed the FTC complaint. *Id.*, at 1315. In our view, however, reverse payment settlements such as the agreement alleged in the complaint before us can sometimes violate the antitrust laws. We consequently hold that the Eleventh Circuit should have allowed the FTC's lawsuit to proceed.

I

A

Apparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already-approved brand-name drug owner. See Brief for Petitioner 29; 12 P. Areeda &

H. Hovenkamp, Antitrust Law ¶2046, p. 338 (3d ed. 2012) (hereinafter Areeda); Hovenkamp, Sensible Antitrust Rules for Pharmaceutical Competition, 39 U. S. F. L. Rev. 11, 24 (2004). We consequently describe four key features of the relevant drug-regulatory framework established by the Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, as amended. That Act is commonly known as the Hatch-Waxman Act.

First, a drug manufacturer, wishing to market a new prescription drug, must submit a New Drug Application to the federal Food and Drug Administration (FDA) and undergo a long, comprehensive, and costly testing process, after which, if successful, the manufacturer will receive marketing approval from the FDA. See 21 U. S. C. § 355(b)(1) (requiring, among other things, "full reports of investigations" into safety and effectiveness; "a full list of the articles used as components"; and a "full description" of how the drug is manufactured, processed, and packed).

Second, once the FDA has approved a brand-name drug for marketing, a manufacturer of a generic drug can obtain similar marketing approval through use of abbreviated procedures. The Hatch-Waxman Act permits a generic manufacturer to file an Abbreviated New Drug Application specifying that the generic has the "same active ingredients as," and is "biologically equivalent" to, the already-approved brand-name drug. *Caraco Pharmaceutical Laboratories, Ltd.* v. *Novo Nordisk A/S*, 566 U. S. 399, 405 (2012) (citing 21 U. S. C. §§ 355(j)(2)(A)(ii), (iv)). In this way the generic manufacturer can obtain approval while avoiding the "costly and time-consuming studies" needed to obtain approval "for a pioneer drug." See *Eli Lilly & Co.* v. *Medtronic, Inc.*, 496 U. S. 661, 676 (1990). The Hatch-Waxman process, by allowing the generic to piggyback on the pioneer's approval efforts, "speed[s] the introduction of low-cost generic drugs to market," *Caraco*, *supra*, at 405, thereby furthering drug competition.

Third, the Hatch-Waxman Act sets forth special procedures for identifying, and resolving, related patent disputes. It requires the pioneer brand-name manufacturer to list in its New Drug Application the "number and the expiration date" of any relevant patent. See 21 U. S. C. § 355(b)(1). And it requires the generic manufacturer in its Abbreviated New Drug Application to "assure the FDA" that the generic "will not infringe" the brand-name's patents. See *Caraco*, *supra*, at 406.

The generic can provide this assurance in one of several ways. See 21 U. S. C. § 355(j)(2)(A)(vii). It can certify that the brand-name manufacturer has not listed any relevant patents. It can certify that any relevant patents have expired. It can request approval to market beginning when any still-in-force patents expire. Or, it can certify that any listed, relevant patent "is invalid or will not be infringed by the manufacture, use, or sale" of the drug described in the Abbreviated New Drug Application. See § 355(j)(2)(A)(vii)(IV). Taking this last-mentioned route (called the "paragraph IV" route), automatically counts as patent infringement, see 35 U. S. C. § 271(e)(2)(A) (2006 ed., Supp. V), and often "means provoking litigation." *Caraco*, *supra*, at 407. If the brand-name patentee brings an infringement suit within 45 days, the FDA then must withhold approving the generic, usually for a 30-month period, while the parties litigate patent validity (or infringement) in court. If the courts decide the matter within that period, the FDA follows that determination; if they do not, the FDA may go forward and give approval to market the generic product. See 21 U. S. C. § 355(j)(5)(B)(iii).

Fourth, Hatch-Waxman provides a special incentive for a generic to be the first to file an Abbreviated New Drug Application taking the paragraph IV route. That applicant will enjoy a period of 180 days of exclusivity (from the first commercial marketing of its drug). See § 355(j)(5)(B)(iv) (establishing exclusivity period). During that period of ex-

clusivity no other generic can compete with the brand-name drug. If the first-to-file generic manufacturer can overcome any patent obstacle and bring the generic to market, this 180-day period of exclusivity can prove valuable, possibly "worth several hundred million dollars." Hemphill, Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, 81 N. Y. U. L. Rev. 1553, 1579 (2006). Indeed, the Generic Pharmaceutical Association said in 2006 that the "'vast majority of potential profits for a generic drug manufacturer materialize during the 180-day exclusivity period.'" Brief for Petitioner 6 (quoting statement). The 180-day exclusivity period, however, can belong only to the first generic to file. Should that first-to-file generic forfeit the exclusivity right in one of the ways specified by statute, no other generic can obtain it. See § 355(j)(5)(D).

B

1

In 1999, Solvay Pharmaceuticals, a respondent here, filed a New Drug Application for a brand-name drug called AndroGel. The FDA approved the application in 2000. In 2003, Solvay obtained a relevant patent and disclosed that fact to the FDA, 677 F. 3d, at 1308, as Hatch-Waxman requires. See § 355(c)(2) (requiring, in addition, that the FDA must publish new patent information upon submission).

Later the same year another respondent, Actavis, Inc. (then known as Watson Pharmaceuticals), filed an Abbreviated New Drug Application for a generic drug modeled after AndroGel. Subsequently, Paddock Laboratories, also a respondent, separately filed an Abbreviated New Drug Application for its own generic product. Both Actavis and Paddock certified under paragraph IV that Solvay's listed patent was invalid and their drugs did not infringe it. A fourth manufacturer, Par Pharmaceutical, likewise a respondent, did not file an application of its own but joined forces with Paddock, agreeing to share the patent-litigation costs in re-

turn for a share of profits if Paddock obtained approval for its generic drug.

Solvay initiated paragraph IV patent litigation against Actavis and Paddock. Thirty months later the FDA approved Actavis' first-to-file generic product, but, in 2006, the patent-litigation parties all settled. Under the terms of the settlement Actavis agreed that it would not bring its generic to market until August 31, 2015, 65 months before Solvay's patent expired (unless someone else marketed a generic sooner). Actavis also agreed to promote AndroGel to urologists. The other generic manufacturers made roughly similar promises. And Solvay agreed to pay millions of dollars to each generic—$12 million in total to Paddock; $60 million in total to Par; and an estimated $19–$30 million annually, for nine years, to Actavis. See App. 46, 49–50, Complaint ¶¶66, 77. The companies described these payments as compensation for other services the generics promised to perform, but the FTC contends the other services had little value. According to the FTC the true point of the payments was to compensate the generics for agreeing not to compete against AndroGel until 2015. See *id.*, at 50–53, Complaint ¶¶81–85.

2

On January 29, 2009, the FTC filed this lawsuit against all the settling parties, namely, Solvay, Actavis, Paddock, and Par. The FTC's complaint (as since amended) alleged that respondents violated §5 of the Federal Trade Commission Act, 15 U. S. C. §45, by unlawfully agreeing "to share in Solvay's monopoly profits, abandon their patent challenges, and refrain from launching their low-cost generic products to compete with AndroGel for nine years." App. 29, Complaint ¶5. See generally *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 454 (1986) (Section 5 "encompass[es] . . . practices that violate the Sherman Act and the other antitrust laws"). The District Court held that these allegations did not set forth an antitrust law violation. *In re Androgel An-*

titrust Litigation (No. II), 687 F. Supp. 2d 1371, 1379 (ND Ga. 2010). It accordingly dismissed the FTC's complaint. The FTC appealed.

The Court of Appeals for the Eleventh Circuit affirmed the District Court. It wrote that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." 677 F. 3d, at 1312. The court recognized that "antitrust laws typically prohibit agreements where one company pays a potential competitor not to enter the market." *Id.*, at 1307 (citing *Valley Drug Co.* v. *Geneva Pharmaceuticals, Inc.*, 344 F. 3d 1294, 1304 (CA11 2003)). See also *Palmer*, 498 U. S., at 50 (agreement to divide territorial markets held "unlawful on its face"). But, the court found that "reverse payment settlements of patent litigation presen[t] atypical cases because one of the parties owns a patent." 677 F. 3d, at 1307 (internal quotation marks and second alteration omitted). Patent holders have a "lawful right to exclude others from the market," *ibid.* (internal quotation marks omitted); thus a patent "conveys the right to cripple competition," *id.*, at 1310 (internal quotation marks omitted). The court recognized that, if the parties to this sort of case do not settle, a court might declare the patent invalid. *Id.*, at 1305. But, in light of the public policy favoring settlement of disputes (among other considerations), it held that the courts could not require the parties to continue to litigate in order to avoid antitrust liability. *Id.*, at 1313–1314.

The FTC sought certiorari. Because different courts have reached different conclusions about the application of the antitrust laws to Hatch-Waxman-related patent settlements, we granted the FTC's petition. Compare, *e. g.*, *id.*, at 1312 (case below) (settlements generally "immune from antitrust attack"); *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 544 F. 3d 1323, 1332–1337 (CA Fed. 2008)

(similar); *In re Tamoxifen Citrate Antitrust Litigation*, 466 F. 3d 187, 212–213 (CA2 2006) (similar), with *In re K-Dur Antitrust Litigation*, 686 F. 3d 197, 214–218 (CA3 2012) (settlements presumptively unlawful).

II

A

Solvay's patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors. And we are willing to take this fact as evidence that the agreement's "anticompetitive effects fall within the scope of the exclusionary potential of the patent." 677 F. 3d, at 1312. But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack.

For one thing, to refer, as the Circuit referred, simply to what the holder of a valid patent could do does not by itself answer the antitrust question. The patent here may or may not be valid, and may or may not be infringed. "[A] *valid* patent excludes all except its owner from the use of the protected process or product," *United States* v. *Line Material Co.*, 333 U. S. 287, 308 (1948) (emphasis added). And that exclusion may permit the patent owner to charge a higher-than-competitive price for the patented product. But an *invalidated* patent carries with it no such right. And even a valid patent confers no right to exclude products or processes that do not actually infringe. The paragraph IV litigation in this case put the patent's validity at issue, as well as its actual preclusive scope. The parties' settlement ended that litigation. The FTC alleges that in substance, the plaintiff agreed to pay the defendants many millions of dollars to stay out of its market, even though the defendants did not have any claim that the plaintiff was liable to them for damages. That form of settlement is unusual. And, for

reasons discussed in Part II–B, *infra*, there is reason for concern that settlements taking this form tend to have significant adverse effects on competition.

Given these factors, it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well. And indeed, contrary to the Circuit's view that the only pertinent question is whether "the settlement agreement . . . fall[s] within" the legitimate "scope" of the patent's "exclusionary potential," 677 F. 3d, at 1311, 1312, this Court has indicated that patent and antitrust policies are both relevant in determining the "scope of the patent monopoly"—and consequently antitrust law immunity—that is conferred by a patent.

Thus, the Court in *Line Material* explained that "the improper use of [a patent] monopoly" is "invalid" under the antitrust laws and resolved the antitrust question in that case by seeking an accommodation "between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act." 333 U. S., at 310. To strike that balance, the Court asked questions such as whether "the patent statute specifically gives a right" to restrain competition in the manner challenged; and whether "competition is impeded to a greater degree" by the restraint at issue than other restraints previously approved as reasonable. *Id.*, at 311. See also *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 390–391 (1948) (courts must "balance the privileges of [the patent holder] and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize"); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 174 (1965) ("[E]nforcement of a patent procured by fraud" may violate the Sherman Act). In short, rather than measure the length or amount of a restriction solely against the length of the patent's term or

its earning potential, as the Court of Appeals apparently did here, this Court answered the antitrust question by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents. See Part II–B, *infra*. Whether a particular restraint lies "beyond the limits of the patent monopoly" is a *conclusion* that flows from that analysis and not, as THE CHIEF JUSTICE suggests, its starting point. *Post*, at 162, 164–165 (dissenting opinion).

For another thing, this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws. In *United States* v. *Singer Mfg. Co.*, 374 U. S. 174 (1963), for example, two sewing machine companies possessed competing patent claims; a third company sought a patent under circumstances where doing so might lead to the disclosure of information that would invalidate the other two firms' patents. All three firms settled their patent-related disagreements while assigning the broadest claims to the firm best able to enforce the patent against yet other potential competitors. *Id.*, at 190–192. The Court did not examine whether, on the assumption that all three patents were valid, patent law would have allowed the patents' holders to do the same. Rather, emphasizing that the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage," *id.*, at 197, it held that the agreements, although settling patent disputes, violated the antitrust laws, *id.*, at 195, 197. And that, in important part, was because "the public interest in granting patent monopolies" exists only to the extent that "the public is given a novel and useful invention" in "consideration for its grant." *Id.*, at 199 (White, J., concurring). See also *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371, 378 (1952) (applying antitrust scrutiny to patent settlement); *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163 (1931) (same).

Similarly, both within the settlement context and without, the Court has struck down overly restrictive patent licensing agreements—irrespective of whether those agreements produced supra-patent-permitted revenues. We concede that in *United States* v. *General Elec. Co.*, 272 U. S. 476, 489 (1926), the Court permitted a single patentee to grant to a single licensee a license containing a minimum resale price requirement. But in *Line Material*, *supra*, at 308, 310–311, the Court held that the antitrust laws forbid a group of patentees, each owning one or more patents, to cross-license each other, and, in doing so, to insist that each licensee maintain retail prices set collectively by the patent holders. The Court was willing to presume that the single-patentee practice approved in *General Electric* was a "reasonable restraint" that "accords with the patent monopoly granted by the patent law," 333 U. S., at 312, but declined to extend that conclusion to multiple-patentee agreements: "As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly," *ibid.* In *New Wrinkle*, 342 U. S., at 378, the Court held roughly the same, this time in respect to a similar arrangement in settlement of a litigation between two patentees, each of which contended that its own patent gave it the exclusive right to control production. That one or the other company (we may presume) was right about its patent did not lead the Court to confer antitrust immunity. Far from it, the agreement was found to violate the Sherman Act. *Id.*, at 380.

Finally in *Standard Oil Co. (Indiana)*, the Court upheld cross-licensing agreements among patentees that settled actual and impending patent litigation, 283 U. S., at 168, which agreements set royalty rates to be charged third parties for a license to practice all the patents at issue (and which divided resulting revenues). But, in doing so, Justice Brandeis, writing for the Court, warned that such an arrangement would have violated the Sherman Act had the patent

holders thereby "dominate[d]" the industry and "curtail[ed] the manufacture and supply of an unpatented product." *Id.*, at 174. These cases do not simply ask whether a hypothetically valid patent's holder would be able to charge, *e. g.*, the high prices that the challenged patent-related term allowed. Rather, they seek to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the antitrust law policy strongly favoring competition.

Thus, contrary to the dissent's suggestion, *post*, at 163–165, there is nothing novel about our approach. What *does* appear novel are the dissent's suggestions that a patent holder may simply "pa[y] a competitor to respect its patent" and quit its patent invalidity or noninfringement claim without any antitrust scrutiny whatever, *post*, at 162, and that "such settlements . . . are a well-known feature of intellectual property litigation," *post*, at 168. Closer examination casts doubt on these claims. The dissent does not identify any patent statute that it understands to grant such a right to a patentee, whether expressly or by fair implication. It would be difficult to reconcile the proposed right with the patent-related policy of eliminating unwarranted patent grants so the public will not "continually be required to pay tribute to would-be monopolists without need or justification." *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 670 (1969). And the authorities cited for this proposition (none from this Court, and none an antitrust case) are not on point. Some of them say that when Company A sues Company B for patent infringement and demands, say, $100 million in damages, it is not uncommon for B (the defendant) to pay A (the plaintiff) some amount less than the full demand as part of the settlement—$40 million, for example. See Schildkraut, Patent-Splitting Settlements and the Reverse Payment Fallacy, 71 Antitrust L. J. 1033, 1046 (2003) (suggesting that this hypothetical settlement includes "an implicit net payment" from A to B of $60 million—*i. e.*, the amount of the settlement discount).

The cited authorities also indicate that if B has a counterclaim for damages against A, the original infringement plaintiff, A might end up paying B to settle B's counterclaim. Cf. *Metro-Goldwyn Mayer, Inc.* v. *007 Safety Prods., Inc.*, 183 F. 3d 10, 13 (CA1 1999) (describing trademark dispute and settlement). Insofar as the dissent urges that settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding. But the dissent appears also to suggest that reverse payment settlements—*e. g.*, in which A, the plaintiff, pays money to defendant B purely so B will give up the patent fight—should be viewed for antitrust purposes in the same light as these familiar settlement forms. See *post*, at 168–169. We cannot agree. In the traditional examples cited above, a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim. In reverse payment settlements, in contrast, a party with no claim for damages (something that is usually true of a paragraph IV litigation defendant) walks away with money simply so it will stay away from the patentee's market. That, we think, is something quite different. Cf. *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 408 (2004) ("[C]ollusion" is "the supreme evil of antitrust").

Finally, the Hatch-Waxman Act itself does not embody a statutory policy that supports the Eleventh Circuit's view. Rather, the general procompetitive thrust of the statute, its specific provisions facilitating challenges to a patent's validity, see Part I–A, *supra*, and its later-added provisions requiring parties to a patent dispute triggered by a paragraph IV filing to report settlement terms to the FTC and the Antitrust Division of the Department of Justice, all suggest the contrary. See §§ 1112–1113, 117 Stat. 2461–2462. Those interested in legislative history may also wish to examine the statements of individual Members of Congress condemning reverse payment settlements in advance of the 2003 amend-

ments. See, *e. g.*, 148 Cong. Rec. 14437 (2002) (remarks of Sen. Hatch) ("It was and is very clear that the [Hatch-Waxman Act] was not designed to allow deals between brand and generic companies to delay competition"); 146 Cong. Rec. 18774 (2000) (remarks of Rep. Waxman) (introducing bill to deter companies from "strik[ing] collusive agreements to trade multimillion dollar payoffs by the brand company for delays in the introduction of lower cost, generic alternatives").

B

The Eleventh Circuit's conclusion finds some degree of support in a general legal policy favoring the settlement of disputes. 677 F. 3d, at 1313–1314. See also *Schering-Plough Corp.* v. *FTC*, 402 F. 3d 1056, 1074–1075 (2005) (same); *In re Tamoxifen Citrate*, 466 F. 3d, at 202 (noting public's "'strong interest in settlement'" of complex and expensive cases). The Circuit's related underlying practical concern consists of its fear that antitrust scrutiny of a reverse payment agreement would require the parties to litigate the validity of the patent in order to demonstrate what would have happened to competition in the absence of the settlement. Any such litigation will prove time consuming, complex, and expensive. The antitrust game, the Circuit may believe, would not be worth that litigation candle.

We recognize the value of settlements and the patent-litigation problem. But we nonetheless conclude that this patent-related factor should not determine the result here. Rather, five sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.

First, the specific restraint at issue has the "potential for genuine adverse effects on competition." *Indiana Federation of Dentists*, 476 U. S., at 460–461 (citing 7 Areeda ¶1511, at 429 (1986)). The payment in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation

were to continue and the patent were held invalid or not infringed by the generic product. Suppose, for example, that the exclusive right to sell produces $50 million in supracompetitive profits per year for the patentee. And suppose further that the patent has 10 more years to run. Continued litigation, if it results in patent invalidation or a finding of noninfringement, could cost the patentee $500 million in lost revenues, a sum that then would flow in large part to consumers in the form of lower prices.

We concede that settlement on terms permitting the patent challenger to enter the market before the patent expires would also bring about competition, again to the consumer's benefit. But settlement on the terms said by the FTC to be at issue here—payment in return for staying out of the market—simply keeps prices at patentee-set levels, potentially producing the full patent-related $500 million monopoly return while dividing that return between the challenged patentee and the patent challenger. The patentee and the challenger gain; the consumer loses. Indeed, there are indications that patentees sometimes pay a generic challenger a sum even larger than what the generic would gain in profits if it won the paragraph IV litigation and entered the market. See Hemphill, 81 N. Y. U. L. Rev., at 1581. See also Brief for 118 Law, Economics, and Business Professors et al. as *Amici Curiae* 25 (estimating that this is true of the settlement challenged here). The rationale behind a payment of this size cannot in every case be supported by traditional settlement considerations. The payment may instead provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market.

But, one might ask, as a practical matter would the parties be able to enter into such an anticompetitive agreement? Would not a high reverse payment signal to other potential challengers that the patentee lacks confidence in its patent,

thereby provoking additional challenges, perhaps too many for the patentee to "buy off"? Two special features of Hatch-Waxman mean that the answer to this question is "not necessarily so." First, under Hatch-Waxman only the first challenger gains the special advantage of 180 days of an exclusive right to sell a generic version of the brand-name product. See Part I–A, *supra*. And as noted, that right has proved valuable—indeed, it can be worth several hundred million dollars. See Hemphill, *supra*, at 1579; Brief for Petitioner 6. Subsequent challengers cannot secure that exclusivity period, and thus stand to win significantly less than the first if they bring a successful paragraph IV challenge. That is, if subsequent litigation results in invalidation of the patent, or a ruling that the patent is not infringed, that litigation victory will free not just the challenger to compete, but all other potential competitors too (once they obtain FDA approval). The potential reward available to a subsequent challenger being significantly less, the patentee's payment to the initial challenger (in return for not pressing the patent challenge) will not necessarily provoke subsequent challenges. Second, a generic that files a paragraph IV after learning that the first filer has settled will (if sued by the brand-name) have to wait out a stay period of (roughly) 30 months before the FDA may approve its application, just as the first filer did. See 21 U. S. C. § 355(j)(5)(B)(iii). These features together mean that a reverse payment settlement with the first filer (or, as in this case, *all* of the initial filers) "removes from consideration the most motivated challenger, and the one closest to introducing competition." Hemphill, *supra*, at 1586. The dissent may doubt these provisions matter, *post*, at 174–176, but scholars in the field tell us that "where only one party owns a patent, it is virtually unheard of outside of pharmaceuticals for that party to pay an accused infringer to settle the lawsuit," 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 15.3, p. 15–45, n. 161 (2d ed. Supp. 2011). It may well be that Hatch-

Waxman's unique regulatory framework, including the special advantage that the 180-day exclusivity period gives to first filers, does much to explain why in this context, but not others, the patentee's ordinary incentives to resist paying off challengers (*i. e.*, the fear of provoking myriad other challengers) appear to be more frequently overcome. See 12 Areeda ¶2046, at 341 (3d ed. 2010) (noting that these provisions, no doubt unintentionally, have created special incentives for collusion).

Second, these anticompetitive consequences will at least sometimes prove unjustified. See 7 *id.*, ¶1504, at 410–415; *California Dental Assn.* v. *FTC*, 526 U. S. 756, 786–787 (1999) (BREYER, J., concurring in part and dissenting in part). As the FTC admits, offsetting or redeeming virtues are sometimes present. Brief for Petitioner 37–39. The reverse payment, for example, may amount to no more than a rough approximation of the litigation expenses saved through the settlement. That payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item. There may be other justifications. Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about the anticompetitive consequences we mentioned above. But that possibility does not justify dismissing the FTC's complaint. An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason. See, *e. g.*, *Indiana Federation of Dentists*, 476 U. S., at 459; 7 Areeda ¶¶1504a–1504b, at 401–404.

Third, where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice. See *id.*, ¶1503, at 392–393. At least, the "size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power"—namely, the power to charge prices higher than the competitive level. 12 *id.*, ¶2046, at 351. An important patent itself helps to ensure such power. Neither is a firm without that power likely to pay "large sums" to induce "others to stay out of its market." *Ibid.* In any event, the FTC has referred to studies showing that reverse payment agreements are associated with the presence of higher-than-competitive profits—a strong indication of market power. See Brief for Petitioner 45.

Fourth, an antitrust action is likely to prove more feasible administratively than the Eleventh Circuit believed. The Circuit's holding does avoid the need to litigate the patent's validity (and also, any question of infringement). But to do so, it throws the baby out with the bath water, and there is no need to take that drastic step. That is because it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham, see 677 F. 3d, at 1312). An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm.

In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself. 12 Areeda ¶2046, at 350–352.

Fifth, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. They may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point. Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement.

In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent; a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without the use of reverse payments. In our view, these considerations, taken together, outweigh the single strong consideration—the desirability of settlements—that led the Eleventh Circuit to provide near-automatic antitrust immunity to reverse payment settlements.

III

The FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts re-

viewing such agreements should proceed via a "quick look" approach, rather than applying a "rule of reason." See *California Dental*, 526 U. S., at 775, n. 12 ("[Q]uick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects"); 7 Areeda ¶1508, at 435–440. We decline to do so. In *California Dental*, we held (unanimously) that abandonment of the "rule of reason" in favor of presumptive rules (or a "quick-look" approach) is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." 526 U. S., at 770; *id.*, at 781 (BREYER, J., concurring in part and dissenting in part). We do not believe that reverse payment settlements, in the context we here discuss, meet this criterion.

That is because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.

To say this is not to require the courts to insist, contrary to what we have said, that the Commission need litigate the patent's validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible prodefense theory. As a leading antitrust scholar has pointed out, "'[t]here is always something of a sliding scale in appraising reasonableness,'" and as such "'the quality of proof required should vary with the circumstances.'" *California Dental*, *supra*, at 780 (quoting with approval 7 Areeda ¶1507, at 402 (1986)).

As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of

antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. See 7 *id.*, ¶1508c, at 438–440. We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation. We reverse the judgment of the Eleventh Circuit, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Solvay Pharmaceuticals holds a patent. It sued two generic drug manufacturers that it alleged were infringing that patent. Those companies counterclaimed, contending the patent was invalid and that, in any event, their products did not infringe. The parties litigated for three years before settling on these terms: Solvay agreed to pay the generics millions of dollars and to allow them into the market five years before the patent was set to expire; in exchange, the generics agreed to provide certain services (help with marketing and manufacturing) and to honor Solvay's patent. The Federal Trade Commission alleges that such a settlement violates the antitrust laws. The question is how to assess that claim.

A patent carves out an exception to the applicability of antitrust laws. The correct approach should therefore be to ask whether the settlement gives Solvay monopoly power beyond what the patent already gave it. The Court, however, departs from this approach, and would instead use antitrust law's amorphous rule of reason to inquire into the anticompetitive effects of such settlements. This novel ap-

proach is without support in any statute, and will discourage the settlement of patent litigation. I respectfully dissent.

I

The point of antitrust law is to encourage competitive markets to promote consumer welfare. The point of patent law is to grant limited monopolies as a way of encouraging innovation. Thus, a patent grants "the right to exclude others from profiting by the patented invention." *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 215 (1980). In doing so it provides an exception to antitrust law, and the scope of the patent—*i. e.*, the rights conferred by the patent—forms the zone within which the patent holder may operate without facing antitrust liability.

This should go without saying, in part because we've said it so many times. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965) ("'A patent . . . is an exception to the general rule against monopolies'"); *United States* v. *Line Material Co.*, 333 U. S. 287, 300 (1948) ("[T]he precise terms of the grant define the limits of a patentee's monopoly and the area in which the patentee is freed from competition"); *United States* v. *General Elec. Co.*, 272 U. S. 476, 485 (1926) ("It is only when . . . [the patentee] steps out of the scope of his patent rights" that he comes within the operation of the Sherman Act); *Simpson* v. *Union Oil Co. of Cal.*, 377 U. S. 13, 24 (1964) (similar). Thus, although it is *per se* unlawful to fix prices under antitrust law, we have long recognized that a patent holder is entitled to license a competitor to sell its product on the condition that the competitor charge a certain, fixed price. See, *e. g.*, *General Elec. Co.*, *supra*, at 488–490.

We have never held that it violates antitrust law for a competitor to refrain from challenging a patent. And by extension, we have long recognized that the settlement of patent litigation does not by itself violate the antitrust laws. *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163,

171 (1931) ("Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act"). Like most litigation, patent litigation is settled all the time, and such settlements—which can include agreements that clearly violate antitrust law, such as licenses that fix prices, or agreements among competitors to divide territory—do not ordinarily subject the litigants to antitrust liability. See 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 7.3, pp. 7–13 to 7–15 (2d ed. 2003) (hereinafter Hovenkamp).

The key, of course, is that the patent holder—when doing anything, including settling—must act within the scope of the patent. If its actions go beyond the monopoly powers conferred by the patent, we have held that such actions are subject to antitrust scrutiny. See, *e. g.*, *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 196–197 (1963). If its actions are within the scope of the patent, they are not subject to antitrust scrutiny, with two exceptions concededly not applicable here: (1) when the parties settle sham litigation, cf. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49, 60–61 (1993); and (2) when the litigation involves a patent obtained through fraud on the Patent and Trademark Office. *Walker Process Equipment*, *supra*, at 177.

Thus, under our precedent, this is a fairly straightforward case. Solvay paid a competitor to respect its patent—conduct which did not exceed the scope of its patent. No one alleges that there was sham litigation, or that Solvay's patent was obtained through fraud on the PTO. As in any settlement, Solvay gave its competitors something of value (money) and, in exchange, its competitors gave it something of value (dropping their legal claims). In doing so, they put an end to litigation that had been dragging on for three years. Ordinarily, we would think this a good thing.

II

Today, however, the Court announces a new rule. It is willing to accept that Solvay's actions did not exceed the scope of its patent. *Ante*, at 147. But it does not agree that this is enough to "immunize the agreement from antitrust attack." *Ibid.* According to the majority, if a patent holder settles litigation by paying an alleged infringer a "large and unjustified" payment, in exchange for having the alleged infringer honor the patent, a court should employ the antitrust rule of reason to determine whether the settlement violates antitrust law. *Ante*, at 158.

The Court's justifications for this holding are unpersuasive. First, the majority explains that "[t]he patent here may or may not be valid, and may or may not be infringed." *Ante*, at 147. Because there is "uncertainty" about whether the patent is actually valid, the Court says that any questions regarding the legality of the settlement should be "measur[ed]" by "procompetitive antitrust policies," rather than "patent law policy." *Ante*, at 148. This simply states the conclusion. The difficulty with such an approach is that a patent holder acting within the scope of its patent has an obvious defense to any antitrust suit: that its patent allows it to engage in conduct that would otherwise violate the antitrust laws. But again, that's the whole point of a patent: to confer a limited monopoly. The problem, as the Court correctly recognizes, is that we're not quite certain if the patent is actually valid, or if the competitor is infringing it. But that is always the case, and is plainly a question of patent law.

The majority, however, would assess those patent law issues according to "antitrust policies." According to the majority, this is what the Court did in *Line Material—i. e.*, it "accommodat[ed]" antitrust principles and struck a "balance" between patent and antitrust law. *Ante*, at 148. But the Court in *Line Material* did no such thing. Rather, it ex-

plained that it is "well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act *beyond the limits of the patent monopoly*." 333 U. S., at 308 (emphasis added). It then, in the very next sentence, stated that "[b]y aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act." *Ibid.* That second sentence follows only if such conduct—the aggregation of multiple patents—goes "beyond the limits of the patent monopoly," which is precisely what the Court concluded. See *id.*, at 312 ("There is *no suggestion in the patent statutes* of authority to combine with other patent owners to fix prices on articles covered by the respective patents" (emphasis added)). The Court stressed, over and over, that a patent holder does not violate the antitrust laws when it acts within the scope of its patent. See *id.*, at 305 ("Within the limits of the patentee's rights under his patent, monopoly of the process or product by him is authorized by the patent statutes"); *id.*, at 310 ("price limitations on patented devices *beyond the limits of a patent monopoly* violate the Sherman Act" (emphasis added)).

The majority suggests that "[w]hether a particular restraint lies 'beyond the limits of the patent monopoly' is a *conclusion* that flows from" applying traditional antitrust principles. *Ante*, at 149. It seems to have in mind a regime where courts ignore the patent, and simply conduct an antitrust analysis of the settlement without regard to the validity of the patent. But a patent holder acting within the scope of its patent does not engage in any unlawful anticompetitive behavior; it is simply exercising the monopoly rights granted to it by the Government. Its behavior would be unlawful only if its patent were invalid or not infringed. And the scope of the patent—*i. e.*, what rights are conferred by the *patent*—should be determined by reference to *patent law*. While it is conceivable to set up a legal system where you assess the validity of patents or questions of infringe-

ment by bringing an antitrust suit, neither the majority nor the Government suggests that Congress has done so.

Second, the majority contends that "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws." *Ibid.* For this carefully worded proposition, it cites *Singer Manufacturing Co.*, *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371 (1952), and *Standard Oil Co. (Indiana)*. But each of those cases stands for the same, uncontroversial point: that when a patent holder acts *outside* the scope of its patent, it is no longer protected from antitrust scrutiny by the patent.

To begin, the majority's description of *Singer* is inaccurate. In *Singer*, several patent holders with competing claims entered into a settlement agreement in which they cross-licensed their patents to each other, and did so in order to disadvantage Japanese competition. See 374 U. S., at 194–195 (finding that the agreement had "a common purpose to suppress the Japanese machine competition in the United States" (footnote omitted)). According to the majority, the Court in *Singer* "did not examine whether, on the assumption that all three patents were valid, patent law would have allowed the patents' holders to do the same." *Ante*, at 149. Rather, the majority contends, *Singer* held that this agreement violated the antitrust laws because "in important part . . . 'the public interest in granting patent monopolies' exists only to the extent that 'the public is given a novel and useful invention' in 'consideration for its grant.'" *Ante*, at 149 (quoting *Singer*, 374 U. S., at 199 (White, J., concurring)). But the majority in *Singer* certainly *did* ask whether patent law permitted such an arrangement, concluding that it did not. See *id.*, at 196–197 (reiterating that it "is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act *beyond the limits of the patent monopoly*" and holding that "those limitations have been exceeded in this case" (emphasis added; internal quotation marks omit-

ted)); see also Hovenkamp § 7.2b, at 7–8, n. 15 (citing *Singer* as a quintessential case in which patent holders were subject to antitrust liability *because* their settlement agreement went beyond the scope of their patents and thus conferred monopoly power beyond what the patent lawfully authorized). Even Justice White's concurrence, on which the majority relies, emphasized that the conduct at issue in *Singer*—collusion between patent holders to exclude Japanese competition and to prevent disclosure of prior art—was not authorized by the patent laws. 374 U. S., at 197, 200.

New Wrinkle is to the same effect. There, the Court explained that because "[p]rice control through cross-licensing [is] *barred as beyond the patent monopoly*," an "arrangement . . . made between patent holders to pool their patents and fix prices on the products for themselves and their licensees . . . plainly violate[s] the Sherman Act." 342 U. S., at 379, 380 (emphasis added). As the Court further explained, a patent holder may not, "'acting in concert with all members of an industry, . . . issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.'" *Id.*, at 379–380 (quoting *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 400 (1948)). The majority here, however, ignores this discussion, and instead categorizes the case as "applying antitrust scrutiny to [a] patent settlement." *Ante*, at 149.

Again, in *Standard Oil Co. (Indiana)*, the parties settled claims regarding "competing patented processes for manufacturing an unpatented product," which threatened to create a monopoly over the unpatented product. 283 U. S., at 175. The Court explained that "an exchange of licenses for the purpose of curtailing the . . . supply of an unpatented product, is beyond the privileges conferred by the patents." *Id.*, at 174.

The majority is therefore right to suggest that these "precedents make clear that patent-related settlement agreements can *sometimes* violate the antitrust laws." *Ante*, at 149 (emphasis added). The key word is sometimes. And those some times are spelled out in our precedents. Those cases have made very clear that patent settlements—and for that matter, any agreements relating to patents—are subject to antitrust scrutiny if they confer benefits beyond the scope of the patent. This makes sense. A patent exempts its holder from the antitrust laws only insofar as the holder operates within the scope of the patent. When the holder steps outside the scope of the patent, he can no longer use the patent as his defense. The majority points to *no* case where a patent settlement was subject to antitrust scrutiny merely because the validity of the patent was uncertain. Not one. It is remarkable, and surely worth something, that in the 123 years since the Sherman Act was passed, we have never let antitrust law cross that Rubicon.

Next, the majority points to the "general procompetitive thrust" of the Hatch-Waxman Act, the fact that Hatch-Waxman "facilitat[es] challenges to a patent's validity," and its "provisions requiring parties to [such] patent dispute[s] . . . to report settlement terms to the FTC and the Antitrust Division of the Department of Justice." *Ante*, at 152. The Hatch-Waxman Act surely seeks to encourage competition in the drug market. And, like every law, it accomplishes its ends through specific provisions. These provisions, for example, allow generic manufacturers to enter the market without undergoing a duplicative application process; they also grant a 180-day monopoly to the first qualifying generic to commercially market a competing product. See 21 U. S. C. §§ 355(j)(2)(A)(ii), (iv), 355(j)(5)(B)(iv). So yes, the point of these provisions is to encourage competition. But it should by now be trite—and unnecessary—to say that "no legislation pursues its purposes at all costs" and that "it frustrates rather than effectuates legislative intent simplistically

to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*). It is especially disturbing here, where the Court discerns from specific provisions a very broad policy—a "general procompetitive thrust," in its words—and uses that policy to unsettle the established relationship between patent and antitrust law. *Ante*, at 152. Indeed, for whatever it may be worth, Congress has repeatedly declined to enact legislation addressing the issue the Court takes on today. See Brief for Respondent Actavis, Inc., 57 (citing 11 such bills introduced in the House or Senate since 2006).

In addition, it is of no consequence that settlement terms must be reported to the FTC and the Department of Justice. Such a requirement does not increase the role of antitrust law in scrutinizing patent settlements. Rather, it ensures that such terms are scrutinized consistent with existing antitrust law. In other words, it ensures that the FTC and Antitrust Division can review the settlements to make sure that they do not confer monopoly power beyond the scope of the patent.

The majority suggests that "[a]pparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation." *Ante*, at 141. This claim is not supported empirically by anything the majority cites, and seems unlikely. The term "reverse payment agreement"—coined to create the impression that such settlements are unique—simply highlights the fact that the party suing ends up paying. But this is no anomaly, nor is it evidence of a nefarious plot; it simply results from the fact that the patent holder plaintiff is a defendant against an invalidity counterclaim—not a rare situation in intellectual property litigation. Whatever one might call them, such settlements—paying an alleged infringer to drop its invalidity claim—are a well-known feature of intellectual property litigation, and reflect an intuitive way to settle such disputes.

See *Metro-Goldwyn Mayer, Inc.* v. *007 Safety Prods., Inc.*, 183 F. 3d 10, 13 (CA1 1999); see also Schildkraut, Patent-Splitting Settlements and the Reverse Payment Fallacy, 71 Antitrust L. J. 1033, 1033, 1046–1049 (2003–2004); Brief for Respondent Actavis, Inc., 54, n. 20 (citing examples). To the extent there are not scores and scores of these settlements to point to, this is because such settlements—outside the context of Hatch-Waxman—are private agreements that for obvious reasons are generally not appealed, nor publicly available.

The majority suggests that reverse-payment agreements are distinct because "a party with no claim for damages . . . walks away with money simply so it will stay away from the patentee's market." *Ante*, at 152. Again a distinction without a difference. While the alleged infringer may not be suing for the patent holder's *money*, it is suing for the right to use and market the (intellectual) property, which is worth money.

Finally, the majority complains that nothing in "any patent statute" gives patent holders the right to settle when faced with allegations of invalidity. *Ante*, at 151. But the right to settle generally accompanies the right to litigate in the first place; no one contends that drivers in an automobile accident may not settle their competing claims merely because no statute grants them that authority. The majority suggests that such a right makes it harder to "eliminat[e] unwarranted patent grants." *Ibid.* That may be so, but such a result—true of all patent settlements—is no reason to adjudicate questions of patent law under antitrust principles. Our cases establish that antitrust law has no business prying into a patent settlement so long as that settlement confers to the patent holder no monopoly power beyond what the patent itself conferred—unless, of course, the patent was invalid, but that again is a question of patent law, not antitrust law.

In sum, none of the Court's reasons supports its conclusion that a patent holder, when settling a claim that its patent is

invalid, is not immunized by the fact that it is acting within the scope of its patent. And I fear the Court's attempt to limit its holding to the context of patent settlements under Hatch-Waxman will not long hold.

III

The majority's rule will discourage settlement of patent litigation. Simply put, there would be no incentive to settle if, immediately after settling, the parties would have to litigate the same issue—the question of patent validity—as part of a defense against an antitrust suit. In that suit, the alleged infringer would be in the especially awkward position of being for the patent after being against it.

This is unfortunate because patent litigation is particularly complex, and particularly costly. As one treatise noted, "[t]he median patent case that goes to trial costs each side $1.5 million in legal fees" alone. Hovenkamp § 7.1c, at 7–5, n. 6. One study found that the cost of litigation in this specific context—a generic challenging a brand name pharmaceutical patent—was about $10 million per suit. See Herman, Note, The Stay Dilemma: Examining Brand and Generic Incentives for Delaying the Resolution of Pharmaceutical Patent Litigation, 111 Colum. L. Rev. 1788, 1795, n. 41 (2011) (citing M. Goodman, G. Nachman, & L. Chen, Morgan Stanley Equity Research, Quantifying the Impact from Authorized Generics 9 (2004)).

The Court acknowledges these problems but nonetheless offers "five sets of considerations" that it tells us overcome these concerns: (1) Sometimes patent settlements will have "'genuine adverse effects on competition'"; (2) "these anticompetitive consequences will at least sometimes prove unjustified"; (3) "where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice"; (4) "it is normally not necessary to litigate patent validity to answer the antitrust question" because "[a]n unexplained

large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival," and using a "payment . . . to prevent *the risk* of competition . . . constitutes the relevant anticompetitive harm"; and (5) parties may still "settle in other ways," such as "by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point." *Ante*, at 153–158 (emphasis added).

Almost all of these are unresponsive to the basic problem that settling a patent claim *cannot possibly* impose unlawful anticompetitive harm if the patent holder is acting within the scope of a valid patent and therefore permitted to do precisely what the antitrust suit claims is unlawful. This means that in any such antitrust suit, the defendant (patent holder) will want to use the validity of his patent as a defense—in other words, he'll want to say "I can do this because I have a valid patent that lets me do this." I therefore don't see how the majority can conclude that it won't normally be "necessary to litigate patent validity to answer the antitrust question," *ante*, at 157, unless it means to suggest that the defendant (patent holder) cannot raise his patent as a defense in an antitrust suit. But depriving him of such a defense—if that's what the majority means to do—defeats the point of the patent, which is to confer a *lawful* monopoly on its holder.

The majority seems to think that *even if* the patent is valid, a patent holder violates the antitrust laws merely because the settlement took away some chance that his patent would be declared invalid by a court. See *ibid.* ("payment . . . to prevent *the risk* of competition . . . constitutes the relevant anticompetitive harm" (emphasis added)). This is flawed for several reasons.

First, a patent is either valid or invalid. The parties of course don't know the answer with certainty at the outset of litigation; hence the litigation. But the same is true of any

hard legal question that is yet to be adjudicated. Just because people don't know the answer doesn't mean there is no answer until a court declares one. Yet the majority would impose antitrust liability based on the parties' subjective uncertainty about that legal conclusion.

The Court does so on the assumption that offering a "large" sum is reliable evidence that the patent holder has serious doubts about the patent. Not true. A patent holder may be 95% sure about the validity of its patent, but particularly risk averse or litigation averse, and willing to pay a good deal of money to rid itself of the 5% chance of a finding of invalidity. What is actually motivating a patent holder is apparently a question district courts will have to resolve on a case-by-case basis. The task of trying to discern whether a patent holder is motivated by uncertainty about its patent, or other legitimate factors like risk aversion, will be made all the more difficult by the fact that much of the evidence about the party's motivation may be embedded in legal advice from its attorney, which would presumably be shielded from discovery.

Second, the majority's position leads to absurd results. Let's say in 2005, a patent holder sues a competitor for infringement and faces a counterclaim that its patent is invalid. The patent holder determines that the risk of losing on the question of validity is low, but after a year of litigating, grows increasingly risk averse, tired of litigation, and concerned about the company's image, so it pays the competitor a "large" payment, *ante*, at 157, in exchange for having the competitor honor its patent. Then let's say in 2006, a different competitor, inspired by the first competitor's success, sues the patent holder and seeks a similar payment. The patent holder, recognizing that this dynamic is unsustainable, litigates this suit to conclusion, all the way to the Supreme Court, which unanimously decides the patent was valid. According to the majority, the first settlement would violate the antitrust laws even though the patent was ulti-

mately declared valid, because that first settlement took away some chance that the patent would be invalidated in the first go around. Under this approach, a patent holder may be found liable under antitrust law for doing what its perfectly valid patent allowed it to do in the first place; its sin was to settle, rather than prove the correctness of its position by litigating until the bitter end.

Third, this logic—that taking away any *chance* that a patent will be invalidated is itself an antitrust problem—cannot possibly be limited to reverse-payment agreements, or those that are "large." *Ibid.* The Government's brief acknowledges as much, suggesting that if antitrust scrutiny is invited for such cash payments, it may also be required for "other consideration" and "alternative arrangements." Brief for Petitioner 36, n. 7. For example, when a patent holder licenses its product to a licensee at a fixed monopoly price, surely it takes away some chance that its patent will be challenged by that licensee. According to the majority's reasoning, that's an antitrust problem that must be analyzed under the rule of reason. But see *General Elec. Co.*, 272 U. S., at 488 (holding that a patent holder may license its invention at a fixed price). Indeed, the Court's own solution—that patent holders should negotiate to allow generics into the market sooner, rather than paying them money—also takes away some chance that the generic would have litigated until the patent was invalidated.

Thus, although the question posed by this case is fundamentally a question of patent law—*i. e.*, whether Solvay's patent was valid and therefore permitted Solvay to pay competitors to honor the scope of its patent—the majority declares that such questions should henceforth be scrutinized by antitrust law's unruly rule of reason. Good luck to the district courts that must, when faced with a patent settlement, weigh the "likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances." *Ante,* at 149;

but see *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U. S. 438, 452 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust law").

IV

The majority invokes "procompetitive antitrust policies," *ante*, at 148, but misses the basic point that patent laws promote consumer interests in a different way, by providing protection against competition. As one treatise explains:

> "The purpose of the rule of reason is to determine whether, on balance, a practice is reasonably likely to be anticompetitive or competitively harmless—that is, whether it yields lower or higher marketwide output. By contrast, patent policy encompasses a set of judgments about the proper tradeoff between competition and the incentive to innovate over the *long* run. Antitrust's rule of reason was not designed for such judgments and is not adept at making them." Hovenkamp § 7.3, at 7–13 (footnote omitted).

The majority recognizes that "a high reverse payment" may "signal to other potential challengers that the patentee lacks confidence in its patent, thereby provoking additional challenges." *Ante,* at 154–155. It brushes this off, however, because of two features of Hatch-Waxman that make it "'not necessarily so.'" *Ante*, at 155. First, it points out that the first challenger gets a 180-day exclusive period to market a generic version of the brand name drug, and that subsequent challengers cannot secure that exclusivity period—meaning when the patent holder buys off the first challenger, it has bought off its most motivated competitor. There are two problems with this argument. First, according to the Food and Drug Administration, all manufacturers who file on the first day are considered "first applicants" who share the exclusivity period. Thus, if ten generics file an application to market a generic drug on the first day, all will

be considered "first applicants." See 21 U. S. C. § 355(j)(5)(B)(iv)(II)(bb); see also FDA, Guidance for Industry: 180-Day Exclusivity When Multiple ANDAs Are Submitted on the Same Day 4 (July 2003). This is not an unusual occurrence. See Brief for Generic Pharmaceutical Association as *Amicus Curiae* 23–24 (Generic Brief) (citing FTC data indicating that some drugs "have been subject to as many as *sixteen* first-day" generic applications; that in 2005, the average number of first-day applications per drug was 11; and that between 2002 and 2008, the yearly average never dropped below three first-day applications per drug).

Second, and more fundamentally, the 180 days of exclusivity simply provides *more* incentive for generic challenges. Even if a subsequent generic would not be entitled to this additional incentive, it will have as much or nearly as much incentive to challenge the patent as a potential challenger would in any other context outside of Hatch-Waxman, where there is no 180-day exclusivity period. And a patent holder who gives away notably large sums of money because it is, as the majority surmises, concerned about the strength of its patent, would be putting blood in water where sharks are always near.

The majority also points to the fact that, under Hatch-Waxman, the FDA is enjoined from approving a generic's application to market a drug for 30 months if the brand name sues the generic for patent infringement within 45 days of that application being filed. *Ante*, at 155 (citing 21 U. S. C. § 355(j)(5)(B)(iii)). According to the majority, this provision will chill subsequent generics from challenging the patent (because they will have to wait 30 months before receiving FDA approval to market their drug). But this overlooks an important feature of the law: The FDA may approve the application before the 30 months are up "if before the expiration of [the 30 months,] the district court decides that the patent is invalid or not infringed." § 355(j)(5)(B)(iii)(I). And even if the FDA did not have to wait 30 months, it

is far from clear that a generic would want to market a drug prior to obtaining a judgment of invalidity or noninfringement. Doing so may expose it to ruinous liability for infringement.

The irony of all this is that the majority's decision may very well discourage generics from challenging pharmaceutical patents in the first place. Patent litigation is costly, time consuming, and uncertain. See *Cybor Corp.* v. *FAS Techs., Inc.*, 138 F. 3d 1448, 1476, n. 4 (CA Fed. 1998) (opinion of Rader, J.) (en banc) (discussing study showing that the Federal Circuit wholly or partially reversed in almost 40% of claim construction appeals in a 30-month period); Generic Brief 16 (citing a 2010 study analyzing the prior decade's cases and showing that generics prevailed in 82 cases and lost in 89 cases). Generics "enter this risky terrain only after careful analysis of the potential gains if they prevail and the potential exposure if they lose." *Id.*, at 19. Taking the prospect of settlements off the table—or limiting settlements to an earlier entry date for the generic, which may still be many years in the future—puts a damper on the generic's expected value going into litigation, and decreases its incentive to sue in the first place. The majority assures us, with no support, that everything will be okay because the parties can settle by simply negotiating an earlier entry date for the generic drug manufacturer, rather than settling with money. *Ante*, at 158. But it's a matter of common sense, confirmed by experience, that parties are more likely to settle when they have a broader set of valuable things to trade. See Brief for Mediation and Negotiation Professionals as *Amici Curiae* 6–8.

V

The majority today departs from the settled approach separating patent and antitrust law, weakens the protections afforded to innovators by patents, frustrates the public policy in favor of settling, and likely undermines the very policy it seeks to promote by forcing generics who step into the litiga-

tion ring to do so without the prospect of cash settlements. I would keep things as they were and not subject basic questions of patent law to an unbounded inquiry under antitrust law, with its treble damages and famously burdensome discovery. See 15 U. S. C. § 15; *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 558–559 (2007). I respectfully dissent.

Syllabus

SALINAS *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 12–246. Argued April 17, 2013—Decided June 17, 2013

Petitioner, without being placed in custody or receiving *Miranda* warnings, voluntarily answered some of a police officer's questions about a murder, but fell silent when asked whether ballistics testing would match his shotgun to shell casings found at the scene of the crime. At petitioner's murder trial in Texas state court, and over his objection, the prosecution used his failure to answer the question as evidence of guilt. He was convicted, and both the State Court of Appeals and Court of Criminal Appeals affirmed, rejecting his claim that the prosecution's use of his silence in its case in chief violated the Fifth Amendment.

Held: The judgment is affirmed.

369 S. W. 3d 176, affirmed.

JUSTICE ALITO, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege in response to the officer's question. Pp. 183–191.

(a) To prevent the privilege against self-incrimination from shielding information not properly within its scope, a witness who "'desires the protection of the privilege . . . must claim it'" at the time he relies on it. *Minnesota* v. *Murphy*, 465 U. S. 420, 427. This Court has recognized two exceptions to that requirement. First, a criminal defendant need not take the stand and assert the privilege at his own trial. *Griffin* v. *California*, 380 U. S. 609, 613–615. Petitioner's silence falls outside this exception because he had no comparable unqualified right not to speak during his police interview. Second, a witness' failure to invoke the privilege against self-incrimination must be excused where governmental coercion makes his forfeiture of the privilege involuntary. See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436, 467–468, and n. 37. Petitioner cannot benefit from this principle because it is undisputed that he agreed to accompany the officers to the station and was free to leave at any time. Pp. 183–186.

(b) Petitioner seeks a third exception to the express invocation requirement for cases where the witness chooses to stand mute rather than give an answer that officials suspect would be incriminating, but this Court's cases all but foreclose that argument. A defendant normally does not invoke the privilege by remaining silent. See *Roberts*

v. *United States*, 445 U. S. 552, 560. And the express invocation requirement applies even when an official has reason to suspect that the answer to his question would incriminate the witness. See *Murphy*, *supra*, at 427–428. For the same reasons that neither a witness' silence nor official suspicion is sufficient by itself to relieve a witness of the obligation to expressly invoke the privilege, they do not do so together. The proposed exception also would be difficult to reconcile with *Berghuis* v. *Thompkins*, 560 U. S. 370, where this Court held in the closely related context of post-*Miranda* silence that a defendant failed to invoke his right to cut off police questioning when he remained silent for 2 hours and 45 minutes. 560 U. S., at 376, 380–382.

Petitioner claims that reliance on the Fifth Amendment privilege is the most likely explanation for silence in a case like his, but such silence is "insolubly ambiguous." See *Doyle* v. *Ohio*, 426 U. S. 610, 617. To be sure, petitioner might have declined to answer the officer's question in reliance on his constitutional privilege. But he also might have done so because he was trying to think of a good lie, because he was embarrassed, or because he was protecting someone else. Not every such possible explanation for silence is probative of guilt, but neither is every possible explanation protected by the Fifth Amendment. Petitioner also suggests that it would be unfair to require a suspect unschooled in the particulars of legal doctrine to do anything more than remain silent in order to invoke his "right to remain silent." But the Fifth Amendment guarantees that no one may be "compelled in any criminal case to be a witness against himself," not an unqualified "right to remain silent." In any event, it is settled that forfeiture of the privilege against self-incrimination need not be knowing. *Murphy*, *supra*, at 427–428. Pp. 186–190.

(c) Petitioner's argument that applying the express invocation requirement in this context will be unworkable is also unpersuasive. The Court has long required defendants to assert the privilege in order to subsequently benefit from it, and this rule has not proved difficult to apply in practice. Pp. 190–191.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concluded that petitioner's claim would fail even if he invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony. *Griffin* v. *California*, 380 U. S. 609, in which this Court held that the Fifth Amendment prohibits a prosecutor or judge from commenting on a defendant's failure to testify, should not be extended to a defendant's silence during a precustodial interview because *Griffin* "lacks foundation in the Constitution's text, history, or logic." *Mitchell* v. *United States*, 526 U. S. 314, 341 (THOMAS, J., dissenting). Pp. 191–193.

Syllabus

ALITO, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY, J., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 191. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 193.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *Pamela S. Karlan*, *Dick DeGuerin*, *Neal Davis*, and *Kevin K. Russell*.

Alan Keith Curry argued the cause for respondent. With him on the brief were *Carol M. Cameron*, *Eric Kugler*, *David C. Newell*, and *Mike Anderson*.

Ginger D. Anders argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Raman*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Board of Criminal Lawyers by *Henry W. Asbill* and *Brian J. Murray*; for the American Civil Liberties Union by *Aaron D. Van Oort* and *Steven R. Shapiro*; and for the National Association of Criminal Defense Lawyers et al. by *Craig D. Singer*, *Jeffrey T. Green*, and *Angela Moore*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, and *Jane Elinor Notz*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *Janet T. Mills* of Maine, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *John E. Swallow* of Utah, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming; for Wayne County, Michigan, by *Kym L. Worthy* and *Timothy A. Baughman*; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

John W. Whitehead, *Rita M. Dunaway*, and *Timothy Lynch* filed a brief for The Rutherford Institute et al. as *amici curiae*.

JUSTICE ALITO announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

Without being placed in custody or receiving *Miranda* warnings, petitioner voluntarily answered the questions of a police officer who was investigating a murder. But petitioner balked when the officer asked whether a ballistics test would show that the shell casings found at the crime scene would match petitioner's shotgun. Petitioner was subsequently charged with murder, and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. Petitioner claims that this argument violated the Fifth Amendment, which guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

Petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question. It has long been settled that the privilege "generally is not self-executing" and that a witness who desires its protection "'must claim it.'" *Minnesota* v. *Murphy*, 465 U. S. 420, 425, 427 (1984) (quoting *United States* v. *Monia*, 317 U. S. 424, 427 (1943)). Although "no ritualistic formula is necessary in order to invoke the privilege," *Quinn* v. *United States*, 349 U. S. 155, 164 (1955), a witness does not do so by simply standing mute. Because petitioner was required to assert the privilege in order to benefit from it, the judgment of the Texas Court of Criminal Appeals rejecting petitioner's Fifth Amendment claim is affirmed.

I

On the morning of December 18, 1992, two brothers were shot and killed in their Houston home. There were no witnesses to the murders, but a neighbor who heard gunshots saw someone run out of the house and speed away in a dark-colored car. Police recovered six shotgun shell casings at the scene. The investigation led police to petitioner, who

had been a guest at a party the victims hosted the night before they were killed. Police visited petitioner at his home, where they saw a dark blue car in the driveway. He agreed to hand over his shotgun for ballistics testing and to accompany police to the station for questioning.

Petitioner's interview with the police lasted approximately one hour. All agree that the interview was noncustodial, and the parties litigated this case on the assumption that he was not read *Miranda* warnings. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). For most of the interview, petitioner answered the officer's questions. But when asked whether his shotgun "would match the shells recovered at the scene of the murder," App. 17, petitioner declined to answer. Instead, petitioner "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." *Id.*, at 18. After a few moments of silence, the officer asked additional questions, which petitioner answered. *Ibid.*

Following the interview, police arrested petitioner on outstanding traffic warrants. Prosecutors soon concluded that there was insufficient evidence to charge him with the murders, and he was released. A few days later, police obtained a statement from a man who said he had heard petitioner confess to the killings. On the strength of that additional evidence, prosecutors decided to charge petitioner, but by this time he had absconded. In 2007, police discovered petitioner living in the Houston area under an assumed name.

Petitioner did not testify at trial. Over his objection, prosecutors used his reaction to the officer's question during the 1993 interview as evidence of his guilt. The jury found petitioner guilty, and he received a 20-year sentence. On direct appeal to the Court of Appeals of Texas, petitioner argued that prosecutors' use of his silence as part of their case in chief violated the Fifth Amendment. The Court of Appeals rejected that argument, reasoning that petitioner's prearrest, pre-*Miranda* silence was not "compelled" within

the meaning of the Fifth Amendment. 368 S. W. 3d 550, 557–559 (2011). The Texas Court of Criminal Appeals took up this case and affirmed on the same ground. 369 S. W. 3d 176 (2012).

We granted certiorari, 568 U. S. 1119 (2013), to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief. Compare, *e. g.*, *United States* v. *Rivera*, 944 F. 2d 1563, 1568 (CA11 1991), with *United States* v. *Moore*, 104 F. 3d 377, 386 (CADC 1997). But because petitioner did not invoke the privilege during his interview, we find it unnecessary to reach that question.

II

A

The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony." *Garner* v. *United States*, 424 U. S. 648, 658, n. 11 (1976). To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who "'desires the protection of the privilege . . . must claim it'" at the time he relies on it. *Murphy*, *supra*, at 427 (quoting *Monia*, *supra*, at 427). See also *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927).

That requirement ensures that the government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating, see *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951), or cure any potential self-incrimination through a grant of immunity, see *Kastigar* v. *United States*, 406 U. S. 441, 448 (1972). The express invocation requirement also gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing

the witness' reasons for refusing to answer. See *Roberts* v. *United States*, 445 U. S. 552, 560, n. 7 (1980) ("A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give"); *Hutcheson* v. *United States*, 369 U. S. 599, 610–611 (1962) (declining to treat invocation of due process as proper assertion of the privilege). In these ways, insisting that witnesses expressly invoke the privilege "assures that the Government obtains all the information to which it is entitled." *Garner*, *supra*, at 658, n. 11.

We have previously recognized two exceptions to the requirement that witnesses invoke the privilege, but neither applies here. First, we held in *Griffin* v. *California*, 380 U. S. 609, 613–615 (1965), that a criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an "absolute right not to testify." *Turner* v. *United States*, 396 U. S. 398, 433 (1970) (Black, J., dissenting); see *United States* v. *Patane*, 542 U. S. 630, 637 (2004) (plurality opinion). Since a defendant's reasons for remaining silent at trial are irrelevant to his constitutional right to do so, requiring that he expressly invoke the privilege would serve no purpose; neither a showing that his testimony would not be self-incriminating nor a grant of immunity could force him to speak. Because petitioner had no comparable unqualified right during his interview with police, his silence falls outside the *Griffin* exception.

Second, we have held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. Thus, in *Miranda*, we said that a suspect who is subjected to the "inherently compelling pressures" of an unwarned custodial interrogation need not invoke the privilege. 384 U. S., at 467–468, and n. 37. Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said

to have voluntarily forgone the privilege "unless [he] fails to claim [it] after being suitably warned." *Murphy*, 465 U. S., at 429–430.

For similar reasons, we have held that threats to withdraw a governmental benefit such as public employment sometimes make exercise of the privilege so costly that it need not be affirmatively asserted. *Garrity* v. *New Jersey*, 385 U. S. 493, 497 (1967) (public employment). See also *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 802–804 (1977) (public office); *Lefkowitz* v. *Turley*, 414 U. S. 70, 84–85 (1973) (public contracts). And where assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence. See, *e. g.*, *Leary* v. *United States*, 395 U. S. 6, 28–29 (1969) (no requirement that taxpayer complete tax form where doing so would have revealed income from illegal activities); *Albertson* v. *Subversive Activities Control Bd.*, 382 U. S. 70, 77–79 (1965) (members of the Communist Party not required to complete registration form "where response to any of the form's questions . . . might involve [them] in the admission of a crucial element of a crime"). The principle that unites all of those cases is that a witness need not expressly invoke the privilege where some form of official compulsion denies him "a 'free choice to admit, to deny, or to refuse to answer.'" *Garner*, *supra*, at 656–657 (quoting *Lisenba* v. *California*, 314 U. S. 219, 241 (1941)).

Petitioner cannot benefit from that principle because it is undisputed that his interview with police was voluntary. As petitioner himself acknowledges, he agreed to accompany the officers to the station and "was free to leave at any time during the interview." Brief for Petitioner 2–3 (internal quotation marks omitted). That places petitioner's situation outside the scope of *Miranda* and other cases in which we have held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege.

The dissent elides this point when it cites our precedents in this area for the proposition that "[c]ircumstances, rather than explicit invocation, trigger the protection of the Fifth Amendment." *Post*, at 200 (opinion of BREYER, J.). The critical question is whether, under the "circumstances" of this case, petitioner was deprived of the ability to voluntarily invoke the Fifth Amendment. He was not. We have before us no allegation that petitioner's failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment.

B

Petitioner urges us to adopt a third exception to the invocation requirement for cases in which a witness stands mute and thereby declines to give an answer that officials suspect would be incriminating. Our cases all but foreclose such an exception, which would needlessly burden the government's interests in obtaining testimony and prosecuting criminal activity. We therefore decline petitioner's invitation to craft a new exception to the "general rule" that a witness must assert the privilege to subsequently benefit from it. *Murphy*, *supra*, at 429.

Our cases establish that a defendant normally does not invoke the privilege by remaining silent. In *Roberts* v. *United States*, 445 U. S. 552, for example, we rejected the Fifth Amendment claim of a defendant who remained silent throughout a police investigation and received a harsher sentence for his failure to cooperate. In so ruling, we explained that "if [the defendant] believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate." *Id.*, at 560. See also *United States* v. *Sullivan*, 274 U. S. 259, 263–264 (1927); *Vajtauer*, 273 U. S., at

113.[1] A witness does not expressly invoke the privilege by standing mute.

We have also repeatedly held that the express invocation requirement applies even when an official has reason to suspect that the answer to his question would incriminate the witness. Thus, in *Murphy* we held that the defendant's self-incriminating answers to his probation officer were properly admitted at trial because he failed to invoke the privilege. 465 U. S., at 427–428. In reaching that conclusion, we rejected the notion "that a witness must 'put the Government on notice by formally availing himself of the privilege' only when he alone 'is reasonably aware of the incriminating tendency of the questions.'" *Id.*, at 428 (quoting *Roberts*, *supra*, at 562, n. (Brennan, J., concurring)). See also *United States* v. *Kordel*, 397 U. S. 1, 7 (1970).[2]

Petitioner does not dispute the vitality of either of those lines of precedent but instead argues that we should adopt

[1] The dissent argues that in these cases "neither the nature of the questions nor the circumstances of the refusal to answer them provided any basis to infer a tie between the silence and the Fifth Amendment." *Post*, at 197 (opinion of BREYER, J.). But none of our precedents suggests that governmental officials are obliged to guess at the meaning of a witness' unexplained silence when implicit reliance on the Fifth Amendment seems probable. *Roberts* does not say as much, despite its holding that the defendant in that case was required to explain the Fifth Amendment basis for his failure to cooperate with an investigation that led to his prosecution. 445 U. S., at 559.

[2] Our cases do not support the distinction the dissent draws between silence and the failure to invoke the privilege before making incriminating statements. See *post*, at 198–199 (opinion of BREYER, J.). For example, *Murphy*, a case in which the witness made incriminating statements after failing to invoke the privilege, repeatedly relied on *Roberts* and *Vajtauer*—two cases in which witnesses remained silent and did not make incriminating statements. 465 U. S., at 427, 429 (majority opinion), 455–456, n. 20 (Marshall, J., dissenting). Similarly, *Kordel* cited *Vajtauer*, among other cases, for the proposition that the defendant's "failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself." 397 U. S., at 10, and n. 18.

an exception for cases at their intersection. Thus, petitioner would have us hold that although neither a witness' silence nor official suspicions are enough to excuse the express invocation requirement, the invocation requirement does not apply where a witness is silent in the face of official suspicions. For the same reasons that neither of those factors is sufficient by itself to relieve a witness of the obligation to expressly invoke the privilege, we conclude that they do not do so together. A contrary result would do little to protect those genuinely relying on the Fifth Amendment privilege while placing a needless new burden on society's interest in the admission of evidence that is probative of a criminal defendant's guilt.

Petitioner's proposed exception would also be very difficult to reconcile with *Berghuis* v. *Thompkins*, 560 U. S. 370 (2010). There, we held in the closely related context of post-*Miranda* silence that a defendant failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45 minutes. 560 U. S., at 376, 380–382. If the extended custodial silence in that case did not invoke the privilege, then surely the momentary silence in this case did not do so either.

Petitioner and the dissent attempt to distinguish *Berghuis* by observing that it did not concern the admissibility of the defendant's silence but instead involved the admissibility of his subsequent statements. *Post*, at 200–201 (opinion of BREYER, J.). But regardless of whether prosecutors seek to use silence or a confession that follows, the logic of *Berghuis* applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.[3]

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[3] Petitioner is correct that *due process* prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings, *Doyle* v. *Ohio*, 426 U. S. 610, 617–618 (1976), but that rule does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him, *Jenkins* v. *Anderson*, 447 U. S. 231, 240 (1980).

In support of their proposed exception to the invocation requirement, petitioner and the dissent argue that reliance on the Fifth Amendment privilege is the most likely explanation for silence in a case such as this one. Reply Brief 17; see *post*, at 201–202 (opinion of BREYER, J.). But whatever the most probable explanation, such silence is "insolubly ambiguous." *Doyle* v. *Ohio*, 426 U. S. 610, 617 (1976). To be sure, someone might decline to answer a police officer's question in reliance on his constitutional privilege. But he also might do so because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else. Not every such possible explanation for silence is probative of guilt, but neither is every possible explanation protected by the Fifth Amendment. Petitioner alone knew why he did not answer the officer's question, and it was therefore his "burden . . . to make a timely assertion of the privilege." *Garner*, 424 U. S., at 655.

At oral argument, counsel for petitioner suggested that it would be unfair to require a suspect unschooled in the particulars of legal doctrine to do anything more than remain silent in order to invoke his "right to remain silent." Tr. of Oral Arg. 26–27; see *post*, at 202 (BREYER, J., dissenting); *Michigan* v. *Tucker*, 417 U. S. 433, 439 (1974) (observing that "virtually every schoolboy is familiar with the concept, if not the language," of the Fifth Amendment). But popular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be "compelled in any criminal case to be a witness against himself"; it does not establish an unqualified "right to remain silent." A witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim. See *Hoffman*, 341 U. S., at 486–487.[4]

[4] The dissent suggests that officials in this case had no "special need to know whether the defendant sought to rely on the protections of the Fifth Amendment." *Post*, at 196 (opinion of BREYER, J.). But we have never said that the government must demonstrate such a need on a case-by-case

In any event, it is settled that forfeiture of the privilege against self-incrimination need not be knowing. *Murphy*, 465 U. S., at 427–428; *Garner*, *supra*, at 654, n. 9. Statements against interest are regularly admitted into evidence at criminal trials, see Fed. Rule of Evid. 804(b)(3), and there is no good reason to approach a defendant's silence any differently.

C

Finally, we are not persuaded by petitioner's arguments that applying the usual express invocation requirement where a witness is silent during a noncustodial police interview will prove unworkable in practice. Petitioner and the dissent suggest that our approach will "unleash complicated and persistent litigation" over what a suspect must say to invoke the privilege, Reply Brief 18; see *post*, at 202–203 (opinion of BREYER, J.), but our cases have long required that a witness assert the privilege to subsequently benefit from it. That rule has not proved difficult to apply. Nor did the potential for close cases dissuade us from adopting similar invocation requirements for suspects who wish to assert their rights and cut off police questioning during custodial interviews. *Berghuis*, *supra*, at 380–382 (requiring suspect to unambiguously assert privilege against self-incrimination to cut off custodial questioning); *Davis* v. *United States*, 512 U. S. 452, 459 (1994) (same standard for assertions of the right to counsel).

Notably, petitioner's approach would produce its own line-drawing problems, as this case vividly illustrates. When the interviewing officer asked petitioner if his shotgun would match the shell casings found at the crime scene, petitioner did not merely remain silent; he made movements that suggested surprise and anxiety. At precisely what point such

basis for the invocation requirement to apply. Any such rule would require judicial hypothesizing about the probable strategic choices of prosecutors, who often use immunity to compel testimony from witnesses who invoke the Fifth Amendment.

reactions transform "silence" into expressive conduct would be a difficult and recurring question that our decision allows us to avoid.

We also reject petitioner's argument that an express invocation requirement will encourage police officers to "'unfairly "tric[k]"'" suspects into cooperating. Reply Brief 21 (quoting *South Dakota* v. *Neville*, 459 U. S. 553, 566 (1983)). Petitioner worries that officers could unduly pressure suspects into talking by telling them that their silence could be used in a future prosecution. But as petitioner himself concedes, police officers "have done nothing wrong" when they "accurately stat[e] the law." Brief for Petitioner 32. We found no constitutional infirmity in government officials telling the defendant in *Murphy* that he was required to speak truthfully to his parole officer, 465 U. S., at 436–438, and we see no greater danger in the interview tactics petitioner identifies. So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation.

* * *

Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the judgment of the Texas Court of Criminal Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

We granted certiorari to decide whether the Fifth Amendment privilege against compulsory self-incrimination prohibits a prosecutor from using a defendant's precustodial silence as evidence of his guilt. The plurality avoids reaching that question and instead concludes that Salinas' Fifth Amendment claim fails because he did not expressly invoke the privilege. *Ante*, at 183. I think there is a simpler way to

resolve this case. In my view, Salinas' claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony.

In *Griffin* v. *California*, 380 U. S. 609 (1965), this Court held that the Fifth Amendment prohibits a prosecutor or judge from commenting on a defendant's failure to testify. *Id.*, at 614. The Court reasoned that such comments, and any adverse inferences drawn from them, are a "penalty" imposed on the defendant's exercise of his Fifth Amendment privilege. *Ibid.* Salinas argues that we should extend *Griffin*'s no-adverse-inference rule to a defendant's silence during a precustodial interview. I have previously explained that the Court's decision in *Griffin* "lacks foundation in the Constitution's text, history, or logic" and should not be extended. *Mitchell* v. *United States*, 526 U. S. 314, 341 (1999) (dissenting opinion). I adhere to that view today.

Griffin is impossible to square with the text of the Fifth Amendment, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." A defendant is not "compelled . . . to be a witness against himself" simply because a jury has been told that it may draw an adverse inference from his silence. See *Mitchell*, *supra*, at 331 (SCALIA, J., dissenting) ("[T]he threat of an adverse inference does not 'compel' anyone to testify. . . . Indeed, I imagine that in most instances, a guilty defendant would choose to remain silent *despite* the adverse inference, on the theory that it would do him less damage than his cross-examined testimony"); *Carter* v. *Kentucky*, 450 U. S. 288, 306 (1981) (Powell, J., concurring) ("[N]othing in the [Self-Incrimination] Clause requires that jurors not draw logical inferences when a defendant chooses not to explain incriminating circumstances").

Nor does the history of the Fifth Amendment support *Griffin*. At the time of the founding, English and American courts strongly encouraged defendants to give unsworn

statements and drew adverse inferences when they failed to do so. See *Mitchell*, *supra*, at 332 (SCALIA, J., dissenting); Alschuler, A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination 204 (R. Hemholz et al. eds. 1997). Given *Griffin*'s indefensible foundation, I would not extend it to a defendant's silence during a precustodial interview. I agree with the plurality that Salinas' Fifth Amendment claim fails and, therefore, concur in the judgment.

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

In my view the Fifth Amendment here prohibits the prosecution from commenting on the petitioner's silence in response to police questioning. And I dissent from the Court's judgment.

I

In January 1993, Houston police began to suspect petitioner Genovevo Salinas of having committed two murders the previous month. They asked Salinas to come to the police station "to take photographs and to clear him as [a] suspect." App. 3. At the station, police took Salinas into what he describes as "an interview room." Brief for Petitioner 3. Because he was "free to leave at that time," App. 14, they did not give him *Miranda* warnings. The police then asked Salinas questions. And Salinas answered until the police asked him whether the shotgun from his home "would match the shells recovered at the scene of the murder." App. 17. At that point Salinas fell silent. *Ibid.*

Salinas was later tried for, and convicted of, murder. At closing argument, drawing on testimony he had elicited earlier, the prosecutor pointed out to the jury that Salinas, during his earlier questioning at the police station, had remained silent when asked about the shotgun. The prosecutor told the jury, among other things, that "'[a]n innocent person'" would have said, "'What are you talking about? I didn't do

that. I wasn't there.'" 368 S. W. 3d 550, 556 (Tex. App. 2011). But Salinas, the prosecutor said, "'didn't respond that way.'" *Ibid.* Rather, "'[h]e wouldn't answer that question.'" *Ibid.*

II

The question before us is whether the Fifth Amendment prohibits the prosecutor from eliciting and commenting upon the evidence about Salinas' silence. The plurality believes that the Amendment does not bar the evidence and comments because Salinas "did not expressly invoke the privilege against self-incrimination" when he fell silent during the questioning at the police station. *Ante,* at 181. But, in my view, that conclusion is inconsistent with this Court's case law and its underlying practical rationale.

A

The Fifth Amendment prohibits prosecutors from commenting on an individual's silence where that silence amounts to an effort to avoid becoming "a witness against himself." This Court has specified that "a rule of evidence" permitting "commen[t] . . . by counsel" in a criminal case upon a defendant's failure to testify "violates the Fifth Amendment." *Griffin* v. *California*, 380 U. S. 609, 610, n. 2, 613 (1965) (internal quotation marks omitted). See also *United States* v. *Patane*, 542 U. S. 630, 637 (2004) (plurality opinion); *Turner* v. *United States*, 396 U. S. 398, 433 (1970) (Black, J., dissenting). And, since "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation," the "prosecution may not . . . use at trial *the fact that he stood mute* or claimed his privilege in the face of accusation." *Miranda* v. *Arizona*, 384 U. S. 436, 468, n. 37 (1966) (emphasis added).

Particularly in the context of police interrogation, a contrary rule would undermine the basic protection that the Fifth Amendment provides. Cf. *Kastigar* v. *United States*,

406 U. S. 441, 461 (1972) ("The privilege . . . usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer"). To permit a prosecutor to comment on a defendant's constitutionally protected silence would put that defendant in an impossible predicament. He must either answer the question or remain silent. If he answers the question, he may well reveal, for example, prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent. See, *e. g.*, *Griffin*, *supra*, at 613; Kassin, Inside Interrogation: Why Innocent People Confess, 32 Am. J. Trial Advoc. 525, 537 (2009). If he remains silent, the prosecutor may well use that silence to suggest a consciousness of guilt. And if the defendant then takes the witness stand in order to explain either his speech or his silence, the prosecution may introduce, say, for impeachment purposes, a prior conviction that the law would otherwise make inadmissible. Thus, where the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as "a witness against himself"—very much what the Fifth Amendment forbids. Cf. *Pennsylvania* v. *Muniz*, 496 U. S. 582, 596–597 (1990) (definition of "testimonial" includes responses to questions that require a suspect to communicate an express or implied assertion of fact or belief). And that is similarly so whether the questioned individual, as part of his decision to remain silent, invokes the Fifth Amendment explicitly or implicitly, through words, through deeds, or through reference to surrounding circumstances.

B

It is consequently not surprising that this Court, more than half a century ago, explained that "no ritualistic formula is necessary in order to invoke the privilege." *Quinn* v. *United States*, 349 U. S. 155, 164 (1955). Thus, a prosecutor may not comment on a defendant's failure to testify at trial—even if neither the defendant nor anyone else ever mentions

a Fifth Amendment right not to do so. Circumstances, not a defendant's statement, tie the defendant's silence to the right. Similarly, a prosecutor may not comment on the fact that a defendant in custody, *after* receiving *Miranda* warnings, "stood mute"—regardless of whether he "claimed his privilege" in so many words. *Miranda*, *supra*, at 468, n. 37. Again, it is not any explicit statement but, instead, the defendant's deeds (silence) and circumstances (receipt of the warnings) that tie together silence and constitutional right. Most lower courts have so construed the law, even where the defendant, having received *Miranda* warnings, answers some questions while remaining silent as to others. See, *e. g.*, *Hurd* v. *Terhune*, 619 F. 3d 1080, 1087 (CA9 2010); *United States* v. *May*, 52 F. 3d 885, 890 (CA10 1995); *United States* v. *Scott*, 47 F. 3d 904, 907 (CA7 1995); *United States* v. *Canterbury*, 985 F. 2d 483, 486 (CA10 1993); *Grieco* v. *Hall*, 641 F. 2d 1029, 1034 (CA1 1981); *United States* v. *Ghiz*, 491 F. 2d 599, 600 (CA4 1974). But see, *e. g.*, *United States* v. *Harris*, 956 F. 2d 177, 181 (CA8 1992).

The cases in which this Court has insisted that a defendant expressly mention the Fifth Amendment by name in order to rely on its privilege to protect silence are cases where (1) the circumstances surrounding the silence (unlike the present case) did not give rise to an inference that the defendant intended, by his silence, to exercise his Fifth Amendment rights; *and* (2) the questioner greeted by the silence (again unlike the present case) had a special need to know whether the defendant sought to rely on the protections of the Fifth Amendment. See *ante*, at 183 (explaining that, in such cases, the government needs to know the basis for refusing to answer "so that it may either argue that the testimony sought could not be self-incriminating or cure any potential self-incrimination through a grant of immunity" (citation omitted)). These cases include *Roberts*, *Rogers*, *Sullivan*, *Vajtauer*, and *Jenkins*—all of which at least do involve the protection of *silence*—and also include cases emphasized by

the plurality that are not even about silence—namely, *Murphy* and *Garner*.

In *Roberts* and *Rogers*, the individual refused to answer questions that government investigators (in *Roberts*) and a grand jury (in *Rogers*) asked, principally because the individual wanted to avoid incriminating *other persons*. *Roberts* v. *United States*, 445 U. S. 552, 553–556 (1980); *Rogers* v. *United States*, 340 U. S. 367, 368–370, and n. 4 (1951). But the Fifth Amendment does not protect someone from incriminating others; it protects against *self*-incrimination. In turn, neither the nature of the questions nor the circumstances of the refusal to answer them provided any basis to infer a tie between the silence and the Fifth Amendment, while knowledge of any such tie would have proved critical to the questioner's determination as to *whether* the defendant had any proper legal basis for claiming Fifth Amendment protection.

In *Sullivan*, the defendant's silence consisted of his failure to file a tax return—a return, he later claimed, that would have revealed his illegal activity as a bootlegger. *United States* v. *Sullivan*, 274 U. S. 259, 262–264 (1927). The circumstances did not give rise to an inference of a tie between his silence (in the form of failing to file a tax return) and the Fifth Amendment; and, if he really did want to rely on the Fifth Amendment, then the Government would have had special need to know of any such tie in order to determine whether, for example, the assertion of privilege was valid and, perhaps, an offer of immunity was appropriate.

In *Vajtauer*, an alien refused to answer questions asked by an immigration official at a deportation proceeding. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927). Here, the circumstances gave rise to a distinct inference that the alien was *not* invoking any Fifth Amendment privilege: The alien's lawyer had stated quite publicly at the hearing that he advised his client to remain silent *not* on Fifth Amendment grounds; rather, the lawyer

"'advise[d] the alien not to answer any further questions until the evidence upon which the warrant is based will be presented here.'" *Id.*, at 106–107 (quoting the lawyer). This statement weakened or destroyed the possibility of a silence-Fifth Amendment linkage; the Government could not challenge his right to invoke the Fifth Amendment; and this Court described its later invocation as "evidently an afterthought." *Id.*, at 113.

Perhaps most illustrative is *Jenkins*, a case upon which the plurality relies, *ante*, at 188, n. 3, and upon which the Texas Court of Criminal Appeals relied almost exclusively, 369 S. W. 3d 176, 178–179 (2012). Jenkins killed someone, and was not arrested until he turned himself in two weeks later. *Jenkins* v. *Anderson*, 447 U. S. 231, 232 (1980). On cross-examination at his trial, Jenkins claimed that his killing was in self-defense after being attacked. *Id.*, at 232–233. The prosecutor then asked why he did not report the alleged attack, and in closing argument suggested that Jenkins' failure to do so cast doubt on his claim to have acted in self-defense. *Id.*, at 233–234. We explained that this unusual form of "prearrest silence" was not constitutionally protected from use at trial. *Id.*, at 240. Perhaps even more aptly, Justice Stevens' concurrence noted that "the privilege against compulsory self-incrimination is simply irrelevant" in such circumstances. *Id.*, at 241 (footnote omitted). How would anyone have known that Jenkins, while failing to report an attack, was relying on the Fifth Amendment? And how would the government have had any way of determining whether his claim was valid? In *Jenkins*, as in *Roberts*, *Rogers*, *Sullivan*, and *Vajtauer*, no one had any reason to connect silence to the Fifth Amendment; and the government had no opportunity to contest any alleged connection.

Still further afield from today's case are *Murphy* and *Garner*, neither of which involved silence at all. Rather, in both cases, a defendant had earlier *answered* questions posed by the government—in *Murphy*, by speaking with a probation

officer, and in *Garner*, by completing a tax return. *Minnesota* v. *Murphy*, 465 U. S. 420, 422–425 (1984); *Garner* v. *United States*, 424 U. S. 648, 649–650 (1976). At the time of providing answers, neither circumstances nor deeds nor words suggested reliance on the Fifth Amendment: Murphy simply answered questions posed by his probation officer; Garner simply filled out a tax return. They did not argue that their self-incriminating statements had been "compelled" in violation of the Fifth Amendment until later, at trial. *Murphy*, *supra*, at 425, 431; *Garner*, *supra*, at 649, 665. The Court held that those statements were *not* compelled. *Murphy*, *supra*, at 440; *Garner*, *supra*, at 665. The circumstances indicated that the defendants had affirmatively chosen to speak and to write.

Thus, we have two sets of cases: One where express invocation of the Fifth Amendment was not required to tie one's silence to its protections, and another where something like express invocation was required, because circumstances demanded some explanation for the silence (or the statements) in order to indicate that the Fifth Amendment was at issue.

There is also a third set of cases, cases that may well fit into the second category but where the Court has held that the Fifth Amendment both applies and does not require express invocation *despite* ambiguous circumstances. The Court in those cases has made clear that an individual, when silent, need not expressly invoke the Fifth Amendment if there are "inherently compelling pressures" not to do so. *Miranda*, 384 U. S., at 467. Thus, in *Garrity* v. *New Jersey*, 385 U. S. 493, 497 (1967), the Court held that no explicit assertion of the Fifth Amendment was required where, in the course of an investigation, such assertion would, by law, have cost police officers their jobs. Similarly, this Court did not require explicit assertion in response to a grand jury subpoena where that assertion would have cost two architects their public contracts or a political official his job. *Lefkowitz* v. *Turley*, 414 U. S. 70, 75–76 (1973); *Lefkowitz* v. *Cun-*

ningham, 431 U. S. 801, 802–804 (1977). In *Leary* v. *United States*, 395 U. S. 6, 28–29 (1969), the Court held that the Fifth Amendment did not require explicit assertion of the privilege against self-incrimination because, in the context of the Marihuana Tax Act, such assertion would have been inherently incriminating. In *Albertson* v. *Subversive Activities Control Bd.*, 382 U. S. 70, 77–79 (1965), we held the same where explicit assertion of the Fifth Amendment would have required, as a first step, the potentially incriminating admission of membership in the Communist Party. The Court has also held that gamblers, without explicitly invoking the Fifth Amendment, need not comply with tax requirements that would, inherently and directly, lead to self-incrimination. *Marchetti* v. *United States*, 390 U. S. 39, 60–61 (1968); *Grosso* v. *United States*, 390 U. S. 62, 67–68 (1968). All told, this third category of cases receives the same treatment as the first: Circumstances, rather than explicit invocation, trigger the protection of the Fifth Amendment. So, too, in today's case.

The plurality refers to one additional case, namely, *Berghuis* v. *Thompkins*, 560 U. S. 370 (2010). See *ante*, at 188. But that case is here beside the point. In *Berghuis*, the defendant was in custody, he had been informed of his *Miranda* rights, and he was subsequently silent in the face of 2 hours and 45 minutes of questioning before he offered any substantive answers. 560 U. S., at 374–376. The Court held that he had waived his Fifth Amendment rights in respect to his *later speech*. The Court said nothing at all about a prosecutor's right to comment on his preceding silence, and no prosecutor sought to do so. Indeed, how could a prosecutor lawfully have tried to do so, given this Court's statement in *Miranda* itself that a prosecutor cannot comment on the fact that, after receiving *Miranda* warnings, the suspect "stood mute"? 384 U. S., at 468, n. 37.

We end where we began. "[N]o ritualistic formula is necessary in order to invoke the privilege." *Quinn*, 349

U. S., at 164. Much depends on the circumstances of the particular case, the most important circumstances being: (1) whether one can fairly infer that the individual being questioned is invoking the Amendment's protection; (2) if that is unclear, whether it is particularly important for the questioner to know whether the individual is doing so; and (3) even if it is, whether, in any event, there is a good reason for excusing the individual from referring to the Fifth Amendment, such as inherent penalization simply by answering.

C

Applying these principles to the present case, I would hold that Salinas need not have expressly invoked the Fifth Amendment. The context was that of a criminal investigation. Police told Salinas that and made clear that he was a suspect. His interrogation took place at the police station. Salinas was not represented by counsel. The relevant question—about whether the shotgun from Salinas' home would incriminate him—amounted to a switch in subject matter. And it was obvious that the new question sought to ferret out whether Salinas was guilty of murder. See 368 S. W. 3d, at 552–553.

These circumstances give rise to a reasonable inference that Salinas' silence derived from an exercise of his Fifth Amendment rights. This Court has recognized repeatedly that many, indeed most, Americans are aware that they have a constitutional right not to incriminate themselves by answering questions posed by the police during an interrogation conducted in order to figure out the perpetrator of a crime. See *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000); *Brogan* v. *United States*, 522 U. S. 398, 405 (1998); *Michigan* v. *Tucker*, 417 U. S. 433, 439 (1974). The nature of the surroundings, the switch of topic, the particular question—all suggested that the right we have and generally *know* we have was at issue at the critical moment here. Salinas, not being represented by counsel, would not likely

have used the precise words "Fifth Amendment" to invoke his rights because he would not likely have been aware of technical legal requirements, such as a need to identify the Fifth Amendment by name.

At the same time, the need to categorize Salinas' silence as based on the Fifth Amendment is supported here by the presence, in full force, of the predicament I discussed earlier, namely, that of not forcing Salinas to choose between incrimination through speech and incrimination through silence. That need is also supported by the absence of any special reason that the police had to know, with certainty, whether Salinas was, in fact, relying on the Fifth Amendment—such as whether to doubt that there really was a risk of self-incrimination, see *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951), or whether to grant immunity, see *Kastigar*, 406 U. S., at 448. Given these circumstances, Salinas' silence was "sufficient to put the [government] on notice of an apparent claim of the privilege." *Quinn*, *supra*, at 164. That being so, for reasons similar to those given in *Griffin*, the Fifth Amendment bars the evidence of silence admitted against Salinas and mentioned by the prosecutor. See 380 U. S., at 614–615.

D

I recognize that other cases may arise where facts and circumstances surrounding an individual's silence present a closer question. The critical question—whether those circumstances give rise to a fair inference that the silence rests on the Fifth Amendment—will not always prove easy to administer. But that consideration does not support the plurality's rule-based approach here, for the administrative problems accompanying the plurality's approach are even worse.

The plurality says that a suspect must "expressly invoke the privilege against self-incrimination." *Ante*, at 181. But does it really mean that the suspect must use the exact

words "Fifth Amendment"? How can an individual who is not a lawyer know that these particular words are legally magic? Nor does the Solicitor General help when he adds that the suspect may "mak[e] the claim 'in any language that [the questioner] may reasonably be expected to understand as an attempt to invoke the privilege.'" Brief for United States as *Amicus Curiae* 22 (quoting *Quinn*, 349 U. S., at 162–163; second alteration in original). What counts as "making the claim"? Suppose the individual says, "Let's discuss something else," or "I'm not sure I want to answer that"; or suppose he just gets up and leaves the room. Cf. *Davis* v. *Mississippi*, 394 U. S. 721, 727, n. 6 (1969) (affirming "the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes[,] they have no right to compel them to answer"); *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984) (noting that even someone detained in a *Terry* stop "is not obliged to respond" to police questions); *Florida* v. *Royer*, 460 U. S. 491, 497–498 (1983) (plurality opinion). How is simple silence in the present context any different?

The basic problem for the plurality is that an effort to have a simple, clear "explicit statement" rule poses a serious obstacle to those who, like Salinas, seek to assert their basic Fifth Amendment right to remain silent, for they are likely unaware of any such linguistic detail. At the same time, acknowledging that our case law does not require use of specific words, see *ante*, at 181, leaves the plurality without the administrative benefits it might hope to find in requiring that detail.

Far better, in my view, to pose the relevant question directly: Can one fairly infer from an individual's silence and surrounding circumstances an exercise of the Fifth Amendment's privilege? The need for simplicity, the constitutional importance of applying the Fifth Amendment to those who seek its protection, and this Court's case law all suggest

that this is the right question to ask here. And the answer to that question in the circumstances of today's case is clearly: yes.

For these reasons, I believe that the Fifth Amendment prohibits a prosecutor from commenting on Salinas' silence. I respectfully dissent from the Court's judgment.

Syllabus

AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL. *v.* ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

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

No. 12–10. Argued April 22, 2013—Decided June 20, 2013

In the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U. S. C. § 7601 *et seq.*, Congress has authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to combat HIV/AIDS worldwide. The Leadership Act imposes two related conditions: (1) No funds "may be used to promote or advocate the legalization or practice of prostitution," § 7631(e); and (2) no funds may be used by an organization "that does not have a policy explicitly opposing prostitution," § 7631(f). To enforce the second condition, known as the Policy Requirement, the Department of Health and Human Services (HHS) and the United States Agency for International Development require funding recipients to agree in their award documents that they oppose prostitution.

Respondents, recipients of Leadership Act funds who wish to remain neutral on prostitution, sought a declaratory judgment that the Policy Requirement violates their First Amendment rights. The District Court issued a preliminary injunction, barring the Government from cutting off respondents' Leadership Act funding during the litigation or from otherwise taking action based on their privately funded speech. The Second Circuit affirmed, concluding that the Policy Requirement, as implemented by the agencies, violated respondents' freedom of speech.

Held: The Policy Requirement violates the First Amendment by compelling as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. Pp. 213–221.

(a) The Policy Requirement mandates that recipients of federal funds explicitly agree with the Government's policy to oppose prostitution. The First Amendment, however, "prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61. As a direct regulation, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition of federal funding. P. 213.

(b) The Spending Clause grants Congress broad discretion to fund private programs or activities for the "general Welfare," Art. I, § 8, cl. 1, including authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust* v. *Sullivan*, 500 U. S. 173, 195, n. 4. As a general matter, if a party objects to those limits, its recourse is to decline the funds. In some cases, however, a funding condition can result in an unconstitutional burden on First Amendment rights. The distinction that has emerged from this Court's cases is between conditions that define the limits of the Government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the federal program itself.

Rust illustrates the distinction. In that case, the Court considered Title X of the Public Health Service Act, which authorized grants to health-care organizations offering family planning services, but prohibited federal funds from being "used in programs where abortion is a method of family planning." 500 U. S., at 178. To enforce the provision, HHS regulations barred Title X projects from advocating abortion and required grantees to keep their Title X projects separate from their other projects. The regulations were valid, the Court explained, because they governed only the scope of the grantee's Title X projects, leaving the grantee free to engage in abortion advocacy through programs that were independent from its Title X projects. Because the regulations did not prohibit speech "outside the scope of the federally funded program," they did not run afoul of the First Amendment. *Id.*, at 197. Pp. 213–217.

(c) The distinction between conditions that define a federal program and those that reach outside it is not always self-evident, but the Court is confident that the Policy Requirement falls on the unconstitutional side of the line. To begin, the Leadership Act's other funding condition, which prohibits Leadership Act funds from being used "to promote or advocate the legalization or practice of prostitution or sex trafficking," § 7631(e), ensures that federal funds will not be used for prohibited purposes. The Policy Requirement thus must be doing something more—and it is. By demanding that funding recipients adopt and espouse, as their own, the Government's view on an issue of public concern, the Policy Requirement by its very nature affects "protected conduct outside the scope of the federally funded program." *Rust*, *supra*, at 197. A recipient cannot avow the belief dictated by the condition when spending Leadership Act funds, and assert a contrary belief when participating in activities on its own time and dime.

The Government suggests that if funding recipients could promote or condone prostitution using private funds, "it would undermine the

government's program and confuse its message opposing prostitution." Brief for Petitioners 37. But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. That condition on funding violates the First Amendment. Pp. 217–221.

651 F. 3d 218, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 221. KAGAN, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Srinivasan argued the cause for petitioners. With him on the briefs were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Jeffrey B. Wall*, *Michael S. Raab*, and *Sharon Swingle*.

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**Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber* filed a brief for the American Center for Law and Justice as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Arthur N. Eisenberg*, *Mariko Hirose*, *Steven R. Shapiro*, and *Lenora M. Lapidus*; for the Becket Fund for Religious Liberty et al. by *Eugene Volokh* and *Andrew L. Frey*; for the Cato Institute by *Steven A. Engel* and *Ilya Shapiro*; for the Deans and Professors of Public Health et al. by *Julie Carpenter* and *Jessica Ring Amunson*; for Heartbeat International, Inc., by *Brian J. Murray*; for Independent Sector by *Lawrence S. Lustberg*; and for the Thomas Jefferson Center for the Protection of Free Expression by *J. Joshua Wheeler*.

Briefs of *amici curiae* were filed for Certain Current and Former Members of Congress by *Mark E. Haddad*, *Carter G. Phillips*, *Daron Watts*, and *Tacy F. Flint*; for the Coalition Against Trafficking in Women et al. by *Alexander A. Yanos*; for The Rutherford Institute by *Megan L. Brown* and *John W. Whitehead*; and for the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat) by *Igor V. Timofeyev*.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act), 117 Stat. 711, as amended, 22 U. S. C. § 7601 *et seq.*, outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. The Act imposes two related conditions on that funding: First, no funds made available by the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." § 7631(e). And second, no funds may be used by an organization "that does not have a policy explicitly opposing prostitution and sex trafficking." § 7631(f). This case concerns the second of these conditions, referred to as the Policy Requirement. The question is whether that funding condition violates a recipient's First Amendment rights.

I

Congress passed the Leadership Act in 2003 after finding that HIV/AIDS had "assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation." 22 U. S. C. § 7601(1). According to congressional findings, more than 65 million people had been infected by HIV and more than 25 million had lost their lives, making HIV/AIDS the fourth highest cause of death worldwide. In sub-Saharan Africa alone, AIDS had claimed the lives of more than 19 million individuals and was projected to kill a full quarter of the population of that area over the next decade. The disease not only directly endangered those infected, but also increased the potential for social and political instability and economic devastation, posing a security issue for the entire international community. §§ 7601(2)–(10).

In the Leadership Act, Congress directed the President to establish a "comprehensive, integrated" strategy to combat HIV/AIDS around the world. § 7611(a). The Act sets out 29 different objectives the President's strategy should seek to fulfill, reflecting a multitude of approaches to the problem. The strategy must include, among other things, plans to increase the availability of treatment for infected individuals, prevent new infections, support the care of those affected by the disease, promote training for physicians and other health-care workers, and accelerate research on HIV/AIDS prevention methods, all while providing a framework for cooperation with international organizations and partner countries to further the goals of the program. §§ 7611(a)(1)–(29) (2006 ed., Supp. V).

The Act "make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." § 7611(a)(12); see also § 7601(15) ("Successful strategies to stem the spread of the HIV/AIDS pandemic will require . . . measures to address the social and behavioral causes of the problem"). The Act's approach to reducing behavioral risks is multifaceted. The President's strategy for addressing such risks must, for example, promote abstinence, encourage monogamy, increase the availability of condoms, promote voluntary counseling and treatment for drug users, and, as relevant here, "educat[e] men and boys about the risks of procuring sex commercially" as well as "promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers." § 7611(a)(12). Congress found that the "sex industry, the trafficking of individuals into such industry, and sexual violence" were factors in the spread of the HIV/AIDS epidemic, and determined that "it should be the policy of the United States to eradicate" prostitution and "other sexual victimization." § 7601(23).

The United States has enlisted the assistance of nongovernmental organizations to help achieve the many goals of the program. Such organizations "with experience in health

care and HIV/AIDS counseling," Congress found, "have proven effective in combating the HIV/AIDS pandemic and can be a resource in . . . provid[ing] treatment and care for individuals infected with HIV/AIDS." § 7601(18). Since 2003, Congress has authorized the appropriation of billions of dollars for funding these organizations' fight against HIV/AIDS around the world. § 2151b–2(c); § 7671.

Those funds, however, come with two conditions: First, no funds made available to carry out the Leadership Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." § 7631(e). Second, no funds made available may "provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except . . . to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency." § 7631(f). It is this second condition—the Policy Requirement—that is at issue here.

The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing implementation of the Leadership Act. To enforce the Policy Requirement, the agencies have directed that the recipient of any funding under the Act agree in the award document that it is opposed to "prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 CFR § 89.1(b) (2012); USAID, Acquisition & Assistance Policy Directive 12–04, p. 6 (AAPD 12–04).

II

Respondents are a group of domestic organizations engaged in combating HIV/AIDS overseas. In addition to substantial private funding, they receive billions annually in financial assistance from the United States, including under

the Leadership Act. Their work includes programs aimed at limiting injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India. Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.

In 2005, respondents Alliance for Open Society International and Pathfinder International commenced this litigation, seeking a declaratory judgment that the Government's implementation of the Policy Requirement violated their First Amendment rights. Respondents sought a preliminary injunction barring the Government from cutting off their funding under the Act for the duration of the litigation, from unilaterally terminating their cooperative agreements with the United States, or from otherwise taking action solely on the basis of respondents' own privately funded speech. The District Court granted such a preliminary injunction, and the Government appealed.

While the appeal was pending, HHS and USAID issued guidelines on how recipients of Leadership Act funds could retain funding while working with affiliated organizations not bound by the Policy Requirement. The guidelines permit funding recipients to work with affiliated organizations that "engage[ ] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking" as long as the recipients retain "objective integrity and independence from any affiliated organization." 45 CFR § 89.3; see also AAPD 12–04, at 6–7. Whether sufficient sep-

aration exists is determined by the totality of the circumstances, including "but not . . . limited to" (1) whether the organizations are legally separate; (2) whether they have separate personnel; (3) whether they keep separate accounting records; (4) the degree of separation in the organizations' facilities; and (5) the extent to which signs and other forms of identification distinguish the organizations. 45 CFR §§89.3(b)(1)–(5); see also AAPD 12–04, at 6–7.

The Court of Appeals summarily remanded the case to the District Court to consider whether the preliminary injunction was still appropriate in light of the new guidelines. On remand, the District Court issued a new preliminary injunction along the same lines as the first, and the Government renewed its appeal.

The Court of Appeals affirmed, concluding that respondents had demonstrated a likelihood of success on the merits of their First Amendment challenge under this Court's "unconstitutional conditions" doctrine. 651 F. 3d 218 (CA2 2011). Under this doctrine, the court reasoned, "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *Id.*, at 231 (citing *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972)). And a condition that compels recipients "to espouse the government's position" on a subject of international debate could not be squared with the First Amendment. 651 F. 3d, at 234. The court concluded that "the Policy Requirement, as implemented by the Agencies, falls well beyond what the Supreme Court . . . ha[s] upheld as permissible funding conditions." *Ibid.*

Judge Straub dissented, expressing his view that the Policy Requirement was an "entirely rational exercise of Congress's powers pursuant to the Spending Clause." *Id.*, at 240.

We granted certiorari. 568 U. S. 1119 (2013).

III

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government's policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61 (2006) (citing *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), and *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641 (1994); see *Knox* v. *Service Employees*, 567 U. S. 298, 309 (2012) ("The government may not . . . compel the endorsement of ideas that it approves."). Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

A

The Spending Clause of the Federal Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, §8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the "general Welfare," including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust* v. *Sullivan*, 500 U. S. 173, 195, n. 4 (1991) ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights. See, *e. g.*, *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 212 (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for Internet access on the libraries' installing filtering software violated their First Amendment rights, explaining that "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance"); *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 546 (1983) (dismissing "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State" (internal quotation marks omitted)).

At the same time, however, we have held that the Government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Forum for Academic and Institutional Rights*, *supra*, at 59 (quoting *American Library Assn.*, *supra*, at 210). In some cases, a funding condition can result in an unconstitutional burden on First Amendment rights. See *Forum for Academic and Institutional Rights*, *supra*, at 59 (the First Amendment supplies "a limit on Congress' ability to place conditions on the receipt of funds").

The dissent thinks that can only be true when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. See *post*, at 222–223 (opinion of SCALIA, J.). Our precedents, however, are not so limited. In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to lever-

age funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 547 (2001).

A comparison of two cases helps illustrate the distinction: In *Regan* v. *Taxation With Representation of Washington*, the Court upheld a requirement that nonprofit organizations seeking tax-exempt status under 26 U. S. C. § 501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status, we explained, "ha[d] much the same effect as a cash grant to the organization." 461 U. S., at 544. And by limiting § 501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely "chose[n] not to subsidize lobbying." *Ibid.* In rejecting the nonprofit's First Amendment claim, the Court highlighted—in the text of its opinion, but see *post*, at 225—the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a "dual structure" it had used in the past—separately incorporating as a § 501(c)(3) organization and § 501(c)(4) organization—the nonprofit could continue to claim § 501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its § 501(c)(4) capacity with separate funds. 461 U. S., at 544. Maintaining such a structure, the Court noted, was not "unduly burdensome." *Id.*, at 545, n. 6. The condition thus did not deny the organization a government benefit "on account of its intention to lobby." *Id.*, at 545.

In *FCC* v. *League of Women Voters of Cal.*, by contrast, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private

funds. 468 U. S. 364, 399–401 (1984). Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was "barred absolutely from all editorializing." *Id.*, at 400. Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds "to make known its views on matters of public importance." 468 U. S., at 400. The prohibition thus went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and instead leveraged the federal funding to regulate the stations' speech outside the scope of the program. *Id.*, at 399 (internal quotation marks omitted).

Our decision in *Rust* v. *Sullivan* elaborated on the approach reflected in *Regan* and *League of Women Voters*. In *Rust*, we considered Title X of the Public Health Service Act, a Spending Clause program that issued grants to nonprofit health-care organizations "to assist in the establishment and operation of voluntary family planning projects [to] offer a broad range of acceptable and effective family planning methods and services." 500 U. S., at 178 (internal quotation marks omitted). The organizations received funds from a variety of sources other than the Federal Government for a variety of purposes. The Act, however, prohibited the Title X federal funds from being "used in programs where abortion is a method of family planning." *Ibid.* (internal quotation marks omitted). To enforce this provision, HHS regulations barred Title X projects from advocating abortion as a method of family planning, and required grantees to ensure that their Title X projects were " 'physically and financially separate' " from their other projects that engaged in the prohibited activities. *Id.*, at 180–181 (quoting 42 CFR § 59.9 (1989)). A group of Title X funding recipients brought suit, claiming the regulations imposed an unconstitutional condition on their First Amendment rights. We rejected their claim.

We explained that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply "designed to ensure that the limits of the federal program are observed," and "that public funds [are] spent for the purposes for which they were authorized." *Rust*, 500 U. S., at 193, 196.

In making this determination, the Court stressed that "Title X expressly distinguishes between a Title X *grantee* and a Title X *project*." *Id.*, at 196. The regulations governed only the scope of the grantee's Title X projects, leaving it "unfettered in its other activities." *Ibid.* "The Title X *grantee* can continue to . . . engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *Ibid.* Because the regulations did not "prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program," they did not run afoul of the First Amendment. *Id.*, at 197.

B

As noted, the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident. As Justice Cardozo put it in a related context, "Definition more precise must abide the wisdom of the future." *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 591 (1937). Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

To begin, it is important to recall that the Leadership Act has two conditions relevant here. The first—unchallenged in this litigation—prohibits Leadership Act funds from being used "to promote or advocate the legalization or practice of

prostitution or sex trafficking." 22 U. S. C. § 7631(e). The Government concedes that § 7631(e) by itself ensures that federal funds will not be used for the prohibited purposes. Brief for Petitioners 26–27.

The Policy Requirement therefore must be doing something more—and it is. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations "who believe in its ideas to carry them to fruition." *Post*, at 221. As an initial matter, whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients' speech and activities, a ground for terminating a grant after selection is complete. See AAPD 12–04, at 12. In any event, as the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Reply Brief 5. Rather, it explains, "Congress has expressed its purpose 'to eradicate' prostitution and sex trafficking, 22 U. S. C. 7601(23), and it wants recipients *to adopt* a similar stance." Brief for Petitioners 32 (emphasis added). This case is not about the Government's ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding.

By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects "protected conduct outside the scope of the federally funded program." *Rust*, 500 U. S., at 197. A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient. See *ibid.* ("our 'unconstitutional conditions' cases

involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program").

The Government contends that the affiliate guidelines, established while this litigation was pending, save the program. Under those guidelines, funding recipients are permitted to work with affiliated organizations that do not abide by the condition, as long as the recipients retain "objective integrity and independence" from the unfettered affiliates. 45 CFR § 89.3. The Government suggests the guidelines alleviate any unconstitutional burden on respondents' First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with the Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby "cabin[ing] the effects" of the Policy Requirement within the scope of the federal program. Brief for Petitioners 38–39, 44–49.

Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. See *Rust*, *supra*, at 197–198. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. See 45 CFR § 89.3 (allowing funding recipients to work with affiliates whose conduct is "inconsistent with *the*

recipient's opposition to the practices of prostitution and sex trafficking" (emphasis added)).

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient's private funds "to be used to promote prostitution or sex trafficking." Brief for Petitioners 27 (citing *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 30–31 (2010). That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government's argument were correct, *League of Women Voters* would have come out differently, and much of the reasoning of *Regan* and *Rust* would have been beside the point.

The Government cites but one case to support that argument, *Holder* v. *Humanitarian Law Project*. That case concerned the quite different context of a ban on providing material support to terrorist organizations, where the record indicated that support for those organizations' nonviolent operations was funneled to support their violent activities. 561 U. S., at 30.

Pressing its argument further, the Government contends that "if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public *or private* funds, it would undermine the government's program and confuse its message opposing prostitution and sex trafficking." Brief for Petitioners 37 (emphasis added). But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: "If there is any fixed star in our constitutional constellation, it is that no

official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U. S., at 642.

* * *

The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained. The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Leadership Act provides that "any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking" may not receive funds appropriated under the Act. 22 U. S. C. § 7631(f). This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS. That is perfectly permissible under the Constitution.

The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common common sense. For example:

One of the purposes of America's foreign-aid programs is the fostering of good will towards this country. If the organization Hamas—reputed to have an efficient system for delivering welfare—were excluded from a program for the distribution of U. S. food assistance, no one could reasonably object. And that would remain true if Hamas were an organization of United States citizens entitled to the protection of the Constitution. So long as the unfunded organization remains free to engage in its activities (including anti-American propaganda) "without federal assistance," *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 212 (2003) (plurality opinion), refusing to make use of its assistance for an enterprise to which it is opposed does not abridge its speech. And the same is true when the rejected organization is not affirmatively opposed to, but merely unsupportive of, the object of the federal program, which appears to be the case here. (Respondents do not promote prostitution, but neither do they wish to oppose it.) A federal program to encourage healthy eating habits need not be administered by the American Gourmet Society, which has nothing against healthy food but does not insist upon it.

The argument is that this commonsense principle will enable the government to discriminate against, and injure, points of view to which it is opposed. Of course the Constitution does not prohibit government spending that discriminates against, and injures, points of view to which the government is opposed; every government program which takes a position on a controversial issue does that. Antismoking programs injure cigar aficionados, programs encouraging sexual abstinence injure free-love advocates, etc. The constitutional prohibition at issue here is not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment's prohibition against the coercing of speech. I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one runs afoul of that prohibition even when the condi-

tion is irrelevant to the goals of the program. Not every disadvantage is a coercion.

But that is not the issue before us here. Here the views that the Government demands an applicant forswear—or that the Government insists an applicant favor—are relevant to the program in question. The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors. It would not, for example, permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure prostitution. But here a central part of the Government's HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.

According to the Court, however, this transgresses a constitutional line between conditions that operate *inside* a spending program and those that control speech *outside* of it. I am at a loss to explain what this central pillar of the Court's opinion—this distinction that the Court itself admits is "hardly clear" and "not always self-evident," *ante*, at 215, 217—has to do with the First Amendment. The distinction was alluded to, to be sure, in *Rust* v. *Sullivan*, 500 U. S. 173 (1991), but not as (what the Court now makes it) an invariable requirement for First Amendment validity. That the pro-abortion speech prohibition was limited to "inside the program" speech was relevant in *Rust* because the program itself was not an anti-abortion program. The Government remained neutral on that controversial issue, but did not wish abortion to be promoted within its family-planning-services program. The statutory objective could not be impaired, in other words, by "outside the program" pro-abortion speech. The purpose of the limitation was to pre-

vent Government funding from providing the *means* of pro-abortion propaganda, which the Government did not wish (and had no constitutional obligation) to provide. The situation here is vastly different. Elimination of prostitution *is* an objective of the HIV/AIDS program, and *any* promotion of prostitution—whether made inside or outside the program—*does* harm the program.

Of course the most obvious manner in which the admission to a program of an ideological opponent can frustrate the purpose of the program is by freeing up the opponent's funds for use in its ideological opposition. To use the Hamas example again: Subsidizing that organization's provision of social services enables the money that it would otherwise use for that purpose to be used, instead, for anti-American propaganda. Perhaps that problem does not exist in this case since the respondents do not affirmatively promote prostitution. But the Court's analysis categorically rejects that justification for ideological requirements in *all* cases, demanding "record indica[tion]" that "federal funding will simply supplant private funding, rather than pay for new programs." *Ante,* at 220. This seems to me quite naive. Money is fungible. The economic reality is that when NGOs can conduct their AIDS work on the Government's dime, they can expend greater resources on policies that undercut the Leadership Act. The Government need not establish by record evidence that this will happen. To make it a valid consideration in determining participation in federal programs, it suffices that this is a real and obvious risk.

None of the cases the Court cites for its holding provide support. I have already discussed *Rust.* As for *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983), that case *upheld* rather than invalidated a prohibition against lobbying as a condition of receiving 26 U. S. C. § 501(c)(3) tax-exempt status. The Court's holding rested on the conclusion that "a legislature's decision not to subsidize

the exercise of a fundamental right does not infringe the right." 461 U. S., at 549. Today's opinion, *ante*, at 215, stresses the fact that these nonprofits were permitted to use a separate § 501(c)(4) affiliate for their lobbying—but that fact, alluded to in a footnote, *Regan*, 461 U. S., at 545, n. 6, was entirely nonessential to the Court's holding. Indeed, that rationale prompted a separate concurrence precisely because the majority of the Court did not rely upon it. See *id.*, at 551–554 (Blackmun, J., concurring). As for *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984), the ban on editorializing at issue there was disallowed precisely because it did not further a relevant, permissible policy of the Federal Communications Act—and indeed was simply incompatible with the Act's "affirmativ[e] encourage[ment]" of the "vigorous expression of controversial opinions" by licensed broadcasters. *Id.*, at 397.

The Court makes a head-fake at the unconstitutional conditions doctrine, *ante*, at 218–219, but that doctrine is of no help. There is no case of ours in which a condition that is relevant to a statute's valid purpose and that is not in itself unconstitutional (*e. g.*, a religious-affiliation condition that violates the Establishment Clause) has been held to violate the doctrine.* Moreover, as I suggested earlier, the contention that the condition here "coerces" respondents' speech is on its face implausible. Those organizations that wish to take a different tack with respect to prostitution "are as unconstrained now as they were before the enactment of [the Leadership Act]." *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 595 (1998) (SCALIA, J., concurring in judgment). As the Court acknowledges, "[a]s a general matter, if a party

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*In *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533 (2001), upon which the Court relies, the opinion specified that "in the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives," *id.*, at 548.

objects to a condition on the receipt of federal funding, its recourse is to decline the funds," *ante*, at 214, and to draw on its own coffers.

The majority cannot credibly say that this speech condition is coercive, so it does not. It pussyfoots around the lack of coercion by invalidating the Leadership Act for "*requiring* recipients to profess a specific belief" and "*demanding* that funding recipients adopt—as their own—the Government's view on an issue of public concern." *Ante*, at 218 (emphasis mine). But like King Cnut's commanding of the tides, here the Government's "requiring" and "demanding" have no coercive effect. In the end, and in the circumstances of this case, "compell[ing] *as a condition* of federal funding the affirmation of a belief," *ante*, at 221 (emphasis mine), is no compulsion at all. It is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject. Section 7631(f) "defin[es] the recipient" only to the extent he decides that it is in his interest to be so defined. *Ante*, at 218.

* * *

Ideological-commitment requirements such as the one here are quite rare; but making the choice between competing applicants on relevant ideological grounds is undoubtedly quite common. See, *e. g.*, *Finley*, *supra*. As far as the Constitution is concerned, it is quite impossible to distinguish between the two. If the government cannot demand a relevant ideological commitment as a condition of application, neither can it distinguish between applicants on a relevant ideological ground. And that is the real evil of today's opinion. One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons.

The Court's opinion contains stirring quotations from cases like *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), and *Turner Broadcasting System, Inc.* v. *FCC*, 512

U. S. 622 (1994). They serve only to distract attention from the elephant in the room: that the Government is not forcing *anyone* to say *anything*. What Congress has done here—requiring an ideological commitment relevant to the Government task at hand—is approved by the Constitution itself. Americans need not support the Constitution; they may be Communists or anarchists. But "[t]he Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support [the] Constitution." U. S. Const., Art. VI, cl. 3. The Framers saw the wisdom of imposing affirmative ideological commitments prerequisite to assisting in the government's work. And so should we.

Syllabus

AMERICAN EXPRESS CO. ET AL. *v.* ITALIAN COLORS RESTAURANT ET AL.

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

No. 12–133. Argued February 27, 2013—Decided June 20, 2013

An agreement between petitioners, American Express and a subsidiary, and respondents, merchants who accept American Express cards, requires all of their disputes to be resolved by arbitration and provides that there "shall be no right or authority for any Claims to be arbitrated on a class action basis." Respondents nonetheless filed a class action, claiming that petitioners violated § 1 of the Sherman Act and seeking treble damages for the class under § 4 of the Clayton Act. Petitioners moved to compel individual arbitration under the Federal Arbitration Act (FAA), but respondents countered that the cost of expert analysis necessary to prove the antitrust claims would greatly exceed the maximum recovery for an individual plaintiff. The District Court granted the motion and dismissed the lawsuits. The Second Circuit reversed and remanded, holding that because of the prohibitive costs respondents would face if they had to arbitrate, the class-action waiver was unenforceable and arbitration could not proceed. The Circuit stood by its reversal when this Court remanded in light of *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, which held that a party may not be compelled to submit to class arbitration absent an agreement to do so.

Held: The FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. Pp. 232–239.

(a) The FAA reflects the overarching principle that arbitration is a matter of contract. See *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 67. Courts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 221, even for claims alleging a violation of a federal statute, unless the FAA's mandate has been "'overridden by a contrary congressional command,'" *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95, 98. Pp. 232–233.

(b) No contrary congressional command requires rejection of the class-arbitration waiver here. The antitrust laws do not guarantee an affordable procedural path to the vindication of every claim, see *Rodriguez* v. *United States*, 480 U. S. 522, 525–526, or "evinc[e] an intention to

preclude a waiver" of class-action procedure, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628. Nor does congressional approval of Federal Rule of Civil Procedure 23 establish an entitlement to class proceedings for the vindication of statutory rights. The Rule imposes stringent requirements for certification that exclude most claims, and this Court has rejected the assertion that the class-notice requirement must be dispensed with because the "prohibitively high cost" of compliance would "frustrate [plaintiff's] attempt to vindicate the policies underlying the antitrust" laws, *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 167–168, 175–176. Pp. 233–235.

(c) The "effective vindication" exception that originated as dictum in *Mitsubishi Motors*, *supra*, also does not invalidate the instant arbitration agreement. The exception comes from a desire to prevent "prospective waiver of a party's right to pursue statutory remedies," *id.*, at 637, n. 19; but the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy. Cf. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32; *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 530, 534. *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, all but resolves this case. There, in finding that a law that conditioned enforcement of arbitration on the availability of class procedure interfered with fundamental arbitration attributes, *id.*, at 344, the Court specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system," *id.*, at 351. Pp. 235–238.

667 F. 3d 204, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 239. KAGAN, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 240. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Michael K. Kellogg argued the cause for petitioners. With him on the briefs were *Derek T. Ho*, *Mark G. Califano*, *Bernadette Miragliotta*, and *Julia B. Strickland.*

Paul D. Clement argued the cause for respondents. With him on the brief were *Deepak Gupta*, *Brian Wolfman*, *Gregory A. Beck*, and *Jonathan E. Taylor.*

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With

him on the brief were *Solicitor General Verrilli*, *Deputy Assistant Attorney General Overton*, *Ginger D. Anders*, *Catherine G. O'Sullivan*, *Robert B. Nicholson*, *David Seidman*, and *David C. Shonka.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *Alan S. Kaplinsky*, *Jeremy T. Rosenblum*, and *Mark J. Levin*; for the Chamber of Commerce of the United States of America et al. by *Andrew J. Pincus*, *Evan M. Tager*, *Archis A. Parasharami*, *Robin S. Conrad*, and *Sheldon Gilbert*; for Distinguished Law Professors by *Thomas R. McCarthy*; for DRI–The Voice of the Defense Bar by *Mary Massaron Ross*, *Jerrold J. Ganzfried*, and *John F. Stanton*; for the Equal Employment Advisory Council by *Rae T. Vann* and *Ann Elizabeth Reesman*; for Experian Information Solutions, Inc., et al. by *Meir Feder* and *Daniel J. McLoon*; for the Financial Services Roundtable by *Linda T. Coberly* and *Gene C. Schaerr*; for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*; and for Marcy S. Cohen et al. by *Martin S. Kaufman* and *Mary-Christine Sungaila.*

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Michael DeWine*, Attorney General of Ohio, *Alexandra T. Schimmer*, Solicitor General, *Stephen P. Carney*, Deputy Solicitor, and *Jennifer L. Pratt*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Thomas C. Horne* of Arizona, *George Jepsen* of Connecticut, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Catherine Cortez Masto* of Nevada, *Gary King* of New Mexico, *Eric T. Schneiderman* of New York, *Kathleen G. Kane* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, *John E. Swallow* of Utah, *William H. Sorrell* of Vermont, *Bob Ferguson* of Washington, and *Gregory A. Phillips* of Wyoming; for the American Antitrust Institute by *Ellen Meriwether* and *Albert A. Foer*; for Antitrust Scholars by *David A. Reiser* and *Cyril V. Smith*; for COSAL by *Jonathan Cuneo* and *Joel Davidow*; for the Food Marketing Institute et al. by *David A. Balto*, *Erik R. Lieberman*, and *Mallory Duncan*; for the National Community Pharmacists Association et al. by *Matthew L. Cantor*; for Professional Arbitrators et al. by *Lisa T. McElroy*; for Professors of Civil Procedure by *Alexander H. Schmidt*; and for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve.*

F. Paul Bland, Jr., *John Vail*, *Arthur H. Bryant*, *Leslie A. Bailey*, *Spencer J. Wilson*, *Julie Nepveu*, and *Michael Schuster* filed a brief for Public Justice, P. C., et al. as *amici curiae.*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

I

Respondents are merchants who accept American Express cards. Their agreement with petitioners—American Express and a wholly owned subsidiary—contains a clause that requires all disputes between the parties to be resolved by arbitration. The agreement also provides that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." *In re American Express Merchants' Litigation*, 667 F. 3d 204, 209 (CA2 2012).

Respondents brought a class action against petitioners for violations of the federal antitrust laws. According to respondents, American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards.[1] This tying arrangement, respondents said, violated § 1 of the Sherman Act. They sought treble damages for the class under § 4 of the Clayton Act.

Petitioners moved to compel individual arbitration under the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.* In resisting the motion, respondents submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be "at least several hundred thousand dollars, and might exceed $1 million," while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled. App. 93. The District Court granted the motion and dismissed

[1] A charge card requires its holder to pay the full outstanding balance at the end of a billing cycle; a credit card requires payment of only a portion, with the balance subject to interest.

the lawsuits. The Court of Appeals reversed and remanded for further proceedings. It held that because respondents had established that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver," the waiver was unenforceable and the arbitration could not proceed. *In re American Express Merchants' Litigation*, 554 F. 3d 300, 315–316 (CA2 2009).

We granted certiorari, vacated the judgment, and remanded for further consideration in light of *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010), which held that a party may not be compelled to submit to class arbitration absent an agreement to do so. *American Express Co.* v. *Italian Colors Restaurant*, 559 U. S. 1103 (2010). The Court of Appeals stood by its reversal, stating that its earlier ruling did not compel class arbitration. *In re American Express Merchants' Litigation*, 634 F. 3d 187, 200 (CA2 2011). It then *sua sponte* reconsidered its ruling in light of *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011), which held that the FAA pre-empted a state law barring enforcement of a class-arbitration waiver. Finding *AT&T Mobility* inapplicable because it addressed pre-emption, the Court of Appeals reversed for the third time. 667 F. 3d, at 213. It then denied rehearing en banc with five judges dissenting. *In re American Express Merchants' Litigation*, 681 F. 3d 139 (CA2 2012). We granted certiorari, 568 U. S. 1006 (2012), to consider the question "[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim," Pet. for Cert. i.

II

Congress enacted the FAA in response to widespread judicial hostility to arbitration. See *AT&T Mobility*, *supra*, at 339. As relevant here, the Act provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to

> settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.

This text reflects the overarching principle that arbitration is a matter of contract. See *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 67 (2010). And consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 221 (1985), including terms that "specify *with whom* [the parties] choose to arbitrate their disputes," *Stolt-Nielsen*, *supra*, at 683, and "the rules under which that arbitration will be conducted," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989). That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been "'overridden by a contrary congressional command.'" *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95, 98 (2012) (quoting *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 226 (1987)).

III

No contrary congressional command requires us to reject the waiver of class arbitration here. Respondents argue that requiring them to litigate their claims individually—as they contracted to do—would contravene the policies of the antitrust laws. But the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. Congress has taken some measures to facilitate the litigation of antitrust claims—for example, it enacted a multiplied-damages remedy. See 15 U. S. C. § 15 (treble damages). In enacting such measures, Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have in-

tended whatever departures from those normal limits advance antitrust goals is simply irrational. "[N]o legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*).

The antitrust laws do not "evinc[e] an intention to preclude a waiver" of class-action procedure. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628 (1985). The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701 (1979). The parties here agreed to arbitrate pursuant to that "usual rule," and it would be remarkable for a court to erase that expectation.

Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights. To begin with, it is likely that such an entitlement, invalidating private arbitration agreements denying class adjudication, would be an "abridg[ment]" or modif[ication]" of a "substantive right" forbidden to the Rules, see 28 U. S. C. § 2072(b). But there is no evidence of such an entitlement in any event. The Rule imposes stringent requirements for certification that in practice exclude most claims. And we have specifically rejected the assertion that one of those requirements (the class-notice requirement) must be dispensed with because the "prohibitively high cost" of compliance would "frustrate [plaintiff's] attempt to vindicate the policies underlying the antitrust" laws. *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 166–168, 175–176 (1974). One might respond, perhaps, that federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have

already rejected that proposition in *AT&T Mobility*, 563 U. S., at 343–344.

IV

Our finding of no "contrary congressional command" does not end the case. Respondents invoke a judge-made exception to the FAA which, they say, serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the "effective vindication" of a federal statutory right. Enforcing the waiver of class arbitration bars effective vindication, respondents contend, because they have no economic incentive to pursue their antitrust claims individually in arbitration.

The "effective vindication" exception to which respondents allude originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on "public policy" grounds, arbitration agreements that "operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies." 473 U. S., at 637, n. 19 (emphasis added). Dismissing concerns that the arbitral forum was inadequate, we said that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.*, at 637. Subsequent cases have similarly asserted the existence of an "effective vindication" exception, see, *e. g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 273–274 (2009); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 28 (1991), but have similarly declined to apply it to invalidate the arbitration agreement at issue.[2]

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[2] Contrary to the dissent's claim, *post*, at 246–247, and n. 3 (opinion of KAGAN, J.), the Court in *Mitsubishi Motors* did not hold that federal statutory claims are subject to arbitration so long as the claimant may effectively vindicate his rights in the arbitral forum. The Court expressly stated that, "at this stage in the proceedings," it had "no occasion to speculate" on whether the arbitration agreement's potential deprivation of a claimant's right to pursue federal remedies may render that agreement

And we do so again here. As we have described, the exception finds its origin in the desire to prevent "prospective waiver of a party's *right to pursue* statutory remedies," *Mitsubishi Motors*, *supra*, at 637, n. 19 (emphasis added). That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. See *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights"). But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy. See 681 F. 3d, at 147 (Jacobs, C. J., dissenting from denial of rehearing en banc).[3] The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938, see Fed. Rule Civ. Proc. 23, 28 U. S. C., p. 864 (1938 ed., Supp. V); 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1752, p. 18 (3d ed. 2005). Or, to put it differently, the individual suit that was considered adequate to ensure "effective vindication" of a federal

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unenforceable. 473 U. S., at 637, n. 19. Even the Court of Appeals in this case recognized the relevant language in *Mitsubishi Motors* as dicta. *In re American Express Merchants' Litigation*, 667 F. 3d 204, 214 (CA2 2012).

[3] The dissent contends that a class-action waiver may deny a party's right to pursue statutory remedies in the same way as a clause that bars a party from presenting economic testimony. See *post*, at 242, 248. That is a false comparison for several reasons: To begin with, it is not a given that such a clause would constitute an impermissible waiver; we have never considered the point. But more importantly, such a clause, assuming it makes vindication of the claim impossible, makes it impossible not just as a class action but even as an individual claim.

right before adoption of class-action procedures did not suddenly become "ineffective vindication" upon their adoption.[4]

A pair of our cases brings home the point. In *Gilmer*, *supra*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions. We said that statutory permission did "'not mean that individual attempts at conciliation were intended to be barred.'" *Id.*, at 32. And in *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528 (1995), we held that requiring arbitration in a foreign country was compatible with the federal Carriage of Goods by Sea Act. That legislation prohibited any agreement "'relieving'" or "'lessening'" the liability of a carrier for damaged goods, *id.*, at 530, 534 (quoting 46 U. S. C. App. § 1303(8) (1988 ed.))—which is close to codification of an "effective vindication" exception. The Court rejected the argument that the "inconvenience and costs of proceeding" abroad "lessen[ed]" the defendants' liability, stating that "[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the

[4] Who can disagree with the dissent's assertion that "the effective-vindication rule asks about the world today, not the world as it might have looked when Congress passed a given statute"? *Post*, at 250. But time does not change the meaning of effectiveness, making ineffective vindication today what was effective vindication in the past. The dissent also says that the agreement bars other forms of cost sharing—existing before the Sherman Act—that could provide effective vindication. See *post*, at 249–250, and n. 5. Petitioners denied that, and that is not what the Court of Appeals decision under review here held. It held that, because other forms of cost sharing were not economically feasible ("the *only economically feasible* means for . . . enforcing [respondents'] statutory rights is *via a class action*"), the class-action waiver was unenforceable. 667 F. 3d, at 218 (emphasis added). (The dissent's assertion to the contrary cites not the opinion on appeal here, but an earlier opinion that was vacated. See *In re American Express Merchants' Litigation*, 554 F. 3d 300 (CA2 2009), vacated and remanded, 559 U. S. 1103 (2010).) That is the conclusion we reject.

costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier." 515 U. S., at 532, 536. Such a "tally[ing] [of] the costs and burdens" is precisely what the dissent would impose upon federal courts here.

Truth to tell, our decision in *AT&T Mobility* all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with fundamental attributes of arbitration." 563 U. S., at 344. "[T]he switch from bilateral to class arbitration," we said, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*, at 348. We specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." *Id.*, at 351.[5]

* * *

The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of de-

[5] In dismissing *AT&T Mobility* as a case involving pre-emption and not the effective-vindication exception, the dissent ignores what that case established—that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. The latter interest, we said, is "unrelated" to the FAA. 563 U. S., at 351. Accordingly, the FAA does, contrary to the dissent's assertion, see *post*, at 244, favor the absence of litigation when that is the consequence of a class-action waiver, since its "'principal purpose'" is the enforcement of arbitration agreements according to their terms. 563 U. S., at 344 (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989)).

veloping that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

The judgment of the Court of Appeals is reversed.

It is so ordered.

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

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to note that the result here is also required by the plain meaning of the Federal Arbitration Act. In *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011), I explained that "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Id.*, at 352 (concurring opinion). In this case, Italian Colors makes two arguments to support its conclusion that the arbitration agreement should not be enforced. First, it contends that enforcing the arbitration agreement "would contravene the policies of the antitrust laws." *Ante*, at 233. Second, it contends that a court may "invalidate agreements that prevent the 'effective vindication' of a federal statutory right." *Ante*, at 235. Neither argument "concern[s] whether the contract was properly made." *AT&T Mobility*, *supra*, at 357 (THOMAS, J., concurring). Because Italian Colors has not furnished "grounds . . . for the revocation of any contract," 9 U. S. C. §2, the arbitration agreement must be enforced. Italian Colors voluntarily entered into a contract containing a bilateral arbitration provision. It cannot now escape its obligations merely because the claim it wishes to bring might be economically infeasible.

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

Here is the nutshell version of this case, unfortunately obscured in the Court's decision. The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.

And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.

That answer is a betrayal of our precedents, and of federal statutes like the antitrust laws. Our decisions have developed a mechanism—called the effective-vindication rule—to prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights. That doctrine bars applying such a clause when (but only when) it operates to confer immunity from potentially meritorious federal claims. In so doing, the rule reconciles the Federal Arbitration Act (FAA) with all the rest of federal law—and indeed, promotes the most fundamental purposes of the FAA itself. As applied here, the rule would ensure that Amex's arbitration clause does not foreclose Italian Colors from vindicating its right to redress antitrust harm.

The majority barely tries to explain why it reaches a contrary result. It notes that we have not decided this exact case before—neglecting that the principle we have established fits this case hand in glove. And it concocts a special exemption for class-arbitration waivers—ignoring that this

case concerns much more than that. Throughout, the majority disregards our decisions' central tenet: An arbitration clause may not thwart federal law, irrespective of exactly how it does so. Because the Court today prevents the effective vindication of federal statutory rights, I respectfully dissent.

I

Start with an uncontroversial proposition: We would refuse to enforce an exculpatory clause insulating a company from antitrust liability—say, "Merchants may bring no Sherman Act claims"—even if that clause were contained in an arbitration agreement. See *ante*, at 236. Congress created the Sherman Act's private cause of action not solely to compensate individuals, but to promote "the public interest in vigilant enforcement of the antitrust laws." *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955). Accordingly, courts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, whether in an arbitration agreement or any other contract. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 637, and n. 19 (1985). The same rule applies to other important federal statutory rights. See *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 273 (2009) (Age Discrimination in Employment Act); *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 704 (1945) (Fair Labor Standards Act). But its necessity is nowhere more evident than in the antitrust context. Without the rule, a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability.

If the rule were limited to baldly exculpatory provisions, however, a monopolist could devise numerous ways around it. Consider several alternatives that a party drafting an arbitration agreement could adopt to avoid antitrust liability, each of which would have the identical effect. On the front end: The agreement might set outlandish filing fees or estab-

lish an absurd (*e. g.*, one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum. On the back end: The agreement might remove the arbitrator's authority to grant meaningful relief, so that a judgment gets the claimant nothing worthwhile. And in the middle: The agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant's liability—say, by prohibiting any economic testimony (good luck proving an antitrust claim without that!). Or else the agreement might appoint as an arbitrator an obviously biased person—say, the CEO of Amex. The possibilities are endless—all less direct than an express exculpatory clause, but no less fatal. So the rule against prospective waivers of federal rights can work only if it applies not just to a contract clause explicitly barring a claim, but to others that operate to do so.

And sure enough, our cases establish this proposition: An arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result. The rule originated in *Mitsubishi*, where we held that claims brought under the Sherman Act and other federal laws are generally subject to arbitration. 473 U. S., at 628. By agreeing to arbitrate such a claim, we explained, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Ibid.* But crucial to our decision was a limiting principle, designed to safeguard federal rights: An arbitration clause will be enforced only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Id.*, at 637. If an arbitration provision "operated . . . as a prospective waiver of a party's right to pursue statutory remedies," we emphasized, we would "condemn[ ]" it. *Ibid.*, n. 19. Similarly, we stated that such a clause should be "set[ ] aside" if "proceedings in the contractual forum will be so gravely difficult" that the claimant "will for all practical

purposes be deprived of his day in court." *Id.*, at 632 (internal quotation marks omitted). And in the decades since *Mitsubishi*, we have repeated its admonition time and again, instructing courts not to enforce an arbitration agreement that effectively (even if not explicitly) forecloses a plaintiff from remedying the violation of a federal statutory right. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 28 (1991); *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 540 (1995); *14 Penn Plaza*, 556 U. S., at 266, 273–274.

Our decision in *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79 (2000), confirmed that this principle applies when an agreement thwarts federal law by making arbitration prohibitively expensive. The plaintiff there (seeking relief under the Truth in Lending Act) argued that an arbitration agreement was unenforceable because it "create[d] a risk" that she would have to "bear prohibitive arbitration costs" in the form of high filing and administrative fees. *Id.*, at 90 (internal quotation marks omitted). We rejected that contention, but not because we doubted that such fees could prevent the effective vindication of statutory rights. To the contrary, we invoked our rule from *Mitsubishi*, making clear that it applied to the case before us. See 531 U. S., at 90. Indeed, we added a burden of proof: "[W]here, as here," we held, a party asserting a federal right "seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.*, at 92. Randolph, we found, had failed to meet that burden: The evidence she offered was "too speculative." *Id.*, at 91. But even as we dismissed Randolph's suit, we reminded courts to protect against arbitration agreements that make federal claims too costly to bring.

Applied as our precedents direct, the effective-vindication rule furthers the purposes not just of laws like the Sherman Act, but of the FAA itself. That statute reflects a federal

policy favoring actual arbitration—that is, arbitration as a streamlined "method of resolving disputes," not as a foolproof way of killing off valid claims. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 481 (1989). Put otherwise: What the FAA prefers to litigation is arbitration, not *de facto* immunity. The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a real, not faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless. So down one road: more arbitration, better enforcement of federal statutes. And down the other: less arbitration, poorer enforcement of federal statutes. Which would you prefer? Or still more aptly: Which do you think Congress would?

The answer becomes all the more obvious given the limits we have placed on the rule, which ensure that it does not diminish arbitration's benefits. The rule comes into play only when an agreement "operate[s] . . . as a prospective waiver"—that is, forecloses (not diminishes) a plaintiff's opportunity to gain relief for a statutory violation. *Mitsubishi*, 473 U. S., at 637, n. 19. So, for example, *Randolph* assessed whether fees in arbitration would be "prohibitive" (not high, excessive, or extravagant). 531 U. S., at 90. Moreover, the plaintiff must make that showing through concrete proof: "[S]peculative" risks, "unfounded assumptions," and "unsupported statements" will not suffice. *Id.*, at 90–91, and n. 6. With the inquiry that confined and the evidentiary requirements that high, courts have had no trouble assessing the matters the rule makes relevant. And for almost three decades, courts have followed our edict that arbitration clauses must usually prevail, declining to enforce them in only rare cases. See Brief for United States as *Amicus Cu-*

riae 26–27. The effective-vindication rule has thus operated year in and year out without undermining, much less "destroy[ing]," the prospect of speedy dispute resolution that arbitration secures. *Ante*, at 239.

And this is just the kind of case the rule was meant to address. Italian Colors, as I have noted, alleges that Amex used its market power to impose a tying arrangement in violation of the Sherman Act. The antitrust laws, all parties agree, provide the restaurant with a cause of action and give it the chance to recover treble damages. Here, that would mean Italian Colors could take home up to $38,549. But a problem looms. As this case comes to us, the evidence shows that Italian Colors cannot prevail in arbitration without an economic analysis defining the relevant markets, establishing Amex's monopoly power, showing anticompetitive effects, and measuring damages. And that expert report would cost between several hundred thousand and one million dollars.[1] So the expense involved in proving the claim in arbitration is ten times what Italian Colors could hope to gain, even in a best-case scenario. That counts as a "prohibitive" cost, in *Randolph*'s terminology, if anything does. No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.

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[1] The evidence relating to these costs comes from an affidavit submitted by an economist experienced in proving similar antitrust claims. The Second Circuit found that Amex "ha[d] brought no serious challenge" to that factual showing. See, *e. g.*, 667 F. 3d 204, 210 (2012). And in this Court, Amex conceded that Italian Colors would need an expert economic report to prevail in arbitration. See Tr. of Oral Arg. 15. Perhaps that is not really true. A hallmark of arbitration is its use of procedures tailored to the type of dispute and amount in controversy; so arbitrators might properly decline to demand such a rigorous evidentiary showing in small antitrust cases. But that possibility cannot disturb the factual premise on which this case comes to us, and which the majority accepts: that Italian Colors's tying claim is an ordinary kind of antitrust claim; and that it is worth about a tenth the cost of arbitration.

An arbitration agreement could manage such a mismatch in many ways, but Amex's disdains them all. As the Court makes clear, the contract expressly prohibits class arbitration. But that is only part of the problem.[2] The agreement also disallows any kind of joinder or consolidation of claims or parties. And more: Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report. And still more: The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails. And beyond all that: Amex refused to enter into any stipulations that would obviate or mitigate the need for the economic analysis. In short, the agreement as applied in this case cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs. Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.

So contra the majority, the court below got this case right. Italian Colors proved what the plaintiff in *Randolph* could not—that a standard-form agreement, taken as a whole, renders arbitration of a claim "prohibitively expensive." 531 U. S., at 92. The restaurant thus established that the contract "operate[s] . . . as a prospective waiver," and prevents the "effective[ ] . . . vindicat[ion]" of Sherman Act rights. *Mitsubishi*, 473 U. S., at 637, and n. 19. I would follow our precedents and decline to compel arbitration.

II

The majority is quite sure that the effective-vindication rule does not apply here, but has precious little to say about why. It starts by disparaging the rule as having "originated as dictum." *Ante*, at 235. But it does not rest on that swipe, and for good reason. As I have explained, see *supra*,

[2] The majority contends that the class-action waiver is the only part we should consider. See *ante*, at 237, n. 4. I explain below why that assertion is wrong. See *infra*, at 249–250.

at 242–243, the rule began as a core part of *Mitsubishi*: We held there that federal statutory claims are subject to arbitration "*so long as*" the claimant "effectively may vindicate its [rights] in the arbitral forum." 473 U. S., at 637 (emphasis added). The rule thus served as an essential condition of the decision's holding.[3] And in *Randolph*, we provided a standard for applying the rule when a claimant alleges "prohibitive costs" ("Where, as here," etc., see *supra*, at 243), and we then applied that standard to the parties before us. So whatever else the majority might think of the effective-vindication rule, it is not dictum.

The next paragraph of the Court's decision (the third of Part IV) is the key: It contains almost the whole of the majority's effort to explain why the effective-vindication rule does not stop Amex from compelling arbitration. The majority's first move is to describe *Mitsubishi* and *Randolph* as covering only discrete situations: The rule, the majority asserts, applies to arbitration agreements that eliminate the "right to pursue statutory remedies" by "forbidding the assertion" of the right (as addressed in *Mitsubishi*) or imposing filing and administrative fees "so high as to make access to the forum impracticable" (as addressed in *Randolph*). *Ante*, at 236 (emphasis deleted; internal quotation marks omitted). Those cases are not this case, the majority says: Here, the agreement's provisions went to the possibility of "*proving* a statutory remedy." *Ibid.*

But the distinction the majority proffers, which excludes problems of proof, is one *Mitsubishi* and *Randolph* (and our

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[3] The majority is dead wrong when it says that *Mitsubishi* reserved judgment on "whether the arbitration agreement's potential deprivation of a claimant's right to pursue federal remedies may render that agreement unenforceable." *Ante*, at 235, n. 2. What the *Mitsubishi* Court had "no occasion to speculate on" was whether a particular agreement *in fact* eliminated the claimant's federal rights. 473 U. S., at 637, n. 19. But we stated expressly that if the agreement did so (as Amex's does), we would invalidate it. *Ibid.*; see *supra*, at 242.

decisions reaffirming them) foreclose. Those decisions establish what in some quarters is known as a principle: When an arbitration agreement prevents the effective vindication of federal rights, a party may go to court. That principle, by its nature, operates in diverse circumstances—not just the ones that happened to come before the Court. See *supra*, at 241–243. It doubtless covers the baldly exculpatory clause and prohibitive fees that the majority acknowledges would preclude an arbitration agreement's enforcement. But so too it covers the world of other provisions a clever drafter might devise to scuttle even the most meritorious federal claims. Those provisions might deny entry to the forum in the first instance. Or they might deprive the claimant of any remedy. Or they might prevent the claimant from offering the necessary proof to prevail, as in my "no economic testimony" hypothetical—and in the actual circumstances of this case. See *supra*, at 242. The variations matter not at all. Whatever the precise mechanism, each "operate[s] . . . as a prospective waiver of a party's [federal] right[s]"—and so confers immunity on a wrongdoer. *Mitsubishi*, 473 U. S., at 637, n. 19. And that is what counts under our decisions.[4]

Nor can the majority escape the principle we have established by observing, as it does at one point, that Amex's agreement merely made arbitration "not worth the expense." *Ante*, at 236. That suggestion, after all, runs smack into *Randolph*, which likewise involved an allegation that arbitration, as specified in a contract, "would be prohibitively

[4] *Gilmer* and *Vimar Seguros*, which the majority relies on, see *ante*, at 237–238, fail to advance its argument. The plaintiffs there did not claim, as Italian Colors does, that an arbitration clause altogether precluded them from vindicating their federal rights. They averred only that arbitration would be less convenient or effective than a proceeding in court. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 31–32 (1991); *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 533 (1995). As I have explained, that kind of showing does not meet the effective-vindication rule's high bar. See *supra*, at 244.

expensive." 531 U. S., at 92. Our decision there made clear that a provision raising a plaintiff's costs could foreclose consideration of federal claims, and so run afoul of the effective-vindication rule. The expense at issue in *Randolph* came from a filing fee combined with a per-diem payment for the arbitrator. But nothing about those particular costs is distinctive; and indeed, a rule confined to them would be weirdly idiosyncratic. Not surprisingly, then, *Randolph* gave no hint of distinguishing among the different ways an arbitration agreement can make a claim too costly to bring. Its rationale applies whenever an agreement makes the vindication of federal claims impossibly expensive—whether by imposing fees or proscribing cost-sharing or adopting some other device.

That leaves the three last sentences in the majority's core paragraph. Here, the majority conjures a special reason to exclude "class-action waiver[s]" from the effective-vindication rule's compass. *Ante*, at 236, 237, n. 4. Rule 23, the majority notes, became law only in 1938—decades after the Sherman Act. The majority's conclusion: If federal law in the interim decades did not eliminate a plaintiff's rights under that Act, then neither does this agreement.

But that notion, first of all, rests on a false premise: that this case is only about a class-action waiver. See *ante*, at 237, n. 4 (confining the case to that issue). It is not, and indeed could not sensibly be. The effective-vindication rule asks whether an arbitration agreement *as a whole* precludes a claimant from enforcing federal statutory rights. No single provision is properly viewed in isolation, because an agreement can close off one avenue to pursue a claim while leaving others open. In this case, for example, the agreement could have prohibited class arbitration without offending the effective-vindication rule *if* it had provided an alternative mechanism to share, shift, or reduce the necessary costs. The agreement's problem is that it bars not just class actions, but also all mechanisms—many existing long before the

Sherman Act, if that matters—for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses. See *supra*, at 246. And contrary to the majority's assertion, the Second Circuit well understood that point: It considered, for example, whether Italian Colors could shift expert expenses to Amex if its claim prevailed (no) or could join with merchants bringing similar claims to produce a common expert report (no again). See 554 F. 3d 300, 318 (2009). It is only in this Court that the case has become strangely narrow, as the majority stares at a single provision rather than considering, in the way the effective-vindication rule demands, how the entire contract operates.[5]

In any event, the age of the relevant procedural mechanisms (whether class actions or any other) does not matter, because the effective-vindication rule asks about the world today, not the world as it might have looked when Congress passed a given statute. Whether a particular procedural device preceded or post-dated a particular statute, the question remains the same: Does the arbitration agreement foreclose a party—right now—from effectively vindicating the substantive rights the statute provides? This case exhibits a whole raft of changes since Congress passed the Sherman Act, affecting both parties to the dispute—not just new procedural rules (like Rule 23), but also new evidentiary re-

[5] In defense of this focus, the majority quotes the Second Circuit as concluding that "the *only economically feasible* means" for Italian Colors to enforce its statutory rights "is via a class action." *Ante*, at 237, n. 4 (quoting 667 F. 3d, at 218; internal quotation marks omitted; emphasis added by the Court). But the Court of Appeals reached that conclusion only after finding that the agreement prohibited all *other* forms of cost-sharing and cost-shifting. See 554 F. 3d 300, 318 (2009). (That opinion was vacated on other grounds, but its analysis continued to inform—indeed, was essential to—the Second Circuit's final decision in the case. See 667 F. 3d, at 218.) The Second Circuit therefore did exactly what the majority refuses to do—look to the agreement as a whole to determine whether it permits the vindication of federal rights.

quirements (like the demand here for an expert report) and new contract provisions affecting arbitration (like this agreement's confidentiality clause). But what has stayed the same is this: Congress's intent that antitrust plaintiffs should be able to enforce their rights free of any prior waiver. See *supra*, at 241; *Mitsubishi*, 473 U. S., at 637, n. 19. The effective-vindication rule carries out that purpose by ensuring that any arbitration agreement operating as such a waiver is unenforceable. And that requires courts to determine in the here and now—rather than in ye olde glory days—whether an agreement's provisions foreclose even meritorious antitrust claims.

Still, the majority takes one last stab: "Truth to tell," it claims, *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011), "all but resolves this case." *Ante*, at 238. In that decision, the majority recounts, this Court held that the FAA preempted a state "law conditioning enforcement of arbitration on the availability of class procedure." *Ibid.*; see 563 U. S., at 344. According to the majority, that decision controls here because "[w]e specifically rejected the argument that class arbitration was necessary." *Ante*, at 238.

Where to begin? Well, maybe where I just left off: Italian Colors is not claiming that a class action is necessary—only that it have *some* means of vindicating a meritorious claim. And as I have shown, non-class options abound. See *supra*, at 249–250. The idea that *AT&T Mobility* controls here depends entirely on the majority's view that this case is "class action or bust." Were the majority to drop that pretense, it could make no claim for *AT&T Mobility*'s relevance.

And just as this case is not about class actions, *AT&T Mobility* was not—and could not have been—about the effective-vindication rule. Here is a tip-off: *AT&T Mobility* nowhere cited our effective-vindication precedents. That was so for two reasons. To begin with, the state law in question made class-action waivers unenforceable even when a party *could* feasibly vindicate her claim in an individual

arbitration. The state rule was designed to preserve the broad-scale "deterrent effects of class actions," not merely to protect a particular plaintiff's right to assert her own claim. 563 U. S., at 338. Indeed, the Court emphasized that the complaint in that case was "most unlikely to go unresolved" because AT&T's agreement contained a host of features ensuring that "aggrieved customers who filed claims would be essentially guaranteed to be made whole." *Id.*, at 351–352 (internal quotation marks and brackets omitted). So the Court professed that *AT&T Mobility* did not implicate the only thing (a party's ability to vindicate a meritorious claim) this case involves.

And if that is not enough, *AT&T Mobility* involved a *state* law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so—as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them. Again, then, *AT&T Mobility* had no occasion to address the issue in this case. The relevant decisions are instead *Mitsubishi* and *Randolph*.

* * *

The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled. So the Court does not consider that Amex's agreement bars not just class actions, but "other forms of cost sharing . . . that could pro-

vide effective vindication." *Ante*, at 237, n. 4. In short, the Court does not consider—and does not decide—Italian Colors's (and similarly situated litigants') actual argument about why the effective-vindication rule precludes this agreement's enforcement.

As a result, Amex's contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. The FAA, the majority says, so requires. Do not be fooled. Only the Court so requires; the FAA was never meant to produce this outcome. The FAA conceived of arbitration as a "method of *resolving* disputes"—a way of using tailored and streamlined procedures to facilitate redress of injuries. *Rodriguez de Quijas*, 490 U. S., at 481 (emphasis added). In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action. I respectfully dissent.

Syllabus

DESCAMPS *v.* UNITED STATES

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

No. 11–9540. Argued January 7, 2013—Decided June 20, 2013

The Armed Career Criminal Act (ACCA) increases the sentences of certain federal defendants who have three prior convictions "for a violent felony," including "burglary, arson, or extortion." 18 U. S. C. § 924(e). To determine whether a past conviction is for one of those crimes, courts use a "categorical approach": They compare the statutory elements of a prior conviction with the elements of the "generic" crime—*i. e.*, the offense as commonly understood. If the statute's elements are the same as, or narrower than, those of the generic offense, the prior conviction qualifies as an ACCA predicate. When a prior conviction is for violating a "divisible statute"—one that sets out one or more of the elements in the alternative, *e. g.*, burglary involving entry into a building *or* an automobile—a "modified categorical approach" is used. That approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative element formed the basis of the defendant's prior conviction.

Petitioner Descamps was convicted of being a felon in possession of a firearm. The Government sought an ACCA sentence enhancement, pointing to Descamps' three prior convictions, including one for burglary under Cal. Penal Code Ann. § 459, which provides that a "person who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." In imposing an enhanced sentence, the District Court rejected Descamps' argument that his § 459 conviction cannot serve as an ACCA predicate because § 459 goes beyond the "generic" definition of burglary. The Ninth Circuit affirmed, holding that its decision in *United States* v. *Aguila-Montes de Oca*, 655 F. 3d 915, permits the application of the modified categorical approach to a prior conviction under a statute that is "categorically broader than the generic offense." It found that Descamps' § 459 conviction, as revealed in the plea colloquy, rested on facts satisfying the elements of generic burglary.

Held: The modified categorical approach does not apply to statutes like § 459 that contain a single, indivisible set of elements. Pp. 260–278.

(a) This Court's caselaw all but resolves this case. In *Taylor* v. *United States*, 495 U. S. 575, and *Shepard* v. *United States*, 544 U. S. 13, the Court approved the use of a modified categorical approach in a "nar-

row range of cases" in which a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction. Because a sentencing court cannot tell, simply by looking at a divisible statute, which version of the offense a defendant was convicted of, the court is permitted to consult extra-statutory documents—but only to assess whether the defendant was convicted of the particular "statutory definition" that corresponds to the generic offense. *Nijhawan* v. *Holder*, 557 U. S. 29, and *Johnson* v. *United States*, 559 U. S. 133, also emphasized this elements-based rationale for the modified categorical approach. That approach plays no role here, where the dispute does not concern alternative elements but a simple discrepancy between generic burglary and § 459. Pp. 260–265.

(b) The Ninth Circuit's *Aguila-Montes* approach turns an elements-based inquiry into an evidence-based one, asking not whether "statutory definitions" necessarily require an adjudicator to find the generic offense, but whether the prosecutor's case realistically led the adjudicator to find certain facts. *Aguila-Montes* has no roots in this Court's precedents. In fact, it subverts those decisions, conflicting with each of the rationales supporting the categorical approach and threatening to undo all its benefits. Pp. 265–274.

(1) *Taylor*'s elements-centric categorical approach comports with ACCA's text and history, avoids Sixth Amendment concerns that would arise from sentencing courts' making factual findings that properly belong to juries, and averts "the practical difficulties and potential unfairness of a factual approach." 495 U. S., at 601.

ACCA's language shows that Congress intended sentencing courts "to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Id.*, at 600. The Ninth Circuit's approach runs headlong into that congressional choice. Instead of reviewing extra-statutory documents only to determine which alternative element was the basis for the conviction, the Circuit looks to those materials to discover what the defendant actually did.

Under ACCA, the sentencing court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. That is why *Shepard* refused to permit sentencing courts to make a disputed determination about what facts must have supported a defendant's conviction. 544 U. S., at 25 (plurality opinion). Yet the Ninth Circuit flouts this Court's reasoning by authorizing judicial factfinding that goes far beyond the recognition of a prior conviction.

Syllabus

The Ninth Circuit's decision also creates the same "daunting" difficulties and inequities that first encouraged the adoption of the categorical approach. Sentencing courts following *Aguila-Montes* would have to expend resources examining (often aged) documents for evidence that a defendant admitted, or a prosecutor showed, facts that, although unnecessary to the crime of conviction, satisfied an element of the relevant generic offense. And the *Aguila-Montes* approach would also deprive many defendants of the benefits of their negotiated plea deals. Pp. 267–271.

(2) In defending *Aguila-Montes*, the Ninth Circuit denied any real distinction between divisible and indivisible statutes extending further than the generic offense. But the Circuit's efforts to imaginatively reconceive all indivisible statutes as divisible ones are unavailing. Only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime. Pp. 271–274.

(c) The Government offers a slightly different argument: It contends that the modified categorical approach should apply where, as here, the mismatch of elements between the crime of conviction and the generic offense results not from a missing element but from an element's overbreadth. But that distinction is malleable and manipulable. And in any event, it is a distinction without a difference. Whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime. Pp. 274–277.

(d) Because generic unlawful entry is not an element, or an alternative element, of § 459, a conviction under that statute is never for generic burglary. Descamps' ACCA enhancement was therefore improper. Pp. 277–278.

466 Fed. Appx. 563, reversed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 278. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 279. ALITO, J., filed a dissenting opinion, *post,* p. 281.

Dan B. Johnson, by appointment of the Court, 568 U. S. 976, argued the cause for petitioner. With him on the briefs was *Matthew Campbell.*

Benjamin J. Horwich argued the cause for the United States. With him on the brief were *Solicitor General Ver-*

rilli, Assistant Attorney General Breuer, Deputy Solicitor General Dreeben, and *Daniel S. Goodman.**

JUSTICE KAGAN delivered the opinion of the Court.

The Armed Career Criminal Act (ACCA or Act), 18 U. S. C. § 924(e), increases the sentences of certain federal defendants who have three prior convictions "for a violent felony," including "burglary, arson, or extortion." To determine whether a past conviction is for one of those crimes, courts use what has become known as the "categorical approach": They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime—*i. e.*, the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.

We have previously approved a variant of this method—labeled (not very inventively) the "modified categorical approach"—when a prior conviction is for violating a so-called "divisible statute." That kind of statute sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.

**Kevin K. Russell, Jeffrey L. Fisher,* and *Pamela S. Karlan* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

This case presents the question whether sentencing courts may also consult those additional documents when a defendant was convicted under an "indivisible" statute—*i. e.*, one not containing alternative elements—that criminalizes a broader swath of conduct than the relevant generic offense. That would enable a court to decide, based on information about a case's underlying facts, that the defendant's prior conviction qualifies as an ACCA predicate even though the elements of the crime fail to satisfy our categorical test. Because that result would contravene our prior decisions and the principles underlying them, we hold that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.

I

Petitioner Matthew Descamps was convicted of being a felon in possession of a firearm, in violation of 18 U. S. C. § 922(g). That unadorned offense carries a maximum penalty of 10 years in prison. The Government, however, sought an enhanced sentence under ACCA, based on Descamps' prior state convictions for burglary, robbery, and felony harassment.

ACCA prescribes a mandatory minimum sentence of 15 years for a person who violates § 922(g) and "has three previous convictions . . . for a violent felony or a serious drug offense." § 924(e)(1). The Act defines a "violent felony" to mean any felony, whether state or federal, that "has as an element the use, attempted use, or threatened use of physical force against the person of another," or that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B).

Descamps argued that his prior burglary conviction could not count as an ACCA predicate offense under our categorical approach. He had pleaded guilty to violating Cal. Penal Code Ann. § 459 (West 2010), which provides that a "person

who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." That statute does not require the entry to have been unlawful in the way most burglary laws do. Whereas burglary statutes generally demand breaking and entering or similar conduct, California's does not: It covers, for example, a shoplifter who enters a store, like any customer, during normal business hours. See *People* v. *Barry*, 94 Cal. 481, 483–484, 29 P. 1026, 1026–1027 (1892). In sweeping so widely, the state law goes beyond the normal, "generic" definition of burglary. According to Descamps, that asymmetry of offense elements precluded his conviction under § 459 from serving as an ACCA predicate, whether or not his own burglary involved an unlawful entry that could have satisfied the requirements of the generic crime.

The District Court disagreed. According to the court, our modified categorical approach permitted it to examine certain documents, including the record of the plea colloquy, to discover whether Descamps had "admitted the elements of a generic burglary" when entering his plea. App. 50a. And that transcript, the court ruled, showed that Descamps had done so. At the plea hearing, the prosecutor proffered that the crime "'involve[d] the breaking and entering of a grocery store,'" and Descamps failed to object to that statement. *Ibid.* The plea proceedings, the District Court thought, thus established that Descamps' prior conviction qualified as a generic burglary (and so as a "violent felony") under ACCA. Applying the requisite penalty enhancement, the court sentenced Descamps to 262 months in prison—more than twice the term he would otherwise have received.

The Court of Appeals for the Ninth Circuit affirmed, relying on its recently issued decision in *United States* v. *Aguila-Montes de Oca*, 655 F. 3d 915 (2011) (en banc) (*per curiam*). There, a divided en banc court took much the same view of the modified categorical approach as had the District Court in this case. The en banc court held that when a sentencing

court considers a conviction under § 459—or any other statute that is "categorically broader than the generic offense"—the court may scrutinize certain documents to determine the factual basis of the conviction. See *id.*, at 940. Applying that approach, the Court of Appeals here found that Descamps' plea, as revealed in the colloquy, "rested on facts that satisfy the elements of the generic definition of burglary." 466 Fed. Appx. 563, 565 (2012).

We granted certiorari, 567 U. S. 964 (2012), to resolve a Circuit split on whether the modified categorical approach applies to statutes like § 459 that contain a single, "indivisible" set of elements sweeping more broadly than the corresponding generic offense.[1] We hold that it does not, and so reverse.

II

Our caselaw explaining the categorical approach and its "modified" counterpart all but resolves this case. In those decisions, as shown below, the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction. So understood, the modified approach cannot convert Descamps' conviction under § 459 into an ACCA predicate, because that state law defines burglary not alternatively, but only more broadly than the generic offense.

We begin with *Taylor* v. *United States*, 495 U. S. 575 (1990), which established the rule for determining when a defendant's prior conviction counts as one of ACCA's enu-

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[1] Compare, *e. g.*, 466 Fed. Appx. 563, 565 (CA9 2012) (case below) (applying the modified categorical approach to § 459); *United States* v. *Armstead*, 467 F. 3d 943, 947–950 (CA6 2006) (applying that approach to a similar, indivisible statute), with, *e. g.*, *United States* v. *Beardsley*, 691 F. 3d 252, 268–274 (CA2 2012) (holding that the modified categorical approach applies only to divisible statutes); *United States* v. *Giggey*, 551 F. 3d 27, 40 (CA1 2008) (en banc) (same).

merated predicate offenses (*e. g.*, burglary). *Taylor* adopted a "formal categorical approach": Sentencing courts may "look only to the statutory definitions"—*i. e.*, the elements—of a defendant's prior offenses, and *not* "to the particular facts underlying those convictions." *Id.*, at 600. If the relevant statute has the same elements as the "generic" ACCA crime, then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is "necessarily . . . guilty of all the [generic crime's] elements." *Id.*, at 599. But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form. The key, we emphasized, is elements, not facts. So, for example, we held that a defendant can receive an ACCA enhancement for burglary only if he was convicted of a crime having "the basic elements" of generic burglary—*i. e.*, "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Ibid.* And indeed, we indicated that the very statute at issue here, § 459, does not fit that bill because "California defines 'burglary' so broadly as to include shoplifting." *Id.*, at 591.

At the same time, *Taylor* recognized a "narrow range of cases" in which sentencing courts—applying what we would later dub the "modified categorical approach"—may look beyond the statutory elements to "the charging paper and jury instructions" used in a case. *Id.*, at 602. To explain when courts should resort to that approach, we hypothesized a statute with alternative elements—more particularly, a burglary statute (otherwise conforming to the generic crime) that prohibits "entry of an automobile as well as a building." *Ibid.* One of those alternatives (a building) corresponds to an element in generic burglary, whereas the other (an automobile) does not. In a typical case brought under the statute, the prosecutor charges one of those two alternatives,

and the judge instructs the jury accordingly. So if the case involves entry into a building, the jury is "actually required to find all the elements of generic burglary," as the categorical approach demands. *Ibid.* But the statute alone does not disclose whether that has occurred. Because the statute is "divisible"—*i. e.*, comprises multiple, alternative versions of the crime—a later sentencing court cannot tell, without reviewing something more, if the defendant's conviction was for the generic (building) or non-generic (automobile) form of burglary. Hence *Taylor* permitted sentencing courts, as a tool for implementing the categorical approach, to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction.

In *Shepard* v. *United States*, 544 U. S. 13 (2005), the hypothetical we posited in *Taylor* became real: We confronted a Massachusetts burglary statute covering entries into "boats and cars" as well as buildings. 544 U. S., at 17. The defendant there pleaded guilty to violating the statute, and we first confirmed that *Taylor*'s categorical approach applies not just to jury verdicts, but also to plea agreements. That meant, we held, that a conviction based on a guilty plea can qualify as an ACCA predicate only if the defendant "necessarily admitted [the] elements of the generic offense." *Id.*, at 26. But as we had anticipated in *Taylor*, the divisible nature of the Massachusetts burglary statute confounded that inquiry: No one could know, just from looking at the statute, which version of the offense Shepard was convicted of. Accordingly, we again authorized sentencing courts to scrutinize a restricted set of materials—here, "the terms of a plea agreement or transcript of colloquy between judge and defendant"—to determine if the defendant had pleaded guilty to entering a building or, alternatively, a car or boat. *Ibid.* Yet we again underscored the narrow scope of that review: It was not to determine "what the defendant and state judge must have understood as the factual basis of the

prior plea," but only to assess whether the plea was to the version of the crime in the Massachusetts statute (burglary of a building) corresponding to the generic offense. *Id.*, at 25–26 (plurality opinion).

Two more recent decisions have further emphasized the elements-based rationale—applicable only to divisible statutes—for examining documents like an indictment or plea agreement. In *Nijhawan* v. *Holder*, 557 U. S. 29 (2009), we discussed another Massachusetts statute, this one prohibiting "'Breaking and Entering at Night'" in any of four alternative places: a "building, ship, vessel, or vehicle." *Id.*, at 35. We recognized that when a statute so "refer[s] to several different crimes," not all of which qualify as an ACCA predicate, a court must determine which crime formed the basis of the defendant's conviction. *Ibid.* That is why, we explained, *Taylor* and *Shepard* developed the modified categorical approach. By reviewing the extra-statutory materials approved in those cases, courts could discover "which statutory phrase," contained within a statute listing "several different" crimes, "covered a prior conviction." 557 U. S., at 41. And a year later, we repeated that understanding of when and why courts can resort to those documents: "[T]he 'modified categorical approach' that we have approved permits a court to determine which statutory phrase was the basis for the conviction." *Johnson* v. *United States*, 559 U. S. 133, 144 (2010) (citation omitted).

Applied in that way—which is the only way we have ever allowed—the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison

when a statute lists multiple, alternative elements, and so effectively creates "several different . . . crimes." *Nijhawan*, 557 U. S., at 41. If at least one, but not all, of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.[2]

The modified approach thus has no role to play in this case. The dispute here does not concern any list of alternative elements. Rather, it involves a simple discrepancy between generic burglary and the crime established in § 459. The former requires an unlawful entry along the lines of breaking and entering. See 3 W. LaFave, Substantive Criminal Law § 21.1(a) (2d ed. 2003) (hereinafter LaFave). The latter does not, and indeed covers simple shoplifting, as even the Gov-

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[2] The dissent delves into the nuances of various States' laws in an effort to cast doubt on this understanding of our prior holdings, arguing that we used the modified categorical approach in cases like *Taylor*, *Shepard*, and *Johnson* "in relation to statutes that may not have been divisible" in the way that we have just described. *Post*, at 285 (opinion of ALITO, J.). But if, as the dissent claims, the state laws at issue in those cases set out "merely alternative means, not alternative elements," of an offense, *post*, at 287, that is news to us. And more important, it would have been news to the *Taylor*, *Shepard*, and *Johnson* Courts: All those decisions rested on the explicit premise that the laws "contain[ed] statutory phrases that cover several different . . . crimes," not several different methods of committing one offense. *Johnson*, 559 U. S., at 144 (citing *Nijhawan*, 557 U. S., at 41). And if the dissent's real point is that distinguishing between "alternative elements" and "alternative means" is difficult, we can see no real-world reason to worry. Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard*—*i. e.*, indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

ernment acknowledges. See Brief for United States 38; *Barry*, 94 Cal., at 483–484, 29 P., at 1026–1027. In *Taylor*'s words, then, § 459 "define[s] burglary more broadly" than the generic offense. 495 U. S., at 599. And because that is true—because California, to get a conviction, need not prove that Descamps broke and entered—a § 459 violation cannot serve as an ACCA predicate. Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction. But here no uncertainty of that kind exists, and so the categorical approach needs no help from its modified partner. We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over.

III

The Court of Appeals took a different view. Dismissing everything we have said on the subject as "lack[ing] conclusive weight," the Ninth Circuit held in *Aguila-Montes* that the modified categorical approach could turn a conviction under *any* statute into an ACCA predicate offense. 655 F. 3d, at 931. The statute, like § 459, could contain a single, indivisible set of elements covering far more conduct than the generic crime—and still, a sentencing court could "conside[r] to some degree the factual basis for the defendant's conviction" or, otherwise stated, "the particular acts the defendant committed." *Id.*, at 935–936. More specifically, the court could look to reliable materials (the charging document, jury instructions, plea colloquy, and so forth) to deter-

mine "what facts" can "confident[ly]" be thought to underlie the defendant's conviction in light of the "prosecutorial theory of the case" and the "facts put forward by the government." *Id.*, at 936–937. It makes no difference, in the Ninth Circuit's view, whether "specific words in the statute" of conviction "'actually required'" the jury (or judge accepting a plea) "to find a particular generic element." *Id.*, at 936 (quoting *Taylor*, 495 U. S., at 602; some internal quotation marks omitted).[3]

That approach—which an objecting judge aptly called "modified factual," 655 F. 3d, at 948 (Berzon, J., concurring in judgment)—turns an elements-based inquiry into an

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[3] The dissent, as we understand it, takes the same view as the Ninth Circuit; accordingly, each of the reasons—statutory, constitutional, and practical—that leads us to reject *Aguila-Montes* proves fatal to the dissent's position as well. The dissent several times obscures its call to explore facts with language from our categorical cases, asking whether "the relevant portions of the state record clearly show that the jury necessarily found, or the defendant necessarily admitted, the elements of [the] generic [offense]." *Post*, at 294; see *Shepard*, 544 U. S., at 24 (plurality opinion) (reiterating *Taylor*'s "demanding requirement that . . . a prior conviction '*necessarily' involve[]*" a jury finding on each element of the generic offense (emphasis added)). But the dissent nowhere explains how a factfinder can have "necessarily found" a non-element—that is, a fact that by definition is *not* necessary to support a conviction. The dissent's fundamental view is that a sentencing court should be able to make reasonable "inference[s]" about what the factfinder really (even though not necessarily) found. See *post*, at 295. That position accords with our dissenting colleague's previously expressed skepticism about the categorical approach. See *Moncrieffe* v. *Holder*, 569 U. S. 184, 220 (2013) (ALITO, J., dissenting) ("I would hold that the categorical approach is not controlling where the state conviction at issue was based on a state statute that encompasses both a substantial number of cases that qualify under the federal standard and a substantial number that do not. In such situations, it is appropriate to look beyond the elements of the state offense and to rely as well on facts that were admitted in state court or that, taking a realistic view, were clearly proved"). But there are several decades of water over that dam, and the dissent offers no newly persuasive reasons for revisiting our precedents.

evidence-based one. It asks not whether "statutory definitions" necessarily require an adjudicator to find the generic offense, but instead whether the prosecutor's case realistically led the adjudicator to make that determination. And it makes examination of extra-statutory documents not a tool used in a "narrow range of cases" to identify the relevant element from a statute with multiple alternatives, but rather a device employed in every case to evaluate the facts that the judge or jury found. By this point, it should be clear that the Ninth Circuit's new way of identifying ACCA predicates has no roots in our precedents. But more: *Aguila-Montes* subverts those decisions, conflicting with each of the rationales supporting the categorical approach and threatening to undo all its benefits.

A

This Court offered three grounds for establishing our elements-centric, "formal categorical approach." *Taylor*, 495 U. S., at 600. First, it comports with ACCA's text and history. Second, it avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries. And third, it averts "the practical difficulties and potential unfairness of a factual approach." *Id.*, at 601. When assessed in light of those three reasons, the Ninth Circuit's ruling strikes out swinging.

Start with the statutory text and history. As we have long recognized, ACCA increases the sentence of a defendant who has three "previous convictions" for a violent felony—not a defendant who has thrice committed such a crime. 18 U. S. C. § 924(e)(1); see *Taylor*, 495 U. S., at 600. That language shows, as *Taylor* explained, that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.*; see *Shepard*, 544 U. S., at 19. If Congress had wanted to increase a sentence based on the facts of a prior offense, it presumably would have said so; other statutes, in other

contexts, speak in just that way. See *Nijhawan*, 557 U. S., at 36 (construing an immigration statute as requiring a " 'circumstance-specific,' not a 'categorical,' " approach). But in ACCA, *Taylor* found, Congress made a deliberate decision to treat every conviction of a crime in the same manner: During the lengthy debate preceding the statute's enactment, "no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." 495 U. S., at 601. Congress instead meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none.

The Ninth Circuit's approach runs headlong into that congressional choice. Instead of reviewing documents like an indictment or plea colloquy only to determine "which statutory phrase was the basis for the conviction," the Ninth Circuit looks to those materials to discover what the defendant actually did. *Johnson*, 559 U. S., at 144. This case demonstrates the point. Descamps was not *convicted of* generic burglary, because (as the Government agrees) § 459 does not contain that crime's required unlawful-entry element. See Brief for United States 38, 43–44. At most, the colloquy showed that Descamps *committed* generic burglary, and so hypothetically *could have been* convicted under a law criminalizing that conduct. But that is just what we said, in *Taylor* and elsewhere, is not enough. See 495 U. S., at 600; *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563, 576 (2010) (rejecting such a " 'hypothetical approach' " given a similar statute's directive to "look to the conviction itself," rather than "to what might have or could have been charged"). And the necessary result of the Ninth Circuit's method is exactly the differential treatment we thought Congress, in enacting ACCA, took care to prevent. In the two years since *Aguila-Montes*, the Ninth Circuit has treated some, but not other, convictions under § 459 as ACCA predicates, based on minor variations in the cases' plea documents. Compare,

e. g., 466 Fed. Appx., at 565 (Descamps' § 459 conviction counts as generic burglary), with 655 F. 3d, at 946 (Aguila-Montes' does not).

Similarly, consider (though *Aguila-Montes* did not) the categorical approach's Sixth Amendment underpinnings. We have held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000). Under ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. Those concerns, we recognized in *Shepard*, counsel against allowing a sentencing court to "make a disputed" determination "about what the defendant and state judge must have understood as the factual basis of the prior plea," or what the jury in a prior trial must have accepted as the theory of the crime. 544 U. S., at 25 (plurality opinion); see *id.*, at 28 (THOMAS, J., concurring in part and concurring in judgment) (stating that such a finding would "giv[e] rise to constitutional error, not doubt"). Hence our insistence on the categorical approach.

Yet again, the Ninth Circuit's ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction. Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits. But the Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. See *Aguila-Montes*, 655 F. 3d, at 937. And there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those

constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. See, *e. g.*, *Richardson* v. *United States*, 526 U. S. 813, 817 (1999). Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment. See 544 U. S., at 24–26 (plurality opinion). So when the District Court here enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement (that he "broke and entered") irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence.

Finally, the Ninth Circuit's decision creates the same "daunting" difficulties and inequities that first encouraged us to adopt the categorical approach. *Taylor*, 495 U. S., at 601–602. In case after case, sentencing courts following *Aguila-Montes* would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.) And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations. In this case, for example, Descamps may have let the prosecutor's statement go by because it was irrelevant to the proceedings. He likely was not thinking about the possibility that his silence could come

back to haunt him in an ACCA sentencing 30 years in the future. (Actually, he could not have been thinking that thought: ACCA was not even on the books at the time of Descamps' burglary conviction.)

Still worse, the *Aguila-Montes* approach will deprive some defendants of the benefits of their negotiated plea deals. Assume (as happens every day) that a defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match an ACCA offense. Under the Ninth Circuit's view, a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements found in the old record. *Taylor* recognized the problem: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain," the Court stated, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty" to generic burglary. 495 U. S., at 601–602. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain.

B

The Ninth Circuit defended its (excessively) modified approach by denying any real distinction between divisible and indivisible statutes extending further than the generic offense. "The only conceptual difference," the court reasoned, "is that [a divisible statute] creates an *explicitly* finite list of possible means of commission, while [an indivisible one] creates an *implied* list of every means of commission that otherwise fits the definition of a given crime." *Aguila-Montes*, 655 F. 3d, at 927. For example, an indivisible statute "requir[ing] use of a 'weapon' is not meaningfully different"—or so says the Ninth Circuit—"from a statute that simply lists every kind of weapon in existence . . . ('gun, axe, sword, baton, slingshot, knife, machete, bat,' and so on)." *Ibid.* In a similar way, *every* indivisible statute can be imaginatively

reconstructed as a divisible one. And if that is true, the Ninth Circuit asks, why limit the modified categorical approach only to explicitly divisible statutes?

The simple answer is: Because only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime. A prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives. See, *e. g.*, *The Confiscation Cases*, 20 Wall. 92, 104 (1874) ("[A]n indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient").[4] And the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt. So assume, along the lines of the Ninth Circuit's example, that a statute criminalizes assault with any of eight specified weapons; and suppose further, as the Ninth Circuit did, that only assault with a *gun* counts as an ACCA offense. A later sentencing court need only check the charging documents and instructions ("Do they refer to a gun or something else?") to determine whether in convicting a defendant under that divisible statute, the jury necessarily found that he committed the ACCA-qualifying crime.

None of that is true of an overbroad, indivisible statute. A sentencing court, to be sure, can hypothetically reconceive such a statute in divisible terms. So, as *Aguila-Montes* re-

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[4] See also 1 C. Wright & A. Leipold, Federal Practice and Procedure: Criminal § 125, pp. 550–551 (4th ed. 2008) ("If a single statute sets forth several different offenses, [a] pleading . . . that does not indicate which crime [the] defendant allegedly committed is insufficient"); 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 19.3(a), p. 263 (3d ed. 2007) ("[W]here a statute specifies several different ways in which the crime can be committed, [courts often] hold that the pleading must refer to the particular alternative presented in the individual case").

veals, a court blessed with sufficient time and imagination could devise a laundry list of potential "weapons"—not just the eight the Ninth Circuit mentioned, but also (for starters) grenades, pipe bombs, spears, tire irons, BB guns, nunchucks, and crossbows. But the thing about hypothetical lists is that they are, well, hypothetical. As long as the statute itself requires only an indeterminate "weapon," that is all the indictment must (or is likely to) allege and all the jury instructions must (or are likely to) mention. And most important, that is all the jury must find to convict the defendant. The jurors need not all agree on whether the defendant used a gun or a knife or a tire iron (or any other particular weapon that might appear in an imagined divisible statute), because the actual statute requires the jury to find only a "weapon." And even if in many cases, the jury could have readily reached consensus on the weapon used, a later sentencing court cannot supply that missing judgment. Whatever the underlying facts or the evidence presented, the defendant still would not have been convicted, in the deliberate and considered way the Constitution guarantees, of an offense with the same (or narrower) elements as the supposed generic crime (assault with a gun).

Indeed, accepting the Ninth Circuit's contrary reasoning would altogether collapse the distinction between a categorical and a fact-specific approach. After all, the Ninth Circuit's "weapons" example is just the tip of the iceberg: Courts can go much further in reconceiving indivisible statutes as impliedly divisible ones. In fact, every element of every statute can be imaginatively transformed as the Ninth Circuit suggests—so that every crime is seen as containing an infinite number of subcrimes corresponding to "all the possible ways an individual can commit" it. *Aguila-Montes*, 655 F. 3d, at 927. (Think: Professor Plum, in the ballroom, with the candlestick? Colonel Mustard, in the conservatory, with the rope, on a snowy day, to cover up his affair with Mrs. Peacock?) If a sentencing court, as the Ninth Circuit

holds, can compare each of those "implied . . . means of commission" to the generic ACCA offense, *ibid.* (emphasis deleted), then the categorical approach is at an end. At that point, the court is merely asking whether a particular set of facts leading to a conviction conforms to a generic ACCA offense. And that is what we have expressly and repeatedly forbidden. Courts may *modify* the categorical approach to accommodate alternative "statutory definitions." *Ibid.*; cf. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 225 (1994) (" '[T]o modify' means to change moderately or in minor fashion"). They may not, by pretending that every fact pattern is an "implied" statutory definition, *Aguila-Montes*, 655 F. 3d, at 927, convert that approach into its opposite.

IV

The Government tries to distance itself from the Ninth Circuit by offering a purportedly narrower theory—that although an indivisible statute that is "truly missing" an element of the generic offense cannot give rise to an ACCA conviction, California's burglary law can do so because it merely "contains a broader version of the [generic] element of unlawfulness of entry." Brief for United States 11–12. The Government's argument proceeds in three steps. It begins from the premise that sentencing courts applying ACCA should consider not only the statute defining a prior crime but also any judicial interpretations of it. Next, the Government points to a California decision holding (not surprisingly) that a defendant cannot "burglariz[e] his own home"; the case's reasoning, the Government notes, is that § 459 (though not saying so explicitly) requires "an entry which invades a possessory right." *People* v. *Gauze*, 15 Cal. 3d 709, 713–716, 542 P. 2d 1365, 1367–1368 (1975). Given that precedent, the Government contends, § 459 includes a kind of "unlawful entry" element, although it is broader than the generic crime's analogous requirement. Finally,

the Government asserts that sentencing courts may use the modified approach "to determine whether a particular defendant's conviction under" such an overbroad statute actually "was for [the] generic" crime. Brief for United States 11.

Although elaborately developed in the Government's brief, this argument's first two steps turn out to be sideshows. We may reserve the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it. And we may assume, as the Government insists, that California caselaw treats § 459 as including an element of entry "invading a possessory right"—although, truth be told, we find the state decisions on that score contradictory and confusing.[5] Even on those assumptions, § 459's elements do not come into line with generic burglary's. As the Government concedes, almost every entry onto another's property with intent to steal—including, for example, a shoplifter's walking into an open store—"invades a possessory right" under § 459. See Brief for United States 38; *Gauze*, 15 Cal. 3d, at 714, 542 P. 2d, at 1367. By contrast, generic burglary's unlawful-entry element excludes any case in which a person enters premises open to the public, no matter his intent; the generic crime requires breaking and entering or similar unlawful activity. See Brief for United States 38; LaFave § 21.1(a). So everything rests on the Government's

[5] Several decisions treat "invasion of a possessory right" as an aspect of § 459's entry element, see, *e. g.*, *People* v. *Waidla*, 22 Cal. 4th 690, 723, 996 P. 2d 46, 65 (2000); *Fortes* v. *Sacramento Munic. Ct. Dist.*, 113 Cal. App. 3d 704, 712–714, 170 Cal. Rptr. 292, 296–297 (1980), but others view the issue of possessory right as bearing only on the affirmative defense of consent, see, *e. g.*, *People* v. *Sherow*, 196 Cal. App. 4th 1296, 1303–1305, 1311, and n. 9, 128 Cal. Rptr. 3d 255, 260–261, 266, and n. 9 (2011); *People* v. *Felix*, 23 Cal. App. 4th 1385, 1397, 28 Cal. Rptr. 2d 860, 867 (1994). And California's pattern jury instructions do *not* require the jury to find invasion of a possessory right before convicting a defendant of burglary. See 1 Cal. Jury Instr., Crim., No. 1700 (2012).

third point: that this mismatch does not preclude applying the modified categorical approach, because it results not from a missing element but instead from an element's overbreadth.

But for starters, we see no principled way to make that distinction. Most overbroad statutes can also be characterized as missing an element; and most statutes missing an element can also be labeled overbroad. Here is the only conclusion in *Aguila-Montes* we agree with: "[I]t is difficult, if not impossible," to determine which is which. 655 F. 3d, at 925. The example that court gave was as follows: A statute of conviction punishes possession of pornography, but a federal law carries a sentence enhancement for possession of child pornography. Is the statute of conviction overbroad because it includes both adult and child pornography; or is that law instead missing the element of involvement of minors? The same name game can be played with § 459. The Government labors mightily to turn what it fears looks like a missing-element statute into an overbroad statute through the incorporation of judicial decisions. But even putting those decisions aside, the Government might have described § 459 as merely having an overbroad element because "entry" includes both the lawful and the unlawful kind. And conversely, Descamps could claim that even as judicially interpreted, § 459 is entirely missing generic burglary's element of breaking and entering or similar unlawful conduct. All is in the eye of the beholder, and prone to endless manipulation.

In any event, and more fundamentally, we see no reason why the Government's distinction should matter. Whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime. In this case, for example, Descamps was not convicted of generic burglary because § 459, whether viewed as missing an element or containing an over-

broad one, does not require breaking and entering. So every reason we have given—textual, constitutional, and practical—for rejecting the Ninth Circuit's proposed approach applies to the Government's as well. See *supra*, at 267–271. At bottom, the Government wants the same thing as the Ninth Circuit (if nominally in a few fewer cases): It too wishes a sentencing court to look beyond the elements to the evidence or, otherwise said, to explore whether a person convicted of one crime could also have been convicted of another, more serious offense. But that circumstance-specific review is just what the categorical approach precludes. And as we have explained, we adopted the modified approach to help implement the categorical inquiry, not to undermine it.

V

Descamps may (or may not) have broken and entered, and so committed generic burglary. But § 459—the crime of which he was convicted—does not require the factfinder (whether jury or judge) to make that determination. Because generic unlawful entry is not an element, or an alternative element, of § 459, a conviction under that statute is never for generic burglary. And that decides this case in Descamps' favor; the District Court should not have enhanced his sentence under ACCA.[6] That court and the Ninth Circuit erred in invoking the modified categorical approach to look behind Descamps' conviction in search of

[6] The Government here forfeited an alternative argument that § 459 qualifies as a predicate offense under ACCA's "residual clause," which covers statutes "involv[ing] conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii). We express no view on that argument's merits. Compare *United States* v. *Mayer*, 560 F. 3d 948, 960–963 (CA9 2009) (holding that Oregon's burglary statute falls within the residual clause, even though it does not include all of generic burglary's elements), with *id.*, at 951 (Kozinski, C. J., dissenting from denial of rehearing en banc) (arguing that the panel opinion "is a train wreck in the making").

record evidence that he actually committed the generic offense. The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE KENNEDY, concurring.

As the Court explains, this case concerns earlier convictions under state statutes classified by cases in the Courts of Appeals, and now in today's opinion for the Court, as "indivisible." See, *e. g., United States* v. *Aguila-Montes de Oca*, 655 F. 3d 915 (CA9 2011) (en banc) (*per curiam*); *United States* v. *Beardsley*, 691 F. 3d 252 (CA2 2012). This category is used to describe a class of criminal statutes that are drafted with a single set of elements that are broader than those of the generic definition of the corresponding crime enumerated in the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e)(2)(B)(ii).

Just one of the substantial concerns that the Court is correct to consider is that, in the regular course of the criminal process, convictions may be entered, often by guilty pleas, when either the attorney or the client, or both, have given no consideration to possible later consequences under ACCA. See *ante*, at 270–271. As a result, certain facts in the documents approved for judicial examination in *Shepard* v. *United States*, 544 U. S. 13 (2005), may go uncontested because they do not alter the sentencing consequences of the crime, even though their effect is to require a later enhancement under ACCA. This significant risk of failing to consider the full consequences of the plea and conviction is troubling.

Balanced against this, as JUSTICE ALITO indicates, is that the dichotomy between divisible and indivisible state criminal statutes is not all that clear. See *post*, at 291–293 (dissenting opinion). The effect of today's decision, moreover, is that an unspecified number, but likely a large number, of state criminal statutes that are indivisible but that often do reach serious crimes otherwise subject to ACCA's provisions now must be amended by state legislatures. Otherwise, they will not meet federal requirements even though they would have come within ACCA's terms had the state statute been drafted in a different way. This is an intrusive demand on the States.

On due consideration, the concerns well expressed by the Court persuade me that it reaches the correct result. The disruption to the federal policy underlying ACCA, nevertheless, is troubling and substantial. See *post*, at 293–294 (ALITO, J., dissenting). If Congress wishes to pursue its policy in a proper and efficient way without mandating uniformity among the States with respect to their criminal statutes for scores of serious offenses, and without requiring the amendment of any number of federal criminal statutes as well, Congress should act at once. It may then determine whether ACCA's design and structure should be modified to meet the concerns expressed both by the Court and the dissenting opinion.

With these observations, I join the opinion of the Court.

JUSTICE THOMAS, concurring in the judgment.

Petitioner Matthew Descamps was convicted of being a felon in possession of a firearm, 18 U. S. C. § 922(g), which subjected him to a maximum sentence of 10 years' imprisonment. The District Court, however, applied an Armed Career Criminal Act (ACCA) enhancement with a mandatory *minimum* of 15 years based in part on Descamps' earlier California conviction for burglary. See § 924(e). The Cali-

fornia law says that any "person who enters" any of a number of structures "with intent to commit grand or petit larceny or any felony is guilty of burglary." Cal. Penal Code Ann. § 459 (West 2010). That law does not, on its face, require the jury to determine whether the entry itself was unlawful, a required element of the so-called "generic" offense of burglary that qualifies as an ACCA predicate. See *Taylor* v. *United States*, 495 U. S. 575, 599 (1990). The majority holds that a court may not review the underlying facts of Descamps' state crime to determine whether he entered the building unlawfully and, thus, that his burglary conviction may not be used as a predicate offense under ACCA. While I agree with the Court's conclusion, I disagree with its reasoning.

I have previously explained that ACCA runs afoul of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), because it allows the judge to "mak[e] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *James* v. *United States*, 550 U. S. 192, 231 (2007) (dissenting opinion) (internal quotation marks omitted). Under the logic of *Apprendi*, a court may not find facts about a prior conviction when such findings increase the statutory maximum. This is so whether a court is determining whether a prior conviction was entered, see 530 U. S., at 520–521 (THOMAS, J., concurring), or attempting to discern what facts were necessary to a prior conviction, see *James*, *supra*, at 231–232 (THOMAS, J., dissenting). In either case, the court is inappropriately finding a fact that must be submitted to the jury because it "increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, *supra*, at 490.

In light of the foregoing, it does not matter whether a statute is "divisible" or "indivisible," see *ante*, at 257–258, and courts should not have to struggle with the contours of the so-called "modified categorical" approach, *ante*, at 257.

The only reason Descamps' ACCA enhancement is before us is "because this Court has not yet reconsidered *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions." *Shepard* v. *United States*, 544 U. S. 13, 27 (2005) (THOMAS, J., concurring in part and concurring in judgment). Regardless of the framework adopted, judicial factfinding increases the statutory maximum in violation of the Sixth Amendment. However, because today's opinion at least limits the situations in which courts make factual determinations about prior convictions, I concur in the judgment.

JUSTICE ALITO, dissenting.

The Court holds, on highly technical grounds, that no California burglary conviction qualifies as a burglary conviction under the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(c). This is so, according to the Court, because (1) burglary under California law is broader than so-called "generic burglary"—unlawfully entering or remaining in a building with the intent to commit a crime; (2) the California burglary statute is not "divisible"; and (3) our "modified categorical approach" cannot be used in a case involving an indivisible statute. Even when it is apparent that a California burglary conviction was based on what everyone imagines when the term "burglary" is mentioned—*e. g.*, breaking into a home to steal valuables—that conviction, the Court holds, must be ignored.

I would give ACCA a more practical reading. When it is clear that a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary, the conviction should qualify. Petitioner's burglary conviction meets that requirement, and I would therefore affirm the decision of the Court of Appeals.

I

Before petitioner was charged in the case now before us, he had already compiled a criminal record that included con-

victions in Washington State for assault and threatening to kill a judge, and convictions in California for robbery and burglary. See App. 11a–12a; 466 Fed. Appx. 563, 565 (CA9 2012). After his release from custody for these earlier crimes, petitioner fired a gun in the direction of a man who supposedly owed him money for methamphetamine, and as a result, he was charged in federal court with possession of a firearm by a convicted felon, in violation of § 922(g)(1). A jury found him guilty, and the District Court imposed an enhanced sentence under ACCA because he had the requisite number of previous convictions for "a violent felony or a serious drug offense." § 924(e). ACCA defines a "violent felony" to include a "burglary" that is "punishable by imprisonment for a term exceeding one year," § 924(e)(2)(B), and both the District Court and the Court of Appeals found that petitioner's California burglary conviction fit this definition.

While the concept of a conviction for burglary might seem simple, things have not worked out that way under our case law. In *Taylor* v. *United States*, 495 U. S. 575, 599 (1990), we held that "burglary" under ACCA means what we called "generic burglary," that is, the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Determining whether a burglary conviction qualifies under this definition is easy if the elements set out in the state statute are the same as or narrower than the elements of generic burglary, see *ibid.*, but what if the state offense is broader? In that event, we have held, a federal court may sometimes apply what we have termed the "modified categorical approach," that is, it may examine some items in the state-court record, including charging documents, jury instructions, and statements made at guilty plea proceedings, to determine if the defendant was actually found to have committed the elements of the generic offense. See *Shepard* v. *United States*, 544 U. S. 13, 20 (2005); *Taylor*, *supra*, at 602.

Petitioner argues that his 1978 conviction for burglary under Cal. Penal Code § 459 does not qualify as a burglary conviction for ACCA purposes because of the particular way in which this provision is worded. Section 459 provides that a "person who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." Cal. Penal Code Ann. § 459 (West 2010). This provision is broader than generic burglary in two respects.

The first, which does not preclude application of the modified categorical approach, concerns the place burglarized. While generic burglary applies only to offenses involving the entry of a building, the California provision also reaches offenses involving the entry of some other locations, see *ibid.* Under our cases, however, a federal court considering whether to apply ACCA may determine, based on an examination of certain relevant documents, whether the conviction was actually based on the entry of a building and, if it was, may impose an increased sentence. See *Johnson* v. *United States*, 559 U. S. 133, 144 (2010); *Nijhawan* v. *Holder*, 557 U. S. 29, 35 (2009); *Shepard*, *supra*, at 26.

The second variation is more consequential. Whereas generic burglary requires an entry that is unlawful or unprivileged, the California statute refers without qualification to "[e]very person who enters." § 459. Petitioner argues, and the Court agrees, that this discrepancy renders the modified categorical approach inapplicable to his California burglary conviction.

II

The Court holds that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Ante*, at 258. Because the Court's holding is based on the distinction between "divisible" and "indivisible" statutes, it is important to identify precisely what this taxonomy means.

My understanding is that a statute is divisible, in the sense used by the Court, only if the offense in question includes as separate elements all of the elements of the generic offense. By an element, I understand the Court to mean something on which a jury must agree by the vote required to convict under the law of the applicable jurisdiction. See *ante*, at 269–270 (citing *Richardson* v. *United States*, 526 U. S. 813, 817 (1999)). And although the Court reserves decision on the question whether a sentencing court may take authoritative judicial decisions into account in identifying the elements of a statute, see *ante*, at 275, I will assume that a sentencing court may do so. While the elements of a criminal offense are generally set out in the statutory text, courts sometimes find that unmentioned elements are implicit. See, *e. g.*, *Neder* v. *United States*, 527 U. S. 1, 20 (1999) (holding that federal mail fraud, wire fraud, and bank fraud statutes require proof of materiality even though that element is not mentioned in the statutory text). I cannot think of any reason why an authoritative decision of this sort should be ignored, and the Court has certainly not provided any. I therefore proceed on the assumption that a statute is divisible if the offense, *as properly construed*, has the requisite elements.

The Court's holding that the modified categorical approach may be used only when a statute is divisible in this sense is not required by ACCA or by our prior cases and will cause serious practical problems.

A

Nothing in the text of ACCA mandates the Court's exclusive focus on the elements of an offense. ACCA increases the sentence of a defendant who has "three previous *convictions* . . . for a violent felony," 18 U. S. C. § 924(e)(1) (emphasis added), and the Court claims that the word "convictions" mandates a narrow, elements-based inquiry, see *ante*, at 267. But "[i]n ordinary speech, when it is said that a person was convicted of or for doing something, the 'something' may include facts that go beyond the bare elements of the relevant

criminal offense." *Moncrieffe* v. *Holder*, 569 U. S. 184, 219 (2013) (ALITO, J., dissenting).

Nor is an exclusively elements-based inquiry mandated by ACCA's definition of a "violent felony" as "any crime . . . that . . . is burglary," § 924(e)(2)(B)(ii). In drafting that provision, Congress did not say "any crime that has *the elements* of burglary." Indeed, the fact that Congress referred to "elements" elsewhere in the same subparagraph, see § 924(e)(2)(B)(i) (defining "violent felony" to mean any crime that "has *as an element* the use, attempted use, or threatened use of physical force against the person of another" (emphasis added)), but omitted any reference to elements from § 924(e)(2)(B)(ii) suggests, if anything, that it did not intend to focus exclusively on elements. Cf. *Caraco Pharmaceutical Laboratories, Ltd.* v. *Novo Nordisk A/S*, 566 U. S. 399, 416 (2012).

B

The Court says that our precedents require an elements-based approach and accuses the Court of Appeals of "flout-[ing] our reasoning" in *Taylor*, *Shepard*, *Nijhawan*, and *Johnson*, see *ante*, at 260–263, 269, but that charge is unfounded. In at least three of those cases, the Court thought that the modified categorical approach could be used in relation to statutes that may not have been divisible.

Shepard concerned prior convictions under two Massachusetts burglary statutes that applied not only to the entry of a "building" (as is the case with generic burglary) but also to the entry of a "ship, vessel or vehicle." Mass. Gen. Laws Ann., ch. 266, § 16 (West 2000). See also § 18; 544 U. S., at 17. And the *Shepard* Court did not think that this feature of the Massachusetts statutes precluded the application of the modified categorical approach. See *id.*, at 25–26; *ante*, at 262–263. See also *Nijhawan*, *supra*, at 35 (discussing *Shepard*).

In today's decision, the Court assumes that "building" and the other locations enumerated in the Massachusetts

statutes, such as "vessel," were alternative elements, but that is questionable. It is quite likely that the entry of a building and the entry of a vessel were simply alternative means of satisfying an element. See *Commonwealth* v. *Cabrera*, 449 Mass. 825, 827, 874 N. E. 2d 654, 657 (2007) ("The elements of breaking and entering in the nighttime with intent to commit a felony are (1) breaking and (2) entering a building, ship, vessel or vehicle belonging to another (3) at night, (4) with the intent to commit a felony"). "[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Schad* v. *Arizona*, 501 U. S. 624, 636 (1991) (plurality opinion). The feature that distinguishes elements and means is the need for juror agreement, see *Richardson*, *supra*, at 817, and therefore in determining whether the entry of a building and the entry of a vessel are elements or means, the critical question is whether a jury would have to agree on the nature of the place that a defendant entered.

A case that we decided earlier this Term illustrates why "building" and "vessel" may have been means and not separate elements. In *Lozman* v. *Riviera Beach*, 568 U. S. 115 (2013), we were required to determine whether a "floating home" (a buoyant but not very seaworthy dwelling) was a "vessel." Seven of us thought it was not; two of us thought it might be. Compare *id.*, at 118, with *id.*, at 144 (SOTOMAYOR, J., dissenting). Suppose that a defendant in Massachusetts was charged with breaking into a structure like the *Lozman* floating home. In order to convict, would it be necessary for the jury to agree whether this structure was a "building" or a "vessel"? If some jurors insisted it was a building and others were convinced it was a vessel, would the jury be hung? The Court's answer is "yes." According to the Court, if a defendant had been charged with burglarizing the *Lozman* floating home and this Court had been sitting as the jury, the defendant would have escaped conviction

for burglary, no matter how strong the evidence, because the "jury" could not agree on whether he burglarized a building or a vessel.

I have not found a Massachusetts decision squarely on point, but there is surely an argument that the Massachusetts Legislature did not want to demand juror agreement on this question. In other words, there is a strong argument that entry of a "building" and entry of a "vessel" are merely alternative means, not alternative elements. And if that is so, the reasoning in *Shepard* undermines the Court's argument that the modified categorical approach focuses solely on elements and not on conduct.

Johnson, like *Shepard*, involved a statute that may have set out alternative means, rather than alternative elements. Under the Florida statute involved in that case, a battery occurs when a person either "1. [a]ctually and intentionally touches or strikes another person against the will of the other; or 2. [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a) (2010). It is a distinct possibility (one not foreclosed by any Florida decision of which I am aware) that a conviction under this provision does not require juror agreement as to whether a defendant firmly touched or lightly struck the victim. Nevertheless, in *Johnson*, we had no difficulty concluding that the modified categorical approach could be applied.[1] See 559 U. S., at 137.[2]

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[1] However, because the *Shepard* documents did not reveal whether Johnson had been found to have touched or struck, we had to determine whether the relatively innocuous phrase—"[a]ctually and intentionally touch[ing]" another person—constituted physical force for purposes of § 924(e)(2)(B)(i). See *Johnson*, 559 U. S., at 137.

[2] The remaining case, *Taylor* v. *United States*, 495 U. S. 575 (1990), may also have involved a statute that was not divisible, but the situation is less clear. There, the defendant had several Missouri burglary convictions, and Missouri had several different burglary provisions in effect at the time in question. See *id.*, at 578, n. 1. The particular provision involved in each of those cases was not certain. *Ibid.* At least one of those provi-

Far from mandating the Court's approach, these decisions support a practical understanding of the modified categorical approach. Thus, in *Shepard*, we observed that the factual circumstances of a defendant's prior conviction may be relevant to determining whether it qualifies as a violent felony under ACCA. See 544 U. S., at 20–21 ("With such material in a pleaded case, a later court could generally tell whether the plea had 'necessarily' rested on the *fact* identifying the burglary as generic, just as the details of instructions could support that conclusion in the jury case, or the details of a generically limited charging document would do in any sort of case" (emphasis added; citation omitted)); *id.*, at 24 (plurality opinion) ("Developments in the law since *Taylor* . . . provide a further reason to adhere to the demanding requirement that . . . a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) *facts equating to* generic burglary" (emphasis added)); *id.*, at 25 (noting that, in the context of a nongeneric burglary statute, unless the charging documents "narro[w] the charge to generic limits, the only certainty of a generic finding lies in jury instructions, or bench-trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted *findings of fact* confirming the *factual basis* for a

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sions, however, may not have been divisible. That provision, Mo. Rev. Stat. § 560.070 (1969) (repealed), applied not only to buildings but also to "any booth or tent," "any boat or vessel," or a "railroad car." It is not entirely clear whether a Missouri court would have required jurors to agree on a particular choice from this list. In *State* v. *Vandergriff*, 403 S. W. 2d 579, 581 (Mo. 1966), the Missouri Supreme Court held that an information was deficient because it "omitted a description of the type of building that might be burglarized as defined by § 560.070, and thereby omitted an essential element of the offense of burglary in the second degree." Because an information must generally include factual details that go beyond the elements of an offense, see 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 19.3(b), p. 276 (3d ed. 2007) (hereinafter LaFave), it is possible that the Missouri court did not mean to say that the type of building was an element in the sense in which I understand the Court to use the term here.

valid plea" (emphasis added)). And in *Nijhawan*, we departed from the categorical approach altogether and instead applied a "circumstance-specific" approach. See 557 U. S., at 36, 38. If anything, then, *Nijhawan* undermines the majority's position that rigid adherence to elements is always required.

C

The Court fears that application of the modified categorical approach to statutes such as § 459 would be unfair to defendants, who "often ha[ve] little incentive to contest facts that are not elements of the charged offense" and "may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." *Ante*, at 270. This argument attributes to criminal defendants and their attorneys a degree of timidity that may not be realistic. But in any event, even if a defendant does not think it worthwhile to "squabbl[e]" about insignificant factual allegations, a defendant clearly has an incentive to dispute allegations that may have a bearing on his sentence. And that will often be the case when alternative elements or means suggest different degrees of culpability. Cf. Cal. Penal Code Ann. § 460 (providing that burglary of certain inhabited locations enumerated in § 459 is punishable in the first degree, and that burglary of all other locations is punishable in the second degree).

D

The Court's approach, I must concede, does have one benefit: It provides an extra measure of assurance that a burglary conviction will not be counted as an ACCA predicate unless the defendant, if he went to trial, was actually found by a jury to have committed the elements of the generic offense. But this extra bit of assurance will generally be quite modest at best.

To see why this is so, compare what would happen under an indivisible burglary statute that simply requires entry in-

vading a possessory right, and a divisible statute that has the following two alternative elements: (1) entry by trespass and (2) entry by invitation but with an undisclosed criminal intent. Under the former statute, the jury would be required to agree only that the defendant invaded a possessory right when entering the place in question, and therefore it would be possible for the jury to convict even if some jurors thought that the defendant entered by trespassing while others thought that he entered by invitation but with an undisclosed criminal intent. Under the latter statute, by contrast, the jury would have to agree either that he trespassed or that he entered by invitation but with an undisclosed criminal intent.

This requirement of unanimity would be of some practical value only if the evidence in a case pointed to both possibilities, and in a great many cases that will not be so. In cases prosecuted under the California burglary statute, I suspect, the evidence generally points either to a trespassory entry, typically involving breaking into a building or other covered place, or to an entry by invitation but with an undisclosed criminal intent (in many cases, shoplifting). Cases in which the evidence suggests that the defendant might have done either are probably not common. And in cases where there is evidence supporting both theories, the presence of a divisible statute containing alternative elements will not solve the problem: A guilty verdict will not reveal the alternative on which the jury agreed unless the jury was asked to return a special verdict, something that is not generally favored in criminal cases. See 6 LaFave § 24.10(a), at 543–544.

In cases that end with a guilty plea—and most do—the benefit of divisibility is even less. A judge who accepts a guilty plea is typically required to confirm that there is a factual basis for the plea, see 5 *id.*, § 21.4(f), at 835–840 (3d ed. 2007 and Supp. 2011–2012), and the proffer of a factual basis will generally focus exclusively on one of the alternative elements.

The Court nevertheless suggests that the extra modicum of assurance provided in cases involving divisible statutes is needed to prevent violations of the Sixth Amendment jury trial right, *ante*, at 268–271, but I disagree. So long as a judge applying ACCA is determining, not what the defendant did when the burglary in question was committed, but what the jury in that case necessarily found or what the defendant, in pleading guilty, necessarily admitted, the jury trial right is not infringed. See *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). When the modified categorical approach is used to decide whether "a jury was actually required to find all the elements of [a] generic [offense]," the defendant has already enjoyed his Sixth Amendment right to a jury determination of those elements. *Taylor*, 495 U. S., at 602.

III

While producing very modest benefits at most, the Court's holding will create several serious problems.

A

Determining whether a statute is divisible will often be harder than the Court acknowledges. What I have said about the statutes involved in *Shepard* and *Johnson* illustrates this point. The Court assumes that those statutes were divisible, *ante*, at 262, 264, n. 2, but as I have explained, it is possible that they were not. See *supra*, at 285–287.

To determine whether a statute contains alternative elements, as opposed to merely alternative means of satisfying an element, a court called upon to apply ACCA will be required to look beyond the text of the statute, which may be deceptive. Take, for example, Mich. Comp. Laws Ann. § 750.82(1) (West 2004), which criminalizes assault with "a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon." The Court seems to assume that a statute like this enumerates alternative elements, *ante*, at 272–273, but the Michigan courts have held otherwise.

Under Michigan law, the elements of § 750.82(1) are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People* v. *Avant*, 235 Mich. App. 499, 505, 597 N. W. 2d 864, 869 (1999). Although the statute lists numerous types of weapons, the particular type of weapon is not itself an element that the prosecution must prove beyond a reasonable doubt. Instead, the list of weapons in the statute merely enumerates alternative means of committing the crime.[3]

Even if a federal court applying ACCA discovers a state-court decision holding that a particular fact must be alleged in a charging document, its research is not at an end. Charging documents must generally include factual allegations that go beyond the bare elements of the crime—specifically, at least enough detail to permit the defendant to mount a defense. See 5 LaFave § 19.3(b), at 276. And some jurisdictions require fairly specific factual allegations. See, *e. g.*, N. Y. Crim. Proc. Law Ann. § 200.50 (West 2007) (enumerating detailed requirements for indictment); *People* v. *Swanson*, 308 Ill. App. 3d 708, 712, 721 N. E. 2d 630, 633 (1999) (vacating conviction for disorderly conduct for submitting a false police report because information "d[id] not describe with particularity the time, date, or location of the alleged domestic battery and the acts comprising the battery . . . [or] the statement that was falsely reported"); *Edwards* v. *State*, 379 So. 2d 336, 338 (Ala. Crim. App. 1979) (it is insufficient for an indictment for robbery to allege the amount of money taken; it "must aver the denomination of the money taken or that the particular denomination is un-

[3] The board game Clue, to which the Court refers, see *ante*, at 273, does not provide sound legal guidance. In that game, it matters whether Colonel Mustard bashed in the victim's head with a candlestick, wrench, or lead pipe. But in real life, the colonel would almost certainly not escape conviction simply because the jury was unable to agree on the particular type of blunt instrument that he used to commit the murder.

known to the grand jury"). Thus, the mere fact that state law requires a particular fact to be alleged in a charging document does not mean that this fact must be found by a jury or admitted by the defendant.

The only way to be sure whether particular items are alternative elements or simply alternative means of satisfying an element may be to find cases concerning the correctness of jury instructions that treat the items one way or the other. And such cases may not arise frequently. One of the Court's reasons for adopting the modified categorical approach was to simplify the work of ACCA courts, see *Shepard*, 544 U. S., at 20; *Taylor*, 495 U. S., at 601, but the Court's holding today will not serve that end.

B

The Court's holding will also frustrate fundamental ACCA objectives. We have repeatedly recognized that Congress enacted ACCA to ensure (1) that violent, dangerous recidivists would be subject to enhanced penalties and (2) that those enhanced penalties would be applied uniformly, regardless of state-law variations. See, *e. g.*, *id.*, at 587–589. See also *id.*, at 582 (" '[I]n terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases' " (quoting S. Rep. No. 98–190, p. 20 (1983))); 495 U. S., at 591 (rejecting disparate results across States based on label given by State to a particular crime).

The Court's holding will hamper the achievement of these objectives by artificially limiting ACCA's reach and treating similar convictions differently based solely on the vagaries of state law. Defendants convicted of the elements of generic burglary in California will not be subject to ACCA, but defendants who engage in exactly the same behavior in, say, Virginia, will fall within ACCA's reach. See Va. Code Ann. § 18.2–90 (Lexis 2009).

I would avoid these problems by applying the modified categorical approach to § 459—and any other similar burglary statute from another State—and would ask whether the relevant portions of the state record clearly show that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. If the state-court record is inconclusive, then the conviction should not count. But where the record is clear, I see no reason for granting a special dispensation.

IV

When the modified categorical approach is applied to petitioner's conviction, it is clear that he "necessarily admitted"—and therefore was convicted for committing—the elements of generic burglary: the unlawful or unprivileged entry of a building with the intent to commit a crime.

Both the complaint and information alleged that petitioner "unlawfully and feloniously enter[ed]" a building (the "CentroMart") "with the intent to commit theft therein." App. 14a–17a (emphasis deleted). When the trial court inquired into the factual basis for petitioner's plea, the prosecutor stated that petitioner's crime involved "the breaking and entering of a grocery store." *Id.*, at 25a. Neither petitioner nor his attorney voiced any objection.[4] *Ibid.* In order to accept petitioner's plea, the trial court was required under California law to ensure that the plea had a factual basis, see Cal. Penal Code Ann. § 1192.5 (1978); App. 26a, and we must presume that the plea proceedings were conducted in a regular manner, see *Parke* v. *Raley*, 506 U. S. 20, 29–

[4] The Ninth Circuit has held that a court applying the modified categorical approach may rely on a prosecutor's statement as to the factual basis for a guilty plea when that statement is offered on the record in the defendant's presence and the defendant does not object. *United States* v. *Hernandez-Hernandez*, 431 F. 3d 1212, 1219 (2005). Petitioner has not challenged the Ninth Circuit's rule, and that issue is not within the scope of the question on which we granted certiorari. Accordingly, I would apply it for purposes of this case.

30 (1992). The unmistakable inference arising from the plea transcript is that the trial judge—quite reasonably—understood petitioner and his attorney to assent to the factual basis provided by the prosecutor. Both the District Court and the Court of Appeals concluded that petitioner had admitted and, as a practical matter, was convicted for having committed the elements of generic burglary, and we did not agree to review that factbound determination, see 567 U. S. 964 (2012) (granting certiorari "limited to Question 1 presented by the petition").

Even if that determination is reviewed, however, the lower courts' conclusion should be sustained. Under the California burglary statute, as interpreted by the State Supreme Court, a defendant must either (1) commit a trespass in entering the location in question or (2) enter in violation of some other possessory right. See *People* v. *Gauze*, 15 Cal. 3d 709, 713–714, 542 P. 2d 1365, 1367 (1975).[5]

In this case, the judge who accepted petitioner's guilty plea must have relied on petitioner's implicit admission that he "broke" into the store, for if petitioner had admitted only that he entered the store, the judge would not have been able to assess whether he had invaded a possessory right. Nor would an admission to merely "entering" the store have permitted the judge to assess whether petitioner entered with the intent to commit a crime; petitioner's admission to "breaking" was therefore critical to that element, as well. Cf. Black's Law Dictionary 236 (rev. 4th ed. 1968) ("Breaking" denotes the "tearing away or removal of any part of a house or of the locks, latches, or other fastenings intended to

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[5] The majority suggests that California law is ambiguous as to this requirement, see *ante*, at 275, n. 5, but any confusion appears to have arisen after petitioner's 1978 conviction and is therefore irrelevant for purposes of this case. Cf. *McNeill* v. *United States*, 563 U. S. 816, 820 (2011) ("The only way to answer [ACCA's] backward-looking question [whether a previous conviction was for a serious drug offense] is to consult the law that applied at the time of that conviction").

secure it, or otherwise exerting force to gain an entrance, with the intent to commit a felony").

We have explained that burglary under § 924(e) means "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U. S., at 598. Based on petitioner's guilty plea and the *Shepard* documents, it is clear that petitioner necessarily admitted the elements of generic burglary. He unlawfully entered a building with the intent to commit a crime. Accordingly, I would hold that petitioner's conviction under § 459 qualifies as a conviction for "burglary" under § 924(e).

For these reasons, I would affirm the decision of the Court of Appeals, and I therefore respectfully dissent.

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FISHER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL.

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

No. 11–345. Argued October 10, 2012—Decided June 24, 2013

The University of Texas at Austin (University) considers race as one of various factors in its undergraduate admissions process. The University, which is committed to increasing racial minority enrollment, adopted its current program after this Court decided *Grutter* v. *Bollinger*, 539 U. S. 306, upholding the use of race as one of many "plus factors" in an admissions program that considered the overall individual contribution of each candidate, and decided *Gratz* v. *Bollinger*, 539 U. S. 244, holding unconstitutional an admissions program that automatically awarded points to applicants from certain racial minorities.

Petitioner, who is Caucasian, was rejected for admission to the University's 2008 entering class. She sued the University and school officials, alleging that the University's consideration of race in admissions violated the Equal Protection Clause. The District Court granted summary judgment to the University. Affirming, the Fifth Circuit held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan.

Held: Because the Fifth Circuit did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, its decision affirming the District Court's grant of summary judgment to the University was incorrect. Pp. 307–315.

(a) *Bakke*, *Gratz*, and *Grutter*, which directly address the question considered here, are taken as given for purposes of deciding this case. In *Bakke*'s principal opinion, Justice Powell recognized that state university "decisions based on race or ethnic origin . . . are reviewable under the Fourteenth Amendment," 438 U. S., at 287, using a strict scrutiny standard, *id.*, at 299. He identified as a compelling interest that could justify the consideration of race the interest in the educational benefits that flow from a diverse student body, but noted that this interest is complex, encompassing a broad array "of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.*, at 315.

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In *Gratz* and *Grutter*, the Court endorsed these precepts, observing that an admissions process with such an interest is subject to judicial review and must withstand strict scrutiny, *Gratz*, *supra*, at 275, *i. e.*, a university must clearly demonstrate that its "'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose,'" *Bakke*, *supra*, at 305. Additional guidance may be found in the Court's broader equal protection jurisprudence. See, *e. g.*, *Rice* v. *Cayetano*, 528 U. S. 495, 517; *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 505. Strict scrutiny is a searching examination, and the government bears the burden to prove "'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.'" *Ibid.* Pp. 307–310.

(b) Under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications. A court may give some deference to a university's "judgment that such diversity is essential to its educational mission," 539 U. S., at 328, provided that diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision. On this point, the courts below were correct in finding that *Grutter* calls for deference to the University's experience and expertise about its educational mission. However, once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to its goal. On this point, the University receives no deference. *Id.*, at 333. It is at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.*, at 337. Narrow tailoring also requires a reviewing court to verify that it is "necessary" for the university to use race to achieve the educational benefits of diversity. *Bakke*, *supra*, at 305. The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.

Rather than perform this searching examination, the Fifth Circuit held petitioner could challenge only whether the University's decision to use race as an admissions factor "was made in good faith." It presumed that the school had acted in good faith and gave petitioner the burden of rebutting that presumption. It thus undertook the narrow tailoring requirement with a "degree of deference" to the school. These expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" 539 U. S., at 326. Strict scrutiny does not permit a court to accept a school's assertion that

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its admissions process uses race in a permissible way without closely examining how the process works in practice, yet that is what the District Court and Fifth Circuit did here. The Court vacates the Fifth Circuit's judgment. But fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. In determining whether summary judgment in the University's favor was appropriate, the Fifth Circuit must assess whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Pp. 310–314.

631 F. 3d 213, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., *post*, p. 315, and THOMAS, J., *post*, p. 315, filed concurring opinions. GINSBURG, J., filed a dissenting opinion, *post*, p. 334. KAGAN, J., took no part in the consideration or decision of the case.

Bert W. Rein argued the cause for petitioner. With him on the briefs were *William S. Consovoy*, *Thomas R. McCarthy*, and *Claire J. Evans*.

Gregory G. Garre argued the cause for respondents. With him on the brief were *Maureen E. Mahoney*, *J. Scott Ballenger*, *Lori Alvino McGill*, *James C. Ho*, *Patricia C. Ohlendorf*, and *Douglas Laycock*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Assistant Attorney General Perez*, *Deputy Solicitor General Kneedler*, *Ginger D. Anders*, *Diana K. Flynn*, *Sharon M. McGowan*, *Jeh Charles Johnson*, *Philip H. Rosenfelt*, *William B. Schultz*, *Cameron F. Kerry*, and *M. Patricia Smith*.*

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*Briefs of *amici curiae* urging reversal were filed 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 Rights Union by *Peter J. Ferrara*; for the Asian American Legal Foundation et al. by *Erik S. Jaffe*, *Gordon M. Fauth, Jr.*, and *Carrie Severino*; for the Cato Institute by *David B. Rivkin, Jr.*, *Lee A. Casey*, and *Ilya Shapiro*; for the Center for Individual Rights by *Terence J. Pell* and *Michael E. Rosman*; for Current and Former Federal Civil Rights Officials by *Michael H. Park*, *Steven*

JUSTICE KENNEDY delivered the opinion of the Court.

The University of Texas at Austin (University) considers race as one of various factors in its undergraduate admis-

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G. Bradbury, and *Steven A. Engel*; for Judicial Watch, Inc., et al. by *Paul J. Orfanedes* and *Chris Fedeli*; for the Louis D. Brandeis Center for Human Rights Under Law et al. by *Alan Gura*; for the Mountain States Legal Foundation by *J. Scott Detamore*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard*, *Ralph W. Kasarda*, and *Joshua P. Thompson*; for Scholars of Economics and Statistics by *Kenneth A. Klukowski*; for the Southeastern Legal Foundation, Inc., by *Shannon Lee Goessling* and *John J. Park, Jr.*; for Richard Sander et al. by *Stuart Taylor, Jr., pro se*; and for Abigail Thernstrom et al. by *Robert N. Driscoll*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Richard Dearing*, Deputy Solicitor General, and *Simon Heller*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *George Jepsen* of Connecticut, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Jim Hood* of Mississippi, *Steve Bullock* of Montana, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *William H. Sorrell* of Vermont, *Vincent F. Frazer* of the Virgin Islands, *Robert M. McKenna* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia; for the Advancement Project by *Tomiko Brown-Nagin* and *Lani Guinier*; for the American Bar Association by *Laurel G. Bellows*, *Theodore V. Wells, Jr.*, *David W. Brown*, *Sidney S. Rosdeitcher*, and *Jennifer H. Wu*; for the American Council on Education et al. by *Martin Michaelson*, *Alexander E. Dreier*, *Catherine E. Stetson*, *Elizabeth B. Meers*, and *Ada Meloy*; for the American Educational Research Association et al. by *Angelo N. Ancheta*; for the American Jewish Committee et al. by *Richard C. Godfrey*; for the American Psychological Association by *Lisa S. Blatt*, *R. Reeves Anderson*, and *Nathalie F. P. Gilfoyle*; for American Social Science Researchers by *Liliana M. Garces*; for Amherst College et al. by *Charles S. Sims* and *Shelley J. Klein*; for the Anti-Defamation League by *Howard W. Goldstein*, *Steven M. Freeman*, and *Mark S. Finkelstein*; for the Asian American Legal Defense and Education Fund et al. by *Dean Richlin*, *Robert E. Toone*, and *Kenneth Kimerling*; for the Association of American Law Schools by *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Michael C. Dorf*, *Kevin K. Russell*, and *Thomas C. Goldstein*; for the Association of American Medical Colleges et al. by *Jonathan S. Franklin*, *Robert Burgoyne*, and *Frank R. Trinity*; for the

sions process. Race is not itself assigned a numerical value for each applicant, but the University has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a "critical mass." Petitioner, who is Cauca-

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Black Student Alliance at the University of Texas at Austin et al. by *Debo P. Adegbile*, *Elise C. Boddie*, *Damon T. Hewitt*, *Leticia V. Smith-Evans*, *Rachel M. Kleinman*, and *Joshua Civin*; for the Boston Bar Association et al. by *Jonathan M. Albano*; for the Brennan Center for Justice at NYU School of Law et al. by *Steven S. Michaels*, *Inimai M. Chettiar*, and *Lloyd Leonard*; for Brown University et al. by *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Beverly E. Ledbetter*, *Jane E. Booth*, *James J. Mingle*, *Robert B. Donin*, *Pamela J. Bernard*, *Wendy S. White*, *Debra Zumwalt*, and *David Williams II*; for the California Institute of Technology et al. by *Douglas Hallward-Driemeier*; for the Coalition to Defend Affirmative Action et al. by *George B. Washington*; for the College Board et al. by *Richard W. Riley*, *Francisco M. Negrón, Jr.*, and *Naomi E. Gittins*; for Constitutional Law Scholars et al. by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *David H. Gans*; for the Council for Minority Affairs at Texas A&M et al. by *Melissa Hart*; for Distinguished Alumni of the University of Texas at Austin by *David C. Frederick*, *Derek T. Ho*, and *Christopher J. Walker*; for Emory Outlaw et al. by *Sarah M. Shalf*; for Experimental Psychologists by *Stuart Banner* and *Rachel D. Godsil*; for Fordham University et al. by *Floyd Abrams* and *Susan Buckley*; for Former Commissioners and General Counsel of the Federal Communications Commission et al. by *Patricia A. Millett*, *Ruthanne M. Deutsch*, *David Honig*, *Maurita Coley*, *Michael Small*, and *John B. Capehart*; for Former Student Body Presidents of the University of Texas at Austin by *Felicia R. Reid*, *Natasha J. Baker*, *Megan L. Anderson*, and *Abigail S. Crouse*; for the Harvard Graduate School of Education Students for Diversity by *Philip Lee* and *Matthew P. Shaw*; for the Howard University School of Law Civil Rights Clinic et al. by *Aderson B. François*; for the Houston Community College System by *Gene L. Locke*, *Elizabeth A. Campbell*, and *Lino Mendiola III*; for the Law School Admission Council by *Jonathan D. Hacker*; for the Lawyers' Committee for Civil Rights Under Law et al. by *Bradley S. Phillips*, *Michelle Friedland*, *Daniel B. Levin*, *Jon Greenbaum*, *Brenda Shum*, *Wade Henderson*, *Lisa M. Bornstein*, and *Dianne Piche*; for Members of the Asian American Center for Advancing Justice et al. by *Bill Lann Lee* and *Albert Giang*; for the National Association of Basketball Coaches et al. by *Theodore W. Ruger*; for the National Black Law Students Association by *Deborah N. Archer* and *Mr. François*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Harold Craig Becker*, *Lynn*

sian, sued the University after her application was rejected. She contends that the University's use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment.

Rhinehart, *Judith A. Scott*, *David Strom*, and *John C. Dempsey*; for National Latino Organizations by *Thomas A. Saenz*, *David G. Hinojosa*, *Walter Dellinger*, *Anton Metlitsky*, *Loren L. Alikhan*, and *Juan Cartagena*; for the National Women's Law Center et al. by *Andrew J. Pincus*, *Richard B. Katskee*, *Marcia D. Greenberger*, *Fatima Goss Graves*, and *Neena K. Chaudhry*; for the New York State Bar Association by *David M. Schraver* and *Seymour W. James, Jr.*; for the President and Chancellors of the University of California by *Ethan P. Schulman*, *Charles F. Robinson*, and *Christopher M. Patti*; for Religious Organizations and Campus Ministries et al. by *Allyson N. Ho*; for Social and Organizational Psychologists by *Eva Paterson* and *John A. Powell*; for the Society of American Law Teachers by *Mark E. Brossman*; for Teach For America, Inc., by *Janet Pitterle Holt*; for the United Negro College Fund by *David E. Schwartz*, *Richard W. Kidd*, and *Desireé C. Boykin*; for the United States Student Association by *Jonathan Greenblatt*, *Joanna Shally*, and *Brenda Wright*; for the University of Delaware et al. by *Deanne E. Maynard* and *Brian R. Matsui*; for the University of North Carolina at Chapel Hill by *John Charles Boger*; for Lieutenant General Julius W. Becton, Jr., et al. by *Philippa Scarlett*, *Joe R. Reeder*, and *Robert P. Charrow*; for David Boyle by *Mr. Boyle*, *pro se*; for Representative Ruben Hinojosa et al. by *Steven D. Gordon*; for Robert D. Putnam by *Brigida Benitez*; for Senator Harry Reid et al. by *Mitchell Y. Mirviss*; for the Family of Heman Sweatt by *Allan Van Fleet*; for Kimberly West-Faulcon by *E. Richard Larson*; and for 38 Current Members of the Texas State Senate and House of Representatives by *Eric L. Lewis*, *Robin A. Lenhardt*, and *Michelle Adams*.

Briefs of *amici curiae* were filed for the State of California by *Kamala D. Harris*, Attorney General of California, *Antonette Benita Cordero*, Deputy Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Mark Breckler*, Chief Assistant Attorney General, *Louis Verdugo, Jr.*, Senior Assistant Attorney General, *Angela Sierra*, Supervising Deputy Attorney General, and *Catherine Z. Ysreal*, Deputy Attorney General; for the American Association for Affirmative Action by *Marilynn L. Schuyler*, *Ryan Nelson*, *David J. Goldstein*, and *Joseph D. Weiner*; for the American Civil Liberties Union by *Dennis D. Parker*, *Matthew A. Coles*, and *Steven R. Shapiro*; for the Appalachian State University et al. by *Kim M. Watterson* and *Martha Hartle Munsch*; for the Association of the Bar of the City of New York by *Carey Dunne* and *Alan Rothstein*; for the

The parties asked the Court to review whether the judgment below was consistent with "this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter* v. *Bollinger*, 539 U. S. 306 (2003)." Pet. for Cert. i. The Court concludes that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 305 (1978) (opinion of Powell, J.). Because the Court of Appeals did not apply the correct standard of strict scrutiny, its decision affirming the District Court's grant of summary judgment to the University was incorrect. That decision is vacated, and the case is remanded for further proceedings.

California Association of Scholars et al. by *John C. Eastman*, *Edwin Meese III*, and *Manuel S. Klausner*; for the Coalition of Bar Associations of Color et al. by *Jonathan M. Cohen*, *Mark A. Packman*, *John Page*, *Benny Agosto, Jr.*, *Peter M. Reyes, Jr.*, *Patty Ferguson-Bohnee*, and *Robert O. Saunooke*; for Empirical Scholars by *Thomas S. Leatherbury* and *Harry M. Reasoner*; for the Equal Employment Advisory Council by *Jeffrey A. Norris*, *Rae T. Vann*, and *Ann Elizabeth Reesman*; for Fortune-100 Businesses et al. by *David W. DeBruin*, *Elaine J. Goldenberg*, *Matthew S. Hellman*, *Laura Schumacher*, *Maureen F. Del Duca*, *Lawrence P. Tu*, *Christopher H. Hahn*, *William F. Lloyd*, *Charles J. Kalil*, *Thomas L. Sager*, *Darryl M. Bradford*, *Gregory S. Gallopoulos*, *Brackett B. Denniston III*, *Stephen Shackelford, Jr.*, *John L. Howard*, *William L. Bedman*, *A. Douglas Melamed*, *Edward A. Ryan*, *Bruce N. Kuhlik*, *Thomas W. Burt*, *Sheila C. Cheston*, *Larry D. Thompson*, *Thomas R. Kelly*, *Deborah P. Majoras*, *Ann M. Kappler*, *J. A. Bouknight, Jr.*, *Randall E. Mehrberg*, *James O'Connor*, and *Michael D. Fricklas*; for Human Rights Advocates et al. by *Constance de la Vega*, *Neil A. F. Popović*, and *Risa E. Kaufman*; for the National Association for the Advancement of Colored People et al. by *Kim M. Keenan*, *Victor Goode*, *Andrew L. Deutsch*, and *Gary L. Bledsoe*; for the National League of Cities et al. by *Ms. Klein*; for Small Business Owners and Associations by *Joseph M. Sellers* and *Anthony W. Robinson*; for the Texas Association of Scholars by *Joel C. Mandelman*; for Gail Heriot et al. by *Anthony T. Caso*; for Robert Post et al. by *Carter G. Phillips*; for the Honorable Allen B. West by *R. Lawrence Purdy*; and for 28 Undergraduate and Graduate Student Organizations by *Monte Cooper* and *Robert A. Rosenfeld.*

I

A

Located in Austin, Texas, on the most renowned campus of the Texas state university system, the University is one of the leading institutions of higher education in the Nation. Admission is prized and competitive. In 2008, when petitioner sought admission to the University's entering class, she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled. Petitioner was denied admission.

In recent years the University has used three different programs to evaluate candidates for admission. The first is the program it used for some years before 1997, when the University considered two factors: a numerical score reflecting an applicant's test scores and academic performance in high school (Academic Index or AI), and the applicant's race. In 1996, this system was held unconstitutional by the United States Court of Appeals for the Fifth Circuit. It ruled the University's consideration of race violated the Equal Protection Clause because it did not further any compelling government interest. *Hopwood* v. *Texas*, 78 F. 3d 932, 955 (1996).

The second program was adopted to comply with the *Hopwood* decision. The University stopped considering race in admissions and substituted instead a new holistic metric of a candidate's potential contribution to the University, to be used in conjunction with the Academic Index. This "Personal Achievement Index" (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. Seeking to address the decline in minority enrollment after *Hopwood*, the University also expanded its outreach programs.

The Texas State Legislature also responded to the *Hopwood* decision. It enacted a measure known as the Top Ten Percent Law, codified at Tex. Educ. Code Ann. § 51.803 (West 2009). Also referred to as H. B. 588, the Top Ten Percent Law grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards.

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African-American and 14.5% Hispanic.

Following this Court's decisions in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U. S. 244 (2003), the University adopted a third admissions program, the 2004 program in which the University reverted to explicit consideration of race. This is the program here at issue. In *Grutter*, the Court upheld the use of race as one of many "plus factors" in an admissions program that considered the overall individual contribution of each candidate. In *Gratz*, by contrast, the Court held unconstitutional Michigan's undergraduate admissions program, which automatically awarded points to applicants from certain racial minorities.

The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal To Consider Race and Ethnicity in Admissions (Proposal). Supp. App. 1a. The Proposal relied in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students. It

showed that few of these classes had significant enrollment by members of racial minorities. In addition the Proposal relied on what it called "anecdotal" reports from students regarding their "interaction in the classroom." The Proposal concluded that the University lacked a "critical mass" of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program.

To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.

Once applications have been scored, they are plotted on a grid with the Academic Index on the x-axis and the PAI on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not. Each college—such as liberal arts or engineering—admits students separately. So a student is considered initially for her first-choice college, then for her second choice, and finally for general admission as an undeclared major.

Petitioner applied for admission to the University's 2008 entering class and was rejected. She sued the University and various University officials in the United States District Court for the Western District of Texas. She alleged that the University's consideration of race in admissions violated the Equal Protection Clause. The parties cross-moved for summary judgment. The District Court granted summary judgment to the University. The United States Court of Appeals for the Fifth Circuit affirmed. It held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diver-

sity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan. 631 F. 3d 213, 217–218 (2011).

Over the dissent of seven judges, the Court of Appeals denied petitioner's request for rehearing en banc. See 644 F. 3d 301, 303 (2011). Petitioner sought a writ of certiorari. The writ was granted. 565 U. S. 1195 (2012).

B

Among the Court's cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body: *Bakke*, 438 U. S. 265; *Gratz*, *supra*; and *Grutter*, 539 U. S. 306. We take those cases as given for purposes of deciding this case.

We begin with the principal opinion authored by Justice Powell in *Bakke*, *supra*. In *Bakke*, the Court considered a system used by the medical school of the University of California at Davis. From an entering class of 100 students the school had set aside 16 seats for minority applicants. In holding this program impermissible under the Equal Protection Clause Justice Powell's opinion stated certain basic premises. First, "decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment." *Id.*, at 287 (separate opinion). The principle of equal protection admits no "artificial line of a 'two-class theory' " that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.*, at 295. It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions "touch upon an individual's race or ethnic background, he is entitled to a

judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.*, at 299.

Next, Justice Powell identified one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body. Redressing past discrimination could not serve as a compelling interest, because a university's "broad mission [of] education" is incompatible with making the "judicial, legislative, or administrative findings of constitutional or statutory violations" necessary to justify remedial racial classification. *Id.*, at 307–309.

The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes. The academic mission of a university is "'a special concern of the First Amendment.'" *Id.*, at 312. Part of "'the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,'" and this in turn leads to the question of "'who may be admitted to study.'" *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in judgment).

Justice Powell's central point, however, was that this interest in securing diversity's benefits, although a permissible objective, is complex. "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, *supra*, at 315 (separate opinion).

In *Gratz*, 539 U. S. 244, and *Grutter, supra*, the Court endorsed the precepts stated by Justice Powell. In *Grutter*,

the Court reaffirmed his conclusion that obtaining the educational benefits of "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325.

As *Gratz* and *Grutter* observed, however, this follows only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny. "Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis." *Gratz*, *supra*, at 275. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system," *Grutter*, 539 U. S., at 334, but instead must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," *id.*, at 337. Strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose." *Bakke*, *supra*, at 305 (opinion of Powell, J.) (internal quotation marks omitted).

While these are the cases that most specifically address the central issue in this case, additional guidance may be found in the Court's broader equal protection jurisprudence which applies in this context. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," *Rice* v. *Cayetano*, 528 U. S. 495, 517 (2000) (internal quotation marks omitted), and therefore "are contrary to our traditions and hence constitutionally suspect," *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). "'[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,'" *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 505 (1989) (quoting *Fullilove* v. *Klutznick*,

448 U. S. 448, 533–534 (1980) (Stevens, J., dissenting)), "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny,'" *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967).

To implement these canons, judicial review must begin from the position that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." *Fullilove*, *supra*, at 523 (Stewart, J., dissenting); *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964). Strict scrutiny is a searching examination, and it is the government that bears the burden to prove "'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,'" *Croson*, *supra*, at 505 (quoting *Fullilove*, *supra*, at 535 (Stevens, J., dissenting)).

II

Grutter made clear that racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." 539 U. S., at 326. And *Grutter* endorsed Justice Powell's conclusion in *Bakke* that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." 438 U. S., at 311–312 (separate opinion). Thus, under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications.

According to *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." 539 U. S., at 328. *Grutter* concluded that the decision to pursue "the educational benefits that flow from student body diversity," *id.*, at 330, that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and Court of Appeals were correct in finding

that *Grutter* calls for deference to the University's conclusion, "'based on its experience and expertise,'" 631 F. 3d, at 230 (quoting 645 F. Supp. 2d 587, 603 (WD Tex. 2009)), that a diverse student body would serve its educational goals. There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. See *post*, at 315 (SCALIA, J., concurring); *post*, at 318–319 (THOMAS, J., concurring); *post*, at 336–337 (GINSBURG, J., dissenting). But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding.

A university is not permitted to define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke*, 438 U. S., at 307 (opinion of Powell, J.). "That would amount to outright racial balancing, which is patently unconstitutional." *Grutter*, *supra*, at 330. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 732 (2007).

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." 539 U. S., at 333 (internal quotation marks omitted). True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter*, it remains at all times the university's obligation to demonstrate, and the Ju-

diciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.*, at 337.

Narrow tailoring also requires that the reviewing court verify that it is "'necessary'" for a university to use race to achieve the educational benefits of diversity. *Bakke*, *supra*, at 305. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, *supra*, at 339–340 (emphasis added). Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If "'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,'" *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (quoting Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559, 578–579 (1975)), then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.

Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only "whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith." 631 F. 3d, at 236. And in considering such a challenge, the court would

"presume the University acted in good faith" and place on petitioner the burden of rebutting that presumption. *Id.*, at 231–232. The Court of Appeals held that to "second-guess the merits" of this aspect of the University's decision was a task it was "ill-equipped to perform" and that it would attempt only to "ensure that [the University's] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration." *Id.*, at 231. The Court of Appeals thus concluded that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y]." *Id.*, at 232. Because "the efforts of the University have been studied, serious, and of high purpose," the Court of Appeals held that the use of race in the admissions program fell within "a constitutionally protected zone of discretion." *Id.*, at 231.

These expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" 539 U. S., at 326 (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995)). In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed "serious, good faith consideration of workable race-neutral alternatives." 539 U. S., at 339. As noted above, see *supra*, at 303, the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.

Grutter did not hold that good faith would forgive an impermissible consideration of race. It must be remembered that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Croson*, 488 U. S., at 500. Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.

The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts. "[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable . . . . While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724, n. 9 (1982).

The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. The Court vacates that judgment, but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. See *Adarand*, *supra*, at 237. Unlike *Grutter*, which was decided after trial, this case arises from cross-motions for summary judgment. In this case, as in similar cases, in determining whether summary judgment in favor of the University would be appropriate, the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Whether this record—and not "simple . . . assurances of good intention," *Croson*, *supra*, at 500—is sufficient is a question for the Court of Appeals in the first instance.

* * *

Strict scrutiny must not be "'strict in theory, but fatal in fact,'" *Adarand*, *supra*, at 237; see also *Grutter*, *supra*, at 326. But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest

that this Court has approved in this context: the benefits of a student body diversity that "encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U. S., at 315 (opinion of Powell, J.). The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE SCALIA, concurring.

I adhere to the view I expressed in *Grutter* v. *Bollinger*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." 539 U. S. 306, 349 (2003) (opinion concurring in part and dissenting in part). The petitioner in this case did not ask us to overrule *Grutter*'s holding that a "compelling interest" in the educational benefits of diversity can justify racial preferences in university admissions. Tr. of Oral Arg. 8–9. I therefore join the Court's opinion in full.

JUSTICE THOMAS, concurring.

I join the Court's opinion because I agree that the Court of Appeals did not apply strict scrutiny to the University of Texas at Austin's (University) use of racial discrimination in admissions decisions. *Ante*, at 303. I write separately to explain that I would overrule *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.

I

A

The Fourteenth Amendment provides that no State shall "deny to any person . . . the equal protection of the laws."

The Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. "At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Missouri* v. *Jenkins*, 515 U. S. 70, 120–121 (1995) (THOMAS, J., concurring). "It is for this reason that we must subject all racial classifications to the strictest of scrutiny." *Id.*, at 121.

Under strict scrutiny, all racial classifications are categorically prohibited unless they are "'necessary to further a compelling governmental interest'" and "narrowly tailored to that end." *Johnson* v. *California*, 543 U. S. 499, 514 (2005) (quoting *Grutter*, *supra*, at 327). This most exacting standard "has proven automatically fatal" in almost every case. *Jenkins*, *supra*, at 121 (THOMAS, J., concurring). And rightly so. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 240 (1995) (THOMAS, J., concurring in part and concurring in judgment). "The Constitution abhors classifications based on race" because "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, *supra*, at 353 (THOMAS, J., concurring in part and dissenting in part).

B

1

The Court first articulated the strict-scrutiny standard in *Korematsu* v. *United States*, 323 U. S. 214 (1944). There, we held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.*, at 216.[1] Aside from *Grutter*, the Court has

[1] The standard of "pressing public necessity" is more frequently called a "compelling governmental interest." I use the terms interchangeably.

recognized only two instances in which a "[p]ressing public necessity" may justify racial discrimination by the government. First, in *Korematsu*, the Court recognized that protecting national security may satisfy this exacting standard. In that case, the Court upheld an evacuation order directed at "all persons of Japanese ancestry" on the grounds that the Nation was at war with Japan and that the order had "a definite and close relationship to the prevention of espionage and sabotage." 323 U. S., at 217–218. Second, the Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but we have stressed that a government wishing to use race must provide "a 'strong basis in evidence for its conclusion that remedial action [is] necessary.'" *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 500, 504 (1989) (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277 (1986) (plurality opinion)).

In contrast to these compelling interests that may, in a narrow set of circumstances, justify racial discrimination, the Court has frequently found other asserted interests insufficient. For example, in *Palmore* v. *Sidoti*, 466 U. S. 429 (1984), the Court flatly rejected a claim that the best interests of a child justified the government's racial discrimination. In that case, a state court awarded custody to a child's father because the mother was in a mixed-race marriage. The state court believed the child might be stigmatized by living in a mixed-race household and sought to avoid this perceived problem in its custody determination. We acknowledged the possibility of stigma but nevertheless concluded that "the reality of private biases and the possible injury they might inflict" do not justify racial discrimination. *Id.*, at 433. As we explained: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Ibid.*

Two years later, in *Wygant*, *supra*, the Court held that even asserted interests in remedying societal discrimination and in providing role models for minority students could not justify governmentally imposed racial discrimination. In that case, a collective-bargaining agreement between a school board and a teacher's union favored teachers who were "'Black, American Indian, Oriental, or of Spanish descendancy.'" *Id.*, at 270–271, and n. 2 (plurality opinion). We rejected the interest in remedying societal discrimination because it had no logical stopping point. *Id.*, at 276. We similarly rebuffed as inadequate the interest in providing role models to minority students and added that the notion that "black students are better off with black teachers could lead to the very system the Court rejected in *Brown* v. *Board of Education*, 347 U. S. 483 (1954)." *Ibid.*

2

Grutter was a radical departure from our strict-scrutiny precedents. In *Grutter*, the University of Michigan Law School (Law School) claimed that it had a compelling reason to discriminate based on race. The reason it advanced did not concern protecting national security or remedying its own past discrimination. Instead, the Law School argued that it needed to discriminate in admissions decisions in order to obtain the "educational benefits that flow from a diverse student body." 539 U. S., at 317. Contrary to the very meaning of strict scrutiny, the Court *deferred* to the Law School's determination that this interest was sufficiently compelling to justify racial discrimination. *Id.*, at 325.

I dissented from that part of the Court's decision. I explained that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity'" sufficient to satisfy strict scrutiny. *Id.*, at 353. Cf. *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, J., concurring) (protecting pris-

oners from violence might justify narrowly tailored discrimination); *J. A. Croson*, *supra*, at 521 (SCALIA, J., concurring in judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]"). I adhere to that view today. As should be obvious, there is nothing "pressing" or "necessary" about obtaining whatever educational benefits may flow from racial diversity.

II

A

The University claims that the District Court found that it has a compelling interest in attaining "a diverse student body and the educational benefits flowing from such diversity." Brief for Respondents 18. The use of the conjunction, "and," implies that the University believes its discrimination furthers two distinct interests. The first is an interest in attaining diversity for its own sake. The second is an interest in attaining educational benefits that allegedly flow from diversity.

Attaining diversity for its own sake is a nonstarter. As even *Grutter* recognized, the pursuit of diversity as an end is nothing more than impermissible "racial balancing." 539 U. S., at 329–330 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional" (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 307 (1978) (opinion of Powell, J.); citation omitted)); see also *id.*, at 307 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids"). Rather, diversity can only be the *means* by which the University obtains educational benefits; it cannot be an end pursued for its own sake. Therefore, the *educational benefits* allegedly produced by diversity must rise to

the level of a compelling state interest in order for the program to survive strict scrutiny.

Unfortunately for the University, the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the alleged educational benefits of diversity cannot justify racial discrimination today.

1

Our desegregation cases establish that the Constitution prohibits public schools from discriminating based on race, even if discrimination is necessary to the schools' survival. In *Davis* v. *School Bd. of Prince Edward Cty.*, decided with *Brown*, *supra*, the school board argued that if the Court found segregation unconstitutional, white students would migrate to private schools, funding for public schools would decrease, and public schools would either decline in quality or cease to exist altogether. Brief for Appellees in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 30 (hereinafter Brief for Appellees in *Davis*) ("Virginians . . . would no longer permit sizeable appropriations for schools on either the State or local level; private segregated schools would be greatly increased in number and the masses of our people, both white and Negro, would suffer terribly. . . . [M]any white parents would withdraw their children from the public schools and, as a result, the program of providing better schools would be abandoned" (internal quotation marks omitted)). The true victims of desegregation, the school board asserted, would be black students, who would be unable to afford private school. See *id.*, at 31 ("[W]ith the demise of segregation, education in Virginia would re-

ceive a serious setback. Those who would suffer most would be the Negroes who, by and large, would be economically less able to afford the private school"); Tr. of Oral Arg. in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1954, No. 3, p. 208 ("What is worst of all, in our opinion, you impair the public school system of Virginia and the victims will be the children of both races, we think the Negro race worse than the white race, because the Negro race needs it more by virtue of these disadvantages under which they have labored. We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County").[2]

Unmoved by this sky-is-falling argument, we held that segregation violates the principle of equality enshrined in the Fourteenth Amendment. See *Brown*, *supra*, at 495 ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"); see also *Allen* v. *School Bd. of Prince*

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[2] Similar arguments were advanced unsuccessfully in other cases as well. See, *e. g.*, Brief for Respondents in *Sweatt* v. *Painter*, O. T. 1949, No. 44, pp. 94–95 (hereinafter Brief for Respondents in *Sweatt*) ("[I]f the power to separate the students were terminated, . . . it would be as a bonanza to the private white schools of the State, and it would mean the migration out of the schools and the turning away from the public schools of the influence and support of a large number of children and of the parents of those children . . . who are the largest contributors to the cause of public education, and whose financial support is necessary for the continued progress of public education. . . . Should the State be required to mix the public schools, there is no question but that a very large group of students would transfer, or be moved by their parents, to private schools with a resultant deterioration of the public schools" (internal quotation marks omitted)); Brief for Appellees in *Briggs* v. *Elliott*, O. T. 1952, No. 101, p. 27 (hereinafter Brief for Appellees in *Briggs*) ("[I]t would be impossible to have sufficient acceptance of the idea of mixed groups attending the same schools to have public education on that basis at all . . . . [I]t would eliminate the public schools in most, if not all, of the communities in the State").

Edward Cty., 249 F. 2d 462, 465 (CA4 1957) (*per curiam*) ("The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights"). Within a matter of years, the warning became reality: After being ordered to desegregate, Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964. See R. Sarratt, The Ordeal of Desegregation 237 (1966). Despite this fact, the Court never backed down from its rigid enforcement of the Equal Protection Clause's antidiscrimination principle.

In this case, of course, Texas has not alleged that the University will close if it is prohibited from discriminating based on race. But even if it had, the foregoing cases make clear that even that consequence would not justify its use of racial discrimination. It follows, *a fortiori*, that the putative educational benefits of student body diversity cannot justify racial discrimination: If a State does not have a compelling interest in the *existence* of a university, it certainly cannot have a compelling interest in the supposed benefits that might accrue to that university from racial discrimination. See *Grutter*, 539 U. S., at 361 (opinion of THOMAS, J.) ("[A] marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest either in its existence or in its current educational and admissions policies"). If the Court were actually applying strict scrutiny, it would require Texas either to close the University or to stop discriminating against applicants based on their race. The Court has put other schools to that choice, and there is no reason to treat the University differently.

2

It is also noteworthy that, in our desegregation cases, we rejected arguments that are virtually identical to those ad-

vanced by the University today. The University asserts, for instance, that the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society. See, *e. g.*, Brief for Respondents 6 (arguing that student body diversity "prepares students to become the next generation of leaders in an increasingly diverse society"). The segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks. See, *e. g.*, Brief for Respondents in *Sweatt* 96 ("[A] very large group of Northern Negroes [comes] South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more 'secure' at a college of his own people"); Brief for Appellees in *Davis* 25–26 ("The Negro child gets an opportunity to participate in segregated schools that I have never seen accorded to him in non-segregated schools. He is important, he holds offices, he is accepted by his fellows, he is on athletic teams, he has a full place there" (internal quotation marks omitted)). This argument was unavailing. It is irrelevant under the Fourteenth Amendment whether segregated or mixed schools produce better leaders. Indeed, no court today would accept the suggestion that segregation is permissible because historically black colleges produced Booker T. Washington, Thurgood Marshall, Martin Luther King, Jr., and other prominent leaders. Likewise, the University's racial discrimination cannot be justified on the ground that it will produce better leaders.

The University also asserts that student body diversity improves interracial relations. See, *e. g.*, Brief for Respondents 6 (arguing that student body diversity promotes "cross-racial understanding" and breaks down racial and ethnic

stereotypes). In this argument, too, the University repeats arguments once marshaled in support of segregation. See, *e. g.*, Brief for Appellees in *Davis* 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.*, at 25 ("If segregation be stricken down, the general welfare will be definitely harmed [and] there would be more friction developed" (internal quotation marks omitted)); Brief for Respondents in *Sweatt* 93 ("Texas has had no serious breaches of the peace in recent years in connection with its schools. The separation of the races has kept the conflicts at a minimum"); *id.*, at 97–98 ("The legislative acts are based not only on the belief that it is the best way to provide education for both races, and the knowledge that separate schools are necessary to keep public support for the public schools, but upon the necessity to maintain the public peace, harmony, and welfare"); Brief for Appellees in *Briggs* 32 ("The southern Negro, by and large, does not want an end to segregation in itself any more than does the southern white man. The Negro in the South knows that discriminations, and worse, can and would multiply in such event" (internal quotation marks omitted)). We flatly rejected this line of arguments in *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637 (1950), where we held that segregation would be unconstitutional even if white students never tolerated blacks. *Id.*, at 641 ("It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar"). It is,

thus, entirely irrelevant whether the University's racial discrimination increases or decreases tolerance.

Finally, while the University admits that racial discrimination in admissions is not ideal, it asserts that it is a temporary necessity because of the enduring race consciousness of our society. See Brief for Respondents 53–54 ("Certainly all aspire for a colorblind society in which race does not matter . . . . But in Texas, as in America, 'our highest aspirations are yet unfulfilled' "). Yet again, the University echoes the hollow justifications advanced by the segregationists. See, *e. g.*, Brief for State of Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Brief for Respondents in *Sweatt* 94 ("The racial consciousness and feeling which exists today in the minds of many people may be regrettable and unjustified. Yet they are a reality which must be dealt with by the State if it is to preserve harmony and peace and at the same time furnish equal education to both groups"); *id.*, at 96 (" '[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions' "); Brief for Appellees in *Briggs* 26–27 ("[I]t would be unwise in administrative practice . . . to mix the two races in the same schools at the present time and under present conditions"); Brief for Appellees on Reargument in *Briggs* v. *Elliott*, O. T. 1953, No. 2, p. 79 ("It is not 'racism' to be cognizant of the fact that mankind has struggled with race problems and racial tensions for upwards of sixty centuries"). But these arguments too were unavailing. The Fourteenth Amendment views racial bigotry as an evil to be stamped out, not as an excuse for perpetual racial tinkering by the State. See *DeFunis* v. *Odegaard*, 416 U. S. 312, 342 (1974) (Douglas, J., dissenting) ("The Equal Protection Clause com-

mands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized"). The University's arguments to this effect are similarly insufficient to justify discrimination.[3]

3

The University's arguments today are no more persuasive than they were 60 years ago. Nevertheless, despite rejecting identical arguments in *Brown*, the Court in *Grutter* deferred to the University's determination that the diversity obtained by racial discrimination would yield educational benefits. There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits. See *Grutter*, 539 U. S., at 365–366 (opinion of THOMAS, J.) ("Contained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation"). Educational benefits are a far cry from the truly compelling state interests that we previously required to justify use of racial classifications.

B

My view of the Constitution is the one advanced by the plaintiffs in *Brown*: "[N]o State has any authority under the

[3] While the arguments advanced by the University in defense of discrimination are the same as those advanced by the segregationists, one obvious difference is that the segregationists argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argues that *diversity* is the key. Today, the segregationists' arguments would never be given serious consideration. But see M. Plocienniczak, Pennsylvania School Experiments With 'Segregation,' CNN (Jan. 27, 2011), http://www.cnn.com/2011/US/01/27/pennsylvania.segregation/index.html?_s=PM:US (as visited June 21, 2013, and available in Clerk of Court's case file). We should be equally hostile to the University's repackaged version of the same arguments in support of its favored form of racial discrimination.

equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown* v. *Board of Education*, O. T. 1952, No. 8, p. 7; see also Juris. Statement in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action"); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 8, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"); Brief for Appellants in Nos. 1, 2, and 4, and for Respondents in No. 10 on Reargument in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief"). The Constitution does not pander to faddish theories about whether race mixing is in the public interest. The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.

This principle is neither new nor difficult to understand. In 1868, decades before *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), the Iowa Supreme Court held that schools may not discriminate against applicants based on their skin color. In *Clark* v. *Board of Directors*, 24 Iowa 266, a school denied admission to a student because she was black, and "public sentiment [was] opposed to the intermingling of white and colored children in the same schools." *Id.*, at 269. The Iowa Supreme Court rejected that flimsy justification, holding that "all the youths are equal before the law, and there is no discretion vested in the board . . . or elsewhere, to interfere with or disturb that equality." *Id.*, at 277. "For the courts to sustain a board of school directors . . . in limiting the rights and privileges of persons by reason of their [race], would be to sanction a plain violation of the spirit of

our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races." *Id.*, at 276. This simple, yet fundamental, truth was lost on the Court in *Plessy* and *Grutter*.

I would overrule *Grutter* and hold that the University's admissions program violates the Equal Protection Clause because the University has not put forward a compelling interest that could possibly justify racial discrimination.

III

While I find the theory advanced by the University to justify racial discrimination facially inadequate, I also believe that its use of race has little to do with the alleged educational benefits of diversity. I suspect that the University's program is instead based on the notion of the anointed that it is possible to tell when discrimination helps, rather than hurts, racial minorities. See *post*, at 336 (GINSBURG, J., dissenting) ("[G]overnment actors, including state universities, need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality' "). But "[h]istory should teach greater humility." *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 609 (1990) (O'Connor, J., dissenting). The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.

A

Slaveholders argued that slavery was a "positive good" that civilized blacks and elevated them in every dimension of life. See, *e. g.*, Calhoun, Speech in the U. S. Senate, 1837, in P. Finkelman, Defending Slavery 54, 58–59 (2003) ("Never before has the black race of Central Africa, from the dawn of history to the present day, attained a condition so civilized and so improved, not only physically, but morally and intellectually. . . . [T]he relation now existing in the slaveholding States between the two [races], is, instead of an evil, a good—

a positive good"); Harper, Memoir on Slavery, in The Ideology of Slavery 78, 115–116 (D. Faust ed. 1981) ("Slavery, as it is said in an eloquent article published in a Southern periodical work . . . 'has done more to elevate a degraded race in the scale of humanity; to tame the savage; to civilize the barbarous; to soften the ferocious; to enlighten the ignorant, and to spread the blessings of [C]hristianity among the heathen, than all the missionaries that philanthropy and religion have ever sent forth' "); Hammond, The Mudsill Speech, 1858, in Defending Slavery, *supra*, at 80, 87 ("They are elevated from the condition in which God first created them, by being made our slaves").

A century later, segregationists similarly asserted that segregation was not only benign, but good for black students. They argued, for example, that separate schools protected black children from racist white students and teachers. See, *e. g.*, Brief for Appellees in *Briggs* 33–34 (" 'I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their child to "fight" this thing out,—but, dear God, at what a cost! . . . We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated' " (quoting DuBois, Does the Negro Need Separate Schools? 4 J. of Negro Educ. 328, 330–331 (1935))); Tr. of Oral Arg. in *Bolling* v. *Sharpe*, O. T. 1952, No. 413, p. 56 ("There was behind these [a]cts a kindly feeling [and] an intention to help these people who had been in bondage. And there was and there still is an intention by the Congress to see that these children shall be educated in a healthful atmosphere, in a wholesome atmosphere, in a place where they are wanted, in a place where

they will not be looked upon with hostility, in a place where there will be a receptive atmosphere for learning for both races without the hostility that undoubtedly Congress thought might creep into these situations"). And they even appealed to the fact that many blacks agreed that separate schools were in the "best interests" of both races. See, *e. g.*, Brief for Appellees in *Davis* 24–25 ("'It has been my experience, in working with the people of Virginia, including both white and Negro, that the customs and the habits and the traditions of Virginia citizens are such that they believe for the best interests of both the white and the Negro that the separate school is best'").

Following in these inauspicious footsteps, the University would have us believe that its discrimination is likewise benign. I think the lesson of history is clear enough: Racial discrimination is never benign. "'[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." See *Metro Broadcasting*, *supra*, at 610 (O'Connor, J., dissenting). It is for this reason that the Court has repeatedly held that strict scrutiny applies to *all* racial classifications, regardless of whether the government has benevolent motives. See, *e. g.*, *Johnson*, 543 U. S., at 505 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand*, 515 U. S., at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); *J. A. Croson*, 488 U. S., at 500 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice"). The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.

B

While it does not, for constitutional purposes, matter whether the University's racial discrimination is benign, I note that racial engineering does in fact have insidious consequences. There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race. But I believe the injury to those admitted under the University's discriminatory admissions program is even more harmful.

Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. In the University's entering class of 2009, for example, among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile. Brief for Richard Sander et al. as *Amici Curiae* 3–4, and n. 4. Blacks had a mean grade point average (GPA) of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991.[4] *Ibid.*

Tellingly, neither the University nor any of the 73 *amici* briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University. Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L. Rev. 1583, 1605–1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom). "It is a fact that in virtually all selective schools . . . where racial preferences in

[4] The lowest possible score on the SAT is 600, and the highest possible score is 2400.

admission is practiced, the majority of [black] students end up in the lower quarter of their class." S. Cole & E. Barber, Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students 124 (2003). There is no reason to believe this is not the case at the University. The University and its dozens of *amici* are deafeningly silent on this point.

Furthermore, the University's discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally. Instead, the University's discrimination has a pervasive shifting effect. See T. Sowell, Affirmative Action Around the World 145–146 (2004). The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.

The Court of Appeals believed that the University needed to enroll more blacks and Hispanics because they remained "clustered in certain programs." 631 F. 3d 213, 240 (CA5 2011) ("[N]early a quarter of the undergraduate students in [the University's] College of Social Work are Hispanic, and more than 10% are [black]. In the College of Education, 22.4% of students are Hispanic and 10.1% are [black]"). But racial discrimination may be the cause of, not the solution to, this clustering. There is some evidence that students admitted as a result of racial discrimination are more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who

attend less selective schools. See, *e. g.*, Elliott, Strenta, Adair, Matier, & Scott, The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 Research in Higher Educ. 681, 699–701 (1996).[5] These students may well drift toward less competitive majors because the mismatch caused by racial discrimination in admissions makes it difficult for them to compete in more rigorous majors.

Moreover, the University's discrimination "stamp[s] [blacks and Hispanics] with a badge of inferiority." *Adarand*, 515 U. S., at 241 (opinion of THOMAS, J.). It taints the accomplishments of all those who are admitted as a result of racial discrimination. Cf. J. McWhorter, Losing the Race: Self-Sabotage in Black America 248 (2000) ("I was never able to be as proud of getting into Stanford as my classmates could be. . . . [H]ow much of an achievement can I truly say it was to have been a good enough *black* person to be admitted, while my colleagues had been considered good enough *people* to be admitted"). And, it taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination. In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission.

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[5] The success of historically black colleges at producing graduates who go on to earn graduate degrees in science and engineering is well documented. See, *e. g.*, National Science Foundation, J. Burrelli & A. Rapoport, InfoBrief, Role of HBCUs as Baccalaureate-Origin Institutions of Black S&E Doctorate Recipients 6 (2008) (Table 2) (showing that, from 1997–2006, Howard University had more black students who went on to earn science and engineering doctorates than any other undergraduate institution, and that 7 other historically black colleges ranked in the top 10); Association of American Medical Colleges, Diversity in Medical Education: Facts & Figures 86 (2012) (Table 19) (showing that, in 2011, Xavier University had more black students who went on to earn medical degrees than any other undergraduate institution and that Howard University was second).

"When blacks [and Hispanics] take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement." *Grutter*, 539 U. S., at 373 (opinion of THOMAS, J.). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those . . . who would succeed without discrimination." *Ibid.* Although cloaked in good intentions, the University's racial tinkering harms the very people it claims to be helping.

* * *

For the foregoing reasons, I would overrule *Grutter*. However, because the Court correctly concludes that the Court of Appeals did not apply strict scrutiny, I join its opinion.

JUSTICE GINSBURG, dissenting.

The University of Texas at Austin (University) is candid about what it is endeavoring to do: It seeks to achieve student-body diversity through an admissions policy patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 316–317 (1978). The University has steered clear of a quota system like the one struck down in *Bakke*, which excluded all nonminority candidates from competition for a fixed number of seats. See *id.*, at 272–275, 315, 319–320 (opinion of Powell, J.). See also *Gratz* v. *Bollinger*, 539 U. S. 244, 293 (2003) (Souter, J., dissenting) ("Justice Powell's opinion in [*Bakke*] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class."). And, like so many educational institutions across the Nation,[1] the University has taken care to follow the

[1] See Brief for Amherst College et al. as *Amici Curiae* 33–35; Brief for Association of American Law Schools as *Amicus Curiae* 6; Brief for Association of American Medical Colleges et al. as *Amici Curiae* 30–32;

model approved by the Court in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003). See 645 F. Supp. 2d 587, 609 (WD Tex. 2009) ("[T]he parties agree [that the University's] policy was based on the [admissions] policy [upheld in *Grutter*].").

Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. See *Gratz*, 539 U. S., at 303–304, n. 10 (dissenting opinion). As Justice Souter observed, the vaunted alternatives suffer from "the disadvantage of deliberate obfuscation." *Id.*, at 297–298 (dissenting opinion).

Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. See House Research Organization, Bill Analysis, HB 588, pp. 4–5 (Apr. 15, 1997) ("Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities."). It is race consciousness, not blindness to race, that drives such plans.[2] As for holistic review, if universities cannot explic-

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Brief for Brown University et al. as *Amici Curiae* 2–3, 13; Brief for Robert Post et al. as *Amici Curiae* 24–27; Brief for Fordham University et al. as *Amici Curiae* 5–6; Brief for University of Delaware et al. as *Amici Curiae* 16–21.

[2] The notion that Texas' Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell's famous statement: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." T. Arnold, The Symbols of Government 101 (1935) (internal quotation marks omitted). Only that kind of legal mind could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious.

itly include race as a factor, many may "resort to camouflage" to "maintain their minority enrollment." *Gratz*, 539 U. S., at 304 (GINSBURG, J., dissenting).

I have several times explained why government actors, including state universities, need not be blind to the lingering effects of "an overtly discriminatory past," the legacy of "centuries of law-sanctioned inequality." *Id.*, at 298 (dissenting opinion). See also *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 272–274 (1995) (dissenting opinion). Among constitutionally permissible options, I remain convinced, "those that candidly disclose their consideration of race [are] preferable to those that conceal it." *Gratz*, 539 U. S., at 305, n. 11 (dissenting opinion).

Accordingly, I would not return this case for a second look. As the thorough opinions below show, 631 F. 3d 213 (CA5 2011); 645 F. Supp. 2d 587, the University's admissions policy flexibly considers race only as a "factor of a factor of a factor of a factor" in the calculus, *id.*, at 608; followed a yearlong review through which the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity, see 631 F. 3d, at 225–226; and is subject to periodic review to ensure that the consideration of race remains necessary and proper to achieve the University's educational objectives, see *id.*, at 226.[3] Justice Powell's opinion in *Bakke* and the Court's de-

[3] As the Court said in *Grutter* v. *Bollinger*, 539 U. S. 306, 339 (2003), "[n]arrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." But, *Grutter* also explained, it does not "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.* I do not read the Court to say otherwise. See *ante*, at 311 (acknowledging that, in determining whether a race-conscious admissions policy satisfies *Grutter*'s narrow-tailoring requirement, "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes").

cision in *Grutter* require no further determinations. See *Grutter*, 539 U. S., at 333–343; *Bakke*, 438 U. S., at 315–320.

The Court rightly declines to cast off the equal protection framework settled in *Grutter*. See *ante*, at 307. Yet it stops short of reaching the conclusion that framework warrants. Instead, the Court vacates the Court of Appeals' judgment and remands for the Court of Appeals to "assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Ante*, at 314. As I see it, the Court of Appeals has already completed that inquiry, and its judgment, trained on this Court's *Bakke* and *Grutter* pathmarkers, merits our approbation.[4]

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals.

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[4] Because the University's admissions policy, in my view, is constitutional under *Grutter*, there is no need for the Court in this case "to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review." 539 U. S., at 346, n. (GINSBURG, J., concurring). See also *Gratz* v. *Bollinger*, 539 U. S. 244, 301 (2003) (GINSBURG, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.").

Syllabus

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER *v.* NASSAR

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

No. 12–484. Argued April 24, 2013—Decided June 24, 2013

Petitioner, a university medical center (University) that is part of the University of Texas system, specializes in medical education. It has an affiliation agreement with Parkland Memorial Hospital (Hospital), which requires the Hospital to offer vacant staff physician posts to University faculty members. Respondent, a physician of Middle Eastern descent who was both a University faculty member and a Hospital staff physician, claimed that Dr. Levine, one of his supervisors at the University, was biased against him on account of his religion and ethnic heritage. He complained to Dr. Fitz, Levine's supervisor. But after he arranged to continue working at the Hospital without also being on the University's faculty, he resigned his teaching post and sent a letter to Fitz and others, stating that he was leaving because of Levine's harassment. Fitz, upset at Levine's public humiliation and wanting public exoneration for her, objected to the Hospital's job offer, which was then withdrawn. Respondent filed suit, alleging two discrete Title VII violations. First, he alleged that Levine's racially and religiously motivated harassment had resulted in his constructive discharge from the University, in violation of 42 U. S. C. § 2000e–2(a), which prohibits an employer from discriminating against an employee "because of such individual's race, color, religion, sex, or national origin" (referred to here as status-based discrimination). Second, he claimed that Fitz's efforts to prevent the Hospital from hiring him were in retaliation for complaining about Levine's harassment, in violation of § 2000e–3(a), which prohibits employer retaliation "because [an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge." The jury found for respondent on both claims. The Fifth Circuit vacated as to the constructive-discharge claim, but affirmed as to the retaliation finding on the theory that retaliation claims brought under § 2000e–3(a)—like § 2000e–2(a) status-based claims—require only a showing that retaliation was a motivating factor for the adverse employment action, not its but-for cause, see § 2000e–2(m). And it found that the evidence supported a finding that Fitz was motivated, at least in part, to retaliate against respondent for his complaints about Levine.

Syllabus

Held: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). Pp. 346–363.

(a) In defining the proper causation standard for Title VII retaliation claims, it is presumed that Congress incorporated tort law's causation in fact standard—*i. e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—absent an indication to the contrary in the statute itself. See *Meyer* v. *Holley*, 537 U. S. 280, 285. An employee alleging status-based discrimination under § 2000e–2 need not show "but-for" causation. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives for the decision. This principle is the result of *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, and the ensuing Civil Rights Act of 1991 (1991 Act), which substituted a new burden-shifting framework for the one endorsed by *Price Waterhouse*. As relevant here, the 1991 Act added a new subsection to § 2000e–2, providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice," § 2000e–2(m).

Also relevant here is this Court's decision in *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176, which interprets the Age Discrimination in Employment Act of 1967 (ADEA) phrase "because of . . . age," 29 U. S. C. § 623(a)(1). *Gross* holds two insights that inform the analysis of this case. The first is textual and concerns the proper interpretation of the term "because" as it relates to the principles of causation underlying both § 623(a) and § 2000e–3(a). The second is the significance of Congress' structural choices in both Title VII itself and the 1991 Act. Pp. 346–351.

(b) Title VII's antiretaliation provision appears in a different section from its status-based discrimination ban. And, like § 623(a)(1), the ADEA provision in *Gross*, § 2000e–3(a) makes it unlawful for an employer to take adverse employment action against an employee "because" of certain criteria. Given the lack of any meaningful textual difference between § 2000e–3(a) and § 623(a)(1), the proper conclusion is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action. Respondent and the United States maintain that § 2000e–2(m)'s motivating-factor test applies, but that reading is flawed. First, it is inconsistent with the provision's plain language, which addresses only race, color, religion, sex, and national origin discrimination and says nothing about retaliation. Second, their reading is inconsistent with the statute's design and structure. Congress inserted the motivating-factor provision as a

subsection within § 2000e–2, which deals only with status-based discrimination. The conclusion that Congress acted deliberately in omitting retaliation claims from § 2000e–2(m) is reinforced by the fact that another part of the 1991 Act, § 109, expressly refers to all unlawful employment actions. See *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 256. Third, the cases they rely on, which state the general proposition that Congress' enactment of a broadly phrased antidiscrimination statute may signal a concomitant intent to ban retaliation against individuals who oppose that discrimination, see, *e. g.*, *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 452–453; *Gómez-Pérez* v. *Potter*, 553 U. S. 474, do not support the quite different rule that every reference to race, color, creed, sex, or nationality in an antidiscrimination statute is to be treated as a synonym for "retaliation," especially in a precise, complex, and exhaustive statute like Title VII. The Americans with Disabilities Act of 1990, which contains seven paragraphs of detailed description of the practices constituting prohibited discrimination, as well as an express antiretaliation provision, and which was passed only a year before § 2000e–2(m)'s enactment, shows that when Congress elected to address retaliation as part of a detailed statutory scheme, it did so clearly. Pp. 351–357.

(c) The proper interpretation and implementation of § 2000e–3(a) and its causation standard are of central importance to the fair and responsible allocation of resources in the judicial and litigation systems, particularly since retaliation claims are being made with ever-increasing frequency. Lessening the causation standard could also contribute to the filing of frivolous claims, siphoning resources from efforts by employers, agencies, and courts to combat workplace harassment. Pp. 358–360.

(d) Respondent and the Government argue that their view would be consistent with longstanding agency views contained in an Equal Employment Opportunity Commission guidance manual, but the manual's explanations for its views lack the persuasive force that is a necessary precondition to deference under *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. Respondent's final argument—that if § 2000e–2(m) does not control, then the *Price Waterhouse* standard should—is foreclosed by the 1991 Act's amendments to Title VII, which displaced the *Price Waterhouse* framework. Pp. 360–363.

674 F. 3d 448, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 363.

Counsel

Daryl L. Joseffer argued the cause for petitioner. With him on the briefs were *Greg Abbott*, Attorney General of Texas, *Daniel T. Hodge*, First Assistant Attorney General, *David C. Mattax*, Deputy Attorney General, *James Eccles*, General Litigation, Division Chief, *Lars Hagen*, Assistant Attorney General, *Michael W. Johnston*, and *Myrna Salinas Baumann*.

Brian P. Lauten argued the cause for respondent. With him on the brief were *Michael T. Kirkpatrick*, *Allison M. Zieve*, *Charla Aldous*, and *Brent Walker*.

Melissa Arbus Sherry argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Perez*, *Deputy Solicitor General Srinivasan*, *Dennis J. Dimsey*, *Tovah R. Calderon*, *Patrick David Lopez*, *Carolyn L. Wheeler*, and *Gail S. Coleman*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *John J. Bursch*, Solicitor General, *Matthew T. Nelson*, and *Nicole L. Mazzocco*, and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *James D. Caldwell* of Louisiana, *Jim Hood* of Mississippi, *Michael A. Delaney* of New Hampshire, *Robert E. Cooper, Jr.*, of Tennessee, and *J. B. Van Hollen* of Wisconsin; for the American Council on Education et al. by *H. Christopher Bartolomucci* and *Ada Meloy*; for the Chamber of Commerce of the United States of America et al. by *Gregory G. Garre*, *Robin S. Conrad*, *Kate Comerford Todd*, and *Deborah White*; for DRI–The Voice of the Defense Bar by *Mary Massaron Ross* and *Hilary A. Ballentine*; and for the Equal Employment Advisory Council et al. by *Rae T. Vann*, *Karen R. Harned*, and *Elizabeth Milito*. Briefs of *amici curiae* urging vacatur were filed for the National School Boards Association by *Francisco M. Negrón, Jr.*, *Naomi Gittins*, *Sonja Trainor*, *Jon B. Laramore*, *D. Lucetta Pope*, and *Rozlyn Fulgoni-Brittan*; and for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*.

Briefs of *amici curiae* urging affirmance were filed for the American-Arab Anti-Discrimination Committee et al. by *Samer B. Korkor* and *David F. Williams*; for the American Association of University Professors by *Aaron Nisenson* and *Theresa Chmara*; for the Committee of Interns

JUSTICE KENNEDY delivered the opinion of the Court.

When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts. This case requires the Court to define those rules in the context of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, which provides remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers.

Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor. This opinion discusses the causation rules for two categories of wrongful employer conduct prohibited by Title VII. The first type is called, for purposes of this opinion, status-based discrimination. The term is used here to refer to basic workplace protection such as prohibitions against employer discrimination on the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion and the like. See § 2000e–2(a). The second type of conduct is employer retaliation on account of an employee's having opposed, complained of, or sought remedies for unlawful workplace discrimination. See § 2000e–3(a).

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and Residents SEIU et al. by *Charlotte Garden* and *Anjana Malhotra*; for Employment Law Professors by *Sandra F. Sperino*; for the Foundation for Individual Rights in Education et al. by *David J. Hacker*, *David A. Cortman*, *Kevin H. Theriot*, and *Greg Lukianoff*; for the Lawyers' Committee for Civil Rights Under Law by *Jon M. Greenbaum*, *Ray McClain*, and *Jane Dolkart*; for the National Employment Lawyers Association et al. by *Michael L. Foreman* and *Lisa M. Bornstein*; and for the Washington Lawyers Committee for Civil Rights and Urban Affairs et al. by *Neal Goldfarb*, *Roderic V. O. Boggs*, and *Barbra Kavanaugh*.

Alice O'Brien and *Philip A. Hostak* filed a brief for the National Education Association as *amicus curiae*.

An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision. This principle is the result of an earlier case from this Court, *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989), and an ensuing statutory amendment by Congress that codified in part and abrogated in part the holding in *Price Waterhouse*, see §§ 2000e–2(m), 2000e–5(g)(2)(B). The question the Court must answer here is whether that lessened causation standard is applicable to claims of unlawful employer retaliation under § 2000e–3(a).

Although the Court has not addressed the question of the causation showing required to establish liability for a Title VII retaliation claim, it has addressed the issue of causation in general in a case involving employer discrimination under a separate but related statute, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 623. See *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167 (2009). In *Gross*, the Court concluded that the ADEA requires proof that the prohibited criterion was the but-for cause of the prohibited conduct. The holding and analysis of that decision are instructive here.

I

Petitioner, the University of Texas Southwestern Medical Center (University), is an academic institution within the University of Texas system. The University specializes in medical education for aspiring physicians, health professionals, and scientists. Over the years, the University has affiliated itself with a number of healthcare facilities including, as relevant in this case, Parkland Memorial Hospital (Hospital). As provided in its affiliation agreement with the University, the Hospital permits the University's students to gain clini-

cal experience working in its facilities. The agreement also requires the Hospital to offer empty staff physician posts to the University's faculty members, see App. 361–362, 366, and, accordingly, most of the staff physician positions at the Hospital are filled by those faculty members.

Respondent is a medical doctor of Middle Eastern descent who specializes in internal medicine and infectious diseases. In 1995, he was hired to work both as a member of the University's faculty and a staff physician at the Hospital. He left both positions in 1998 for additional medical education and then returned in 2001 as an assistant professor at the University and, once again, as a physician at the Hospital.

In 2004, Dr. Beth Levine was hired as the University's Chief of Infectious Disease Medicine. In that position Dr. Levine became respondent's ultimate (though not direct) superior. Respondent alleged that Dr. Levine was biased against him on account of his religion and ethnic heritage, a bias manifested by undeserved scrutiny of his billing practices and productivity, as well as comments that "'Middle Easterners are lazy.'" 674 F. 3d 448, 450 (CA5 2012). On different occasions during his employment, respondent met with Dr. Gregory Fitz, the University's Chair of Internal Medicine and Dr. Levine's supervisor, to complain about Dr. Levine's alleged harassment. Despite obtaining a promotion with Dr. Levine's assistance in 2006, respondent continued to believe that she was biased against him. So he tried to arrange to continue working at the Hospital without also being on the University's faculty. After preliminary negotiations with the Hospital suggested this might be possible, respondent resigned his teaching post in July 2006 and sent a letter to Dr. Fitz (among others), in which he stated that the reason for his departure was harassment by Dr. Levine. That harassment, he asserted, "'stems from . . . religious, racial and cultural bias against Arabs and Muslims.'" *Id.*, at 451. After reading that letter, Dr. Fitz expressed consternation at respondent's accusations, saying that Dr. Le-

vine had been "publicly humiliated by th[e] letter" and that it was "very important that she be publicly exonerated." App. 41.

Meanwhile, the Hospital had offered respondent a job as a staff physician, as it had indicated it would. On learning of that offer, Dr. Fitz protested to the Hospital, asserting that the offer was inconsistent with the affiliation agreement's requirement that all staff physicians also be members of the University faculty. The Hospital then withdrew its offer.

After exhausting his administrative remedies, respondent filed this Title VII suit in the United States District Court for the Northern District of Texas. He alleged two discrete violations of Title VII. The first was a status-based discrimination claim under § 2000e–2(a). Respondent alleged that Dr. Levine's racially and religiously motivated harassment had resulted in his constructive discharge from the University. Respondent's second claim was that Dr. Fitz's efforts to prevent the Hospital from hiring him were in retaliation for complaining about Dr. Levine's harassment, in violation of § 2000e–3(a). 674 F. 3d, at 452. The jury found for respondent on both claims. It awarded him over $400,000 in backpay and more than $3 million in compensatory damages. The District Court later reduced the compensatory damages award to $300,000.

On appeal, the Court of Appeals for the Fifth Circuit affirmed in part and vacated in part. The court first concluded that respondent had submitted insufficient evidence in support of his constructive-discharge claim, so it vacated that portion of the jury's verdict. The court affirmed as to the retaliation finding, however, on the theory that retaliation claims brought under § 2000e–3(a)—like claims of status-based discrimination under § 2000e–2(a)—require only a showing that retaliation was a motivating factor for the adverse employment action, rather than its but-for cause. See *id.*, at 454, n. 16 (citing *Smith* v. *Xerox Corp.*, 602 F. 3d 320, 330 (CA5 2010)). It further held that the evidence sup-

ported a finding that Dr. Fitz was motivated, at least in part, to retaliate against respondent for his complaints against Dr. Levine. The Court of Appeals then remanded for a redetermination of damages in light of its decision to vacate the constructive-discharge verdict.

Four judges dissented from the court's decision not to rehear the case en banc, arguing that the Circuit's application of the motivating-factor standard to retaliation cases was "an erroneous interpretation of [Title VII] and controlling caselaw" and should be overruled en banc. 688 F. 3d 211, 213–214 (CA5 2012) (Smith, J., dissenting from denial of rehearing en banc).

Certiorari was granted. 568 U. S. 1140 (2013).

II

A

This case requires the Court to define the proper standard of causation for Title VII retaliation claims. Causation in fact—*i. e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim, see Restatement of Torts § 9 (1934) (definition of "legal cause"); § 431, Comment *a* (same); § 279, and Comment *c* (intentional infliction of physical harm); § 280 (other intentional torts); § 281(c) (negligence). This includes federal statutory claims of workplace discrimination. *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993) (In intentional-discrimination cases, "liability depends on whether the protected trait" "actually motivated the employer's decision" and "had a determinative influence on the outcome"); *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978) (explaining that the "simple test" for determining a discriminatory employment practice is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" (internal quotation marks omitted)).

In the usual course, this standard requires the plaintiff to show "that the harm would not have occurred" in the ab-

sence of—that is, but for—the defendant's conduct. Restatement of Torts § 431, Comment *a* (negligence); § 432(1), and Comment *a* (same); see § 279, and Comment *c* (intentional infliction of bodily harm); § 280 (other intentional torts); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27, and Comment *b* (2005) (noting the existence of an exception for cases where an injured party can prove the existence of multiple, independently sufficient factual causes, but observing that "cases invoking the concept are rare"). See also Restatement (Second) of Torts § 432(1) (1963 and 1964) (negligence claims); § 870, Comment *l* (intentional injury to another); cf. § 435a, and Comment *a* (legal cause for intentional harm). It is thus textbook tort law that an action "is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984). This, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself. See *Meyer* v. *Holley*, 537 U. S. 280, 285 (2003); *Carey* v. *Piphus*, 435 U. S. 247, 257–258 (1978).

B

Since the statute's passage in 1964, it has prohibited employers from discriminating against their employees on any of seven specified criteria. Five of them—race, color, religion, sex, and national origin—are personal characteristics and are set forth in § 2000e–2. (As noted at the outset, discrimination based on these five characteristics is called status-based discrimination in this opinion.) And then there is a point of great import for this case: The two remaining categories of wrongful employer conduct—the employee's opposition to employment discrimination, and the employee's submission of or support for a complaint that alleges employment discrimination—are not wrongs based on personal traits but rather types of protected employee conduct.

These latter two categories are covered by a separate, subsequent section of Title VII, § 2000e–3(a).

Under the status-based discrimination provision, it is an "unlawful employment practice" for an employer "to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a). In its 1989 decision in *Price Waterhouse*, the Court sought to explain the causation standard imposed by this language. It addressed in particular what it means for an action to be taken "because of" an individual's race, religion, or nationality. Although no opinion in that case commanded a majority, six Justices did agree that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a "motivating" or "substantial" factor in the employer's decision. 490 U. S., at 258 (plurality opinion); *id.*, at 259 (White, J., concurring in judgment); *id.*, at 276 (O'Connor, J., concurring in judgment). If the plaintiff made that showing, the burden of persuasion would shift to the employer, which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus. *Id.*, at 258 (plurality opinion); *id.*, at 259–260 (opinion of White, J.); *id.*, at 276–277 (opinion of O'Connor, J.). In other words, the employer had to show that a discriminatory motive was not the but-for cause of the adverse employment action.

Two years later, Congress passed the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071. This statute (which had many other provisions) codified the burden-shifting and lessened causation framework of *Price Waterhouse* in part but also rejected it to a substantial degree. The legislation first added a new subsection to the end of § 2000e–2, *i. e.*, Title VII's principal ban on status-based discrimination. See § 107(a), 105 Stat. 1075. The new provision, § 2000e–2(m), states:

> "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, re-

> ligion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

This, of course, is a lessened causation standard.

The 1991 Act also abrogated a portion of *Price Waterhouse*'s framework by removing the employer's ability to defeat liability once a plaintiff proved the existence of an impermissible motivating factor. See *Gross*, 557 U. S., at 178, n. 5. In its place, Congress enacted § 2000e–5(g)(2), which provides:

> "(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and [the employer] demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> "(i) may grant declaratory relief, injunctive relief . . . and [limited] attorney's fees and costs . . . ; and
>
> "(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . ."

So, in short, the 1991 Act substituted a new burden-shifting framework for the one endorsed by *Price Waterhouse*. Under that new regime, a plaintiff could obtain declaratory relief, attorney's fees and costs, and some forms of injunctive relief based solely on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action; but the employer's proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order. See *Gross*, 557 U. S., at 178, n. 5; see also *id.*, at 175, n. 2, 177, n. 3.

After *Price Waterhouse* and the 1991 Act, considerable time elapsed before the Court returned again to the meaning of "because" and the problem of causation. This time it arose in the context of a different, yet similar, statute, the ADEA, 29 U. S. C. § 623(a). See *Gross*, *supra*. Much like

the Title VII statute in *Price Waterhouse*, the relevant portion of the ADEA provided that "'[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.'" 557 U. S., at 176 (quoting § 623(a)(1); emphasis, alteration, and ellipsis in original).

Concentrating first and foremost on the meaning of the phrase "'*because of* . . . age,'" the Court in *Gross* explained that the ordinary meaning of "'because of'" is "'[b]y reason of'" or "'on account of.'" *Id.*, at 176 (citing 1 Webster's Third New International Dictionary 194 (1966); 1 Oxford English Dictionary 746 (1933); The Random House Dictionary of the English Language 132 (1966); emphasis in original). Thus, the "requirement that an employer took adverse action 'because of' age [meant] that age was the 'reason' that the employer decided to act," or, in other words, that "age was the 'but-for' cause of the employer's adverse decision." 557 U. S., at 176. See also *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 63–64, and n. 14 (2007) (noting that "because of" means "based on" and that "'based on' indicates a but-for causal relationship"); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 265–266 (1992) (equating "by reason of" with "'but for' cause").

In the course of approving this construction, *Gross* declined to adopt the interpretation endorsed by the plurality and concurring opinions in *Price Waterhouse.* Noting that "the ADEA must be 'read . . . the way Congress wrote it,'" 557 U. S., at 179 (quoting *Meacham* v. *Knolls Atomic Power Laboratory,* 554 U. S. 84, 102 (2008)), the Court concluded that "the textual differences between Title VII and the ADEA" "prevent[ed] us from applying *Price Waterhouse* . . . to federal age discrimination claims," 557 U. S., at 175, n. 2. In particular, the Court stressed the congressional choice not to add a provision like § 2000e–2(m) to the ADEA de-

spite making numerous other changes to the latter statute in the 1991 Act. *Id.*, at 174–175 (citing *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 256 (1991)); 557 U. S., at 177, n. 3 (citing *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 270 (2009)).

Finally, the Court in *Gross* held that it would not be proper to read *Price Waterhouse* as announcing a rule that applied to both statutes, despite their similar wording and near-contemporaneous enactment. 557 U. S., at 178, n. 5. This different reading was necessary, the Court concluded, because Congress' 1991 amendments to Title VII, including its "careful tailoring of the 'motivating factor' claim" and the substitution of § 2000e–5(g)(2)(B) for *Price Waterhouse*'s full affirmative defense, indicated that the motivating-factor standard was not an organic part of Title VII and thus could not be read into the ADEA. See 557 U. S., at 178, n. 5.

In *Gross*, the Court was careful to restrict its analysis to the statute before it and withhold judgment on the proper resolution of a case, such as this, which arose under Title VII rather than the ADEA. But the particular confines of *Gross* do not deprive it of all persuasive force. Indeed, that opinion holds two insights for the present case. The first is textual and concerns the proper interpretation of the term "because" as it relates to the principles of causation underlying both § 623(a) and § 2000e–3(a). The second is the significance of Congress' structural choices in both Title VII itself and the law's 1991 amendments. These principles do not decide the present case but do inform its analysis, for the issues possess significant parallels.

III

A

As noted, Title VII's antiretaliation provision, which is set forth in § 2000e–3(a), appears in a different section from Title VII's ban on status-based discrimination. The antiretaliation provision states, in relevant part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

This enactment, like the statute at issue in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee "because" of certain criteria. Cf. 29 U. S. C. § 623(a)(1). Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action. See *Gross*, *supra*, at 176.

The principal counterargument offered by respondent and the United States relies on their different understanding of the motivating-factor section, which—on its face—applies only to status discrimination, discrimination on the basis of race, color, religion, sex, and national origin. In substance, they contend that: (1) retaliation is defined by the statute to be an unlawful employment practice; (2) § 2000e–2(m) allows unlawful employment practices to be proved based on a showing that race, color, religion, sex, or national origin was a motivating factor for—and not necessarily the but-for factor in—the challenged employment action; and (3) the Court has, as a matter of course, held that "retaliation for complaining about race discrimination *is* 'discrimination based on race.'" Brief for United States as *Amicus Curiae* 14; see *id.*, at 11–14; Brief for Respondent 16–19.

There are three main flaws in this reading of § 2000e–2(m). The first is that it is inconsistent with the provision's plain language. It must be acknowledged that because Title VII defines "unlawful employment practice" to include retaliation, the question presented by this case would be different

if § 2000e–2(m) extended its coverage to all unlawful employment practices. As actually written, however, the text of the motivating-factor provision, while it begins by referring to "unlawful employment practices," then proceeds to address only five of the seven prohibited discriminatory actions—actions based on the employee's status, *i. e.*, race, color, religion, sex, and national origin. This indicates Congress' intent to confine that provision's coverage to only those types of employment practices. The text of § 2000e–2(m) says nothing about retaliation claims. Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope. *Gardner* v. *Collins*, 2 Pet. 58, 93 (1829) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words"); see *Sebelius* v. *Cloer*, 569 U. S. 369, 378 (2013).

The second problem with this reading is its inconsistency with the design and structure of the statute as a whole. See *Gross*, 557 U. S., at 175, n. 2, 178, n. 5. Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices. See *id.*, at 177, n. 3. When Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within § 2000e–2, which contains Title VII's ban on status-based discrimination, §§ 2000e–2(a) to (d), (*l*), and says nothing about retaliation. See 1991 Act, § 107(a), 105 Stat. 1075 (directing that "[§] 2000e–2 . . . [be] further amended by adding at the end the following new subsection . . . (m)"). The title of the section of the 1991 Act that created § 2000e–2(m)—"Clarifying prohibition against impermissible consideration of race, color, religion, sex, or national origin in employment practices"—also indicates that Congress determined to address only claims of status-based discrimination, not retaliation. See § 107(a), *id.*, at 1075.

What is more, a different portion of the 1991 Act contains an express reference to all unlawful employment actions,

thereby reinforcing the conclusion that Congress acted deliberately when it omitted retaliation claims from § 2000e–2(m). See *Arabian American Oil Co.*, 499 U. S., at 256 (congressional amendment of the ADEA on a similar subject coupled with congressional failure to amend Title VII weighs against conclusion that the ADEA's standard applies to Title VII); see also *Gross*, *supra*, at 177, n. 3. The relevant portion of the 1991 Act, § 109(b), allowed certain overseas operations by U. S. employers to engage in "any practice prohibited by section 703 or 704," *i. e.*, § 2000e–2 or § 2000e–3, "if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such workplace is located." 105 Stat. 1077.

If Congress had desired to make the motivating-factor standard applicable to all Title VII claims, it could have used language similar to that which it invoked in § 109. See *Arabian American Oil Co.*, *supra*, at 256. Or, it could have inserted the motivating-factor provision as part of a section that applies to all such claims, such as § 2000e–5, which establishes the rules and remedies for all Title VII enforcement actions. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160 (2000). But in writing § 2000e–2(m), Congress did neither of those things, and "[w]e must give effect to Congress' choice." *Gross*, *supra*, at 177, n. 3.

The third problem with respondent's and the Government's reading of the motivating-factor standard is in its submission that this Court's decisions interpreting federal antidiscrimination law have, as a general matter, treated bans on status-based discrimination as also prohibiting retaliation. In support of this proposition, both respondent and the United States rely upon decisions in which this Court has "read [a] broadly worded civil rights statute . . . as including an antiretaliation remedy." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 452–453 (2008). In *CBOCS*, for example, the Court held that 42 U. S. C. § 1981—which declares that all persons "shall have the same right . . . to make

and enforce contracts . . . as is enjoyed by white citizens"—prohibits not only racial discrimination but also retaliation against those who oppose it. 553 U. S., at 445. And in *Gómez-Pérez* v. *Potter*, 553 U. S. 474 (2008), the Court likewise read a bar on retaliation into the broad wording of the federal-employee provisions of the ADEA. *Id.*, at 479, 487 ("All personnel actions affecting [federal] employees . . . who are at least 40 years of age . . . shall be made free from any discrimination based on age," 29 U. S. C. § 633a(a)); see also *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 173, 179 (2005) (20 U. S. C. § 1681(a) (Title IX)); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 235, n. 3, 237 (1969) (42 U. S. C. § 1982).

These decisions are not controlling here. It is true these cases do state the general proposition that Congress' enactment of a broadly phrased antidiscrimination statute may signal a concomitant intent to ban retaliation against individuals who oppose that discrimination, even where the statute does not refer to retaliation in so many words. What those cases do not support, however, is the quite different rule that every reference to race, color, creed, sex, or nationality in an antidiscrimination statute is to be treated as a synonym for "retaliation." For one thing, § 2000e–2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII. The cases cited by respondent and the Government do not address rules of this sort, and those precedents are of limited relevance here.

The approach respondent and the Government suggest is inappropriate in the context of a statute as precise, complex, and exhaustive as Title VII. As noted, the laws at issue in *CBOCS*, *Jackson*, and *Gómez-Pérez* were broad, general bars on discrimination. In interpreting them the Court concluded that by using capacious language Congress expressed the intent to bar retaliation in addition to status-based discrimination. See *Gómez-Pérez*, *supra*, at 486–488. In

other words, when Congress' treatment of the subject of prohibited discrimination was both broad and brief, its omission of any specific discussion of retaliation was unremarkable.

If Title VII had likewise been phrased in broad and general terms, respondent's argument might have more force. But that is not how Title VII was written, which makes it incorrect to infer that Congress meant anything other than what the text does say on the subject of retaliation. Unlike Title IX, § 1981, § 1982, and the federal-sector provisions of the ADEA, Title VII is a detailed statutory scheme. This statute enumerates specific unlawful employment practices. See §§ 2000e–2(a)(1), (b), (c)(1), (d) (status-based discrimination by employers, employment agencies, labor organizations, and training programs, respectively); § 2000e–2(*l*) (status-based discrimination in employment-related testing); § 2000e–3(a) (retaliation for opposing, or making or supporting a complaint about, unlawful employment actions); § 2000e–3(b) (advertising a preference for applicants of a particular race, color, religion, sex, or national origin). It defines key terms, see § 2000e, and exempts certain types of employers, see § 2000e–1. And it creates an administrative agency with both rulemaking and enforcement authority. See §§ 2000e–5, 2000e–12.

This fundamental difference in statutory structure renders inapposite decisions which treated retaliation as an implicit corollary of status-based discrimination. Text may not be divorced from context. In light of Congress' special care in drawing so precise a statutory scheme, it would be improper to indulge respondent's suggestion that Congress meant to incorporate the default rules that apply only when Congress writes a broad and undifferentiated statute. See *Gómez-Pérez*, *supra*, at 486–488 (when construing the broadly worded federal-sector provision of the ADEA, Court refused to draw inferences from Congress' amendments to the detailed private-sector provisions); *Arabian American Oil Co.*,

499 U. S., at 256; cf. *Jackson*, *supra*, at 175 (distinguishing Title IX's "broadly written general prohibition on discrimination" from Title VII's "greater detail [with respect to] the conduct that constitutes discrimination").

Further confirmation of the inapplicability of § 2000e–2(m) to retaliation claims may be found in Congress' approach to the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327. In the ADA Congress provided not just a general prohibition on discrimination "because of [an individual's] disability," but also seven paragraphs of detailed description of the practices that would constitute the prohibited discrimination, see §§ 102(a), (b)(1)–(7), *id.*, at 331–332 (codified at 42 U. S. C. § 12112). And, most pertinent for present purposes, it included an express antiretaliation provision, see § 503(a), 104 Stat. 370 (codified at 42 U. S. C. § 12203). That law, which Congress passed only a year before enacting § 2000e–2(m) and which speaks in clear and direct terms to the question of retaliation, rebuts the claim that Congress must have intended to use the phrase "race, color, religion, sex, or national origin" as the textual equivalent of "retaliation." To the contrary, the ADA shows that when Congress elected to address retaliation as part of a detailed statutory scheme, it did so in clear textual terms.

The Court confronted a similar structural dispute in *Lehman* v. *Nakshian*, 453 U. S. 156 (1981). The question there was whether the federal-employment provisions of the ADEA, 29 U. S. C. § 633a, provided a jury-trial right for claims against the Federal Government. *Nakshian*, 453 U. S., at 157. In concluding that it did not, the Court noted that the portion of the ADEA that prohibited age discrimination by private, state, and local employers, § 626, expressly provided for a jury trial, whereas the federal-sector provisions said nothing about such a right. *Id.*, at 162–163, 168. So, too, here. Congress has in explicit terms altered the standard of causation for one class of claims but not another, despite the obvious opportunity to do so in the 1991 Act.

B

The proper interpretation and implementation of § 2000e–3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. EEOC, Charge Statistics FY 1997 Through FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (as visited June 20, 2013, and available in Clerk of Court's case file). Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race. See *ibid.*

In addition, lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. Cf. *Vance* v. *Ball State Univ.*, *post*, at 431–432. It would be inconsistent with the structure and operation of Title VII to so raise the costs,

both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent. See Brief for National School Boards Association as *Amicus Curiae* 11–22. Yet there would be a significant risk of that consequence if respondent's position were adopted here.

The facts of this case also demonstrate the legal and factual distinctions between status-based and retaliation claims, as well as the importance of the correct standard of proof. Respondent raised both claims in the District Court. The alleged wrongdoer differed in each: In respondent's status-based discrimination claim, it was his indirect supervisor, Dr. Levine. In his retaliation claim, it was the Chair of Internal Medicine, Dr. Fitz. The proof required for each claim differed, too. For the status-based claim, respondent was required to show instances of racial slurs, disparate treatment, and other indications of nationality-driven animus by Dr. Levine. Respondent's retaliation claim, by contrast, relied on the theory that Dr. Fitz was committed to exonerating Dr. Levine and wished to punish respondent for besmirching her reputation. Separately instructed on each type of claim, the jury returned a separate verdict for each, albeit with a single damages award. And the Court of Appeals treated each claim separately, too, finding insufficient evidence on the claim of status-based discrimination.

If it were proper to apply the motivating-factor standard to respondent's retaliation claim, the University might well be subject to liability on account of Dr. Fitz's alleged desire to exonerate Dr. Levine, even if it could also be shown that the terms of the affiliation agreement precluded the Hospital's hiring of respondent and that the University would have sought to prevent respondent's hiring in order to honor that agreement in any event. That result would be inconsistent with both the text and purpose of Title VII.

In sum, Title VII defines the term "unlawful employment practice" as discrimination on the basis of any of seven

prohibited criteria: race, color, religion, sex, national origin, opposition to employment discrimination, and submitting or supporting a complaint about employment discrimination. The text of § 2000e–2(m) mentions just the first five of these factors, the status-based ones; and it omits the final two, which deal with retaliation. When it added § 2000e–2(m) to Title VII in 1991, Congress inserted it within the section of the statute that deals only with those same five criteria, not the section that deals with retaliation claims or one of the sections that apply to all claims of unlawful employment practices. And while the Court has inferred a congressional intent to prohibit retaliation when confronted with broadly worded antidiscrimination statutes, Title VII's detailed structure makes that inference inappropriate here. Based on these textual and structural indications, the Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

IV

Respondent and the Government also argue that applying the motivating-factor provision's lessened causation standard to retaliation claims would be consistent with longstanding agency views, contained in a guidance manual published by the EEOC. It urges that those views are entitled to deference under this Court's decision in *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). See *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 110, n. 6 (2002). The weight of deference afforded to agency interpretations under *Skidmore* depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U. S., at 140; see *Vance*, *post*, at 431, n. 4.

According to the manual in question, the causation element of a retaliation claim is satisfied if "there is credible direct evidence that retaliation was a motive for the challenged action," regardless of whether there is also "[e]vidence as to [a] legitimate motive." 2 EEOC Compliance Manual § 8–II(E)(1), pp. 614:0007–614:0008 (Mar. 2003). After noting a division of authority as to whether motivating-factor or but-for causation should apply to retaliation claims, the manual offers two rationales in support of adopting the former standard. The first is that "[c]ourts have long held that the evidentiary framework for proving [status-based] discrimination . . . also applies to claims of discrimination based on retaliation." *Id.*, at 614:0008, n. 45. Second, the manual states that "an interpretation . . . that permits proven retaliation to go unpunished undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism." *Ibid.*

These explanations lack the persuasive force that is a necessary precondition to deference under *Skidmore*. See 323 U. S., at 140; *Vance*, *post*, at 431, n. 4. As to the first rationale, while the settled judicial construction of a particular statute is of course relevant in ascertaining statutory meaning, see *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978), the manual's discussion fails to address the particular interplay among the status-based antidiscrimination provision (§ 2000e–2(a)), the antiretaliation provision (§ 2000e–3(a)), and the motivating-factor provision (§ 2000e–2(m)). Other federal antidiscrimination statutes do not have the structure of statutory subsections that control the outcome at issue here. The manual's failure to address the specific provisions of this statutory scheme, coupled with the generic nature of its discussion of the causation standards for status-based discrimination and retaliation claims, call the manual's conclusions into serious question. See *Kentucky Retirement Systems* v. *EEOC*, 554 U. S. 135, 149–150 (2008).

The manual's second argument is unpersuasive, too; for its reasoning is circular. It asserts the lessened causation

standard is necessary in order to prevent "proven retaliation" from "go[ing] unpunished." 2 EEOC Compliance Manual § 8–II(E)(1), at 614:0008, n. 45. Yet this assumes the answer to the central question at issue here, which is what causal relationship must be shown in order to prove retaliation.

Respondent's final argument, in which he is not joined by the United States, is that even if § 2000e–2(m) does not control the outcome in this case, the standard applied by *Price Waterhouse* should control instead. That assertion is incorrect. First, this position is foreclosed by the 1991 Act's amendments to Title VII. As noted above, *Price Waterhouse* adopted a complex burden-shifting framework. Congress displaced this framework by enacting § 2000e–2(m) (which adopts the motivating-factor standard for status-based discrimination claims) and § 2000e–5(g)(2)(B) (which replaces employers' total defense with a remedial limitation). See *Gross*, 557 U. S., at 175, n. 2, 177, n. 3, 178, n. 5. Given the careful balance of lessened causation and reduced remedies Congress struck in the 1991 Act, there is no reason to think that the different balance articulated by *Price Waterhouse* somehow survived that legislation's passage. Second, even if this argument were still available, it would be inconsistent with the *Gross* Court's reading (and the plain textual meaning) of the word "because" as it appears in both § 623(a) and § 2000e–3(a). See *Gross*, *supra*, at 176–177. For these reasons, the rule of *Price Waterhouse* is not controlling here.

V

The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e–3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer. The University claims that a fair application of this standard, which is more demanding than the motivating-factor standard adopted by the Court of Appeals, entitles it to

judgment as a matter of law. It asks the Court to so hold. That question, however, is better suited to resolution by courts closer to the facts of this case. The judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, makes it an "unlawful employment practice" to "discriminate against any individual . . . *because of* such individual's race, color, religion, sex, or national origin." § 2000e–2(a) (emphasis added). Backing up that core provision, Title VII also makes it an "unlawful employment practice" to discriminate against any individual "*because*" the individual has complained of, opposed, or participated in a proceeding about prohibited discrimination. § 2000e–3(a) (emphasis added). This form of discrimination is commonly called "retaliation," although Title VII itself does not use that term. The Court has recognized that effective protection against retaliation, the office of § 2000e–3(a), is essential to securing "a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status." *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53, 63 (2006) (*Burlington Northern*). That is so because "fear of retaliation is the leading reason why people stay silent" about the discrimination they have encountered or observed. *Crawford* v. *Metropolitan Government of Nashville and Davidson Cty.*, 555 U. S. 271, 279 (2009) (internal quotation marks and brackets omitted).

Similarly worded, the ban on discrimination and the ban on retaliation against a discrimination complainant have traveled together: Title VII plaintiffs often raise the two provisions in tandem. Today's decision, however, drives

a wedge between the twin safeguards in so-called "mixed-motive" cases. To establish discrimination, all agree, the complaining party need show only that race, color, religion, sex, or national origin was "a motivating factor" in an employer's adverse action; an employer's proof that "other factors also motivated the [action]" will not defeat the discrimination claim. § 2000e–2(m). But a retaliation claim, the Court insists, must meet a stricter standard: The claim will fail unless the complainant shows "but-for" causation, *i. e.*, that the employer would not have taken the adverse employment action but for a design to retaliate.

In so reining in retaliation claims, the Court misapprehends what our decisions teach: Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it. Indeed, this Court has explained again and again that "retaliation in response to a complaint about [proscribed] discrimination *is* discrimination" on the basis of the characteristic Congress sought to immunize against adverse employment action. *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 179, n. 3 (2005) (emphasis added; internal quotation marks omitted).

The Court shows little regard for the trial judges who will be obliged to charge discrete causation standards when a claim of discrimination "because of," *e. g.*, race is coupled with a claim of discrimination "because" the individual has complained of race discrimination. And jurors will puzzle over the rhyme or reason for the dual standards. Of graver concern, the Court has seized on a provision, § 2000e–2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation.

I

Dr. Naiel Nassar is of Middle Eastern descent. A specialist in the treatment of HIV/AIDS, Nassar was a faculty member of the University of Texas Southwestern Medical Center (UTSW) from 1995 until 2006, save for a period dur-

ing which he left his employment to continue his education. UTSW is affiliated with Parkland Hospital (Hospital) and, like other faculty members at UTSW, Nassar also worked as a physician at the Hospital. Beginning in 2001, Nassar served as Associate Medical Director of the Hospital's Amelia Court Clinic (Clinic).

Until 2004, Dr. Phillip Keiser, Medical Director of the Clinic, was Nassar's principal supervisor. In that year, UTSW hired Dr. Beth Levine to oversee the Clinic and to supervise Keiser. Before Levine commenced her employment at UTSW, she interviewed her potential subordinates. Meeting with other Clinic doctors for only 15 to 20 minutes, Levine spent an hour and a half with Nassar, engaging in a detailed review of his resume and reading from a list of prepared questions. Record 2926–2928.

Once Levine came on board, she expressed concern to Keiser about Nassar's productivity and questioned his work ethic. *Id.*, at 2361–2362. According to Keiser, Levine "never seemed to [be] satisf[ied]" with his assurances that Nassar was in fact working harder than other physicians. *Id.*, at 2362. Disconcerted by Levine's scrutiny, Nassar several times complained about it to Levine's supervisor, Dr. Gregory Fitz, Chair of Internal Medicine. App. to Pet. for Cert. 4.

In 2005, Levine opposed hiring another physician who, like Nassar, was of Middle Eastern descent. In Keiser's presence, Levine remarked that "Middle Easterners are lazy." *Id.*, at 3. When that physician was hired by Parkland, Levine said, again in Keiser's presence, that the Hospital had "hired another one." *Ibid.* See also Record 2399–2400. Keiser presented to Levine objective data demonstrating Nassar's high productivity. Levine then began criticizing Nassar's billing practices. Her criticism did not take into account that Nassar's salary was funded by a federal grant that precluded billing for most of his services. App. to Pet. for Cert. 3.

Because of Levine's hostility, Nassar sought a way to continue working at the Clinic without falling under her supervision. To that end, Nassar engaged in discussions with the Hospital about dropping his affiliation with UTSW and retaining his post at Parkland. Although he was initially told that an affiliation agreement between UTSW and Parkland obliged Parkland to fill its staff physician posts with UTSW faculty, talks with the Hospital continued. Eventually, Parkland verbally offered Nassar a position as a staff physician. See App. 67–71, 214–216, 326–330.

In July 2006, Nassar resigned from his position at UTSW. "The primary reason [for his] resignation," Nassar wrote in a letter to Fitz, "[was] the continuing harassment and discrimination . . . by . . . Dr. Beth Levine." App. to Pet. for Cert. 5 (internal quotation marks omitted). According to Keiser, Nassar's letter shocked Fitz, who told Keiser that, because Levine had been "publicly humiliated," she should be "publicly exonerated." App. 41. Fitz's opposition to Parkland's hiring Nassar prompted the Hospital to withdraw the offer to engage him. App. to Pet. for Cert. 5–6.

After accepting a position at a smaller HIV/AIDS clinic in Fresno, California, Nassar filed a complaint with the Equal Employment Opportunity Commission (EEOC). The agency found "credibl[e] testimonial evidence" that UTSW had retaliated against Nassar for his allegations of discrimination by Levine. Brief for Respondent 8 (citing Pl. Trial Exh. 78). Nassar then filed suit in District Court alleging that UTSW had discriminated against him, in violation of Title VII, on the basis of his race, religion, and national origin, see § 2000e–2(a), and had constructively discharged him. App. to Pet. for Cert. 6; Complaint ¶23. He further alleged that UTSW had retaliated against him for complaining about Levine's behavior. App. to Pet. for Cert. 6.

On the retaliation claim, the District Court instructed the jury that Nassar "[did] not have to prove that retaliation was [UTSW's] only motive, but he [had to] prove that

[UTSW] acted at least in part to retaliate." *Id.*, at 47. The jury found UTSW liable for both constructive discharge and retaliation. At the remedial phase, the judge charged the jury not to award damages for "actions which [UTSW] prove[d] by a preponderance of the evidence . . . it would have taken even if it had not considered . . . Nassar's protected activity." *Id.*, at 42–43. Finding that UTSW had not met its proof burden, the jury awarded Nassar $438,167.66 in backpay and $3,187,500 in compensatory damages. *Id.*, at 43–44.[1]

The Court of Appeals for the Fifth Circuit affirmed in part.[2] Responding to UTSW's argument that the District Court erred in instructing the jury on a mixed-motive theory of retaliation, the Fifth Circuit held that the instruction conformed to Circuit precedent. 674 F. 3d 448, 454, n. 16 (2012) (citing *Smith* v. *Xerox Corp.*, 602 F. 3d 320, 330 (2010)).[3]

II

This Court has long acknowledged the symbiotic relationship between proscriptions on discrimination and proscriptions on retaliation. Antidiscrimination provisions, the Court has reasoned, endeavor to create a workplace where individuals are not treated differently on account of race, ethnicity, religion, or sex. See *Burlington Northern*, 548 U. S., at 63. Antiretaliation provisions "see[k] to secure that primary objective by preventing an employer from interfering . . . with an employee's efforts to secure or advance

[1] The District Court reduced compensatory damages to $300,000, the statutory cap under Title VII. See 42 U. S. C. § 1981a(b)(3)(D).

[2] The Court of Appeals found the evidence insufficient to support the claim of constructive discharge and reversed the District Court's judgment to that extent. See App. to Pet. for Cert. 8–10. That ruling is not contested here.

[3] The Fifth Circuit has since reversed course in an unpublished opinion, concluding that § 2000e–2(m)'s motivating-factor prescription does not apply to retaliation claims. See *Carter* v. *Luminant Power Servs. Co.*, No. 12–10642, 2013 WL 1337365 (Apr. 3, 2013).

enforcement of [antidiscrimination] guarantees." *Ibid.* As the Court has comprehended, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Id.*, at 67. "'[E]ffective enforcement,'" therefore, can "'only be expected if employees . . . [feel] free to approach officials with their grievances.'" *Ibid.* (quoting *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 292 (1960)). See also *Crawford*, 555 U. S., at 279.

Adverting to the close connection between discrimination and retaliation for complaining about discrimination, this Court has held, in a line of decisions unbroken until today, that a ban on discrimination encompasses retaliation. In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 237 (1969), the Court determined that 42 U. S. C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," protected a white man who suffered retaliation after complaining of discrimination against his black tenant. *Jackson* v. *Birmingham Board of Education* elaborated on that holding in the context of sex discrimination. "Retaliation against a person because [he] has complained of sex discrimination," the Court found it inescapably evident, "is another form of intentional sex discrimination." 544 U. S., at 173. As the Court explained:

> "Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.*, at 173–174 (citations omitted).

Jackson interpreted Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681(a). Noting that the legislation followed three years after *Sullivan*, the Court found

it "not only appropriate but also realistic to presume that Congress was thoroughly familiar with *Sullivan* and . . . expected its enactment of Title IX to be interpreted in conformity with it." 544 U. S., at 176 (internal quotation marks and alterations omitted).

Gómez-Pérez v. *Potter*, 553 U. S. 474 (2008), was similarly reasoned. The Court there held that the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 633a(a), barring discrimination "based on age," also proscribes retaliation. 553 U. S., at 479–491. "What *Jackson* said about the relationship between *Sullivan* and the enactment of Title IX," the Court observed, "can be said as well about the relationship between *Sullivan* and the enactment of the ADEA's federal-sector provision." *Id.*, at 485. See also *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 447–457 (2008) (retaliation for race discrimination constitutes discrimination based on race under 42 U. S. C. § 1981). There is no sound reason in this case to stray from the decisions in *Sullivan*, *Jackson*, *Gómez-Pérez*, and *CBOCS West.*

III

A

The Title VII provision key here, § 2000e–2(m), states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Section 2000e–2(m) was enacted as part of the Civil Rights Act of 1991, which amended Title VII, along with other federal antidiscrimination statutes. See 105 Stat. 1071. The amendments were intended to provide "additional protections against unlawful discrimination in employment," *id.*, § 2(3), and to "respon[d] to a number of . . . decisions by [this Court] that sharply cut back on the scope and effectiveness" of antidiscrimination laws, H. R. Rep. No. 102–40, pt. 2, pp. 2–4 (1991) (hereinafter House Report

Part 2) (citing, *inter alia*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989); *Martin* v. *Wilks*, 490 U. S. 755 (1989); *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900 (1989)).

Among the decisions found inadequately protective was *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989). A plurality of the Court in that case held that the words "because of" in § 2000e–2(a) encompass claims challenging an employment decision attributable to "mixed motives," *i. e.*, one motivated by both legitimate and illegitimate factors. See *id.*, at 240–242.[4] A Title VII plaintiff, the plurality concluded, need show only that a prohibited factor contributed to the employment decision—not that it was the but-for or sole cause. *Id.*, at 240–244. But see *id.*, at 281–282 (KENNEDY, J., dissenting). An employer would not be liable, however, if it could show by a preponderance of the evidence that it would have taken the same action absent the illegitimate motive. *Id.*, at 244–245.

Congress endorsed the plurality's conclusion that, to be actionable under Title VII, discrimination must be a motivating factor in, but need not be the but-for cause of, an adverse employment action. See House Report Part 2, at 18. Congress disagreed with the Court, however, insofar as the *Price Waterhouse* decision allowed an employer to escape liability by showing that the same action would have been taken regardless of improper motive. House Report Part 2, at 18. See also H. R. Rep. No. 102–40, pt. 1, pp. 45–48 (1991) (hereinafter House Report Part 1). "If Title VII's ban on discrimination in employment is to be meaningful," the House Report explained, "victims of intentional discrimination must be able to obtain relief, and perpetrators of dis-

[4] Justices White and O'Connor separately concurred and would have required the Title VII plaintiff to show that protected characteristics constituted a *substantial* motivating factor in the adverse employment decision. See *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 259 (1989) (White, J., concurring in judgment); *id.*, at 265 (O'Connor, J., concurring in judgment).

crimination must be held liable for their actions." House Report Part 2, at 18.

Superseding *Price Waterhouse* in part, Congress sought to "restore" the rule of decision followed by several Circuits that any discrimination "actually shown to play a role in a contested employment decision may be the subject of liability." House Report Part 2, at 18. See also House Report Part 1, at 48. To that end, Congress enacted § 2000e–2(m) and § 2000e–5(g)(2)(B). The latter provides that an employer's proof that an adverse employment action would have been taken in any event does not shield the employer from liability; such proof, however, limits the plaintiff's remedies to declaratory or injunctive relief, attorney's fees, and costs.

Critically, the rule Congress intended to "restore" was not limited to substantive discrimination. As the House Report explained, "the Committee endors[ed] . . . the decisional law" in *Bibbs* v. *Block*, 778 F. 2d 1318 (CA8 1985) (en banc), which held that a violation of Title VII is established when the trier of fact determines that "an unlawful motive played some part in the employment decision or decisional process." *Id.*, at 1323–1324; see House Report Part 1, at 48. Prior to the 1991 Civil Rights Act, *Bibbs* had been applied to retaliation claims. See, *e. g.*, *Johnson* v. *Legal Servs. of Arkansas, Inc.*, 813 F. 2d 893, 900 (CA8 1987) ("Should the court find that retaliation played some invidious part in the [plaintiff's] termination, a violation of Title VII will be established under *Bibbs*."). See also *EEOC* v. *General Lines, Inc.*, 865 F. 2d 1555, 1560 (CA10 1989).

B

There is scant reason to think that, despite Congress' aim to "restore and strengthen . . . laws that ban discrimination in employment," House Report Part 2, at 2, Congress meant to exclude retaliation claims from the newly enacted "motivating factor" provision. Section 2000e–2(m) provides that an "unlawful employment practice is established" when the plaintiff shows that a protected characteristic was a factor

driving "any employment practice." Title VII, in § 2000e–3(a), explicitly denominates retaliation, like status-based discrimination, an "unlawful employment practice." Because "any employment practice" necessarily encompasses practices prohibited under § 2000e–3(a), § 2000e–2(m), by its plain terms, covers retaliation.

Notably, when it enacted § 2000e–2(m), Congress did not tie the new provision specifically to §§ 2000e–2(a) to (d), which proscribe discrimination "because of" race, color, religion, gender, or national origin. Rather, Congress added an entirely new provision to codify the causation standard, one encompassing "any employment practice." § 2000e–2(m).

Also telling, § 2000e–2(m) is not limited to situations in which *the complainant's* race, color, religion, sex, or national origin motivates the employer's action. In contrast, Title VII's substantive antidiscrimination provisions refer to the protected characteristics of the complaining party. See §§ 2000e–2(a)(1) to (2), (c)(2) (referring to "such individual's" protected characteristics); §§ 2000e–2(b), (c)(1), (d) (referring to "his race, color, religion, sex, or national origin"). Congress thus knew how to limit Title VII's coverage to victims of status-based discrimination when it was so minded. It chose, instead, to bring within § 2000e–2(m) "any employment practice." To cut out retaliation from § 2000e–2(m)'s scope, one must be blind to that choice. Cf. *Jackson*, 544 U. S., at 179, n. 3 (omission of reference to the complaining party's sex in Title IX supports the conclusion that the statute protects a male plaintiff from retaliation in response to complaints about sex discrimination against women).

C

From the inception of § 2000e–2(m), the agency entrusted with interpretation of Title VII and superintendence of the Act's administration, the EEOC, see § 2000e–5, has understood the provision to cover retaliation claims. Shortly after Congress amended Title VII to include the motivating-

factor provision, the EEOC issued guidance advising that, "[a]lthough [§ 2000e–2(m)] does not specify retaliation as a basis for finding liability whenever it is a motivating factor for an action, neither does it suggest any basis for deviating from the Commission's long-standing rule that it will find liability . . . whenever retaliation plays any role in an employment decision." EEOC, Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, p. 20, n. 14 (July 14, 1992) (hereinafter EEOC Guidance), available at http://www.eeoc.gov/policy/docs/disparat.html (as visited June 21, 2013, and in Clerk of Court's case file). As the EEOC's initial guidance explained, "if retaliation were to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination." *Ibid.*

In its compliance manual, the EEOC elaborated on its conclusion that "[§ 2000e–2(m)] applies to retaliation." 2 EEOC Compliance Manual § 8–II(E)(1), p. 614:0008, n. 45 (May 20, 1998) (hereinafter EEOC Compliance Manual). That reading, the agency observed, tracked the view, widely held by courts, "that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation." *Ibid.* "[A]n interpretation of [§ 2000e–2(m)] that permit[ted] proven retaliation to go unpunished," the EEOC noted, would "undermin[e] the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism." *Ibid.*

The position set out in the EEOC's guidance and compliance manual merits respect. See *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944); *Federal Express Corp.* v. *Holowecki*, 552 U. S. 389, 399 (2008) ("[EEOC's] policy statements, embodied in its compliance manual and internal directives, . . . reflect a body of experience and informed judgment. . . . As such, they are entitled to a measure of respect under the less deferential *Skidmore* standard." (internal quotation

marks omitted)). If the breadth of § 2000e–2(m) can be deemed ambiguous (although I believe its meaning is plain), the provision should be construed to accord with the EEOC's well-reasoned and longstanding guidance.

IV

The Court draws the opposite conclusion, ruling that retaliation falls outside the scope of § 2000e–2(m). In so holding, the Court ascribes to Congress the unlikely purpose of separating retaliation claims from discrimination claims, thereby undermining the Legislature's effort to fortify the protections of Title VII. None of the reasons the Court offers in support of its restrictive interpretation of § 2000e–2(m) survives inspection.

A

The Court first asserts that reading § 2000e–2(m) to encompass claims for retaliation "is inconsistent with the provision's plain language." *Ante*, at 352. The Court acknowledges, however, that "the text of the motivating-factor provision . . . begins by referring to unlawful employment practices," a term that undeniably includes retaliation. *Ante*, at 353 (internal quotation marks omitted). Never mind that, the Court continues, for § 2000e–2(m) goes on to reference as "motivating factor[s]" only "race, color, religion, sex, or national origin." The Court thus sees retaliation as a protected activity entirely discrete from status-based discrimination. *Ibid.*

This vision of retaliation as a separate concept runs up against precedent. See *supra*, at 367–369. Until today, the Court has been clear eyed on just what retaliation is: a manifestation of status-based discrimination. As *Jackson* explained in the context of sex discrimination, "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." 544 U. S., at 174.

The Court does not take issue with *Jackson*'s insight. Instead, it distinguishes *Jackson* and like cases on the ground

that they concerned laws in which "Congress' treatment of the subject of prohibited discrimination was both broad and brief." *Ante*, at 356. Title VII, by contrast, "is a detailed statutory scheme," that "enumerates specific unlawful employment practices," "defines key terms," and "exempts certain types of employers." *Ibid.* Accordingly, the Court says, "it would be improper to indulge [the] suggestion that Congress meant to incorporate [in Title VII] the default rules that apply only when Congress writes a broad and undifferentiated statute." *Ibid.*

It is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant protection against that unlawful employment practice to have *less* force than the protection available when the statute does not mention retaliation. It is hardly surprising, then, that our jurisprudence does not support the Court's conclusion. In *Gómez-Pérez*, the Court construed the federal-sector provision of the ADEA, which proscribes "discrimination based on age," 29 U. S. C. § 633a(a), to bar retaliation. The Court did so mindful that another part of the Act, the provision applicable to private-sector employees, explicitly proscribes retaliation and, moreover, "set[s] out a specific list of forbidden employer practices." *Gómez-Pérez*, 553 U. S., at 486–487 (citing 29 U. S. C. §§ 623(a) and (d)).

The Court suggests that "the la[w] at issue in . . . *Gómez-Pérez* [was a] broad, general ba[r] on discrimination." *Ante*, at 355. But, as our opinion in that case observes, some of the ADEA's provisions are brief, broad, and general, while others are extensive, specific, and detailed. 553 U. S., at 487. So too of Title VII. See *ibid.* ("The ADEA federal-sector provision was patterned directly after Title VII's federal-sector discrimination ban . . . [which] contains a broad prohibition of 'discrimination,' rather than a list of specific prohibited practices." (some internal quotation marks omitted)). It makes little sense to apply a different mode of analysis to Title VII's § 2000e–2(m) and the ADEA's § 633a(a), both brief

statements on discrimination in the context of larger statutory schemes.[5]

The Court's reliance on § 109(b) of the Civil Rights Act of 1991, 105 Stat. 1077,[6] and the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, is similarly unavailing. According to the Court, Congress' explicit reference to § 2000e–3(a) in § 109(b) "reinforc[es] the conclusion that Congress acted deliberately when it omitted retaliation claims from § 2000e–2(m)." *Ante*, at 354. The same is true of the ADA, the Court says, as "Congress provided not just a general prohibition on discrimination 'because of [an individual's] disability,' but also seven paragraphs of detailed description of the practices that would constitute the prohibited discrimination . . . [a]nd . . . an express antiretaliation provision." *Ante*, at 357.

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[5] The Court obscures the inconsistency between today's opinion and *Gómez-Pérez* by comparing § 633a to *all of* Title VII. See *ante*, at 356 ("Unlike Title IX, § 1981, § 1982, and the federal-sector provisions of the ADEA, Title VII is a detailed statutory scheme."). That comparison is inapt. Like Title VII, the ADEA is a "detailed statutory scheme." *Ibid.* Compare *ibid.* (citing Title VII provisions that proscribe status-based discrimination by employers, employment agencies, labor organizations, and training programs; bar retaliation; prohibit advertising a preference for certain protected characteristics; define terms; exempt certain employers; and create an agency with rulemaking and enforcement authority) with 29 U. S. C. §§ 623(a)–(e) (proscribing age discrimination by employers, employment agencies, and labor unions; barring retaliation; prohibiting advertising a preference for employees of a particular age), § 628 (granting rulemaking authority to the EEOC), and § 630 (defining terms). Thus, § 633a is just like § 2000e–2(m) in the relevant respect: both are single provisions contained within a detailed scheme.

[6] Now codified at 42 U. S. C. § 2000e–1(b), § 109(b) provides:

"It shall not be unlawful under section 2000e–2 or 2000e–3 . . . for an employer . . . to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such workplace is located."

The provision was framed to accord with this Court's decision in *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244 (1991).

This argument is underwhelming. Yes, Congress has sometimes addressed retaliation explicitly in antidiscrimination statutes. When it does so, there is no occasion for interpretation. But when Congress simply targets discrimination "because of" protected characteristics, or, as in § 2000e–2(m), refers to employment practices motivated by race, color, religion, sex, or national origin, how should courts comprehend those phrases? They should read them informed by this Court's consistent holdings that such phrases draw in retaliation, for, in truth, retaliation is a "form of intentional [status-based] discrimination." See *Jackson*, 544 U. S., at 173, described *supra*, at 368. That is why the Court can point to no prior instance in which an antidiscrimination law was found *not* to cover retaliation. The Court's *volte-face* is particularly imprudent in the context of § 2000e–2(m), a provision added as part of Congress' effort to toughen protections against workplace discrimination.

B

The Court also disassociates retaliation from status-based discrimination by stressing that the bar on the latter appears in § 2000e–2, while the proscription of retaliation appears in a separate provision, § 2000e–3. Section 2000e–2, the Court asserts, "contains Title VII's ban on status-based discrimination . . . and says nothing about retaliation." *Ante*, at 353. Retaliation, the Court therefore concludes, should not be read into § 2000e–2(m). *Ante*, at 353–354.

The Court's reasoning rests on a false premise. Section 2000e–2 does not deal exclusively with discrimination based on protected characteristics. The provisions stated after §§ 2000e–2(a) to (d) deal with a variety of matters, some of them unquestionably covering retaliation. For example, § 2000e–2(n), enacted in tandem with and located immediately after § 2000e–2(m), limits opportunities to collaterally attack employment practices installed to implement a consent judgment. Section 2000e–2(n) applies beyond the

substantive antidiscrimination provisions in § 2000e–2; indeed, it applies beyond Title VII to encompass claims "under the Constitution or [other] Federal civil rights laws." § 2000e–2(n)(1)(A). Thus, if an employee sues for retaliatory discharge in violation of § 2000e–3(a), and a consent judgment orders reinstatement, any person adversely affected by that judgment (*e. g.*, an employee who loses seniority as a result) would generally be barred from attacking the judgment if she was given actual notice of the proposed order and a reasonable opportunity to present objections. That Congress placed the consent-judgment provision in § 2000e–2 and not in § 2000e–3 is of no moment. As the text of the provision plainly conveys, § 2000e–2(n) would reach consent judgments settling complaints about retaliation, just as it would cover consent judgments settling complaints about status-based discrimination.

Section 2000e–2(g) is similarly illustrative. Under that provision, "it shall not be an unlawful employment practice for an employer . . . to discharge [an] individual" if she fails to fulfill any requirement imposed in the interest of national security. Because § 2000e–3(a) renders retaliation an "unlawful employment practice," § 2000e–2(g)'s exemption would no doubt apply to a Title VII retaliatory discharge claim. Given these provisions, Congress' placement of the motivating-factor provision within § 2000e–2 cannot bear the weight the Court places on it.[7]

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[7] The Court's assertion that we "confronted a similar structural dispute in *Lehman* v. *Nakshian*, 453 U. S. 156 (1981)," *ante*, at 357, assumes its own conclusion. As the Court explains, in *Nakshian*, the plaintiff argued that § 633a of the ADEA afforded the right to trial by jury. 453 U. S., at 157. An amendment to the private-sector provision, codified at 29 U. S. C. § 626(c), granted that right to plaintiffs suing private employers, as well as state and local governmental entities. But no one argued in *Nakshian* that the private-sector amendment applied to the federal-sector provision. Hence, *Nakshian*'s holding that the ADEA does not permit a federal-sector plaintiff to try her case before a jury is relevant only if the Court is correct that § 2000e–2(m) does not cover retaliation claims.

C

The Court gives no deference to the EEOC's longstanding position that § 2000e–2(m) applies to retaliation because, the Court charges, the agency did not "address the particular interplay among the status-based antidiscrimination provision (§ 2000e–2(a)), the antiretaliation provision (§ 2000e–3(a)), and the motivating-factor provision (§ 2000e–2(m))." *Ante*, at 361. Not so.

In its compliance manual, the EEOC noted that some courts had concluded that § 2000e–2(m) does not cover retaliation, citing as an example *Woodson* v. *Scott Paper Co.*, 109 F. 3d 913 (CA3 1997). In that decision, the Third Circuit acknowledged it was "given pause by the fact that . . . courts have generally borrowed from discrimination law in determining the burdens and order of proof in retaliation cases." *Id.*, at 934. One could therefore say, the Third Circuit continued, that "Congress knew of the practice of borrowing in retaliation cases, and presumed that courts would continue this practice after the 1991 Act." *Ibid.*

While *Woodson* rejected that argument, the EEOC found it sound. See EEOC Compliance Manual, at 614:0008, n. 45 ("Courts have long held that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation."). See also EEOC Guidance, at 20, n. 14 (while § 2000e–2(m) does not explicitly refer to retaliation, nothing in the provision calls for deviation from the longstanding practice of finding liability when a plaintiff demonstrates that retaliatory intent motivated an adverse employment decision). By adverting to *Woodson*, the EEOC made clear that it considered the very argument the Court relies on today. Putting down the agency's appraisal as "generic," *ante*, at 361, is thus conspicuously unfair comment.

The Court's second reason for refusing to accord deference to the EEOC fares no better. The EEOC's conclusion that

"the lessened causation standard is necessary in order to prevent 'proven retaliation' from 'go[ing] unpunished,'" the Court reasons, "is circular" because it "assumes the answer to the central question at issue here, which is what causal relationship must be shown in order to prove retaliation." *Ante*, at 361–362. That reasoning will not wash. Under the motivating-factor test set out in § 2000e–2(m), a plaintiff prevails if she shows that proscribed conduct "was a motivating factor" for the adverse employment action she encountered, "even though other factors also motivated the [action]." She will succeed, although the relief to which she is entitled may be restricted. See *supra*, at 371. Under the Court's view, proof that retaliation was a factor motivating an adverse employment action is insufficient to establish liability under § 2000e–3(a). The Court's but-for causation standard does not mean that the plaintiff has failed to prove she was subjected to unlawful retaliation. It does mean, however, that proof of a retaliatory motive alone yields no victory for the plaintiff. Put otherwise, the Court's view "permits proven retaliation to go unpunished," just as the EEOC recognized. See EEOC Compliance Manual, at 614:0008, n. 45.

V

A

Having narrowed § 2000e–2(m) to exclude retaliation claims, the Court turns to *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167 (2009), to answer the question presented: whether a plaintiff must demonstrate but-for causation to establish liability under § 2000e–3(a).

The Court held in *Gross* that, in contrast to Title VII, § 623(a) of the ADEA does not authorize any age discrimination claim asserting mixed motives. Explaining that uniform interpretation of the two statutes is sometimes unwarranted, the Court noted in *Gross* that the phrase "because of . . . age" in § 623(a) has not been read "to bar discrimination

against people of all ages, even though the Court had previously interpreted 'because of . . . race [or] sex' in Title VII to bar discrimination against people of all races and both sexes." 557 U. S., at 175, n. 2. Yet *Gross*, which took pains to distinguish ADEA claims from Title VII claims, is invoked by the Court today as pathmarking. See *ante*, at 343 ("The holding and analysis of [*Gross*] are instructive here.").

The word "because" in Title VII's retaliation provision, § 2000e–3(a), the Court tells us, should be interpreted not to accord with the interpretation of that same word in the companion status-based discrimination provision of Title VII, § 2000e–2(a). Instead, statutory lines should be crossed: The meaning of "because" in Title VII's retaliation provision should be read to mean just what the Court held "because" means for ADEA-liability purposes. But see *Gross*, 557 U. S., at 174 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" (quoting *Holowecki*, 552 U. S., at 393)). In other words, the employer prevailed in *Gross* because, according to the Court, the ADEA's antidiscrimination prescription is not like Title VII's. But the employer prevails again in Nassar's case, for there is no "meaningful textual difference," *ante*, at 352, between the ADEA's use of "because" and the use of the same word in Title VII's retaliation provision. What sense can one make of this other than "heads the employer wins, tails the employee loses"?

It is a standard principle of statutory interpretation that identical phrases appearing in the same statute—here, Title VII—ordinarily bear a consistent meaning. See *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224, 232 (2007). Following that principle, Title VII's retaliation provision, like its status-based discrimination provision, would permit mixed-motive claims, and the same causation standard would apply to both provisions.

B

The Court's decision to construe § 2000e–3(a) to require but-for causation in line with *Gross* is even more confounding in light of *Price Waterhouse*. Recall that *Price Waterhouse* interpreted "because of" in § 2000e–2(a) to permit mixed-motive claims. See *supra*, at 370. The Court today rejects the proposition that, if § 2000e–2(m) does not cover retaliation, such claims are governed by *Price Waterhouse*'s burden-shifting framework, *i. e.*, if the plaintiff shows that discrimination was *a* motivating factor in an adverse employment action, the defendant may escape liability only by showing it would have taken the same action had there been no illegitimate motive. It is wrong to revert to *Price Waterhouse*, the Court says, because the 1991 Civil Rights Act's amendments to Title VII abrogated that decision.

This conclusion defies logic. Before the 1991 amendments, several courts had applied *Price Waterhouse*'s burden-shifting framework to retaliation claims.[8] In the Court's view, Congress designed § 2000e–2(m)'s motivating-factor standard not only to exclude retaliation claims, but also to override, *sub silentio*, Circuit precedent applying the *Price Waterhouse* framework to such claims. And with what did the 1991 Congress replace the *Price Waterhouse* burden-shifting framework? With a but-for causation requirement *Gross* applied to the ADEA 17 years after the 1991 amendments to Title VII. Shut from the Court's sight is a legislative record replete with statements evincing Congress' intent to strengthen antidiscrimination laws and thereby hold employers accountable for prohibited discrimination. See Civil Rights Act of 1991, § 2, 105 Stat. 1071; House Report Part 2, at 18. It is an odd mode of statutory interpretation that divines Congress' aim in 1991 by looking to a decision of this Court, *Gross*, made under a different

[8] See *Vislisel* v. *Turnage*, 930 F. 2d 9, 9–10 (CA8 1991) (*per curiam*); *Carter* v. *South Central Bell*, 912 F. 2d 832, 843 (CA5 1990); *Williams* v. *Mallinckrodt, Inc.*, 892 F. 2d 75 (CA4 1989) (table).

statute in 2008, while ignoring the overarching purpose of the Congress that enacted the 1991 Civil Rights Act, see *supra*, at 370–372.

C

The Court shows little regard for trial judges who must instruct juries in Title VII cases in which plaintiffs allege both status-based discrimination and retaliation. Nor is the Court concerned about the capacity of jurors to follow instructions conforming to today's decision. Causation is a complicated concept to convey to juries in the best of circumstances. Asking jurors to determine liability based on different standards in a single case is virtually certain to sow confusion. That would be tolerable if the governing statute required double standards, but here, for the reasons already stated, it does not.

VI

A

The Court's assertion that the but-for cause requirement it adopts necessarily follows from § 2000e–3(a)'s use of the word "because" fails to convince. Contrary to the Court's suggestion, see *ante*, at 346–347, the word "because" does not inevitably demand but-for causation to the exclusion of all other causation formulations. When more than one factor contributes to a plaintiff's injury, but-for causation is problematic. See, *e. g.*, 1 Restatement (Third) of Torts § 27, Comment *a*, p. 385 (2005) (hereinafter Restatement Third) (noting near universal agreement that the but-for standard is inappropriate when multiple sufficient causes exist); Restatement of Torts § 9, Comment *b*, p. 18 (1934) (legal cause is a cause that is a "substantial factor in bringing about the harm").

When an event is "overdetermined," *i. e.*, when two forces create an injury each alone would be sufficient to cause, modern tort law permits the plaintiff to prevail upon showing that either sufficient condition created the harm. Restatement Third § 27, at 376–377. In contrast, under the Court's

approach (which it erroneously calls "textbook tort law," *ante*, at 347), a Title VII plaintiff alleging retaliation *cannot* establish liability if her firing was prompted by both legitimate and illegitimate factors. See *supra*, at 380–381.

Today's opinion rehashes arguments rightly rejected in *Price Waterhouse*. Concurring in the judgment in that case, Justice O'Connor recognized the disconnect between the standard the dissent advocated, which would have imposed on the plaintiff the burden of showing but-for causation, see 490 U. S., at 282, 286–287 (KENNEDY, J., dissenting), and the common-law doctrines on which the dissent relied. As Justice O'Connor explained:

> "[I]n the area of tort liability, from whence the dissent's 'but-for' standard of causation is derived, . . . the law has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to . . . defendants to prove that their negligent actions were not the 'but-for' cause of the plaintiff's injury." *Id.*, at 263–264 (concurring in judgment) (citing *Summers* v. *Tice*, 33 Cal. 2d 80, 84–87, 199 P. 2d 1, 3–4 (1948)).

Justice Brennan's plurality opinion was even less solicitous of the dissent's approach. Noting that, under the standard embraced by the dissent in *Price Waterhouse*, neither of two sufficient forces would constitute cause even if either one alone would have led to the injury, the plurality remarked: "We need not leave our common sense at the doorstep when we interpret a statute." 490 U. S., at 241.

B

As the plurality and concurring opinions in *Price Waterhouse* indicate, a strict but-for test is particularly ill suited

to employment discrimination cases. Even if the test is appropriate in some tort contexts, "it is an entirely different matter to determine a 'but-for' relation when . . . consider-[ing], not physical forces, but the mind-related characterizations that constitute motive." *Gross*, 557 U. S., at 190 (BREYER, J., dissenting). When assessing an employer's multiple motives, "to apply 'but-for' causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different." *Id.*, at 191. See also *Price Waterhouse*, 490 U. S., at 264 (opinion of O'Connor, J.) ("'[A]t . . . times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs.'" (quoting Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 67 (1956))).

This point, lost on the Court, was not lost on Congress. When Title VII was enacted, Congress considered and rejected an amendment that would have placed the word "solely" before "because of [the complainant's] race, color, religion, sex, or national origin." See 110 Cong. Rec. 2728, 13837–13838 (1964). Senator Case, a prime sponsor of Title VII, commented that a "sole cause" standard would render the Act "totally nugatory." *Id.*, at 13837. Life does not shape up that way, the Senator suggested, commenting "[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." *Ibid.*

* * *

The Court holds, at odds with a solid line of decisions recognizing that retaliation is inextricably bound up with status-based discrimination, that § 2000e–2(m) excludes retaliation claims. It then reaches outside of Title VII to arrive at an interpretation of "because" that lacks sensitivity to the realities of life at work. In this endeavor, the Court is guided neither by precedent nor by the aims of legislators who formulated and amended Title VII. Indeed, the Court

appears driven by a zeal to reduce the number of retaliation claims filed against employers. See *ante*, at 358–359. Congress had no such goal in mind when it added § 2000e–2(m) to Title VII. See House Report Part 2, at 2. Today's misguided judgment, along with the judgment in *Vance* v. *Ball State Univ.*, *post*, p. 421, should prompt yet another Civil Rights Restoration Act.

For the reasons stated, I would affirm the judgment of the Fifth Circuit.

Syllabus

UNITED STATES *v.* KEBODEAUX

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

No. 12–418. Argued April 17, 2013—Decided June 24, 2013

Respondent Kebodeaux was convicted by a special court-martial of a federal sex offense. After serving his sentence and receiving a bad conduct discharge from the Air Force, he moved to Texas where he registered with state authorities as a sex offender. Congress subsequently enacted the Sex Offender Registration and Notification Act (SORNA), which requires federal sex offenders to register in the States where they live, study, and work, 42 U. S. C. § 16913(a), and which applies to offenders who, when SORNA became law, had already completed their sentences, 28 CFR § 72.3. When Kebodeaux moved within Texas and failed to update his registration, the Federal Government prosecuted him under SORNA, and the District Court convicted him. The Fifth Circuit reversed, noting that, at the time of SORNA's enactment, Kebodeaux had served his sentence and was no longer in any special relationship with the Federal Government. Believing that Kebodeaux was not required to register under the pre-SORNA Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, the court found that he had been "unconditionally" freed. That being so, the court held, the Federal Government lacked the power under Article I's Necessary and Proper Clause to regulate his intrastate movements.

Held: SORNA's registration requirements as applied to Kebodeaux fall within the scope of Congress' authority under the Necessary and Proper Clause. Pp. 391–399.

(a) Contrary to the Fifth Circuit's critical assumption that Kebodeaux's release was unconditional, a full reading of the relevant statutes and regulations makes clear that at the time of his offense and conviction he was subject to the Wetterling Act, which imposed upon him registration requirements very similar to SORNA's. See, *e. g.*, 42 U. S. C. §§ 14072(i)(3)–(4). The fact that these federal-law requirements in part involved compliance with state-law requirements made them no less requirements of federal law. See generally *United States* v. *Sharpnack*, 355 U. S. 286, 293–294. Pp. 391–393.

(b) Congress promulgated the Wetterling Act under authority granted by the Military Regulation Clause, Art. I, § 8, cl. 14, and the Necessary and Proper Clause. The same power that authorized Con-

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gress to promulgate the Uniform Code of Military Justice and punish Kebodeaux's crime also authorized Congress to make the civil registration requirement at issue here a consequence of his conviction. And its decision to impose a civil registration requirement that would apply upon the release of an offender like Kebodeaux is eminently reasonable. See *Smith* v. *Doe*, 538 U. S. 84, 102–103. It was also entirely reasonable for Congress to have assigned a special role to the Federal Government in ensuring compliance with federal sex offender registration requirements. See *Carr* v. *United States*, 560 U. S. 438, 452. Thus, Congress did not apply SORNA to an individual who had, prior to its enactment, been "unconditionally released," but rather to an individual already subject to federal registration requirements enacted pursuant to the Military Regulation and Necessary and Proper Clauses. SORNA somewhat modified the applicable registration requirements to which Kebodeaux was already subject, in order to make more uniform what had remained "a patchwork of federal and 50 individual state registration systems," *Reynolds* v. *United States*, 565 U. S. 432, 435. No one here claims that these changes are unreasonable or that Congress could not reasonably have found them "necessary and proper" means for furthering its pre-existing registration ends. Pp. 393–399.

687 F. 3d 232, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., *post*, p. 399, and ALITO, J., *post*, p. 403, filed opinions concurring in the judgment. SCALIA, J., filed a dissenting opinion, *post*, p. 406. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined as to Parts I, II, and III–B, *post*, p. 407.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, *Curtis E. Gannon*, *Melissa Arbus Sherry*, and *Scott A. C. Meisler*.

M. Carolyn Fuentes argued the cause for respondent. With her on the brief were *Philip J. Lynch*, *Maureen Scott Franco*, *Jeffrey T. Green*, *Jacqueline G. Cooper*, and *Sarah O'Rourke Schrup*.*

**Ilya Somin* and *Ilya Shapiro* filed a brief for the Cato Institute as *amicus curiae*.

JUSTICE BREYER delivered the opinion of the Court.

In 1999 a special court-martial convicted Anthony Kebodeaux, a member of the United States Air Force, of a sex offense. It imposed a sentence of three months' imprisonment and a bad conduct discharge. In 2006, several years after Kebodeaux had served his sentence and been discharged, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 120 Stat. 590, 42 U. S. C. § 16901 *et seq.*, a federal statute that requires those convicted of federal sex offenses to register in the States where they live, study, and work. § 16913(a); 18 U. S. C. § 2250(a). And, by regulation, the Federal Government made clear that SORNA's registration requirements apply to federal sex offenders who, when SORNA became law, had already completed their sentences. 42 U. S. C. § 16913(d) (Attorney General's authority to issue regulations); 28 CFR § 72.3 (2012) (regulation specifying application to pre-SORNA offenders).

We here must decide whether the Constitution's Necessary and Proper Clause grants Congress the power to enact SORNA's registration requirements and apply them to a federal offender who had completed his sentence prior to the time of SORNA's enactment. For purposes of answering this question, we assume that Congress has complied with the Constitution's *Ex Post Facto* and Due Process Clauses. See *Smith* v. *Doe*, 538 U. S. 84, 105–106 (2003) (upholding a similar Alaska statute against *ex post facto* challenge); Supp. Brief for Kebodeaux on Rehearing En Banc in No. 08–51185 (CA5) (not raising any due process challenge); Brief for Respondent (same). We conclude that the Necessary and Proper Clause grants Congress adequate power to enact SORNA and to apply it here.

I

As we have just said, in 1999 a special court-martial convicted Kebodeaux, then a member of the Air Force, of a fed-

eral sex offense. He served his 3-month sentence; the Air Force released him with a bad conduct discharge. And then he moved to Texas. In 2004 Kebodeaux registered as a sex offender with Texas state authorities. Brief for Respondent 6–7. In 2006 Congress enacted SORNA. In 2007 Kebodeaux moved within Texas from San Antonio to El Paso, updating his sex offender registration. App. to Pet. for Cert. 167a–168a. But later that year he returned to San Antonio without making the legally required sex offender registration changes. *Id.*, at 169a. And the Federal Government, acting under SORNA, prosecuted Kebodeaux for this last-mentioned SORNA registration failure.

A Federal District Court convicted Kebodeaux of having violated SORNA. See 687 F. 3d 232, 234 (CA5 2012) (en banc). On appeal a panel of the United States Court of Appeals for the Fifth Circuit initially upheld the conviction. 647 F. 3d 137 (2011) (*per curiam*). But the Circuit then heard the appeal en banc and, by a vote of 10 to 6, reversed. 687 F. 3d, at 234. The court stated that, by the time Congress enacted SORNA, Kebodeaux had "fully served" his sex-offense sentence; he was "no longer in federal custody, in the military, under any sort of supervised release or parole, or in any other special relationship with the federal government." *Ibid.*

The court recognized that, even before SORNA, federal law required certain federal sex offenders to register. *Id.*, at 235, n. 4. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, §170101, 108 Stat. 2038–2042. But it believed that the pre-SORNA federal registration requirements did not apply to Kebodeaux. 687 F. 3d, at 235, n. 4. Hence, in the Circuit's view, Kebodeaux had been "*unconditionally* let . . . free." *Id.*, at 234. And, that being so, the Federal Government lacked the power under Article I's Necessary and Proper Clause to regulate through registration Kebodeaux's intrastate movements. *Id.*, at 234–235. In particular, the court said that

after "the federal government has *unconditionally* let a person free . . . the fact that he once committed a crime is not a jurisdictional basis for subsequent regulation and possible criminal prosecution." *Ibid.*

The Solicitor General sought certiorari. And, in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional, we granted the petition. See, *e. g.*, *United States* v. *Morrison*, 529 U. S. 598, 605 (2000); *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 425 (1993).

II

We do not agree with the Circuit's conclusion. And, in explaining our reasons, we need not go much further than the Circuit's critical assumption that Kebodeaux's release was "unconditional," *i. e.*, that after Kebodeaux's release, he was not in "any . . . special relationship with the federal government." 687 F. 3d, at 234. To the contrary, the Solicitor General, tracing through a complex set of statutory cross-references, has pointed out that at the time of his offense and conviction Kebodeaux was subject to the federal Wetterling Act, an Act that imposed upon him registration requirements very similar to those that SORNA later mandated. Brief for United States 18–29.

Congress enacted the Wetterling Act in 1994 and updated it several times prior to Kebodeaux's offense. Like SORNA, it used the federal spending power to encourage States to adopt sex offender registration laws. 42 U. S. C. § 14071(i) (2000 ed.); *Smith*, *supra*, at 89–90. Like SORNA, it applied to those who committed federal sex crimes. § 14071(b)(7)(A). And like SORNA, it imposed federal penalties upon federal sex offenders who failed to register in the States in which they lived, worked, and studied. §§ 14072(i)(3)–(4).

In particular, § 14072(i)(3) imposed federal criminal penalties upon any "person who is . . . described in section 4042(c)(4) of title 18, and knowingly fails to register in any

State in which the person resides." The cross-referenced § 4042(c)(4) said that a "person is described in this paragraph if the person was convicted of" certain enumerated offenses or "[a]ny other offense designated by the Attorney General as a sexual offense for purposes of this subsection." 18 U. S. C. § 4042(c)(4). In 1998 the Attorney General "delegated this authority [to designate sex offenses] to the Director of the Bureau of Prisons." Dept. of Justice, Bureau of Prisons, Designation of Offenses Subject to Sex Offender Release Notification, 63 Fed. Reg. 69386. And that same year the Director of the Bureau of Prisons "designate[d]" the offense of which Kebodeaux was convicted, namely, the military offense of "carnal knowledge" as set forth in Article 120(b) of the Code of Military Justice. *Id.*, at 69387 See 28 CFR § 571.72(b)(2) (1999). A full reading of these documents makes clear that, contrary to Kebodeaux's contention, the relevant penalty applied to crimes committed by military personnel.

Moreover, a different Wetterling Act section imposed federal criminal penalties upon any "person who is . . . sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105–119, and knowingly fails to register in any State in which the person resides." 42 U. S. C. § 14072(i)(4) (2000 ed.). The cross-referenced section, § 115(a)(8)(C), said that the "Secretary of Defense shall specify categories of conduct punishable under the Uniform Code of Military Justice which encompass a range of conduct comparable to that described in [certain provisions of the Violent Crime Control and Law Enforcement Act of 1994], and such other conduct as the Secretary deems appropriate." 1998 Appropriations Act, § 115(a)(8)(C)(i), 111 Stat. 2466. See note following 10 U. S. C. § 951 (2000 ed.). The Secretary had delegated certain types of authority, such as this last-mentioned "deem-[ing]" authority, to an Assistant Secretary of Defense. DoD Directive 5124.5, p. 4 (Oct. 31, 1994). And in December 1998

an Assistant Secretary, acting pursuant to this authority, published a list of military crimes that included the crime of which Kebodeaux was convicted, namely, Article 120(b) of the Uniform Code of Military Justice. App. to Pet. for Cert. 171a–175a. The provision added that "[c]onvictions . . . shall trigger requirements to notify state and local law enforcement agencies and to provide information to inmates concerning sex offender registration requirements." *Id.*, at 175a. And, the provision says (contrary to Kebodeaux's reading, Brief for Respondent 57) that it "is effective immediately." It contains no expiration date. App. to Pet. for Cert. 174a.

We are not aware of any plausible counterargument to the obvious conclusion, namely, that as of the time of Kebodeaux's offense, conviction, and release from federal custody, these Wetterling Act provisions applied to Kebodeaux and imposed upon him registration requirements very similar to those that SORNA later imposed. Contrary to what the Court of Appeals may have believed, the fact that the federal law's requirements in part involved compliance with state-law requirements made them no less requirements of federal law. See generally *United States* v. *Sharpnack*, 355 U. S. 286, 293–294 (1958) (Congress has the power to adopt as federal law the laws of a State and to apply them in federal enclaves); *Gibbons* v. *Ogden*, 9 Wheat. 1, 207–208 (1824) ("Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. . . . The act [adopts state systems for regulation of pilots] and gives [them] the same validity as if its provisions had been specially made by Congress").

III

Both the Court of Appeals and Kebodeaux come close to conceding that if, as of the time of Kebodeaux's offense, he was subject to a federal registration requirement, then the Necessary and Proper Clause authorized Congress to modify

the requirement as in SORNA and to apply the modified requirement to Kebodeaux. See 687 F. 3d, at 234–235, and n. 4; Tr. of Oral Arg. 38–39. And we believe they would be right to make this concession.

No one here claims that the Wetterling Act, as applied to military sex offenders like Kebodeaux, falls outside the scope of the Necessary and Proper Clause. And it is difficult to see how anyone could persuasively do so. The Constitution explicitly grants Congress the power to "make Rules for the . . . Regulation of the land and naval Forces." Art. I, § 8, cl. 14. And, in the Necessary and Proper Clause itself, it grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" and "all other Powers" that the Constitution vests "in the Government of the United States, or in any Department or Officer thereof." *Id.*, cl. 18.

The scope of the Necessary and Proper Clause is broad. In words that have come to define that scope Chief Justice Marshall long ago wrote:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819).

As we have come to understand these words and the provision they explain, they "leav[e] to Congress a large discretion as to the means that may be employed in executing a given power." *Lottery Case*, 188 U. S. 321, 355 (1903). See *Morrison*, 529 U. S., at 607. The Clause allows Congress to "adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution." *James Everard's Breweries* v. *Day*, 265 U. S. 545, 559 (1924).

The Constitution, for example, makes few explicit references to federal criminal law, but the Necessary and Proper

Clause nonetheless authorizes Congress, in the implementation of other explicit powers, to create federal crimes, to confine offenders to prison, to hire guards and other prison personnel, to provide prisoners with medical care and educational training, to ensure the safety of those who may come into contact with prisoners, to ensure the public's safety through systems of parole and supervised release, and, where a federal prisoner's mental condition so requires, to confine that prisoner civilly after the expiration of his or her term of imprisonment. See *United States* v. *Comstock*, 560 U. S. 126, 136–137 (2010).

Here, under the authority granted to it by the Military Regulation and Necessary and Proper Clauses, Congress could promulgate the Uniform Code of Military Justice. It could specify that the sex offense of which Kebodeaux was convicted was a military crime under that Code. It could punish that crime through imprisonment and by placing conditions upon Kebodeaux's release. And it could make the civil registration requirement at issue here a consequence of Kebodeaux's offense and conviction. This civil requirement, while not a specific condition of Kebodeaux's release, was in place at the time Kebodeaux committed his offense, and was a consequence of his violation of federal law.

And Congress' decision to impose such a civil requirement that would apply upon the release of an offender like Kebodeaux is eminently reasonable. Congress could reasonably conclude that registration requirements applied to federal sex offenders after their release can help protect the public from those federal sex offenders and alleviate public safety concerns. See *Smith*, 538 U. S., at 102–103 (sex offender registration has "a legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their community' "). There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, &

M. Durose, Recidivism of Sex Offenders Released in 1994, p. 1 (Nov. 2003) (reporting that compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex offenders were rearrested for a sex crime). There is also conflicting evidence on the point. Cf. R. Tewsbury, W. Jennings, & K. Zgoba, Final Report on Sex Offenders: Recidivism and Collateral Consequences (Sept. 2011) (concluding that sex offenders have relatively low rates of recidivism, and that registration requirements have limited observable benefits regarding recidivism). But the Clause gives Congress the power to weigh the evidence and to reach a rational conclusion, for example, that safety needs justify postrelease registration rules. See *Lambert* v. *Yellowley*, 272 U. S. 581, 594–595 (1926) (upholding congressional statute limiting the amount of spirituous liquor that may be prescribed by a physician, and noting that Congress' "finding [regarding the appropriate amount], in the presence of the well-known diverging opinions of physicians, cannot be regarded as arbitrary or without a reasonable basis"). See also *Gonzales* v. *Raich*, 545 U. S. 1, 22 (2005) ("In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding"). See also H. R. Rep. No. 109–218, pt. 1, pp. 22, 23 (2005) (House Report) (citing statistics compiled by the Justice Department as support for SORNA's sex offender registration regime).

At the same time, "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Carr* v. *United States*, 560 U. S. 438, 452 (2010). The Federal

Government has long kept track of former federal prisoners through probation, parole, and supervised release in part to prevent further crimes thereby protecting the public against the risk of recidivism. See Parole Act, 36 Stat. 819; Probation Act, ch. 521, 43 Stat. 1259; Sentencing Reform Act of 1984, ch. II, 98 Stat. 1987. See also 1 N. Cohen, The Law of Probation and Parole §§ 7:3, 7:4 (2d ed. 1999) (principal purposes of postrelease conditions are to rehabilitate the convict, thus preventing him from recidivating, and to protect the public). Neither, as of 1994, was registration particularly novel, for by then States had implemented similar requirements for close to half a century. See W. Logan, Knowledge as Power: Criminal Registration and Community Notification Laws in America 30–31 (2009). Moreover, the Wetterling Act took state interests into account by, for the most part, requiring released federal offenders to register in accordance with state law. At the same time, the Wetterling Act's requirements were reasonably narrow and precise, tying time limits to the type of sex offense, incorporating state-law details, and relating penalties for violations to the sex crime initially at issue. See 42 U. S. C. § 14071(b) (2000 ed.).

The upshot is that here Congress did not apply SORNA to an individual who had, prior to SORNA's enactment, been "unconditionally released," *i. e.*, a person who was not in "any . . . special relationship with the federal government," but rather to an individual already subject to federal registration requirements that were themselves a valid exercise of federal power under the Military Regulation and Necessary and Proper Clauses. But cf. *post*, at 406 (SCALIA, J., dissenting).

SORNA, enacted after Kebodeaux's release, somewhat modified the applicable registration requirements. In general, SORNA provided more detailed definitions of sex offenses, described in greater detail the nature of the information registrants must provide, and imposed somewhat different limits upon the length of time that registration

must continue and the frequency with which offenders must update their registration. 42 U. S. C. §§ 16911, 16913–16916 (2006 ed. and Supp. V). But the statute, like the Wetterling Act, used Spending Clause grants to encourage States to adopt its uniform definitions and requirements. It did not insist that the States do so. See §§ 16925(a), (d) (2006 ed.) ("The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section").

As applied to an individual already subject to the Wetterling Act like Kebodeaux, SORNA makes few changes. In particular, SORNA modified the time limitations for a sex offender who moves to update his registration to within three business days of the move from both seven days before and seven days after the move, as required by the Texas law enforced under the Wetterling Act. Compare 42 U. S. C. § 16913(c) with App. to Pet. for Cert. 167a–168a. SORNA also increased the federal penalty for a federal offender's registration violation to a maximum of 10 years from a maximum of 1 year for a first offense. Compare 18 U. S. C. § 2250(a) with 42 U. S. C. § 14072(i) (2000 ed.). Kebodeaux was sentenced to one year and one day of imprisonment. For purposes of federal law, SORNA *reduced* the duration of Kebodeaux's registration requirement to 25 years from the lifetime requirement imposed by Texas law, compare 42 U. S. C. § 16915(a) (2006 ed.) with App. to Pet. for Cert. 167a, and *reduced* the frequency with which Kebodeaux must update his registration to every six months from every 90 days as imposed by Texas law, compare 42 U. S. C. § 16916(2) with App. to Pet. for Cert. 167a. And as far as we can tell, while SORNA punishes violations of its requirements (instead of violations of state law), the Federal Government has prosecuted a sex offender for violating SORNA only when that offender also violated state-registration requirements.

SORNA's general changes were designed to make more uniform what had remained "a patchwork of federal and 50 individual state registration systems," *Reynolds* v. *United States*, 565 U. S. 432, 435 (2012), with "loopholes and deficiencies" that had resulted in an estimated 100,000 sex offenders becoming "'missing'" or "'lost,'" House Report 20, 26. See S. Rep. No. 109–369, pp. 16–17 (2006). See also *Jinks* v. *Richland County*, 538 U. S. 456, 462–463 (2003) (holding that a statute is authorized by the Necessary and Proper Clause when it "provides an alternative to [otherwise] unsatisfactory options" that are "obviously inefficient"). SORNA's more specific changes reflect Congress' determination that the statute, changed in respect to frequency, penalties, and other details, will keep track of more offenders and will encourage States themselves to adopt its uniform standards. No one here claims that these changes are unreasonable or that Congress could not reasonably have found them "necessary and proper" means for furthering its pre-existing registration ends.

We conclude that the SORNA changes as applied to Kebodeaux fall within the scope of Congress' authority under the Military Regulation and Necessary and Proper Clauses. The Fifth Circuit's judgment to the contrary is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring in the judgment.

I agree with the Court that Congress had the power, under the Military Regulation and Necessary and Proper Clauses of Article I, to require Anthony Kebodeaux to register as a sex offender. The majority, having established that premise and thus resolved the case before us, nevertheless goes on to discuss the general public safety benefits of the registration requirement. *Ante,* at 395–397. Because that analysis is beside the point in this case, I concur in the judgment only.

While serving in the Air Force, Kebodeaux violated the Uniform Code of Military Justice by having sexual relations with a minor. A special court-martial convicted him. As relevant here, that conviction had two consequences: First, Kebodeaux was sentenced to confinement for three months. And second, as the majority describes, he was required to register as a sex offender with the State in which he resided and keep that registration current; failure to do so would subject him to federal criminal penalties. *Ante*, at 391–393.

In the same way that Congress undoubtedly had the authority to impose the first consequence for a violation of military rules, it also had the authority to impose the second. The Constitution gives Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cl. 14. And, under the Necessary and Proper Clause, Congress can give those rules force by imposing consequences on members of the military who disobey them. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 416 (1819) ("All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress."). A servicemember will be less likely to violate a relevant military regulation if he knows that, having done so, he will be required to register as a sex offender years into the future.

It is this power, the power to regulate the conduct of members of the military by imposing consequences for their violations of military law, that supports application of the federal registration obligation to Kebodeaux. As the Court explains, the Wetterling Act was in force when Kebodeaux committed the original offense, and applied to him as soon as the special court-martial rendered its verdict. See *ante*, at 393. Congress later, in enacting the Sex Offender Registration and Notification Act (SORNA), modified the registration regime in place under the Wetterling Act. But as applied to Kebodeaux here (the relevant inquiry in this as-applied challenge), those changes were insignificant; their

only effect was that Kebodeaux received a day more than he could have received for the same conduct had the Wetterling Act remained in force. See *ante*, at 398 (describing SORNA's effect on Kebodeaux's registration obligations); compare *post*, at 415, n. 3 (THOMAS, J., dissenting) (discussing changes that did not affect Kebodeaux). Whatever other constitutional concerns might attach to such a change, as a question of Article I *power* it was permissible. Just as the Federal Government may, under the Necessary and Proper Clause, alter the conditions of a federal prisoner's confinement or adjust the timing and location of drug tests required of a federal convict, so too could it make slight modifications to a previously imposed registration obligation.

The majority says, more or less, the same thing. *Ante*, at 395, 398–399. But sandwiched between its discussion of the basis for Congress's power and its discussion of the inconsequential nature of the changes is a discussion of benefits from the registration system. Along with giving force to military regulations, the majority notes, Congress could also have "reasonably conclude[d] that registration requirements . . . help protect the public from . . . federal sex offenders and alleviate public safety concerns." *Ante*, at 395.

Maybe so, but those consequences of the registration requirement are irrelevant for our purposes. Public safety benefits are neither necessary nor sufficient to a proper exercise of the power to regulate the military. What matters—all that matters—is that Congress could have rationally determined that "mak[ing] the civil registration requirement at issue here a consequence of Kebodeaux's offense" would give force to the Uniform Code of Military Justice adopted pursuant to Congress's power to regulate the Armed Forces. *Ibid.*

Ordinarily such surplusage might not warrant a separate writing. Here, however, I worry that incautious readers will think they have found in the majority opinion something they would not find in either the Constitution or any prior

decision of ours: a federal police power. The danger of such confusion is heightened by the fact the Solicitor General adopted something very close to the police power argument, contending that "the federal government has greater ties to former federal sex offenders than it does to other members of the general public," and can therefore impose restrictions on them even years after their unconditional release simply to "serve[ ] . . . public-protection purposes." Brief for United States 34–35.

I write separately to stress not only that a federal police power is immaterial to the result in this case, but also that such a power *could not* be material to the result in this case—because it does not exist. See *United States* v. *Morrison*, 529 U. S. 598, 618–619 (2000) ("'[W]e *always* have rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power'" (quoting *United States* v. *Lopez*, 514 U. S. 549, 584–585 (1995) (THOMAS, J., concurring))).

Our resistance to congressional assertions of such a power has deep roots. From the first, we have recognized that "the powers of the government are limited, and that its limits are not to be transcended." *McCulloch*, 4 Wheat., at 420–421. Thus, while the Necessary and Proper Clause authorizes congressional action "incidental to [an enumerated] power, and conducive to its beneficial exercise," Chief Justice Marshall was emphatic that no "great substantive and independent power" can be "implied as incidental to other powers, or used as a means of executing them." *Id.*, at 418, 411; see also *Gibbons* v. *Ogden*, 9 Wheat. 1, 195 (1824) ("The enumeration presupposes something not enumerated").

It is difficult to imagine a clearer example of such a "great substantive and independent power" than the power to "help protect the public . . . and alleviate public safety concerns," *ante*, at 395. I find it implausible to suppose—and impossible to support—that the Framers intended to confer such authority by implication rather than expression. A power of

that magnitude vested in the Federal Government is not "consist[ent] with the letter and spirit of the constitution," *McCulloch*, *supra*, at 421, and thus not a "proper [means] for carrying into Execution" the enumerated powers of the Federal Government, U. S. Const., Art. I, § 8, cl. 18. See *United States* v. *Comstock*, 560 U. S. 126, 153 (2010) (KENNEDY, J., concurring in judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause").

It makes no difference that the Federal Government would be policing people previously convicted of a federal crime—even a federal sex crime. The fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's purely intrastate conduct.

But as I have said, I do not understand the majority's opinion to be based on such a power. The connection to the Military Regulation Clause on which the majority relies, *ante*, at 395, is less attenuated, and the power it produces less substantial, than would be true of a federal police power over prior federal offenders; the power to threaten and impose particular obligations as a result of a violation of military law is not such a "great substantive and independent power" that the Framers' failure to enumerate it must imply its absence.

Nevertheless, I fear that the majority's discussion of the public safety benefits of the registration requirement will be mistaken for an endorsement of the Solicitor General's public safety *basis* for the law. I accordingly concur in the judgment only.

JUSTICE ALITO, concurring in the judgment.

I concur in the judgment solely on the ground that the registration requirement at issue is necessary and proper to execute Congress' power "[t]o make Rules for the Govern-

ment and Regulation of the land and naval Forces." U. S. Const., Art. I, §8, cl. 14. Exercising this power, Congress has enacted provisions of the Uniform Code of Military Justice (UCMJ) that authorize members of the military to be tried before a military tribunal, rather than a state court, for ordinary criminal offenses, including sex crimes, that are committed both within and outside the boundaries of a military installation. See, *e. g.*, UCMJ Art. 2 (persons subject to UCMJ); Art. 5 ("This chapter applies in all places"); Art. 120 (rape by a person subject to UCMJ); *Solorio* v. *United States*, 483 U. S. 435, 436–438 (1987) (servicemember may be court-martialed for off-base crime without "service connection"). States usually have concurrent jurisdiction over such crimes when they are committed off base and sometimes possess jurisdiction over such offenses when committed on base.[1] These offenses, however, are rarely prosecuted in both a military and a state court, and therefore when a servicemember is court-martialed for a sex offense over which the State had jurisdiction, this is usually because the State has deferred to the military.[2] Where the offense

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[1] See 1 F. Gilligan & F. Lederer, Court-Martial Procedure §2–40.00, p. 2–47 (3d ed. 2006) (hereinafter Gilligan & Lederer). This depends on the circumstances under which the Federal Government acquires the land in question. See Morrison, State Property Tax Implications for Military Privatized Family Housing Program, 56 Air Force L. Rev. 261, 269–270 (2005). See generally Manual for Courts-Martial, United States, Rule for Court-Martial 201(d)(3) (2012) (Rule) (discussing situations "[w]here an act or omission is subject to trial by court-martial and by one or more civil tribunals"); D. Schlueter, Military Criminal Justice: Practice & Procedure §4–12(A), p. 231 (8th ed. 2012) (hereinafter Schlueter).

[2] "Where an act or omission is subject to trial by court-martial and by one or more civil tribunals," "the determination which nation, state, or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused." Rule 201(d)(3). And as the commentary to Rule 201(d) explains, "the determination which agency shall exercise jurisdiction should normally be made through consultation or prior agreement between appropriate military of-

in question is a sex crime, a consequence of this handling of the case is that the offender, if convicted, may fall through the cracks of a state registration system. For example, if the servicemember is convicted of a sex offense in a state court, the state court may be required by state law to provide that information to the state registry. See, *e. g.*, Colo. Rev. Stat. Ann. § 16–22–104(1)(a)(I) (2012). State law may also require the state corrections department to notify both state and local police of the offender's release. See, *e. g.*, § 16–22–107(3). Provisions such as these are designed to prevent sex offenders from avoiding registration, as many have in the past. See H. R. Rep. No. 109–218, pt. 1, p. 26 (2005) (despite pre-SORNA registration efforts, "[t]he most significant enforcement issue in the sex offender program [was] that over 100,000 sex offenders, or nearly one-fifth in the Nation are 'missing,' meaning that they have not complied with sex offender registration requirements"). When a servicemember is convicted by a military tribunal, however, the State has no authority to require that tribunal to notify the state registry, nor does it have the authority to require the officials at a military prison to notify state or local police when the servicemember is released from custody. Because the exercise of military jurisdiction may have this effect—in other words, may create a gap in the laws intended to maximize the registration of sex offenders—it is necessary and proper for Congress to require the registra-

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ficials . . . and appropriate civilian authorities." See Discussion following Rule 201(d), p. 2–10; see also Secretary of Air Force, Air Force Instruction 51–201, §§ 2.6.1–2.6.3 (June 6, 2013); Schlueter § 4–12(B), at 231–232. "[I]t is constitutionally permissible to try a person by court-martial and by a State court for the same act," Discussion following Rule 201(d), at 2–10; see Schlueter § 4–12(B), at 232, § 13–3(F), at 691; however, "as a matter of policy a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act," Discussion following Rule 201(d), at 2–10; Air Force Instruction 51–201, §§ 2.6.1, 2.6.2; Gilligan & Lederer § 7–50.00, at 7–17.

tion of members of the military who are convicted of a qualifying sex offense in a military court. When Congress, in validly exercising a power expressly conferred by the Constitution, creates or exacerbates a dangerous situation (here, the possibility that a convicted sex offender may escape registration), Congress has the power to try to eliminate or at least diminish that danger. See *United States* v. *Comstock*, 560 U. S. 126, 155–158 (2010) (ALITO, J., concurring in judgment). I accordingly concur in the judgment only.

JUSTICE SCALIA, dissenting.

I join Parts I, II, and III–B of JUSTICE THOMAS's dissent. I do not join Part III–A because I do not agree that what is necessary and proper to enforce a statute validly enacted pursuant to an enumerated power is not itself necessary and proper to the execution of an enumerated power. It is my view that if "Congress has the authority" to act, then it also "'possesses every power needed'" to make that action "'effective.'" *Gonzales* v. *Raich*, 545 U. S. 1, 36 (2005) (SCALIA, J., concurring in judgment) (quoting *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 118–119 (1942)). If I thought that SORNA's registration requirement were "'reasonably adapted,'" *Raich*, *supra*, at 37, to carrying into execution some other, valid enactment, I would sustain it.

But it is not. The lynchpin of the Court's reasoning is that Kebodeaux was "subject to a federal registration requirement"—the Wetterling Act—at the time of his offense, and so the Necessary and Proper Clause "authorized Congress to modify the requirement as in SORNA and to apply the modified requirement to Kebodeaux." *Ante*, at 393–394. That does not establish, however, that the Wetterling Act's registration requirement was itself a valid exercise of any federal power, or that SORNA is designed to carry the Wetterling Act into execution. The former proposition is dubious, the latter obviously untrue.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Parts I, II, and III–B, dissenting.

Anthony Kebodeaux was convicted under the Sex Offender Registration and Notification Act (SORNA), 42 U. S. C. § 16901 *et seq.*, for failing to update his sex offender registration when he moved from one Texas city to another. The Court today holds that Congress has power under the Necessary and Proper Clause to enact SORNA and criminalize Kebodeaux's failure to update his registration. I disagree. As applied to Kebodeaux, SORNA does not "carr[y] into Execution" any of the federal powers enumerated in the Constitution. Art. I, § 8, cl. 18. Rather, it usurps the general police power vested in the States. Because SORNA's registration requirements are unconstitutional as applied to Kebodeaux, I respectfully dissent.

I

Congress enacted SORNA in 2006. SORNA requires that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U. S. C. § 16913(a).[1] These requirements "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 28 CFR § 72.3 (2012). As relevant here, SORNA makes it a federal crime when someone who is required to register as a sex offender "knowingly fails to register or update a registration" and that person "is a sex offender [as defined by SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice)." 18 U. S. C. §§ 2250(a)(2)(A), (3).

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[1] A "sex offender" is defined as "an individual who was convicted" of an offense that falls within the statute's defined offenses. 42 U. S. C. §§ 16911(1) and (5)–(7).

In March 1999, Anthony Kebodeaux had consensual sex with a 15-year-old girl when he was a 20-year-old airman in the U. S. Air Force. He was convicted by a court-martial of carnal knowledge of a female under the age of 16, in violation of Article 120(b) of the Uniform Code of Military Justice (UCMJ). He was sentenced to three months' imprisonment and received a bad-conduct discharge. He completed his sentence in September 1999 and was no longer in federal custody or the military when Congress enacted SORNA, which required him to register as a sex offender. In 2007, Kebodeaux failed to update his sex offender registration within three days of moving from El Paso, Texas, to San Antonio, Texas. He was convicted under § 2250(a)(2)(A) in 2008 and sentenced to a year and a day in prison. The question before the Court is whether Congress has power to require Kebodeaux to register as a sex offender and to criminalize his failure to do so.

II

A

The Constitution creates a Federal Government with limited powers. Congress has no powers except those specified in the Constitution. See *Marbury* v. *Madison*, 1 Cranch 137, 176 (1803) (Marshall, C. J.) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). Thus, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States* v. *Morrison*, 529 U. S. 598, 607 (2000).

A different default rule applies to the States. As the Tenth Amendment makes clear, the States enjoy all powers that the Constitution does not withhold from them. See Amdt. 10 ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). While the powers of Congress are "few and defined," the powers that "remain in

the State governments are numerous and indefinite." The Federalist No. 45, p. 328 (B. Wright ed. 1961) (J. Madison).

The Constitution sets forth Congress' limited powers in Article I. That Article begins by "vest[ing]" in Congress "[a]ll legislative Powers herein granted," and then enumerates those powers in § 8. The final clause of § 8, the Necessary and Proper Clause, gives Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18. Importantly, the Necessary and Proper Clause is not a free-standing grant of congressional power, but rather an authorization to make laws that are necessary to execute both the powers vested in Congress by the preceding Clauses of § 8, and the powers vested in Congress and the other branches by other provisions of the Constitution. See, *e. g.*, *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234, 247 (1960) ("The [Necessary and Proper Clause] is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution' ").

In *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), Chief Justice Marshall famously set forth the Court's interpretation of the Necessary and Proper Clause:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional." *Id.*, at 421.

Under this formulation, a federal law is a valid exercise of Congress' power under the Clause if it satisfies a two-part test. "First, the law must be directed toward a 'legitimate' end, which *McCulloch* defines as one 'within the scope of the

[C]onstitution.'" *United States* v. *Comstock*, 560 U. S. 126, 160 (2010) (THOMAS, J., dissenting) (quoting 4 Wheat., at 421). In other words, the law must be directed at "carrying into Execution" one or more of the powers delegated to the Federal Government by the Constitution. Art. I, § 8, cl. 18. "Second, there must be a necessary and proper fit between the 'means' (the federal law) and the 'end' (the enumerated power or powers) it is designed to serve." *Comstock*, 560 U. S., at 160 (THOMAS, J., dissenting). "The means Congress selects will be deemed 'necessary' if they are 'appropriate' and 'plainly adapted' to the exercise of an enumerated power, and 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'" *Id.*, at 160–161 (quoting Art. I, § 8, cl. 18, and *McCulloch*, *supra*, at 421).

Both parts of this test are critical. "[N]o matter how 'necessary' or 'proper' an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than 'carrying into Execution' one or more of the Federal Government's enumerated powers." *Comstock*, *supra*, at 161 (THOMAS, J., dissenting). As applied to Kebodeaux, SORNA fails this test.

B

It is undisputed that no enumerated power in Article I, § 8, gives Congress the power to punish sex offenders who fail to register, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power. Thus, SORNA is a valid exercise of congressional authority only if it is "necessary and proper for carrying into Execution" one or more of those federal powers enumerated in the Constitution.

In the course of this litigation, the Government has argued that Kebodeaux's conviction under § 2250(a)(2)(A) executes Congress' enumerated powers to spend for the general welfare, Art. I, § 8, cl. 1; to regulate interstate commerce, § 8,

cl. 3; and to regulate the Armed Forces, § 8, cl. 14. But none of these powers justifies applying § 2250(a)(2)(A) to Kebodeaux. The Spending Clause argument is a nonstarter. Section 2250(a)(2)(A) does not execute Congress' spending power because it regulates individuals who have not necessarily received federal funds of any kind. The Government contends that "federal funding and logistical support offered to States for their sex-offender-registration-and-notification programs can be effective only if persons required to register actually do so" and that "Congress may impose penalties on such individuals as a means of achieving that goal." Brief for United States 52. But we have never held that Congress gains the power to regulate private individuals merely because it provides money to the States in which they reside.

Nor does the Commerce Clause—the enumerated power that the Court has construed most broadly—support § 2250(a)(2)(A). Under this Court's precedents, Congress may use its Commerce Clause power to regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) economic activities that "substantially affect interstate commerce." *United States* v. *Lopez*, 514 U. S. 549, 558–559 (1995); see also *Morrison*, 529 U. S., at 617. Section 2250(a)(2)(A) does not fall within the first two categories because it is not limited to regulating sex offenders who have traveled in interstate commerce. Instead, it applies to all federal sex offenders who fail to register, even if they never cross state lines. Nor does § 2250(a)(2)(A) fall within the third category. Congress may not regulate noneconomic activity, such as sex crimes, based on the effect it might have on interstate commerce. Cf. *id.*, at 617 ("We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). In short, § 2250(a)(2)(A) regulates activity that is neither "'in-

terstate'" nor "'commercial,'" 687 F. 3d 232, 253 (CA5 2012), and, thus, it cannot be justified on the ground that it executes Congress' power to regulate interstate commerce.

Finally, Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces" does not support Kebodeaux's conviction under § 2250(a)(2)(A). Art. I, § 8, cl. 14. Kebodeaux had long since fully served his criminal sentence for violating Article 120(b) of the UCMJ and was no longer in the military when Congress enacted SORNA. Congress does not retain a general police power over every person who has ever served in the military. See *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 14–15 (1955) ("It has never been intimated by this Court . . . that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions. . . . [G]iven its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces"). Accordingly, Kebodeaux's conviction under § 2250(a)(2)(A) cannot be sustained based on Congress' power over the military.

Moreover, it is clear from the face of SORNA and from the Government's arguments that it is not directed at "carrying into Execution" any of the federal powers enumerated in the Constitution, Art. I, § 8, cl. 18, but is instead aimed at protecting society from sex offenders and violent child predators. See 42 U. S. C. § 16901 ("In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders"); Tr. of Oral Arg. 3 ("Convicted sex offenders pose a serious threat to public safety. When those convictions are entered under Federal law, Congress has the authority to impose both a criminal and a civil sanc-

tion for that conduct in order to protect the public"); Brief for United States 3 (same).

Protecting society from sex offenders and violent child predators is an important and laudable endeavor. See *Kennedy* v. *Louisiana*, 554 U. S. 407, 467 (2008) (ALITO, J., dissenting) (explaining that, for most Americans, sexual abuse of children is the "epitome of moral depravity"). But "the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it." *Comstock*, 560 U. S., at 165 (THOMAS, J., dissenting). The power to protect society from sex offenders is part of the general police power that the Framers reserved to the States or the people. See Amdt. 10; *Morrison*, *supra*, at 618 ("[W]e can think of no better example of the police power, which the [Framers] denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims"); *Lopez*, *supra*, at 561, n. 3 ("[T]he '"States possess primary authority for defining and enforcing the criminal law"'" (quoting *Brecht* v. *Abrahamson*, 507 U. S. 619, 635 (1993))).[2]

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[2] All 50 States have used their general police powers to enact sex offender registration laws. See, *e. g.*, Ala. Code §§ 13A–11–200 to 13A–11–202, 13A–11–1181 (2006); Alaska Stat. §§ 11.56.840, 12.63.010 to 12.63.100, 18.66.087, 28.05.048, 33.30.035 (2006); Ariz. Rev. Stat. Ann. §§ 13–3821 to 13–3825 (2001 and Supp. 2007); Ark. Code Ann. §§ 12–12–901 to 12–12–909 (2003 and Supp. 2007); Cal. Penal Code Ann. §§ 290 to 290.4 (West 2008); Colo. Rev. Stat. Ann. §§ 16–22–103 to 16–22–104, 18–3–412.5 (2007); Conn. Gen. Stat. §§ 54–251 to 54–254 (2008 Supp.); Del. Code Ann., Tit. 11, § 4120 (2007); Fla. Stat. §§ 775.13, 775.21 (2007); Ga. Code Ann. § 42–1–12 (Supp. 2007); Haw. Rev. Stat. §§ 846E–1, 846E–2 (2006 Cum. Supp.); Idaho Code §§ 18–8304 to 18–8311 (Supp. 2008); Ill. Comp. Stat., ch. 730, §§ 150/1 to 150/10, 152/101 to 152/121 (West 2006); Ind. Code §§ 11–8–8–1 to 11–8–8–7 (Supp. 2007); Iowa Code §§ 692A.1 to 692A.16 (2003 and Supp. 2008); Kan. Stat. Ann. §§ 22–4901 to 22–4910 (1995); Ky. Rev. Stat. Ann. §§ 17.500 to 17.540 (Lexis 2003 and Supp. 2007); La. Rev. Stat. Ann. §§ 15:540 to 15:549 (West 2005 and Supp. 2008); Me. Rev. Stat. Ann., Tit. 34–A, §§ 11201 to 11204, 11221 to 11228 (2007 Supp. Pamphlet); Md. Crim. Proc. Code Ann. §§ 11–701 to 11–721 (Lexis 2001 and Supp. 2007); Mass. Gen. Laws, ch. 6,

The Government has failed to identify any enumerated power that § 2250(a)(2)(A) "carr[ies] into Execution" in this case. Accordingly, I would hold that § 2250(a)(2)(A) and the registration requirements that it enforces are unconstitutional as applied to Kebodeaux.

III

In concluding otherwise, the Court entirely skips *McCulloch*'s first step—determining whether the end served by SORNA is "within the scope of the [C]onstitution." 4 Wheat., at 421. The Court appears to believe that Congress' power "to 'make Rules for the . . . Regulation of the

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§§ 178D to 178T (West 2006 and Supp. 2008); Mich. Comp. Laws Ann. §§ 28.721 to 28.731 (West 2004 and Supp. 2008); Minn. Stat. Ann. § 243.166 (West 2003 and Supp. 2008); Miss. Code Ann. §§ 45–33–21 to 45–33–59 (1999 and Supp. 2007); Mo. Rev. Stat. §§ 589.400 to 589.425 (2003 and Supp. 2008), § 211.45 (2004); Mont. Code Ann. §§ 46–23–501 to 46–23–507 (2007); Neb. Rev. Stat. §§ 29–4001 to 29–4013 (2003 and Supp. 2007); Nev. Rev. Stat. §§ 179B.010 to 179B.250 (2007); N. H. Rev. Stat. Ann. §§ 651–B:1 to 651–B:7 (West 2007 and Supp. 2007); N. J. Stat. Ann. §§ 2C:7–1 to 2C:7–20 (West 2005 and Supp. 2008); N. M. Stat. Ann. §§ 29–11A–1 to 29–11A–8 (2004 and Supp. 2008); N. Y. Correc. Law Ann., Art. 6–C, §§ 168 to 168–V (West 2003 and Supp. 2008); N. C. Gen. Stat. Ann. §§ 14–208.5 to 14–208.26 (Lexis 2007); N. D. Cent. Code Ann. § 12.1–32–15 (Lexis 1997 and Supp. 2007); Ohio Rev. Code Ann. §§ 2950.01 to 2950.11 (Lexis 2006 and Supp. 2008); Okla. Stat., Tit. 57, §§ 581 to 585 (West 2001), Tit. 57, §§ 591 to 594 (West 2007 Supp.); Ore. Rev. Stat. §§ 181.585 to 181.606, 181.826 (2007); 42 Pa. Cons. Stat. §§ 9791 to 9799.9 (2006); R. I. Gen. Laws §§ 11–37.1–1 to 11–37.1–12 (2002 and Supp. 2007); S. C. Code Ann. §§ 23–3–430 to 23–3–490 (2007 and Supp. 2007); S. D. Codified Laws §§ 22–24B–1 to 22–24B–15 (2006 and Supp. 2008); Tenn. Code Ann. §§ 40–39–201 to 40–39–212 (2006 and Supp. 2007); Tex. Code Crim. Proc. Ann., Arts. 62.001 to 62.002, 62.051 to 62.059 (Vernon 2006 and Supp. 2008); Utah Code Ann. § 77–27–21.5 (2003 and 2008 Supp.); Vt. Stat. Ann., Tit. 13, §§ 5401 to 5414 (1998 and Supp. 2007); Va. Code Ann. §§ 9.1–900 to 9.1–921 (2006 and Supp. 2007); Wash. Rev. Code §§ 4.24.550, 9A.44.130, 9A.44.140, 10.01.200, 70.48.470, 72.09.830 (2006); W. Va. Code Ann. §§ 15–12–1 to 15–12–10 (Lexis 2004 and Supp. 2007); Wis. Stat. §§ 301.45 to 301.48 (2005 and Supp. 2007); Wyo. Stat. Ann. §§ 7–19–301 to 7–19–307 (2005).

land and naval Forces'" justifies imposing SORNA's registration requirements on Kebodeaux. *Ante*, at 394. But not one line of the opinion explains how SORNA is directed at regulating the Armed Forces. Instead, the Court explains how SORNA and the Wetterling Act serve various ends that are *not* enumerated in the Constitution. Cf. *ante*, at 399 (explaining that SORNA was designed to "keep track of more offenders" and "encourage States . . . to adopt its uniform standards"); *ante*, at 395 (explaining that the Wetterling Act was designed to "protect the public from . . . federal sex offenders and alleviate public safety concerns"). The Court's failure to link SORNA to any enumerated power results in analysis that is untethered from the Constitution and disregards the admonition that "[t]he powers of the legislature are defined, and limited." *Marbury*, 1 Cranch, at 176.

A

The Court's analysis is flawed at every step. It begins by explaining that "at the time of his offense and conviction Kebodeaux was subject to the federal Wetterling Act, an Act that imposed upon him registration requirements very similar to those that SORNA later mandated."[3] *Ante*, at 391.

[3] THE CHIEF JUSTICE wrongly asserts that the differences between the Wetterling Act and SORNA are "insignificant." *Ante*, at 400 (opinion concurring in judgment). SORNA increases the federal penalty for failing to register from a misdemeanor punishable by no more than 1 year to a felony punishable by up to 10 years for a first offense. Compare 18 U. S. C. § 2250(a) with 42 U. S. C. § 14072(i) (2000 ed.). It is simply incorrect to minimize that change by saying that Kebodeaux received only a day more than he could have received for failing to register under the Wetterling Act. *Ante*, at 400–401 (ROBERTS, C. J., concurring in judgment). The "legally prescribed range *is* the penalty affixed to the crime," *Alleyne* v. *United States*, *ante*, at 112, and SORNA increased that range significantly. SORNA also requires that a sex offender who moves update his registration within three days of moving, instead of seven. Compare 42 U. S. C. § 16913(c) with App. to Pet. for Cert. 167a–168a. Thus, a person can be convicted under SORNA for conduct that would have complied with the Wetterling Act.

But that is beside the point. Kebodeaux was convicted of violating SORNA's registration requirements, not the Wetterling Act's, and so the relevant question is what enumerated power *SORNA* "carr[ies] into Execution." "The Necessary and Proper Clause does not provide Congress with authority to enact any law simply because it furthers *other laws* Congress has enacted in the exercise of its incidental authority; the Clause plainly requires a showing that every federal statute 'carr[ies] into Execution' one or more of the Federal Government's *enumerated* powers." *Comstock*, 560 U. S., at 168 (THOMAS, J., dissenting).

Nevertheless, apparently in an effort to bootstrap the Wetterling Act, the Court proceeds to determine whether the Wetterling Act (not SORNA) falls within Congress' power under the Necessary and Proper Clause. The Court first notes that the Clause "'leave[s] to Congress a large discretion as to the means that may be employed in executing a given power,'" *ante*, at 394 (quoting *Lottery Case*, 188 U. S. 321, 355 (1903))—a fact that is entirely irrelevant under *McCulloch*'s first step of determining whether the *end* is itself legitimate. The Court then observes that the Necessary and Proper Clause

> "authorizes Congress, in the implementation of other explicit powers, to create federal crimes, to confine offenders to prison, to hire guards and other prison personnel, to provide prisoners with medical care and educational training, to ensure the safety of those who may come into contact with prisoners, to ensure the public's safety through systems of parole and supervised release, and, where a federal prisoner's mental condition so requires, to confine that prisoner civilly after the expiration of his or her term of imprisonment." *Ante*, at 395.

From these powers, the Court reasons that the Wetterling Act is valid because "Congress could reasonably conclude that registration requirements applied to federal sex offend-

ers after their release can help protect the public from those federal sex offenders and alleviate public safety concerns." *Ibid.* As I explained in *Comstock*, however, this mode of analysis confuses the inquiry. 560 U. S., at 168–169 (dissenting opinion). "Federal laws that criminalize conduct . . . , establish prisons for those who engage in that conduct, and set rules for the care and treatment of prisoners awaiting trial or serving a criminal sentence" are only valid if they "'Execut[e]'" an enumerated power. *Id.*, at 169. Here, for example, Congress has authority to enact Article 120(b) of the UCMJ, to enforce that provision against military personnel who violate it, and to confine them in a military prison while they are awaiting trial and serving a sentence. All of those actions "carr[y] into Execution" Congress' power to promote order and discipline within the military by regulating the conduct of military personnel. Art. I, § 8, cl. 14.

But the enumerated power that justified Kebodeaux's conviction does not justify requiring him to register as a sex offender now that he is a civilian. If Kebodeaux were required to register as part of his criminal sentence, then registration would help execute the power that justifies his conviction. The court-martial here, however, did not impose registration requirements at Kebodeaux's sentencing. See *ante*, at 395 (acknowledging that registration is a "civil requirement" and was "not a specific condition of Kebodeaux's release"). Enacted long after Kebodeaux had completed his sentence, SORNA cannot be justified as a punishment for the offense Kebodeaux committed while in the military because retroactively increasing his punishment would violate the *Ex Post Facto* Clause. See *Peugh* v. *United States*, 569 U. S. 530, 539 (2013) (explaining that laws that "'inflic[t] a greater punishment . . . than the law annexed to the crime . . . when committed'" violate the *Ex Post Facto* Clause (quoting *Calder* v. *Bull*, 3 Dall. 386, 390 (1798))); *Peugh*, *supra*, at 561 (THOMAS, J., dissenting) (explaining that "laws retroactively

increasing the punishment were . . . understood to be *ex post facto* at the time of the founding"). As the Court below correctly recognized, "because SORNA's registration requirements are civil and were enacted after Kebodeaux committed his crime, the [G]overnment cannot justify their constitutionality on the ground that they merely punish Kebodeaux for the crime he committed while in the military." 687 F. 3d, at 239. The only justification for SORNA that the Government has advanced is protection of the public, but that justification has nothing to do with Congress' power to regulate the Armed Forces.[4]

Finally, the Court asserts that the Wetterling Act is reasonable because it "took state interests into account by, for

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[4] THE CHIEF JUSTICE contends that Congress has authority to impose registration as a consequence of Kebodeaux's conviction because "[a] servicemember will be less likely to violate a relevant military regulation if he knows that, having done so, he will be required to register as a sex offender years into the future." *Ante*, at 400 (opinion concurring in judgment). But SORNA could not possibly have deterred Kebodeaux from violating any military regulation because it was enacted *after* he left the military.

JUSTICE ALITO contends that, by trying members of the military in a military court, Congress exacerbated "the possibility that a convicted sex offender may escape [the state] registration [system]," and that SORNA is necessary and proper to correct this problem. *Ante*, at 406 (opinion concurring in judgment). But JUSTICE ALITO has not identified any enumerated power that gives Congress authority to address this supposed problem, and there is no evidence that such a problem exists. Indeed, Texas has indicated that SORNA *undermines* its registration system, rather than making it more effective. See Letter from Jeffrey S. Boyd, General Counsel and Acting Chief of Staff, Texas Office of the Governor, to Linda Baldwin, Director, SMART Office 1 (Aug. 17, 2011) ("Although we in Texas certainly appreciate and agree with the stated goals of SORNA, the adoption of this 'one-size-fits-all' federal legislation in Texas would in fact undermine the accomplishment of those objectives in Texas, just as it would in most other states"), online at http://www.ncleg.net/documentsites/committees/JLOCJPS/October%2013,%202011%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf (as visited June 21, 2013, and available in Clerk of Court's case file).

the most part, requiring released federal offenders to register in accordance with state law," and its requirements are "reasonably narrow and precise." *Ante*, at 397. But the degree to which the Wetterling Act or SORNA accommodates State interests and intrudes on the lives of individuals subject to registration is irrelevant because the Supremacy Clause makes federal law supreme. See Art. VI, cl. 2. "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991). The fact that the Wetterling Act and SORNA may be "narrow" and "[take] state interests into account," *ante*, at 397, is "not a matter of constitutional necessity, but an act of legislative grace," *Comstock*, *supra*, at 178 (THOMAS, J., dissenting). These factors have no place in deciding whether a law "Execut[es]" an enumerated power.

B

The Court not only ignores the limitations on Congress' power set forth in the Constitution, but it also ignores the limits that it marked just three years ago in *Comstock*. In that case, this Court held that Congress has power under the Necessary and Proper Clause to enact 18 U. S. C. § 4248, which authorizes the Federal Government to civilly commit "sexually dangerous persons" beyond the date it lawfully could hold them on a charge or conviction for a federal crime. *Comstock*, 560 U. S., at 142. The Court rebuffed the assertion that it was conferring a general police power on Congress by asserting that § 4248 was "limited to individuals already 'in the custody of the' Federal Government." *Id.*, at 148. The Solicitor General even conceded at oral argument that "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed" because "at that point the State police power over a person has been fully reestablished." Tr. of Oral Arg. in *United States* v. *Comstock*, O. T. 2009, No. 08–1224, p. 9.

The Court and the Government today abandon even that meager restriction, which itself lies far beyond the constitutional limits. Kebodeaux was no longer in federal custody when Congress enacted SORNA, yet the Court disregards the fact that, even under *Comstock*, release from prison and supervised release terminates any hold the Federal Government might otherwise have and "fully reestablished" the State's police power over that individual.

* * *

The Framers believed that the division of powers between the Federal Government and the States would protect individual liberty. See *New York* v. *United States*, 505 U. S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power'" (quoting *Coleman* v. *Thompson*, 501 U. S. 722, 759 (1991) (Blackmun, J., dissenting))). The decision today upsets that careful balance. I respectfully dissent.

Syllabus

VANCE *v.* BALL STATE UNIVERSITY ET AL.

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

No. 11–556. Argued November 26, 2012—Decided June 24, 2013

Under Title VII, an employer's liability for workplace harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action (*i. e.*, "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 761), the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. *Faragher* v. *Boca Raton*, 524 U. S. 775, 807; *Ellerth*, *supra*, at 765.

Petitioner Vance, an African-American woman, sued her employer, Ball State University (BSU), alleging that a fellow employee, Saundra Davis, created a racially hostile work environment in violation of Title VII. The District Court granted summary judgment to BSU. It held that BSU was not vicariously liable for Davis' alleged actions because Davis, who could not take tangible employment actions against Vance, was not a supervisor. The Seventh Circuit affirmed.

Held: An employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim. Pp. 431–450.

(a) Petitioner errs in relying on the meaning of "supervisor" in general usage and in other legal contexts because the term has varying meanings both in colloquial usage and in the law. In any event, Congress did not use the term "supervisor" in Title VII, and the way to understand the term's meaning for present purposes is to consider the interpretation that best fits within the highly structured framework adopted in *Faragher* and *Ellerth*. Pp. 432–436.

(b) Petitioner misreads *Faragher* and *Ellerth* in claiming that those cases support an expansive definition of "supervisor" because, in her

view, at least some of the alleged harassers in those cases, whom the Court treated as supervisors, lacked the authority that the Seventh Circuit's definition demands. In *Ellerth*, there was no question that the alleged harasser, who hired and promoted his victim, was a supervisor. And in *Faragher*, the parties never disputed the characterization of the alleged harassers as supervisors, so the question simply was not before the Court. Pp. 436–439.

(c) The answer to the question presented in this case is implicit in the characteristics of the framework that the Court adopted in *Ellerth* and *Faragher*, which draws a sharp line between co-workers and supervisors and implies that the authority to take tangible employment actions is the defining characteristic of a supervisor. *Ellerth*, *supra*, at 762.

The interpretation of the concept of a supervisor adopted today is one that can be readily applied. An alleged harasser's supervisor status will often be capable of being discerned before (or soon after) litigation commences and is likely to be resolved as a matter of law before trial. By contrast, the vagueness of the Equal Employment Opportunity Commission's standard would impede the resolution of the issue before trial, possibly requiring the jury to be instructed on two very different paths of analysis, depending on whether it finds the alleged harasser to be a supervisor or merely a co-worker.

This approach will not leave employees unprotected against harassment by co-workers who possess some authority to assign daily tasks. In such cases, a victim can prevail simply by showing that the employer was negligent in permitting the harassment to occur, and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor in determining negligence. Pp. 439–446.

(d) The definition adopted today accounts for the fact that many modern organizations have abandoned a hierarchical management structure in favor of giving employees overlapping authority with respect to work assignments. Petitioner fears that employers will attempt to insulate themselves from liability for workplace harassment by empowering only a handful of individuals to take tangible employment actions, but a broad definition of "supervisor" is not necessary to guard against that concern. Pp. 446–447.

646 F. 3d 461, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 450. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 451.

Daniel R. Ortiz argued the cause for petitioner. With him on the briefs was *David T. Goldberg.*

Deputy Solicitor General Srinivasan argued the cause for the United States as *amicus curiae* in support of vacatur. With him on the brief were *Solicitor General Verrilli, Assistant Attorney General Perez, Ann O'Connell, Dennis J. Dimsey, P. David Lopez, Carolyn L. Wheeler, Daniel T. Vail,* and *Julie L. Gantz.*

Gregory G. Garre argued the cause for respondents. With him on the brief were *Jessica E. Phillips, Scott E. Shockley,* and *Lester H. Cohen.**

JUSTICE ALITO delivered the opinion of the Court.

In this case, we decide a question left open in *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998), and *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998), namely, who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment?

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*Briefs of *amici curiae* urging reversal were filed for the National Employment Lawyers Association et al. by *Michael L. Foreman, Rebecca M. Hamburg, Daniel B. Kohrman, Laurie A. McCann, Thomas Osborne,* and *Melvin Radowitz*; and for the National Partnership for Women & Families et al. by *Judith L. Lichtman, Sarah Crawford, Laura E. Neish,* and *Benjamin Voce-Gardner.*

Briefs of *amici curiae* urging affirmance were filed for the American Council on Education et al. by *Ian P. Cooper* and *Ada Meloy*; for the Chamber of Commerce of the United States of America by *Lisa S. Blatt, Dirk C. Phillips, Isaac B. Rosenberg, Robin S. Conrad,* and *Shane B. Kawka*; for the Equal Employment Advisory Council by *Rae T. Vann* and *Michael J. Eastman*; for the National Federation of Independent Business Small Business Legal Center et al. by *Manesh K. Rath, Jacquelyn L. Thompson, Karen R. Harned, Elizabeth Milito,* and *Deborah White*; for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*; and for the Society for Human Resource Management et al. by *Leslie E. Silverman, Lawrence Z. Lorber, James F. Segroves,* and *Allan H. Weitzman.*

James B. Spears, Jr., filed a brief for the National Retail Federation as *amicus curiae.*

Under Title VII, an employer's liability for such harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. *Id.*, at 807; *Ellerth*, *supra*, at 765. Under this framework, therefore, it matters whether a harasser is a "supervisor" or simply a co-worker.

We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim, and we therefore affirm the judgment of the Seventh Circuit.

I

Maetta Vance, an African-American woman, began working for Ball State University (BSU) in 1989 as a substitute server in the University Banquet and Catering division of Dining Services. In 1991, BSU promoted Vance to a part-time catering assistant position, and in 2007 she applied and was selected for a position as a full-time catering assistant.

Over the course of her employment with BSU, Vance lodged numerous complaints of racial discrimination and retaliation, but most of those incidents are not at issue here. For present purposes, the only relevant incidents concern Vance's interactions with a fellow BSU employee, Saundra Davis.

During the time in question, Davis, a white woman, was employed as a catering specialist in the Banquet and Cater-

ing division. The parties vigorously dispute the precise nature and scope of Davis' duties, but they agree that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. See No. 1:06–cv–1452–SEB–JMS, 2008 WL 4247836, *12 (SD Ind., Sept. 10, 2008) ("Vance makes no allegations that Ms. Davis possessed any such power"); Brief for Petitioner 9–11 (describing Davis' authority over Vance); Brief for Respondent Ball State University 39 ("[A]ll agree that Davis lacked the authority to take tangible employments [*sic*] actions against petitioner").

In late 2005 and early 2006, Vance filed internal complaints with BSU and charges with the Equal Employment Opportunity Commission (EEOC), alleging racial harassment and discrimination, and many of these complaints and charges pertained to Davis. 646 F. 3d 461, 467 (CA7 2011). Vance complained that Davis "gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her." *Ibid.* She alleged that she was "left alone in the kitchen with Davis, who smiled at her"; that Davis "blocked" her on an elevator and "stood there with her cart smiling"; and that Davis often gave her "weird" looks. *Ibid.* (internal quotation marks omitted).

Vance's workplace strife persisted despite BSU's attempts to address the problem. As a result, Vance filed this lawsuit in 2006 in the United States District Court for the Southern District of Indiana, claiming, among other things, that she had been subjected to a racially hostile work environment in violation of Title VII. In her complaint, she alleged that Davis was her supervisor and that BSU was liable for Davis' creation of a racially hostile work environment. Complaint in No. 1:06–cv–01452–SEB–TAB (SD Ind., Oct. 3, 2006), Dkt. No. 1, pp. 5–6.

Both parties moved for summary judgment, and the District Court entered summary judgment in favor of BSU. 2008 WL 4247836, *1. The court explained that BSU could not be held vicariously liable for Davis' alleged racial harass-

ment because Davis could not "'hire, fire, demote, promote, transfer, or discipline'" Vance and, as a result, was not Vance's supervisor under the Seventh Circuit's interpretation of that concept. See *id.*, at *12 (quoting *Hall* v. *Bodine Elec. Co.*, 276 F. 3d 345, 355 (CA7 2002)). The court further held that BSU could not be liable in negligence because it responded reasonably to the incidents of which it was aware. 2008 WL 4247836, *15.

The Seventh Circuit affirmed. 646 F. 3d 461. It explained that, under its settled precedent, supervisor status requires "'the power to hire, fire, demote, promote, transfer, or discipline an employee.'" *Id.*, at 470 (quoting *Hall*, *supra*, at 355). The court concluded that Davis was not Vance's supervisor and thus that Vance could not recover from BSU unless she could prove negligence. Finding that BSU was not negligent with respect to Davis' conduct, the court affirmed. 646 F. 3d, at 470–473.

II

A

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1). This provision obviously prohibits discrimination with respect to employment decisions that have direct economic consequences, such as termination, demotion, and pay cuts. But not long after Title VII was enacted, the lower courts held that Title VII also reaches the creation or perpetuation of a discriminatory work environment.

In the leading case of *Rogers* v. *EEOC*, 454 F. 2d 234 (1971), the Fifth Circuit recognized a cause of action based on this theory. See *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 65–66 (1986) (describing development of hostile

environment claims based on race). The *Rogers* court reasoned that "the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." 454 F. 2d, at 238. The court observed that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Ibid.* Following this decision, the lower courts generally held that an employer was liable for a racially hostile work environment if the employer was negligent, *i. e.*, if the employer knew or reasonably should have known about the harassment but failed to take remedial action. See *Ellerth*, 524 U. S., at 768–769 (THOMAS, J., dissenting) (citing cases).

When the issue eventually reached this Court, we agreed that Title VII prohibits the creation of a hostile work environment. See *Meritor*, *supra*, at 64–67. In such cases, we have held, the plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered. See, *e. g.*, *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993).

B

Consistent with *Rogers*, we have held that an employer is directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior. *Faragher*, 524 U. S., at 789. Courts have generally applied this rule to evaluate employer liability when a coworker harasses the plaintiff.[1]

[1] See, *e. g.*, *Williams* v. *Waste Management of Ill.*, 361 F. 3d 1021, 1029 (CA7 2004); *McGinest* v. *GTE Serv. Corp.*, 360 F. 3d 1103, 1119 (CA9 2004); *Joens* v. *John Morrell & Co.*, 354 F. 3d 938, 940 (CA8 2004); *Noviello* v. *Boston*, 398 F. 3d 76, 95 (CA1 2005); *Duch* v. *Jakubek*, 588 F. 3d 757, 762 (CA2 2009); *Huston* v. *Procter & Gamble Paper Prods. Corp.*, 568 F. 3d 100, 104–105 (CA3 2009).

In *Ellerth* and *Faragher*, however, we held that different rules apply where the harassing employee is the plaintiff's "supervisor." In those instances, an employer may be *vicariously* liable for its employees' creation of a hostile work environment. And in identifying the situations in which such vicarious liability is appropriate, we looked to the Restatement of Agency for guidance. See, *e. g.*, *Meritor*, *supra*, at 72; *Ellerth*, *supra*, at 755.

Under the Restatement, "masters" are generally not liable for the torts of their "servants" when the torts are committed outside the scope of the servants' employment. See 1 Restatement (Second) of Agency § 219(2), p. 481 (1957) (Restatement). And because racial and sexual harassment are unlikely to fall within the scope of a servant's duties, application of this rule would generally preclude employer liability for employee harassment. See *Faragher*, *supra*, at 793–796; *Ellerth*, *supra*, at 757. But in *Ellerth* and *Faragher*, we held that a provision of the Restatement provided the basis for an exception. Section 219(2)(d) of that Restatement recognizes an exception to the general rule just noted for situations in which the servant was "aided in accomplishing the tort by the existence of the agency relation." [2] Restatement 481; see *Faragher*, *supra*, at 802–803; *Ellerth*, *supra*, at 760–763.

Adapting this concept to the Title VII context, *Ellerth* and *Faragher* identified two situations in which the aided-in-the-accomplishment rule warrants employer liability even in the absence of negligence, and both of these situations involve

[2] The Restatement (Third) of Agency disposed of this exception to liability, explaining that "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents." 2 Restatement (Third) § 7.08, p. 228 (2005). The parties do not argue that this change undermines our holdings in *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998).

harassment by a "supervisor" as opposed to a co-worker. First, the Court held that an employer is vicariously liable "when a supervisor takes a tangible employment action," *Ellerth*, *supra*, at 762; *Faragher*, *supra*, at 790—*i. e.*, "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," *Ellerth*, 524 U. S., at 761. We explained the reason for this rule as follows: "When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Id.*, at 761–762. In those circumstances, we said, it is appropriate to hold the employer strictly liable. See *Faragher*, *supra*, at 807; *Ellerth*, *supra*, at 765.

Second, *Ellerth* and *Faragher* held that, even when a supervisor's harassment does not culminate in a tangible employment action, the employer can be vicariously liable for the supervisor's creation of a hostile work environment if the employer is unable to establish an affirmative defense.[3] We

[3] *Faragher* and *Ellerth* involved hostile environment claims premised on sexual harassment. Several Federal Courts of Appeals have held that *Faragher* and *Ellerth* apply to other types of hostile environment claims, including race-based claims. See *Spriggs* v. *Diamond Auto Glass*, 242 F. 3d 179, 186, n. 9 (CA4 2001) (citing cases reflecting "the developing consensus . . . that the holdings [in *Faragher* and *Ellerth*] apply with equal force to other types of harassment claims under Title VII"). But see *Ellerth*, *supra*, at 767 (THOMAS, J., dissenting) (stating that, as a result of the Court's decision in *Ellerth*, "employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged"). Neither party in this case challenges the application of *Faragher* and *Ellerth* to race-based hostile environment claims, and we assume that the framework announced in *Faragher* and *Ellerth* applies to cases such as this one.

began by noting that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ellerth*, *supra*, at 763; see *Faragher*, 524 U. S., at 803–805. But it would go too far, we found, to make employers strictly liable whenever a "supervisor" engages in harassment that does not result in a tangible employment action, and we therefore held that in such cases the employer may raise an affirmative defense. Specifically, an employer can mitigate or avoid liability by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided. *Id.*, at 807; *Ellerth*, 524 U. S., at 765. This compromise, we explained, "accommodate[s] the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Id.*, at 764.

The dissenting Members of the Court in *Ellerth* and *Faragher* would not have created a special rule for cases involving harassment by "supervisors." Instead, they would have held that an employer is liable for any employee's creation of a hostile work environment "if, and only if, the plaintiff proves that the employer was negligent in permitting the [offending] conduct to occur." *Ellerth*, *supra*, at 767 (THOMAS, J., dissenting); *Faragher*, *supra*, at 810 (same).

C

Under *Ellerth* and *Faragher*, it is obviously important whether an alleged harasser is a "supervisor" or merely a co-worker, and the lower courts have disagreed about the meaning of the concept of a supervisor in this context. Some courts, including the Seventh Circuit below, have held

that an employee is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer, or discipline the victim. *E. g.*, 646 F. 3d, at 470; *Noviello* v. *Boston*, 398 F. 3d 76, 96 (CA1 2005); *Weyers* v. *Lear Operations Corp.*, 359 F. 3d 1049, 1057 (CA8 2004). Other courts have substantially followed the more open-ended approach advocated by the EEOC's Enforcement Guidance, which ties supervisor status to the ability to exercise significant direction over another's daily work. See, *e. g.*, *Mack* v. *Otis Elevator Co.*, 326 F. 3d 116, 126–127 (CA2 2003); *Whitten* v. *Fred's, Inc.*, 601 F. 3d 231, 245–247 (CA4 2010); EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, *3 (hereinafter EEOC Guidance).

We granted certiorari to resolve this conflict. 567 U. S. 933 (2012).

III

We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i. e.*, to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, *supra*, at 761. We reject the nebulous definition of a "supervisor" advocated in the EEOC Guidance[4] and substantially adopted by several Courts of Appeals. Petitioner's reliance

[4] The United States urges us to defer to the EEOC Guidance. Brief for United States as *Amicus Curiae* 26–29 (U. S. Brief) (citing *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). But to do so would be proper only if the EEOC Guidance has the power to persuade, which "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.*, at 140. For the reasons explained below, we do not find the EEOC Guidance persuasive.

on colloquial uses of the term "supervisor" is misplaced, and her contention that our cases require the EEOC's abstract definition is simply wrong.

As we will explain, the framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers. Those decisions contemplate a unitary category of supervisors, *i. e.*, those employees with the authority to make tangible employment decisions. There is no hint in either decision that the Court had in mind two categories of supervisors: first, those who have such authority and, second, those who, although lacking this power, nevertheless have the ability to direct a co-worker's labor to some ill-defined degree. On the contrary, the *Ellerth/Faragher* framework is one under which supervisory status can usually be readily determined, generally by written documentation. The approach recommended by the EEOC Guidance, by contrast, would make the determination of supervisor status depend on a highly case-specific evaluation of numerous factors.

The *Ellerth/Faragher* framework represents what the Court saw as a workable compromise between the aided-in-the-accomplishment theory of vicarious liability and the legitimate interests of employers. The Seventh Circuit's understanding of the concept of a "supervisor," with which we agree, is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial. The alternative, in many cases, would frustrate judges and confound jurors.

A

Petitioner contends that her expansive understanding of the concept of a "supervisor" is supported by the meaning of the word in general usage and in other legal contexts, see Brief for Petitioner 25–28, but this argument is both incorrect on its own terms and, in any event, misguided.

In general usage, the term "supervisor" lacks a sufficiently specific meaning to be helpful for present purposes. Petitioner is certainly right that the term is often used to refer

to a person who has the authority to direct another's work. See, *e. g.*, 17 Oxford English Dictionary 245 (2d ed. 1989) (defining the term as applying to "one who inspects and directs the work of others"). But the term is also often closely tied to the authority to take what *Ellerth* and *Faragher* referred to as a "tangible employment action." See, *e. g.*, Webster's Third New International Dictionary 2296, def. 1(a) (1976) ("a person having authority delegated by an employer to hire, transfer, suspend, recall, promote, assign, or discharge another employee or to recommend such action").

A comparison of the definitions provided by two colloquial business authorities illustrates the term's imprecision in general usage. One says that "[s]upervisors are usually authorized to recommend and/or effect hiring, disciplining, promoting, punishing, rewarding, and other associated activities regarding the employees in their departments."[5] Another says exactly the opposite: "A supervisor generally does not have the power to hire or fire employees or to promote them."[6] Cf. *Ellerth*, 524 U. S., at 762 ("Tangible employment actions fall within the special province of the supervisor").

If we look beyond general usage to the meaning of the term in other legal contexts, we find much the same situation. Sometimes the term is reserved for those in the upper echelons of the management hierarchy. See, *e. g.*, 25 U. S. C. § 2021(18) (defining the "supervisor" of a school within the jurisdiction of the Bureau of Indian Affairs as "the individual in the position of ultimate authority at a Bureau school"). But sometimes the term is used to refer to lower ranking individuals. See, *e. g.*, 29 U. S. C. § 152(11) (defining a supervisor to include "any individual having authority . . . to hire,

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[5] http://www.businessdictionary.com/definition/supervisor.html (all Internet materials as visited June 21, 2013, and available in Clerk of Court's case file).

[6] http://management.about.com/od/policiesandprocedures/g/supervisor1.html.

transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"); 42 U. S. C. § 1396n(j)(4)(A) (providing that an eligible Medicaid beneficiary who receives care through an approved self-directed services plan may "hire, fire, supervise, and manage the individuals providing such services").

Although the meaning of the concept of a supervisor varies from one legal context to another, the law often contemplates that the ability to supervise includes the ability to take tangible employment actions.[7] See, *e. g.*, 5 CFR

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[7] One outlier that petitioner points to is the National Labor Relations Act (NLRA), 29 U. S. C. § 152(11). Petitioner argues that the NLRA's definition supports her position in this case to the extent that it encompasses employees who have the ability to direct or assign work to subordinates. Brief for Petitioner 27–28.

The NLRA certainly appears to define "supervisor" in broad terms. The National Labor Relations Board (NLRB) and the lower courts, however, have consistently explained that supervisory authority is not trivial or insignificant: If the term "supervisor" is construed too broadly, then employees who are deemed to be supervisors will be denied rights that the NLRA was intended to protect. *E. g.*, *In re Connecticut Humane Society*, 358 NLRB No. 31, *33 (Apr. 12, 2012); *Frenchtown Acquisition Co.* v. *NLRB*, 683 F. 3d 298, 305 (CA6 2012); *Beverly Enterprises-Massachusetts, Inc.* v. *NLRB*, 165 F. 3d 960, 963 (CADC 1999). Indeed, in defining a supervisor for purposes of the NLRA, Congress sought to distinguish "between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). Cf. *NLRB* v. *Health Care & Retirement Corp. of America*, 511 U. S. 571, 586 (1994) (*HCRA*) (GINSBURG, J., dissenting) ("Through case-by-case adjudication, the Board has sought to distinguish individuals exercising the level of control that truly places them in the ranks of management, from highly skilled employees, whether professional or technical, who perform, incidentally to their

§§ 9701.511(a)(2), (3) (2012) (referring to a supervisor's authority to "hire, assign, and direct employees . . . and [t]o lay off and retain employees, or to suspend, remove, reduce in grade, band, or pay, or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source"); § 9701.212(b)(4) (defining "supervisory work" as that which "may involve hiring or selecting employees, assigning work, managing performance, recognizing and rewarding employees, and other associated duties").

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skilled work, a limited supervisory role"). Accordingly, the NLRB has interpreted the NLRA's statutory definition of supervisor more narrowly than its plain language might permit. See, *e. g.*, *Connecticut Humane Society*, *supra*, at *39 (an employee who evaluates others is not a supervisor unless the evaluation "affect[s] the wages and the job status of the employee evaluated"); *In re CGLM, Inc.*, 350 NLRB 974, 977 (2007) ("'If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car'" (quoting *NLRB* v. *Security Guard Serv., Inc.*, 384 F. 2d 143, 151 (CA5 1967))). The NLRA therefore does not define the term "supervisor" as broadly as petitioner suggests.

To be sure, the NLRA may in some instances define "supervisor" more broadly than we define the term in this case. But those differences reflect the NLRA's unique purpose, which is to preserve the balance of power between labor and management, see *HCRA*, *supra*, at 573 (explaining that Congress amended the NLRA to exclude supervisors in order to address the "imbalance between labor and management" that resulted when "supervisory employees could organize as part of bargaining units and negotiate with the employer"). That purpose is inapposite in the context of Title VII, which focuses on eradicating discrimination. An employee may have a sufficient degree of authority over subordinates such that Congress has decided that the employee should not participate with lower level employees in the same collective-bargaining unit (because, for example, a higher level employee will pursue his own interests at the expense of lower level employees' interests), but that authority is not necessarily sufficient to merit heightened liability for the purposes of Title VII. The NLRA's definition of supervisor therefore is not controlling in this context.

In sum, the term "supervisor" has varying meanings both in colloquial usage and in the law. And for this reason, petitioner's argument, taken on its own terms, is unsuccessful.

More important, petitioner is misguided in suggesting that we should approach the question presented here as if "supervisor" were a statutory term. "Supervisor" is not a term used by Congress in Title VII. Rather, the term was adopted by this Court in *Ellerth* and *Faragher* as a label for the class of employees whose misconduct may give rise to vicarious employer liability. Accordingly, the way to understand the meaning of the term "supervisor" for present purposes is to consider the interpretation that best fits within the highly structured framework that those cases adopted.

B

In considering *Ellerth* and *Faragher*, we are met at the outset with petitioner's contention that at least some of the alleged harassers in those cases, whom we treated as supervisors, lacked the authority that the Seventh Circuit's definition demands. This argument misreads our decisions.

In *Ellerth*, it was clear that the alleged harasser was a supervisor under any definition of the term: He hired his victim, and he promoted her (subject only to the ministerial approval of his supervisor, who merely signed the paperwork). 524 U. S., at 747. *Ellerth* was a case from the Seventh Circuit, and at the time of its decision in that case, that court had already adopted its current definition of a supervisor. See *Volk* v. *Coler*, 845 F. 2d 1422, 1436 (1988). See also *Parkins* v. *Civil Constructors of Ill., Inc.*, 163 F. 3d 1027, 1033, n. 1 (CA7 1998) (discussing Circuit case law). Although the en banc Seventh Circuit in *Ellerth* issued eight separate opinions, there was no disagreement about the harasser's status as a supervisor. *Jansen* v. *Packaging Corp. of Am.*, 123 F. 3d 490 (1997) (*per curiam*). Likewise, when the case reached this Court, no question about the harasser's status was raised.

The same is true with respect to *Faragher*. In that case, Faragher, a female lifeguard, sued her employer, the city of Boca Raton, for sexual harassment based on the conduct of two other lifeguards, Bill Terry and David Silverman, and we held that the city was vicariously liable for Terry's and Silverman's harassment. Although it is clear that Terry had authority to take tangible employment actions affecting the victim,[8] see 524 U. S., at 781 (explaining that Terry could hire new lifeguards, supervise their work assignments, counsel, and discipline them), Silverman may have wielded less authority, *ibid.* (noting that Silverman was "responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training"). Nevertheless, the city never disputed Faragher's characterization of both men as her "supervisors." See App., O. T. 1997, No. 97–282, p. 40 (First Amended Complaint ¶¶6–7); *id.*, at 79 (Answer to First Amended Complaint ¶¶6–7) (admitting that both harassers had "supervisory responsibilities" over the plaintiff).[9]

[8] The dissent suggests that it is unclear whether Terry would qualify as a supervisor under the test we adopt because his hiring decisions were subject to approval by higher management. *Post*, at 456–457, n. 1 (opinion of GINSBURG, J.). See also *Faragher*, 524 U. S., at 781. But we have assumed that tangible employment actions can be subject to such approval. See *Ellerth*, 524 U. S., at 762. In any event, the record indicates that Terry possessed the power to make employment decisions having direct economic consequences for his victims. See Brief for Petitioner in *Faragher* v. *Boca Raton*, O. T. 1997, No. 97–282, p. 9 ("No one, during the twenty years that Terry was Marine Safety Chief, was hired without his recommendation. [He] initiated firing and suspending personnel. [His] evaluations of the lifeguards translated into salary increases. [He] made recommendations regarding promotions . . . " (citing record)).

[9] Moreover, it is by no means certain that Silverman lacked the authority to take tangible employment actions against Faragher. In her merits brief, Faragher stated that, as a lieutenant, Silverman "made supervisory and disciplinary decisions and had input on the evaluations as well." *Id.*, at 9–10. If that discipline had economic consequences (such as suspension without pay), then Silverman might qualify as a supervisor under the definition we adopt today.

Silverman's ability to assign Faragher significantly different work responsibilities also may have constituted a tangible employment action. Sil-

In light of the parties' undisputed characterization of the alleged harassers, this Court simply was not presented with the question of the degree of authority that an employee must have in order to be classified as a supervisor.[10] The parties did not focus on the issue in their briefs, although the victim in *Faragher* appears to have agreed that supervisors are employees empowered to take tangible employment actions. See Brief for Petitioner, O. T. 1997, No. 97–282, p. 24 ("Supervisors typically exercise broad discretionary powers over their subordinates, determining many of the terms and conditions of their employment, including their raises and prospects for promotion and controlling or greatly influencing whether they are to be dismissed").

For these reasons, we have no difficulty rejecting petitioner's argument that the question before us in the present case was effectively settled in her favor by our treatment of the alleged harassers in *Ellerth* and *Faragher*.[11]

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verman told Faragher, "'Date me or clean the toilets for a year.'" *Faragher*, *supra*, at 780. That threatened reassignment of duties likely would have constituted significantly different responsibilities for a lifeguard, whose job typically is to guard the beach. If that reassignment had economic consequences, such as foreclosing Faragher's eligibility for promotion, then it might constitute a tangible employment action.

[10] The lower court did not even address this issue. See *Faragher* v. *Boca Raton*, 111 F. 3d 1530, 1547 (CA11 1997) (Anderson, J., concurring in part and dissenting in part) (noting that it was unnecessary to "decide the threshold level of authority which a supervisor must possess in order to impose liability on the employer").

[11] According to the dissent, the rule that we adopt is also inconsistent with our decision in *Pennsylvania State Police* v. *Suders*, 542 U. S. 129 (2004). See *post*, at 457. The question in that case was "whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in *Ellerth* and *Faragher*." *Suders*, *supra*, at 140. As the dissent implicitly acknowledges, the supervisor status of the harassing employees was not before us in that case. See *post*, at 457. Indeed, the employer conceded early in the litigation that the relevant employees were supervisors, App. in *Pennsylvania State Police* v. *Suders*,

The dissent acknowledges that our prior cases do "not squarely resolve whether an employee without power to take tangible employment actions may nonetheless qualify as a supervisor," but accuses us of ignoring the "all-too-plain reality" that employees with authority to control their subordinates' daily work are aided by that authority in perpetuating a discriminatory work environment. *Post*, at 457 (opinion of GINSBURG, J.). As *Ellerth* recognized, however, "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation," and consequently "something more" is required in order to warrant vicarious liability. 524 U. S., at 760. The ability to direct another employee's tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments, see *post*, at 458–460 (discussing examples), but so are many other co-workers. Negligence provides the better framework for evaluating an employer's liability when a harassing employee lacks the power to take tangible employment actions.

C

Although our holdings in *Faragher* and *Ellerth* do not resolve the question now before us, we believe that the answer to that question is implicit in the characteristics of the framework that we adopted.

To begin, there is no hint in either *Ellerth* or *Faragher* that the Court contemplated anything other than a unitary category of supervisors, namely, those possessing the authority to effect a tangible change in a victim's terms or conditions of employment. The *Ellerth/Faragher* framework draws a sharp line between co-workers and supervisors. Co-workers, the Court noted, "can inflict psychological injuries" by creating a hostile work environment, but they "cannot dock another's pay, nor can one co-worker demote

O. T. 2003, No. 03–95, p. 20 (Answer ¶29), and we therefore had no occasion to question that unchallenged characterization.

another." *Ellerth*, 524 U. S., at 762. Only a supervisor has the power to cause "direct economic harm" by taking a tangible employment action. *Ibid.* "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control. . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Ibid.* (emphasis added). The strong implication of this passage is that the authority to take tangible employment actions is the defining characteristic of a supervisor, not simply a characteristic of a subset of an ill-defined class of employees who qualify as supervisors.

The way in which we framed the question presented in *Ellerth* supports this understanding. As noted, the *Ellerth/Faragher* framework sets out two circumstances in which an employer may be vicariously liable for a supervisor's harassment. The first situation (which results in strict liability) exists when a supervisor actually takes a tangible employment action based on, for example, a subordinate's refusal to accede to sexual demands. The second situation (which results in vicarious liability if the employer cannot make out the requisite affirmative defense) is present when no such tangible action is taken. Both *Ellerth* and *Faragher* fell into the second category, and in *Ellerth*, the Court couched the question at issue in the following terms: "whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat." 524 U. S., at 754. This statement plainly ties the second situation to a supervisor's authority to inflict direct economic injury. It is because a supervisor has that authority—and its potential use hangs as a threat over the victim—that vicarious liability (subject to the affirmative defense) is justified.

Finally, the *Ellerth/Faragher* Court sought a framework that would be workable and would appropriately take into account the legitimate interests of employers and employees. The Court looked to principles of agency law for guidance, but the Court concluded that the "malleable terminology" of the aided-in-the-commission principle counseled against the wholesale incorporation of that principle into Title VII case law. *Ellerth*, 524 U. S., at 763. Instead, the Court also considered the objectives of Title VII, including "the limitation of employer liability in certain circumstances." *Id.*, at 764.

The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute. Where this does not occur, supervisor status will generally be capable of resolution at summary judgment. By contrast, under the approach advocated by petitioner and the EEOC, supervisor status would very often be murky—as this case well illustrates.[12]

According to petitioner, the record shows that Davis, her alleged harasser, wielded enough authority to qualify as a supervisor. Petitioner points in particular to Davis' job description, which gave her leadership responsibilities, and to evidence that Davis at times led or directed Vance and other employees in the kitchen. See Brief for Petitioner 42–43 (citing record); Reply Brief 22–23 (same). The United States, on the other hand, while applying the same open-

[12] The dissent attempts to find ambiguities in our holding, see *post*, at 464–465, and n. 5, but it is indisputable that our holding is orders of magnitude clearer than the nebulous standard it would adopt. Employment discrimination cases present an almost unlimited number of factual variations, and marginal cases are inevitable under any standard.

ended test for supervisory status, reaches the opposite conclusion. At least on the present record, the United States tells us, Davis fails to qualify as a supervisor. Her job description, in the Government's view, is not dispositive, and the Government adds that it would not be enough for petitioner to show that Davis "occasionally took the lead in the kitchen." U. S. Brief 31.

This disagreement is hardly surprising since the EEOC's definition of a supervisor, which both petitioner and the United States defend, is a study in ambiguity. In its Enforcement Guidance, the EEOC takes the position that an employee, in order to be classified as a supervisor, must wield authority "'of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.'" *Id.*, at 27 (quoting App. to Pet. for Cert. 89a (EEOC Guidance)). But *any* authority over the work of another employee provides at least some assistance, see *Ellerth*, *supra*, at 763, and that is not what the United States interprets the EEOC Guidance to mean. Rather, it informs us, the authority must exceed both an ill-defined temporal requirement (it must be more than "occasiona[l]") and an ill-defined substantive requirement ("an employee who directs 'only a limited number of tasks or assignments' for another employee . . . would not have sufficient authority to qualify as a supervisor." U. S. Brief 28 (quoting App. to Pet. for Cert. 92a (EEOC Guidance)); U. S. Brief 31.

We read the EEOC Guidance as saying that the number (and perhaps the importance) of the tasks in question is a factor to be considered in determining whether an employee qualifies as a supervisor. And if this is a correct interpretation of the EEOC's position, what we are left with is a proposed standard of remarkable ambiguity.

The vagueness of this standard was highlighted at oral argument when the attorney representing the United States was asked to apply that standard to the situation in *Faragher*, where the alleged harasser supposedly threatened

to assign the plaintiff to clean the toilets in the lifeguard station for a year if she did not date him. 524 U. S., at 780. Since cleaning the toilets is just one task, albeit an unpleasant one, the authority to assign that job would not seem to meet the more-than-a-limited-number-of-tasks requirement in the EEOC Guidance. Nevertheless, the Government attorney's first response was that the authority to make this assignment would be enough. Tr. of Oral Arg. 23. He later qualified that answer by saying that it would be necessary to "know how much of the day's work [was] encompassed by cleaning the toilets." *Id.*, at 23–24. He did not explain what percentage of the day's work (50%, 25%, 10%?) would suffice.

The Government attorney's inability to provide a definitive answer to this question was the inevitable consequence of the vague standard that the Government asks us to adopt. Key components of that standard—"sufficient" authority, authority to assign more than a "limited number of tasks," and authority that is exercised more than "occasionally"—have no clear meaning. Applying these standards would present daunting problems for the lower federal courts and for juries.

Under the definition of "supervisor" that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial. The elimination of this issue from the trial will focus the efforts of the parties, who will be able to present their cases in a way that conforms to the framework that the jury will apply. The plaintiff will know whether he or she must prove that the employer was negligent or whether the employer will have the burden of proving the elements of the *Ellerth/Faragher* affirmative defense. Perhaps even more important, the work of the jury, which is inevitably complicated in employment discrimination cases, will be simplified. The jurors can be given preliminary instructions that allow them to understand, as the evidence comes in, how each item of proof fits into the framework that they will ultimately be required

to apply. And even where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser's authority to take tangible employment actions), this preliminary question is relatively straightforward.

The alternative approach advocated by petitioner and the United States would make matters far more complicated and difficult. The complexity of the standard they favor would impede the resolution of the issue before trial. With the issue still open when trial commences, the parties would be compelled to present evidence and argument on supervisor status, the affirmative defense, and the question of negligence, and the jury would have to grapple with all those issues as well. In addition, it would often be necessary for the jury to be instructed about two very different paths of analysis, *i. e.*, what to do if the alleged harasser was found to be a supervisor and what to do if the alleged harasser was found to be merely a co-worker.

Courts and commentators alike have opined on the need for reasonably clear jury instructions in employment discrimination cases.[13] And the danger of juror confusion is

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[13] See, *e. g., Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 179 (2009); *Armstrong* v. *Burdette Tomlin Memorial Hospital*, 438 F. 3d 240, 249 (CA3 2006) (noting in the context of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), that "the 'prima facie case and the shifting burdens confuse lawyers and judges, much less juries, who do not have the benefit of extensive study of the law on the subject'" (quoting *Mogull* v. *Commercial Real Estate*, 162 N. J. 449, 471, 744 A. 2d 1186, 1199 (2000))); *Whittington* v. *Nordam Group Inc.*, 429 F. 3d 986, 998 (CA10 2005) (noting that unnecessarily complicated instructions complicate a jury's job in employment discrimination cases, and "unnecessary complexity increases the opportunity for error"); *Sanders* v. *New York City Human Resources Admin.*, 361 F. 3d 749, 758 (CA2 2004) ("Making the burden-shifting scheme of *McDonnell Douglas* part of a jury charge undoubtedly constitutes error because of the manifest risk of confusion it creates"); *Mogull*, *supra*, at 473, 744 A. 2d, at 1200 ("Given the confusion that often results when the first and second stages of the McDonnell Douglas test goes to the jury, we recommend that the court should decide both those issues");

particularly high where the jury is faced with instructions on alternative theories of liability under which different parties bear the burden of proof.[14] By simplifying the process of determining who is a supervisor (and by extension, which liability rules apply to a given set of facts), the approach that we take will help to ensure that juries return verdicts that reflect the application of the correct legal rules to the facts.

Contrary to the dissent's suggestions, see *post*, at 463–464, 466, this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or by altering the work environment in objectionable ways. In such cases, the victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur, and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining

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Tymkovich, The Problem With Pretext, 85 Denver U. L. Rev. 503, 527–529 (2008) (discussing the potential for jury confusion that arises when instructions are unduly complex and proposing a simpler framework); Grebeldinger, Instructing the Jury in a Case of Circumstantial Individual Disparate Treatment: Thoroughness or Simplicity? 12 Lab. Law. 399, 419 (1997) (concluding that more straightforward instructions "provid[e] the jury with clearer guidance of their mission"); Davis, The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases, 61 Brooklyn L. Rev. 703, 742–743 (1995) (discussing potential for juror confusion in the face of complex instructions); Note, Toward a Motivating Factor Test for Individual Disparate Treatment Claims, 100 Mich. L. Rev. 234, 262–273 (2001) (discussing the need for a simpler approach to jury instructions in employment discrimination cases).

[14] Cf. Struve, Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions, 51 Boston College L. Rev. 279, 330–334 (2010) (arguing that unnecessary confusion arises when a jury must resolve different claims under different burden frameworks); Monahan, *Cabrera v. Jakabovitz*—A Common-Sense Proposal for Formulating Jury Instructions Regarding Shifting Burdens of Proof in Disparate Treatment Discrimination Cases, 5 Geo. Mason U. C. R. L. J. 55, 76 (1994) ("Any jury instruction that attempts to shift the burden of persuasion on closely related issues is never likely to be successful").

whether the employer was negligent. The nature and degree of authority possessed by harassing employees varies greatly, see *post*, at 458–460 (offering examples), and as we explained above, the test proposed by petitioner and the United States is ill equipped to deal with the variety of situations that will inevitably arise. This variety presents no problem for the negligence standard, which is thought to provide adequate protection for tort plaintiffs in many other situations. There is no reason why this standard, if accompanied by proper instructions, cannot provide the same service in the context at issue here.

D

The dissent argues that the definition of a supervisor that we now adopt is out of touch with the realities of the workplace, where individuals with the power to assign daily tasks are often regarded by other employees as supervisors. See *post*, at 454–455, 458–461. But in reality it is the alternative that is out of touch. Particularly in modern organizations that have abandoned a highly hierarchical management structure, it is common for employees to have overlapping authority with respect to the assignment of work tasks. Members of a team may each have the responsibility for taking the lead with respect to a particular aspect of the work and thus may have the responsibility to direct each other in that area of responsibility.

Finally, petitioner argues that tying supervisor status to the authority to take tangible employment actions will encourage employers to attempt to insulate themselves from liability for workplace harassment by empowering only a handful of individuals to take tangible employment actions. But a broad definition of "supervisor" is not necessary to guard against this concern.

As an initial matter, an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment. And even if an employer concentrates all decisionmaking authority in a few individuals,

it likely will not isolate itself from heightened liability under *Faragher* and *Ellerth*. If an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee. Cf. *Rhodes* v. *Illinois Dept. of Transp.*, 359 F. 3d 498, 509 (CA7 2004) (Rovner, J., concurring in part and concurring in judgment) ("Although they did not have the power to take formal employment actions vis-à-vis [the victim], [the harassers] necessarily must have had substantial input into those decisions, as they would have been the people most familiar with her work—certainly more familiar with it than the off-site Department Administrative Services Manager"). Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies. See *Ellerth*, 524 U. S., at 762.

IV

Importuning Congress, *post*, at 470–471, the dissent suggests that the standard we adopt today would cause the plaintiffs to lose in a handful of cases involving shocking allegations of harassment, see *post*, at 458–461. However, the dissent does not mention *why* the plaintiffs would lose in those cases. It is not clear in any of those examples that the legal outcome hinges on the definition of "supervisor." For example, Clara Whitten ultimately did not prevail on her discrimination claims—notwithstanding the fact that the Fourth Circuit adopted the approach advocated by the dissent, see *Whitten* v. *Fred's, Inc.*, 601 F. 3d, at 243–247—because the District Court subsequently dismissed her claims for lack of jurisdiction. See *Whitten* v. *Fred's, Inc.*, No. 8:08–0218–HMH–BHH, 2010 WL 2757005, *3 (D SC, July 12, 2010). And although the dissent suggests that Donna Rhodes' employer would have been liable under the dissent's definition

of "supervisor," that is pure speculation: It is not clear that Rhodes suffered any tangible employment action, see *Rhodes* v. *Illinois Dept. of Transp.*, 243 F. Supp. 2d 810, 817 (ND Ill. 2003), and no court had occasion to determine whether the employer could have established the affirmative defense (a prospect that is certainly feasible given that there was evidence that the employer had an "adequate anti-harassment policy in place," that the employer promptly addressed the incidents about which Rhodes complained, and that "Rhodes failed to take advantage of the preventative or corrective opportunities provided," *Rhodes* v. *Illinois Dept. of Transp.*, 359 F. 3d, at 507).[15] Finally, the dissent's reliance on Monika Starke's case is perplexing given that the EEOC ultimately *did* obtain relief (in the amount of $50,000) for the harassment of Starke,[16] see Order of Dismissal in No. 1:07–cv–0095–LRR (ND Iowa, Feb. 2, 2013), Dkt. No. 380, Exh. 1, ¶1, notwithstanding the fact that the court in that case applied the definition of "supervisor" that we adopt today, see *EEOC* v. *CRST Van Expedited, Inc.*, 679 F. 3d 657, 684 (CA8 2012).

In any event, the dissent is wrong in claiming that our holding would preclude employer liability in other cases with facts similar to these. Assuming that a harasser is not a supervisor, a plaintiff could still prevail by showing that his

[15] Similarly, it is unclear whether Yasharay Mack ultimately would have prevailed even under the dissent's definition of "supervisor." The Second Circuit (adopting a definition similar to that advocated by the dissent) remanded the case for the District Court to determine whether Mack "'unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.'" *Mack* v. *Otis Elevator Co.*, 326 F. 3d 116, 127–128 (2003) (quoting *Ellerth*, 524 U. S., at 765). But before it had an opportunity to make any such determination, Mack withdrew her complaint, and the District Court dismissed her claims with prejudice. See Stipulation and Order of Dismissal in No. 1:00–cv–7778–LAP (SDNY, Oct. 21, 2004), Dkt. No. 63.

[16] Starke herself lacked standing to pursue her claims, see *EEOC* v. *CRST Van Expedited, Inc.*, 679 F. 3d 657, 678, and n. 14 (CA8 2012), but the Eighth Circuit held that the EEOC could sue in its own name to remedy the sexual harassment against Starke and other CRST employees, see *id.*, at 682.

or her employer was negligent in failing to prevent harassment from taking place. Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant. Thus, it is not true, as the dissent asserts, that our holding "relieves scores of employers of responsibility" for the behavior of workers they employ. *Post*, at 463.

The standard we adopt is not untested. It has been the law for quite some time in the First, Seventh, and Eighth Circuits, see, *e. g.*, *Noviello* v. *Boston*, 398 F. 3d, at 96 (CA1); *Weyers* v. *Lear Operations Corp.*, 359 F. 3d, at 1057 (CA8); *Parkins* v. *Civil Constructors of Ill., Inc.*, 163 F. 3d, at 1033–1034, and n. 1 (CA7)—*i. e.*, in Arkansas, Illinois, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, and Wisconsin. We are aware of no evidence that this rule has produced dire consequences in these 14 jurisdictions.

Despite its rhetoric, the dissent acknowledges that Davis, the alleged harasser in this case, would probably not qualify as a supervisor even under the dissent's preferred approach. See *post*, at 469 ("[T]here is cause to anticipate that Davis would not qualify as Vance's supervisor"). On that point, we agree. Petitioner did refer to Davis as a "supervisor" in some of the complaints that she filed, App. 28; *id.*, at 45, and Davis' job description does state that she supervises kitchen assistants and substitutes and "[l]ead[s] and direct[s]" certain other employees, *id.*, at 12–13. But under the dissent's preferred approach, supervisor status hinges not on formal job titles or "paper descriptions" but on "specific facts about the working relationship." *Post*, at 469 (internal quotation marks omitted).

Turning to the "specific facts" of petitioner's and Davis' working relationship, there is simply no evidence that Davis directed petitioner's day-to-day activities. The record indicates that Bill Kimes (the general manager of the Cater-

ing Division) and the chef assigned petitioner's daily tasks, which were given to her on "prep lists." 2008 WL 4247836, *7; App. 430, 431. The fact that Davis sometimes may have handed prep lists to petitioner, see *id.*, at 74, is insufficient to confer supervisor status, see App. to Pet. for Cert. 92a (EEOC Guidance). And Kimes—*not* Davis—set petitioner's work schedule. See App. 431. See also *id.*, at 212.

Because the dissent concedes that our approach in this case deprives petitioner of none of the protections that Title VII offers, the dissent's critique is based on nothing more than a hypothesis as to how our approach might affect the outcomes of *other* cases—cases where an employee who cannot take tangible employment actions, but who does direct the victim's daily work activities in a meaningful way, creates an unlawful hostile environment, and yet does not wield authority of such a degree and nature that the employer can be deemed negligent with respect to the harassment. We are skeptical that there are a great number of such cases. However, we are confident that, in every case, the approach we take today will be more easily administrable than the approach advocated by the dissent.

* * *

We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. Because there is no evidence that BSU empowered Davis to take any tangible employment actions against Vance, the judgment of the Seventh Circuit is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring.

I continue to believe that *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998), and *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998), were wrongly decided. See *ante*, at 430.

However, I join the opinion because it provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee's harassment.

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

In *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998), this Court held that an employer can be vicariously liable under Title VII of the Civil Rights Act of 1964 for harassment by an employee given supervisory authority over subordinates. In line with those decisions, in 1999, the Equal Employment Opportunity Commission (EEOC) provided enforcement guidance "regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity." EEOC, Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 BNA FEP Manual 405:7651 (Feb. 2003) (hereinafter EEOC Guidance). Addressing who qualifies as a supervisor, the EEOC answered: (1) an individual authorized "to undertake or recommend tangible employment decisions affecting the employee," including "hiring, firing, promoting, demoting, and reassigning the employee"; *or* (2) an individual authorized "to direct the employee's daily work activities." *Id.*, at 405:7654.

The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions. The limitation the Court decrees diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces. I would follow the EEOC Guidance and hold that the authority to direct an employee's daily activities establishes supervisory status under Title VII.

I

A

Title VII makes it "an unlawful employment practice for an employer" to "discriminate against any individual with respect to" the "terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a). The creation of a hostile work environment through harassment, this Court has long recognized, is a form of proscribed discrimination. *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 78 (1998); *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64–65 (1986).

What qualifies as harassment? Title VII imposes no "general civility code." *Oncale*, 523 U. S., at 81. It does not reach "the ordinary tribulations of the workplace," for example, "sporadic use of abusive language" or generally boorish conduct. B. Lindemann & D. Kadue, Sexual Harassment in Employment Law 175 (1992). See also 1 B. Lindemann & P. Grossman, Employment Discrimination Law 1335–1343 (4th ed. 2007) (hereinafter Lindemann & Grossman). To be actionable, charged behavior need not drive the victim from her job, but it must be of such severity or pervasiveness as to pollute the working environment, thereby "alter[ing] the conditions of the victim's employment." *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21–22 (1993).

In *Faragher* and *Ellerth*, this Court established a framework for determining when an employer may be held liable for its employees' creation of a hostile work environment. Recognizing that Title VII's definition of "employer" includes an employer's "agent[s]," 42 U. S. C. § 2000e(b), the Court looked to agency law for guidance in formulating liability standards. *Faragher*, 524 U. S., at 791, 801; *Ellerth*, 524 U. S., at 755–760. In particular, the Court drew upon § 219(2)(d) of the Restatement (Second) of Agency (1957),

which makes an employer liable for the conduct of an employee, even when that employee acts beyond the scope of her employment, if the employee is "aided in accomplishing" a tort "by the existence of the agency relation." See *Faragher*, 524 U. S., at 801; *Ellerth*, 524 U. S., at 758.

Stemming from that guide, *Faragher* and *Ellerth* distinguished between harassment perpetrated by supervisors, which is often enabled by the supervisor's agency relationship with the employer, and harassment perpetrated by co-workers, which is not similarly facilitated. *Faragher*, 524 U. S., at 801–803; *Ellerth*, 524 U. S., at 763–765. If the harassing employee is a supervisor, the Court held, the employer is vicariously liable whenever the harassment culminates in a tangible employment action. *Faragher*, 524 U. S., at 807–808; *Ellerth*, 524 U. S., at 764–765. The term "tangible employment action," *Ellerth* observed, "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*, at 761. Such an action, the Court explained, provides "assurance the injury could not have been inflicted absent the agency relation." *Id.*, at 761–762.

An employer may also be held vicariously liable for a supervisor's harassment that does *not* culminate in a tangible employment action, the Court next determined. In such a case, however, the employer may avoid liability by showing that (1) it exercised reasonable care to prevent and promptly correct harassing behavior, and (2) the complainant unreasonably failed to take advantage of preventative or corrective measures made available to her. *Faragher*, 524 U. S., at 807; *Ellerth*, 524 U. S., at 765. The employer bears the burden of establishing this affirmative defense by a preponderance of the evidence. *Faragher*, 524 U. S., at 807; *Ellerth*, 524 U. S., at 765.

In contrast, if the harassing employee is a co-worker, a negligence standard applies. To satisfy that standard, the

complainant must show that the employer knew or should have known of the offensive conduct but failed to take appropriate corrective action. See *Faragher*, 524 U. S., at 799; *Ellerth*, 524 U. S., at 758–759. See also 29 CFR § 1604.11(d) (2012); EEOC Guidance 405:7652.

B

The distinction *Faragher* and *Ellerth* drew between supervisors and co-workers corresponds to the realities of the workplace. Exposed to a fellow employee's harassment, one can walk away or tell the offender to "buzz off." A supervisor's slings and arrows, however, are not so easily avoided. An employee who confronts her harassing supervisor risks, for example, receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or with placement on a shift spanning hours disruptive of her family life. And she may be demoted or fired. Facing such dangers, she may be reluctant to blow the whistle on her superior, whose "power and authority invests his or her harassing conduct with a particular threatening character." *Ellerth*, 524 U. S., at 763. See also *Faragher*, 524 U. S., at 803; Brief for Respondent Ball State University 23 ("The potential threat to one's livelihood or working conditions will make the victim think twice before resisting harassment or fighting back."). In short, as *Faragher* and *Ellerth* recognized, harassment by supervisors is more likely to cause palpable harm and to persist unabated than similar conduct by fellow employees.

II

While *Faragher* and *Ellerth* differentiated harassment by supervisors from harassment by co-workers, neither decision gave a definitive answer to the question: Who qualifies as a supervisor? Two views have emerged. One view, in line with the EEOC Guidance, counts as a supervisor anyone with authority to take tangible employment actions or to direct an employee's daily work activities. *E. g.*, *Mack* v. *Otis*

Elevator Co., 326 F. 3d 116, 127 (CA2 2003); *Whitten* v. *Fred's, Inc.*, 601 F. 3d 231, 246 (CA4 2010); EEOC Guidance 405:7654. The other view ranks as supervisors only those authorized to take tangible employment actions. *E. g.*, *Noviello* v. *Boston*, 398 F. 3d 76, 96 (CA1 2005); *Parkins* v. *Civil Constructors of Ill., Inc.*, 163 F. 3d 1027, 1034 (CA7 1998); *Joens* v. *John Morrell & Co.*, 354 F. 3d 938, 940–941 (CA8 2004).

Notably, respondent Ball State University agreed with petitioner Vance and the United States, as *amicus curiae*, that the tangible-employment-action-only test "does not necessarily capture all employees who may qualify as supervisors." Brief for Respondent 1. "[V]icarious liability," Ball State acknowledged, "also may be triggered when the harassing employee has the authority to control the victim's daily work activities in a way that materially enables the harassment." *Id.*, at 1–2.

The different view taken by the Court today is out of accord with the agency principles that, *Faragher* and *Ellerth* affirmed, govern Title VII. See *supra*, at 452–454. It is blind to the realities of the workplace, and it discounts the guidance of the EEOC, the agency Congress established to interpret, and superintend the enforcement of, Title VII. Under that guidance, the appropriate question is: Has the employer given the alleged harasser authority to take tangible employment actions *or* to control the conditions under which subordinates do their daily work? If the answer to either inquiry is yes, vicarious liability is in order, for the superior-subordinate working arrangement facilitating the harassment is of the employer's making.

A

Until today, our decisions have assumed that employees who direct subordinates' daily work are supervisors. In *Faragher*, the city of Boca Raton, Florida, employed Bill Terry and David Silverman to oversee the city's corps of

ocean lifeguards. 524 U. S., at 780. Terry and Silverman "repeatedly subject[ed] Faragher and other female lifeguards to uninvited and offensive touching," and they regularly "ma[de] lewd remarks, and [spoke] of women in offensive terms." *Ibid.* (internal quotation marks omitted). Terry told a job applicant that "female lifeguards had sex with their male counterparts," and then "asked whether she would do the same." *Id.*, at 782. Silverman threatened to assign Faragher to toilet-cleaning duties for a year if she refused to date him. *Id.*, at 780. In words and conduct, Silverman and Terry made the beach a hostile place for women to work.

As Chief of Boca Raton's Marine Safety Division, Terry had authority to "hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline." *Id.*, at 781. Silverman's duties as a Marine Safety lieutenant included "making the lifeguards' daily assignments, and . . . supervising their work and fitness training." *Ibid.* Both men "were granted virtually unchecked authority over their subordinates, directly controlling and supervising all aspects of Faragher's day-to-day activities." *Id.*, at 808 (internal quotation marks and brackets omitted).

We may assume that Terry would fall within the definition of supervisor the Court adopts today. See *ante*, at 431–432.[1]

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[1] It is not altogether evident that Terry would qualify under the Court's test. His authority to hire was subject to approval by higher management, *Faragher* v. *Boca Raton*, 524 U. S. 775, 781 (1998), and there is scant indication that he possessed other powers on the Court's list. The Court observes that Terry was able to "recommen[d]" and "initiat[e]" tangible employment actions. *Ante*, at 437, n. 8 (internal quotation marks omitted). Nothing in the *Faragher* record, however, shows that Terry had authority to take such actions himself. Faragher's complaint alleged that Terry said he would never promote a female lifeguard to the rank of lieutenant, 524 U. S., at 780, but that statement hardly suffices to establish that he had ultimate promotional authority. Had Boca Raton anticipated

But nothing in the *Faragher* record shows that Silverman would. Silverman had oversight and assignment responsibilities—he could punish lifeguards who would not date him with full-time toilet-cleaning duty—but there was no evidence that he had authority to take tangible employment actions. See *Faragher*, 524 U. S., at 780–781. Holding that Boca Raton was vicariously liable for Silverman's harassment, *id.*, at 808–809, the Court characterized him as Faragher's supervisor, see *id.*, at 780, and there was no dissent on that point, see *id.*, at 810 (THOMAS, J., dissenting).

Subsequent decisions reinforced *Faragher*'s use of the term "supervisor" to encompass employees with authority to direct the daily work of their victims. In *Pennsylvania State Police* v. *Suders*, 542 U. S. 129, 140 (2004), for example, the Court considered whether a constructive discharge occasioned by supervisor harassment ranks as a tangible employment action. The harassing employees lacked authority to discharge or demote the complainant, but they were "responsible for the day-to-day supervision" of the workplace and for overseeing employee shifts. *Suders* v. *Easton*, 325 F. 3d 432, 450, n. 11 (CA3 2003). Describing the harassing employees as the complainant's "supervisors," the Court proceeded to evaluate the complainant's constructive discharge claim under the *Ellerth* and *Faragher* framework. *Suders*, 542 U. S., at 134, 140–141.

It is true, as the Court says, *ante*, at 437–438, and n. 11, that *Faragher* and later cases did not squarely resolve whether an employee without power to take tangible employment actions may nonetheless qualify as a supervisor. But in laboring to establish that Silverman's supervisor status, undisputed in *Faragher*, is not dispositive here, the Court misses the forest for the trees. *Faragher* illustrates an all-too-plain reality: A supervisor with authority to control subordinates' daily work is no less aided in his harassment than is a super-

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the position the Court today announces, the city might have urged classification of Terry as Faragher's superior, but not her "supervisor."

visor with authority to fire, demote, or transfer. That Silverman could threaten Faragher with toilet-cleaning duties while Terry could orally reprimand her was inconsequential in *Faragher*, and properly so. What mattered was that both men took advantage of the power vested in them as agents of Boca Raton to facilitate their abuse. See 524 U. S., at 801 (Silverman and Terry "implicitly threaten[ed] to misuse their supervisory powers to deter any resistance or complaint."). And when, assisted by an agency relationship, in-charge superiors like Silverman perpetuate a discriminatory work environment, our decisions have appropriately held the employer vicariously liable, subject to the above-described affirmative defense. See *supra*, at 452–454.

B

Workplace realities fortify my conclusion that harassment by an employee with power to direct subordinates' day-to-day work activities should trigger vicarious employer liability. The following illustrations, none of them hypothetical, involve in-charge employees of the kind the Court today excludes from supervisory status.[2]

Yasharay Mack: Yasharay Mack, an African-American woman, worked for the Otis Elevator Company as an elevator mechanic's helper at the Metropolitan Life Building in New York City. James Connolly, the "mechanic in charge" and the senior employee at the site, targeted Mack for abuse. He commented frequently on her "fantastic ass," "luscious lips," and "beautiful eyes," and, using deplorable racial epithets, opined that minorities and women did not "belong in the business." Once, he pulled her on his lap, touched her buttocks, and tried to kiss her while others looked on. Connolly lacked authority to take tangible employment actions

[2] The illustrative cases reached the appellate level after grants of summary judgment in favor of the employer. Like the Courts of Appeals in each case, I recount the facts in the light most favorable to the employee, the nonmoving party.

against mechanic's helpers, but he did assign their work, control their schedules, and direct the particulars of their workdays. When he became angry with Mack, for example, he denied her overtime hours. And when she complained about the mistreatment, he scoffed, "I get away with everything." See *Mack*, 326 F. 3d, at 120–121, 125–126 (internal quotation marks omitted).

Donna Rhodes: Donna Rhodes, a seasonal highway maintainer for the Illinois Department of Transportation, was responsible for plowing snow during winter months. Michael Poladian was a "Lead Lead Worker" and Matt Mara, a "Technician" at the maintenance yard where Rhodes worked. Both men assembled plow crews and managed the work assignments of employees in Rhodes's position, but neither had authority to hire, fire, promote, demote, transfer, or discipline employees. In her third season working at the yard, Rhodes was verbally assaulted with sex-based invectives and a pornographic image was taped to her locker. Poladian forced her to wash her truck in sub-zero temperatures, assigned her undesirable yard work instead of road crew work, and prohibited another employee from fixing the malfunctioning heating system in her truck. Conceding that Rhodes had been subjected to a sex-based hostile work environment, the Department of Transportation argued successfully in the District Court and Court of Appeals that Poladian and Mara were not Rhodes's supervisors because they lacked authority to take tangible employment actions against her. See *Rhodes* v. *Illinois Dept. of Transp.*, 359 F. 3d 498, 501–503, 506–507 (CA7 2004).

Clara Whitten: Clara Whitten worked at a discount retail store in Belton, South Carolina. On Whitten's first day of work, the manager, Matt Green, told her to "give [him] what [he] want[ed]" in order to obtain approval for long weekends off from work. Later, fearing what might transpire, Whitten ignored Green's order to join him in an isolated storeroom. Angered, Green instructed Whitten to stay late and

clean the store. He demanded that she work over the weekend despite her scheduled day off. Dismissing her as "dumb and stupid," Green threatened to make her life a "living hell." Green lacked authority to fire, promote, demote, or otherwise make decisions affecting Whitten's pocketbook. But he directed her activities, gave her tasks to accomplish, burdened her with undesirable work assignments, and controlled her schedule. He was usually the highest ranking employee in the store, and both Whitten and Green considered him the supervisor. See *Whitten*, 601 F. 3d, at 236, 244–247 (internal quotation marks omitted).

Monika Starke: CRST Van Expedited, Inc., an interstate transit company, ran a training program for newly hired truckdrivers requiring a 28-day on-the-road trip. Monika Starke participated in the program. Trainees like Starke were paired in a truck cabin with a single "lead driver" who lacked authority to hire, fire, promote, or demote, but who exercised control over the work environment for the duration of the trip. Lead drivers were responsible for providing instruction on CRST's driving method, assigning specific tasks, and scheduling rest stops. At the end of the trip, lead drivers evaluated trainees' performance with a nonbinding pass or fail recommendation that could lead to full driver status. Over the course of Starke's training trip, her first lead driver, Bob Smith, filled the cabin with vulgar sexual remarks, commenting on her breast size and comparing the gear stick to genitalia. A second lead driver, David Goodman, later forced her into unwanted sex with him, an outrage to which she submitted, believing it necessary to gain a passing grade. See *EEOC* v. *CRST Van Expedited, Inc.*, 679 F. 3d 657, 665–666, 684–685 (CA8 2012).

In each of these cases, a person vested with authority to control the conditions of a subordinate's daily work life used his position to aid his harassment. But in none of them would the Court's severely confined definition of supervisor

yield vicarious liability for the employer. The senior elevator mechanic in charge, the Court today tells us, was Mack's co-worker, not her supervisor. So was the store manager who punished Whitten with long hours for refusing to give him what he wanted. So were the lead drivers who controlled all aspects of Starke's working environment, and the yard worker who kept other employees from helping Rhodes to control the heat in her truck.

As anyone with work experience would immediately grasp, James Connolly, Michael Poladian, Matt Mara, Matt Green, Bob Smith, and David Goodman wielded employer-conferred supervisory authority over their victims. Each man's discriminatory harassment derived force from, and was facilitated by, the control reins he held. Cf. *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53, 70–71 (2006) ("Common sense suggests that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."). Under any fair reading of Title VII, in each of the illustrative cases, the superior employee should have been classified a supervisor whose conduct would trigger vicarious liability.[3]

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[3] The Court misses the point of the illustrations. See *ante*, at 447–448, and nn. 15–16. Even under a vicarious liability rule, the Court points out, employers might escape liability for reasons other than the harasser's status as supervisor. For example, Rhodes might have avoided summary judgment in favor of her employer; even so, it would have been open to the employer to raise and prove to a jury the *Faragher/Ellerth* affirmative defense, see *supra*, at 453. No doubt other barriers also might impede an employee from prevailing, for example, Whitten's and Starke's intervening bankruptcies, see *Whitten* v. *Fred's, Inc.*, No. 8:08–0218–HMH–BHH, 2010 WL 2757005 (D SC, July 12, 2010); *EEOC* v. *CRST Van Expedited, Inc.*, 679 F. 3d 657, 678, and n. 14 (CA8 2012), or Mack's withdrawal of her complaint for reasons not apparent from the record, see *ante*, at 448, n. 15. That, however, is no reason to restrict the definition of supervisor in a way that leaves out those genuinely in charge.

C

Within a year after the Court's decisions in *Faragher* and *Ellerth*, the EEOC defined "supervisor" to include any employee with "authority to undertake or recommend tangible employment decisions," *or* with "authority to direct [another] employee's daily work activities." EEOC Guidance 405:7654. That definition should garner "respect proportional to its 'power to persuade.'" *United States* v. *Mead Corp.*, 533 U. S. 218, 235 (2001) (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). See also *Crawford* v. *Metropolitan Government of Nashville and Davidson Cty.*, 555 U. S. 271, 276 (2009) (EEOC guidelines merited *Skidmore* deference); *Federal Express Corp.* v. *Holowecki*, 552 U. S. 389, 399–403 (2008) (same); *Meritor*, 477 U. S., at 65 (same).[4]

The EEOC's definition of supervisor reflects the agency's "informed judgment" and "body of experience" in enforcing Title VII. *Id.*, at 65 (internal quotation marks omitted). For 14 years, in enforcement actions and litigation, the EEOC has firmly adhered to its definition. See Brief for United States as *Amicus Curiae* 28 (citing numerous briefs in the Courts of Appeals setting forth the EEOC's understanding).

In developing its definition of supervisor, the EEOC paid close attention to the *Faragher* and *Ellerth* framework. An employer is vicariously liable only when the authority it has delegated enables actionable harassment, the EEOC recognized. EEOC Guidance 405:7654. For that reason, a supervisor's authority must be "of a sufficient magnitude so as to

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[4] Respondents' *amici* maintain that the EEOC Guidance is ineligible for deference under *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944), because it interprets *Faragher* and *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998), not the text of Title VII. See Brief for Society for Human Resource Management et al. 11–16. They are mistaken. The EEOC Guidance rests on the employer liability framework set forth in *Faragher* and *Ellerth*, but both the framework and EEOC Guidance construe the term "agent" in 42 U. S. C. § 2000e(b).

assist the harasser . . . in carrying out the harassment." *Ibid.* Determining whether an employee wields sufficient authority is not a mechanical inquiry, the EEOC explained; instead, specific facts about the employee's job function are critical. *Id.*, at 405:7653 to 405:7654. Thus, an employee with authority to increase another's workload or assign undesirable tasks may rank as a supervisor, for those powers can enable harassment. *Id.*, at 405:7654. On the other hand, an employee "who directs only a limited number of tasks or assignments" ordinarily would not qualify as a supervisor, for her harassing conduct is not likely to be aided materially by the agency relationship. *Id.*, at 405:7655.

In my view, the EEOC's definition, which the Court puts down as "a study in ambiguity," *ante*, at 442, has the ring of truth and, therefore, powerfully persuasive force. As a precondition to vicarious employer liability, the EEOC explained, the harassing supervisor must wield authority of sufficient magnitude to enable the harassment. In other words, the aided-in-accomplishment standard requires "something more than the employment relation itself." *Ellerth*, 524 U. S., at 760. Furthermore, as the EEOC perceived, in assessing an employee's qualification as a supervisor, context is often key. See *infra*, at 465–466. I would accord the agency's judgment due respect.

III

Exhibiting remarkable resistance to the thrust of our prior decisions, workplace realities, and the EEOC Guidance, the Court embraces a position that relieves scores of employers of responsibility for the behavior of the supervisors they employ. Trumpeting the virtues of simplicity and administrability, the Court restricts supervisor status to those with power to take tangible employment actions. In so restricting the definition of supervisor, the Court once again shuts from sight the "robust protection against workplace discrimination Congress intended Title VII to secure." *Ledbetter* v.

Goodyear Tire & Rubber Co., 550 U. S. 618, 660 (2007) (GINSBURG, J., dissenting).

A

The Court purports to rely on the *Ellerth* and *Faragher* framework to limit supervisor status to those capable of taking tangible employment actions. *Ante*, at 432, 439–440. That framework, we are told, presupposes "a sharp line between co-workers and supervisors." *Ante*, at 439. The definition of supervisor decreed today, the Court insists, is "clear," "readily applied," and "easily workable," *ante*, at 432, 441, when compared to the EEOC's vague standard, *ante*, at 442–443.

There is reason to doubt just how "clear" and "workable" the Court's definition is. A supervisor, the Court holds, is someone empowered to "take tangible employment actions against the victim, *i. e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Ante*, at 431 (quoting *Ellerth*, 524 U. S., at 761). Whether reassignment authority makes someone a supervisor might depend on whether the reassignment carries economic consequences. *Ante*, at 437–438, n. 9. The power to discipline other employees, when the discipline has economic consequences, might count, too. *Ibid.* So might the power to initiate or make recommendations about tangible employment actions. *Ante*, at 437, n. 8. And when an employer "concentrates all decisionmaking authority in a few individuals" who rely on information from "other workers who actually interact with the affected employee," the other workers may rank as supervisors (or maybe not; the Court does not commit one way or the other). *Ante*, at 446–447.

Someone in search of a bright line might well ask, what counts as "significantly different responsibilities"? Can *any* economic consequence make a reassignment or disciplinary action "significant," or is there a minimum threshold? How

concentrated must the decisionmaking authority be to deem those not formally endowed with that authority nevertheless "supervisors"? The Court leaves these questions unanswered, and its liberal use of "mights" and "mays," *ante*, at 437–438, n. 9, 446–447, dims the light it casts.[5]

That the Court has adopted a standard, rather than a clear rule, is not surprising, for no crisp definition of supervisor could supply the unwavering line the Court desires. Supervisors, like the workplaces they manage, come in all shapes and sizes. Whether a pitching coach supervises his pitchers (can he demote them?), or an artistic director supervises her opera star (can she impose significantly different responsibilities?), or a law firm associate supervises the firm's paralegals (can she fire them?) are matters not susceptible to mechanical rules and on-off switches. One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim. That is why *Faragher* and *Ellerth* crafted an employer liability standard embracive of all whose authority significantly aids in the creation and perpetuation of harassment.

The Court's focus on finding a definition of supervisor capable of instant application is at odds with the Court's ordinary emphasis on the importance of particular circumstances in Title VII cases. See, *e. g.*, *Burlington Northern*, 548 U. S., at 69 ("[T]he significance of any given act of retaliation will often depend upon the particular circumstances."); *Har-*

[5] Even the Seventh Circuit, whose definition of supervisor the Court adopts in large measure, has candidly acknowledged that, under its definition, supervisor status is not a clear and certain thing. See *Doe* v. *Oberweis Dairy*, 456 F. 3d 704, 717 (2006) ("The difficulty of classification in this case arises from the fact that Nayman, the shift supervisor, was in between the paradigmatic classes [of supervisor and co-worker]. He had supervisory responsibility in the sense of authority to direct the work of the [ice-cream] scoopers, and he was even authorized to issue disciplinary write-ups, but he had no authority to fire them. He was either an elevated coworker or a diminished supervisor.").

ris, 510 U. S., at 23 ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.").[6] The question of supervisory status, no less than the question whether retaliation or harassment has occurred, "depends on a constellation of surrounding circumstances, expectations, and relationships." *Oncale*, 523 U. S., at 81–82. The EEOC Guidance so perceives.

B

As a consequence of the Court's truncated conception of supervisory authority, the *Faragher* and *Ellerth* framework has shifted in a decidedly employer-friendly direction. This realignment will leave many harassment victims without an effective remedy and undermine Title VII's capacity to prevent workplace harassment.

The negligence standard allowed by the Court, see *ante*, at 445–446, scarcely affords the protection the *Faragher* and *Ellerth* framework gave victims harassed by those in control of their lives at work. Recall that an employer is negligent with regard to harassment only if it knew or should have known of the conduct but failed to take appropriate corrective action. See 29 CFR § 1604.11(d); EEOC Guidance 405:7652 to 405:7653. It is not uncommon for employers to lack actual or constructive notice of a harassing employee's conduct. See Lindemann & Grossman 1378–1379. An employee may have a reputation as a harasser among those in his vicinity, but if no complaint makes its way up to management, the employer will escape liability under a negligence standard. *Id.*, at 1378.

[6] The Court worries that the EEOC's definition of supervisor will confound jurors who must first determine whether the harasser is a supervisor and second apply the correct employer liability standard. *Ante*, at 443–445, and nn. 13, 14. But the Court can point to no evidence that jury instructions on supervisor status in jurisdictions following the EEOC Guidance have in fact proved unworkable or confusing to jurors. Moreover, under the Court's definition of supervisor, jurors in many cases will be obliged to determine, as a threshold question, whether the alleged harasser possessed supervisory authority. See *supra*, at 464–465 and this page.

Faragher is illustrative. After enduring unrelenting harassment, Faragher reported Terry's and Silverman's conduct informally to Robert Gordon, another immediate supervisor. 524 U. S., at 782–783. But the lifeguards were "completely isolated from the City's higher management," and it did not occur to Faragher to pursue the matter with higher ranking city officials distant from the beach. *Id.*, at 783, 808 (internal quotation marks omitted). Applying a negligence standard, the Eleventh Circuit held that, despite the pervasiveness of the harassment, and despite Gordon's awareness of it, Boca Raton lacked constructive notice and therefore escaped liability. *Id.*, at 784–785. Under the vicarious liability standard, however, Boca Raton could not make out the affirmative defense, for it had failed to disseminate a policy against sexual harassment. *Id.*, at 808–809.

On top of the substantive differences in the negligence and vicarious liability standards, harassment victims, under today's decision, are saddled with the burden of proving the employer's negligence whenever the harasser lacks the power to take tangible employment actions. *Faragher* and *Ellerth*, by contrast, placed the burden squarely on the employer to make out the affirmative defense. See *Suders*, 542 U. S., at 146 (citing *Ellerth*, 524 U. S., at 765; *Faragher*, 524 U. S., at 807). This allocation of the burden was both sensible and deliberate: An employer has superior access to evidence bearing on whether it acted reasonably to prevent or correct harassing behavior, and superior resources to marshal that evidence. See 542 U. S., at 146, n. 7 ("The employer is in the best position to know what remedial procedures it offers to employees and how those procedures operate.").

Faced with a steeper substantive and procedural hill to climb, victims like Yasharay Mack, Donna Rhodes, Clara Whitten, and Monika Starke likely will find it impossible to obtain redress. We can expect that, as a consequence of restricting the supervisor category to those formally empowered to take tangible employment actions, victims of work-

place harassment with meritorious Title VII claims will find suit a hazardous endeavor.[7]

Inevitably, the Court's definition of supervisor will hinder efforts to stamp out discrimination in the workplace. Because supervisors are comparatively few, and employees are many, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers," and a greater incentive to "screen [supervisors], train them, and monitor their performance." *Faragher*, 524 U. S., at 803. Vicarious liability for employers serves this end. When employers know they will be answerable for the injuries a harassing jobsite boss inflicts, their incentive to provide preventative instruction is heightened. If vicarious liability is confined to supervisors formally empowered to take tangible employment actions, however, employers will have a diminished incentive to train those who control their subordinates' work activities and schedules, *i. e.*, the supervisors who "actually interact" with employees. *Ante*, at 447.

IV

I turn now to the case before us. Maetta Vance worked as substitute server and part-time catering assistant for Ball State University's Banquet and Catering Division. During the period in question, she alleged, Saundra Davis, a catering specialist, and other Ball State employees subjected her to a racially hostile work environment. Applying controlling Circuit precedent, the District Court and Seventh Circuit concluded that Davis was not Vance's supervisor, and reviewed Ball State's liability for her conduct under a negligence standard. 646 F. 3d 461, 470–471 (2011); App. to Pet.

[7] Nor is the Court's confinement of supervisor status needed to deter insubstantial claims. Under the EEOC Guidance, a plaintiff must meet the threshold requirement of actionable harassment and then show that her supervisor's authority was of "sufficient magnitude" to assist in the harassment. See EEOC Guidance 405:7652, 405:7654.

for Cert. 53a–55a, 59a–60a. Because I would hold that the Seventh Circuit erred in restricting supervisor status to employees formally empowered to take tangible employment actions, I would remand for application of the proper standard to Vance's claim. On this record, however, there is cause to anticipate that Davis would not qualify as Vance's supervisor.[8]

Supervisor status is based on "job function rather than job title," and depends on "specific facts" about the working relationship. EEOC Guidance 405:7654. See *supra*, at 462–463. Vance has adduced scant evidence that Davis controlled the conditions of her daily work. Vance stated in an affidavit that the general manager of the Catering Division, Bill Kimes, was charged with "overall supervision in the kitchen," including "reassign[ing] people to perform different tasks" and "control[ling] the schedule." App. 431. The chef, Shannon Fultz, assigned tasks by preparing "prep lists" of daily duties. *Id.*, at 277–279, 427. There is no allegation that Davis had a hand in creating these prep lists, nor is there any indication that, in fact, Davis otherwise controlled the particulars of Vance's workday. Vance herself testified that she did not know whether Davis was her supervisor. *Id.*, at 198.

True, Davis' job description listed among her responsibilities "[l]ead[ing] and direct[ing] kitchen part-time, substitute, and student employee helpers via demonstration, coaching, and overseeing their work." *Id.*, at 13. And an-

[8] In addition to concluding that Davis was not Vance's supervisor, the District Court held that the conduct Vance alleged was "neither sufficiently severe nor pervasive to be considered objectively hostile for the purposes of Title VII." App. to Pet. for Cert. 66a. The Seventh Circuit declined to address this issue. See 646 F. 3d 461, 471 (2011). If the case were remanded, the Court of Appeals could resolve the hostile environment issue first, and then, if necessary, Davis' status as supervisor or coworker.

other employee testified to believing that Davis was "a supervisor." *Id.*, at 386. But because the supervisor-status inquiry should focus on substance, not labels or paper descriptions, it is doubtful that this slim evidence would enable Vance to survive a motion for summary judgment. Nevertheless, I would leave it to the Seventh Circuit to decide, under the proper standard for supervisory status, what impact, if any, Davis' job description and the coworker's statement should have on the determination of Davis' status.[9]

V

Regrettably, the Court has seized upon Vance's thin case to narrow the definition of supervisor, and thereby manifestly limit Title VII's protections against workplace harassment. Not even Ball State, the defendant-employer in this case, has advanced the restrictive definition the Court adopts. See *supra*, at 455. Yet the Court, insistent on constructing artificial categories where context should be key, proceeds on an immoderate and unrestrained course to corral Title VII.

Congress has, in the recent past, intervened to correct this Court's wayward interpretations of Title VII. See Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. 5, superseding *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618 (2007). See also Civil Rights Act of 1991, 105 Stat. 1071, superseding in part *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900 (1989); *Martin* v. *Wilks*, 490 U. S. 755 (1989); *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989); and *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989). The ball is once again in Congress' court to correct the error into which this

[9] The Court agrees that Davis "would probably not qualify" as Vance's supervisor under the EEOC's definition. *Ante*, at 449. Then why, one might ask, does the Court nevertheless reach out to announce its restrictive standard in this case, one in which all parties, including the defendant-employer, accept the fitness for Title VII of the EEOC Guidance? See *supra*, at 455.

Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.

* * *

For the reasons stated, I would reverse the judgment of the Seventh Circuit and remand the case for application of the proper standard for determining who qualifies as a supervisor.

Syllabus

MUTUAL PHARMACEUTICAL CO., INC. *v.* BARTLETT

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

No. 12–142. Argued March 19, 2013—Decided June 24, 2013

The Federal Food, Drug, and Cosmetic Act (FDCA) requires manufacturers to gain Food and Drug Administration (FDA) approval before marketing any brand-name or generic drug in interstate commerce. 21 U. S. C. § 355(a). Once a drug is approved, a manufacturer is prohibited from making any major changes to the "qualitative or quantitative formulation of the drug product, including active ingredients, or in the specifications provided in the approved application." 21 CFR § 314.70(b)(2)(i). Generic manufacturers are also prohibited from making any unilateral changes to a drug's label. See §§ 314.94(a)(8)(iii), 314.150(b)(10).

In 2004, respondent was prescribed Clinoril, the brand-name version of the nonsteroidal anti-inflammatory drug (NSAID) sulindac, for shoulder pain. Her pharmacist dispensed a generic form of sulindac manufactured by petitioner Mutual Pharmaceutical. Respondent soon developed an acute case of toxic epidermal necrolysis. She is now severely disfigured, has physical disabilities, and is nearly blind. At the time of the prescription, sulindac's label did not specifically refer to toxic epidermal necrolysis. By 2005, however, the FDA had recommended changing all NSAID labeling to contain a more explicit toxic epidermal necrolysis warning. Respondent sued Mutual in New Hampshire state court, and Mutual removed the case to federal court. A jury found Mutual liable on respondent's design-defect claim and awarded her over $21 million. The First Circuit affirmed. As relevant, it found that neither the FDCA nor the FDA's regulations pre-empted respondent's design-defect claim. It distinguished *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604—in which the Court held that failure-to-warn claims against generic manufacturers are pre-empted by the FDCA's prohibition on changes to generic drug labels—by arguing that generic manufacturers facing design-defect claims could comply with both federal and state law simply by choosing not to make the drug at all.

Held: State-law design-defect claims that turn on the adequacy of a drug's warnings are pre-empted by federal law under *PLIVA*. Pp. 479–493.

(a) Under the Supremacy Clause, state laws that conflict with federal law are "without effect." *Maryland* v. *Louisiana*, 451 U. S. 725, 746. Even in the absence of an express pre-emption provision, a state law

may be impliedly pre-empted where it is "impossible for a private party to comply with both state and federal requirements." *English* v. *General Elec. Co.*, 496 U. S. 72, 79. Here, it is impossible for Mutual to comply with both its federal-law duty not to alter sulindac's label or composition and its state-law duty to either strengthen the warnings on sulindac's label or change sulindac's design. Pp. 479–487.

(1) New Hampshire's design-defect cause of action imposes affirmative duties on manufacturers, including a "duty to design [their products] reasonably safely for the uses which [they] can foresee." *Thibault* v. *Sears, Roebuck & Co.*, 118 N. H. 802, 809, 395 A. 2d 843, 847. Pp. 480–482.

(2) To assess whether a product's design is "unreasonably dangerous to the user," *Vautour* v. *Body Masters Sports Industries, Inc.*, 147 N. H. 150, 153, 784 A. 2d 1178, 1181, the New Hampshire Supreme Court employs a "risk-utility approach," which asks whether the danger's magnitude outweighs the product's utility, *id.*, at 154, 784 A. 2d, at 1182. The court has repeatedly identified three factors as germane to that inquiry: "the usefulness and desirability of the product to the public as a whole, whether the risk of danger could have been reduced without significantly affecting either the product's effectiveness or manufacturing cost, and the presence and efficacy of a warning to avoid an unreasonable risk of harm from hidden dangers or from foreseeable uses." *Ibid.* Increasing a drug's "usefulness" or reducing its "risk of danger" would require redesigning the drug, since those factors are direct results of a drug's chemical design and active ingredients. Here, however, redesign was not possible for two reasons. First, the FDCA requires a generic drug to have the same active ingredients, route of administration, dosage form, strength, and labeling as its brand-name drug equivalent. Second, because of sulindac's simple composition, the drug is chemically incapable of being redesigned. Accordingly, because redesign was impossible, Mutual could only ameliorate sulindac's "risk-utility" profile by strengthening its warnings. Thus, New Hampshire's law ultimately required Mutual to change sulindac's labeling. Pp. 482–486.

(3) But *PLIVA* makes clear that federal law prevents generic drug manufacturers from changing their labels. See 564 U. S., at 617. Accordingly, Mutual was prohibited from taking the remedial action required to avoid liability under New Hampshire law. P. 486.

(4) When federal law forbids an action required by state law, the state law is "without effect." *Maryland*, *supra*, at 746. Because it was impossible for Mutual to comply with both state and federal law, New Hampshire's warning-based design-defect cause of action is pre-empted with respect to FDA-approved drugs sold in interstate commerce. Pp. 486–487.

Syllabus

(b) The First Circuit's rationale—that Mutual could escape the impossibility of complying with both its federal- and state-law duties by choosing to stop selling sulindac—is incompatible with this Court's preemption cases, which have presumed that an actor seeking to satisfy both federal- and state-law obligations is not required to cease acting altogether. Pp. 488–490.

678 F. 3d 30, reversed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined, *post*, p. 493. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 496.

Jay P. Lefkowitz argued the cause for petitioner. With him on the briefs were *Michael W. McConnell* and *Michael D. Shumsky.*

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Jonathan H. Levy*, and *William B. Schultz.*

David C. Frederick argued the cause for respondent. With him on the brief were *Brendan J. Crimmins*, *Steven M. Gordon*, *Christine M. Craig*, and *Keith M. Jensen.**

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Bert W. Rein*, *Robin S. Conrad*, *James M. Spears*, and *Melissa B. Kimmel*; for DRI–The Voice of the Defense Bar by *Mary Massaron Ross*, *Richard A. Oetheimer*, *Sarah K. Frederick*, and *William M. Jay*; for the Generic Pharmaceutical Association by *Linda E. Maichl* and *Joseph P. Thomas*; for the Product Liability Advisory Council, Inc., by *David R. Geiger*; for Ranbaxy Pharmaceuticals Inc. et al. by *Steffen N. Johnson*, *Charles B. Klein*, *Scott H. Blackman*, *Andrew C. Nichols*, *George C. Lombardi*, *James F. Hurst*, *Maureen L. Rurka*, and *William P. Ferranti*; for the Washington Legal Foundation et al. by *Richard A. Samp* and *Cory L. Andrews*; and for Sen. Tom Harkin et al. by *Allison M. Zieve* and *Scott L. Nelson.*

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice et al. by *Andre M. Mura*, *Mary Alice McLarty*, *Arthur Bryant*, *Leslie Brueckner*, and *Claire Prestel*; for the Council of State Governments by *Stephen R. McAllister*, *Lumen N. Mulligan*, and

JUSTICE ALITO delivered the opinion of the Court.

We must decide whether federal law pre-empts the New Hampshire design-defect claim under which respondent Karen Bartlett recovered damages from petitioner Mutual Pharmaceutical, the manufacturer of sulindac, a generic nonsteroidal anti-inflammatory drug (NSAID). New Hampshire law imposes a duty on manufacturers to ensure that the drugs they market are not unreasonably unsafe, and a drug's safety is evaluated by reference to both its chemical properties and the adequacy of its warnings. Because Mutual was unable to change sulindac's composition as a matter of both federal law and basic chemistry, New Hampshire's design-defect cause of action effectively required Mutual to change sulindac's labeling to provide stronger warnings. But, as this Court recognized just two Terms ago in *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604 (2011), federal law prohibits generic drug manufacturers from independently changing their drugs' labels. Accordingly, state law imposed a duty on Mutual *not* to comply with federal law. Under the Supremacy Clause, state laws that require a private party to violate federal law are pre-empted and, thus, are "without effect." *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981).

The Court of Appeals' solution—that Mutual should simply have pulled sulindac from the market in order to comply with both state and federal law—is no solution. Rather, adopting the Court of Appeals' stop-selling rationale would render impossibility pre-emption a dead letter and work a revolution in this Court's pre-emption case law.

Sol H. Weiss; for Public Law Scholars by *Ernest A. Young*, *Edward Blizzard*, *J. Scott Nabers*, *Joseph F. Rice*, and *Fred Thompson III*; for Torts Professors by *Michael F. Sturley*, *Lynn E. Blais*, and *Andy Birchfield*; for John Gilbert et al. by *Louis M. Bograd*, *Richard W. Schulte*, and *Dianne M. Nast*; for Donald Kennedy et al. by *Jonathan S. Massey*, *John Eddie Williams, Jr.*, *John T. Boundas*, *Michael S. Burg*, *Peter W. Burg*, and *Keith L. Altman*; and for John T. Schulz III by *Erik S. Jaffe* and *Michael K. Johnson*.

Accordingly, we hold that state-law design-defect claims that turn on the adequacy of a drug's warnings are preempted by federal law under *PLIVA*. We thus reverse the decision of the Court of Appeals below.

I

Under the Federal Food, Drug, and Cosmetic Act (FDCA), ch. 675, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.*, drug manufacturers must gain approval from the United States Food and Drug Administration (FDA) before marketing any drug in interstate commerce. § 355(a). In the case of a new brand-name drug, FDA approval can be secured only by submitting a new-drug application (NDA). An NDA is a compilation of materials that must include "full reports of [all clinical] investigations," § 355(b)(1)(A), relevant nonclinical studies, and "any other data or information relevant to an evaluation of the safety and effectiveness of the drug product obtained or otherwise received by the applicant from any source," 21 CFR §§ 314.50(d)(2) and (5)(iv) (2012). The NDA must also include "the labeling proposed to be used for such drug," 21 U. S. C. § 355(b)(1)(F); 21 CFR § 314.50(c)(2)(i), and "a discussion of why the [drug's] benefits exceed the risks under the conditions stated in the labeling," 21 CFR § 314.50(d)(5)(viii); § 314.50(c)(2)(ix). The FDA may approve an NDA only if it determines that the drug in question is "safe for use" under "the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof." 21 U. S. C. § 355(d). In order for the FDA to consider a drug safe, the drug's "probable therapeutic benefits must outweigh its risk of harm." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 140 (2000).

The process of submitting an NDA is both onerous and lengthy. See Report to Congressional Requesters, Government Accountability Office, Nov. 2006, New Drug Development, 26 Biotechnology L. Rep. 82, 94 (2007) (A typical NDA spans thousands of pages and is based on clinical trials con-

ducted over several years). In order to provide a swifter route for approval of generic drugs, Congress passed the Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, popularly known as the "Hatch-Waxman Act." Under Hatch-Waxman, a generic drug may be approved without the same level of clinical testing required for approval of a new brand-name drug, provided the generic drug is identical to the already-approved brand-name drug in several key respects.

First, the proposed generic drug must be chemically equivalent to the approved brand-name drug: It must have the same "active ingredient" or "active ingredients," "route of administration," "dosage form," and "strength" as its brand-name counterpart. 21 U. S. C. §§ 355(j)(2)(A)(ii) and (iii). Second, a proposed generic must be "bioequivalent" to an approved brand-name drug. § 355(j)(2)(A)(iv). That is, it must have the same "rate and extent of absorption" as the brand-name drug. § 355(j)(8)(B). Third, the generic drug manufacturer must show that "the labeling proposed for the new drug is the same as the labeling approved for the [approved brand-name] drug." § 355(j)(2)(A)(v).

Once a drug—whether generic or brand name—is approved, the manufacturer is prohibited from making any major changes to the "qualitative or quantitative formulation of the drug product, including active ingredients, or in the specifications provided in the approved application." 21 CFR § 314.70(b)(2)(i). Generic manufacturers are also prohibited from making any unilateral changes to a drug's label. See §§ 314.94(a)(8)(iii), 314.150(b)(10) (approval for a generic drug may be withdrawn if the generic drug's label "is no longer consistent with that for [the brand-name] drug").

II

In 1978, the FDA approved a nonsteroidal anti-inflammatory pain reliever called "sulindac" under the brand name Clinoril. When Clinoril's patent expired, the FDA ap-

proved several generic sulindacs, including one manufactured by Mutual Pharmaceutical. 678 F. 3d 30, 34 (CA1 2012) (case below); App. to Pet. for Cert. 144a–145a. In a very small number of patients, NSAIDs—including both sulindac and popular NSAIDs such as ibuprofen, naproxen, and COX-2 inhibitors—have the serious side effect of causing two hypersensitivity skin reactions characterized by necrosis of the skin and of the mucous membranes: toxic epidermal necrolysis, and its less severe cousin, Stevens-Johnson Syndrome. 678 F. 3d, at 34, 43–44; Dorland's Illustrated Medical Dictionary 1872 (31st ed. 2007); Physicians' Desk Reference 146–147, 597 (67th ed. 2013); Friedman, Orlet, Still, & Law, Toxic Epidermal Necrolysis Due to Administration of Celecobix (Celebrex), 95 Southern Medical J. 1213, 1213–1214 (2002).

In December 2004, respondent Karen L. Bartlett was prescribed Clinoril for shoulder pain. Her pharmacist dispensed a generic form of sulindac, which was manufactured by petitioner Mutual Pharmaceutical. Respondent soon developed an acute case of toxic epidermal necrolysis. The results were horrific. Sixty to sixty-five percent of the surface of respondent's body deteriorated, was burned off, or turned into an open wound. She spent months in a medically induced coma, underwent 12 eye surgeries, and was tube fed for a year. She is now severely disfigured, has a number of physical disabilities, and is nearly blind.

At the time respondent was prescribed sulindac, the drug's label did not specifically refer to Stevens-Johnson Syndrome or toxic epidermal necrolysis, but did warn that the drug could cause "severe skin reactions" and "[f]atalities." App. 553; 731 F. Supp. 2d 135, 142 (NH 2010) (internal quotation marks omitted). However, Stevens-Johnson Syndrome and toxic epidermal necrolysis were listed as potential adverse reactions on the drug's package insert. 678 F. 3d, at 36, n. 1. In 2005—once respondent was already suffering from toxic epidermal necrolysis—the FDA completed a "comprehensive review of the risks and benefits,

[including the risk of toxic epidermal necrolysis], of all approved NSAID products." Decision Letter, FDA Docket No. 2005P-0072/CP1, p. 2 (June 22, 2006), online at http://www.fda.gov/ohrms/dockets/dockets/05p0072/05p-0072-pav0001-vol1.pdf (as visited June 18, 2013, and available in Clerk of Court's case file). As a result of that review, the FDA recommended changes to the labeling of all NSAIDs, including sulindac, to more explicitly warn against toxic epidermal necrolysis. App. 353–354, 364, 557–561, 580, and n. 8.

Respondent sued Mutual in New Hampshire state court, and Mutual removed the case to federal court. Respondent initially asserted both failure-to-warn and design-defect claims, but the District Court dismissed her failure-to-warn claim based on her doctor's "admi[ssion] that he had not read the box label or insert." 678 F. 3d, at 34. After a 2-week trial on respondent's design-defect claim, a jury found Mutual liable and awarded respondent over $21 million in damages.

The Court of Appeals affirmed. 678 F. 3d 30. As relevant, it found that neither the FDCA nor the FDA's regulations pre-empted respondent's design-defect claims. It distinguished *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604—in which the Court held that failure-to-warn claims against generic manufacturers are pre-empted by the FDCA's prohibition on changes to generic drug labels—by arguing that generic manufacturers facing design-defect claims could simply "choose not to make the drug at all" and thus comply with both federal and state law. 678 F. 3d, at 37. We granted certiorari. 568 U. S. 1045 (2012).

III

The Supremacy Clause provides that the laws and treaties of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2. Accordingly, it has long been settled that state laws that con-

flict with federal law are "without effect." *Maryland* v. *Louisiana*, 451 U. S., at 746; *McCulloch* v. *Maryland*, 4 Wheat. 316, 427 (1819). See also *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield" (internal quotation marks omitted)).

Even in the absence of an express pre-emption provision, the Court has found state law to be impliedly pre-empted where it is "impossible for a private party to comply with both state and federal requirements." *English* v. *General Elec. Co.*, 496 U. S. 72, 79 (1990). See also *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce").

In the instant case, it was impossible for Mutual to comply with both its state-law duty to strengthen the warnings on sulindac's label and its federal-law duty not to alter sulindac's label. Accordingly, the state law is pre-empted.

A

We begin by identifying petitioner's duties under state law. As an initial matter, respondent is wrong in asserting that the purpose of New Hampshire's design-defect cause of action "is compensatory, not regulatory." Brief for Respondent 19. Rather, New Hampshire's design-defect cause of action imposes affirmative duties on manufacturers.

Respondent is correct that New Hampshire has adopted the doctrine of strict liability in tort as set forth in § 402A of the Restatement (Second) of Torts. See 2 Restatement (Second) of Torts § 402A (1963 and 1964) (hereinafter Restatement 2d). See *Buttrick* v. *Arthur Lessard & Sons, Inc.*, 110 N. H. 36, 37–39, 260 A. 2d 111, 112–113 (1969).

Under the Restatement—and consequently, under New Hampshire tort law—"[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused" even though he "has exercised all possible care in the preparation and sale of the product." Restatement 2d § 402A, at 347–348.

But respondent's argument conflates what we will call a "strict-liability" regime (in which liability does not depend on negligence, but still signals the breach of a duty) with what we will call an "absolute-liability" regime (in which liability does not reflect the breach of any duties at all, but merely serves to spread risk). New Hampshire has adopted the former, not the latter. Indeed, the New Hampshire Supreme Court has consistently held that the manufacturer of a product has a "duty to design his product reasonably safely for the uses which he can foresee." *Thibault* v. *Sears, Roebuck & Co.*, 118 N. H. 802, 809, 395 A. 2d 843, 847 (1978). See also *Reid* v. *Spadone Mach. Co.*, 119 N. H. 457, 465, 404 A. 2d 1094, 1099 (1979) ("In New Hampshire, the manufacturer is under a general duty to design his product reasonably safely for the uses which he can foresee" (internal quotation marks omitted)); *Chellman* v. *Saab-Scania AB*, 138 N. H. 73, 78, 637 A. 2d 148, 150 (1993) ("The duty to warn is part of the general duty to design, manufacture and sell products that are reasonably safe for their foreseeable uses"); cf. *Simoneau* v. *South Bend Lathe, Inc.*, 130 N. H. 466, 469, 543 A. 2d 407, 409 (1988) ("We limit the application of strict tort liability in this jurisdiction by continuing to emphasize that liability without negligence is not liability without fault"); *Price* v. *BIC Corp.*, 142 N. H. 386, 390, 702 A. 2d 330, 333 (1997) (cautioning "that the term 'unreasonably dangerous' should not be interpreted so broadly as to impose absolute liability on manufacturers or make them insurers of their products"). Accordingly, respondent is incorrect in arguing that New Hampshire's strict-liability system

"imposes no substantive duties on manufacturers." Brief for Respondent 19.[1]

B

That New Hampshire tort law imposes a duty on manufacturers is clear. Determining the content of that duty requires somewhat more analysis. As discussed below in greater detail, New Hampshire requires manufacturers to ensure that the products they design, manufacture, and sell are not "unreasonably dangerous." The New Hampshire Supreme Court has recognized that this duty can be satisfied either by changing a drug's design or by changing its labeling. Since Mutual did not have the option of changing sulindac's design, New Hampshire law ultimately required it to change sulindac's labeling.

Respondent argues that, even if New Hampshire law does impose a duty on drug manufacturers, that duty does not encompass either the "duty to change sulindac's design" or the duty "to change sulindac's labeling." Brief for Respondent 30 (capitalization and emphasis deleted). That argument cannot be correct. New Hampshire imposes design-defect liability only where "the design of the product created a defective condition unreasonably dangerous to the user." *Vautour* v. *Body Masters Sports Industries, Inc.*, 147 N. H.

[1] We can thus save for another day the question whether a true absolute-liability state-law system could give rise to impossibility pre-emption. As we have noted, most common-law causes of action for negligence and strict liability do not exist merely to spread risk, but rather impose affirmative duties. See *Riegel* v. *Medtronic, Inc.*, 552 U. S. 312, 323–324 (2008) ("In [*Medtronic, Inc.* v. *Lohr*, 518 U. S. 470 (1996)], five Justices concluded that common-law causes of action for negligence and strict liability do impose 'requirement[s]' and would be pre-empted by federal requirements specific to a medical device. . . . We adhere to that view"); *id.*, at 324 ("Absent other indication, reference to a State's 'requirements' includes its common-law duties. As the plurality opinion said in *Cipollone* [v. *Liggett Group, Inc.*, 505 U. S. 504, 522 (1992)], common-law liability is 'premised on the existence of a legal duty,' and a tort judgment therefore establishes that the defendant has violated a state-law obligation").

150, 153, 784 A. 2d 1178, 1181 (2001); *Chellman*, *supra*, at 77, 637 A. 2d, at 150. To determine whether a product is "unreasonably dangerous," the New Hampshire Supreme Court employs a "risk-utility approach" under which "a product is defective as designed if the magnitude of the danger outweighs the utility of the product." *Vautour*, 147 N. H., at 154, 784 A. 2d, at 1182 (internal quotation marks omitted). That risk-utility approach requires a "multifaceted balancing process involving evaluation of many conflicting factors." *Ibid.* (internal quotation marks omitted); see also *Thibault*, *supra*, at 809, 395 A. 2d, at 847 (same).

While the set of factors to be considered is ultimately an open one, the New Hampshire Supreme Court has repeatedly identified three factors as germane to the risk-utility inquiry: "the usefulness and desirability of the product to the public as a whole, whether the risk of danger could have been reduced without significantly affecting either the product's effectiveness or manufacturing cost, and the presence and efficacy of a warning to avoid an unreasonable risk of harm from hidden dangers or from foreseeable uses." *Vautour*, *supra*, at 154, 784 A. 2d, at 1182; see also *Price*, *supra*, at 389, 702 A. 2d, at 333 (same); *Chellman*, *supra*, at 77–78, 637 A. 2d, at 150 (same).

In the drug context, either increasing the "usefulness" of a product or reducing its "risk of danger" would require redesigning the drug: A drug's usefulness and its risk of danger are both direct results of its chemical design and, most saliently, its active ingredients. See 21 CFR §201.66(b)(2) (2012) ("Active ingredient means any component that is intended to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease, or to affect the structure of any function of the body of humans" (emphasis deleted)).

In the present case, however, redesign was not possible for two reasons. First, the FDCA requires a generic drug to have the same active ingredients, route of administration,

dosage form, strength, and labeling as the brand-name drug on which it is based. 21 U. S. C. §§ 355(j)(2)(A)(ii)–(v) and (8)(B); 21 CFR § 320.1(c). Consequently, the Court of Appeals was correct to recognize that "Mutual cannot legally make sulindac in another composition." 678 F. 3d, at 37. Indeed, were Mutual to change the composition of its sulindac, the altered chemical would be a new drug that would require its own NDA to be marketed in interstate commerce. See 21 CFR § 310.3(h) (giving examples of when the FDA considers a drug to be new, including cases involving "newness for drug use of any substance which composes such drug, in whole or in part"). Second, because of sulindac's simple composition, the drug is chemically incapable of being redesigned. See 678 F. 3d, at 37 ("Mutual cannot legally make sulindac in another composition (nor is it apparent how it could alter a one-molecule drug anyway)").

Given the impossibility of redesigning sulindac, the only way for Mutual to ameliorate the drug's "risk-utility" profile—and thus to escape liability—was to strengthen "the presence and efficacy of [sulindac's] warning" in such a way that the warning "avoid[ed] an unreasonable risk of harm from hidden dangers or from foreseeable uses." *Vautour*, *supra*, at 154, 784 A. 2d, at 1182. See also *Chellman*, 138 N. H., at 78, 637 A. 2d, at 150 ("The duty to warn is part of the general duty to design, manufacture and sell products that are reasonably safe for their foreseeable uses. If the design of a product makes a warning necessary to avoid an unreasonable risk of harm from a foreseeable use, the lack of warning or an ineffective warning causes the product to be defective and unreasonably dangerous" (citation omitted)). Thus, New Hampshire's design-defect cause of action imposed a duty on Mutual to strengthen sulindac's warnings.

For these reasons, it is unsurprising that allegations that sulindac's label was inadequate featured prominently at trial. Respondent introduced into evidence both the label for Mu-

tual's sulindac at the time of her injuries and the label as revised in 2005 (after respondent had suffered her injuries). App. 553–556. Her counsel's opening statement informed the jury that "the evidence will show you that Sulindac was unreasonably dangerous and had an inadequate warning, as well. . . . You will hear much more evidence about why this label was inadequate in relation to this case." Tr. 110–112 (Aug. 17, 2010). And, the District Court repeatedly instructed the jury that it should evaluate sulindac's labeling in determining whether Mutual's sulindac was unreasonably dangerous. See App. 514 (jury instruction that the jury should find "a defect in design" only if it found that "Sulindac was unreasonably dangerous and that a warning was not present and effective to avoid that unreasonable danger"); *ibid.* (jury instruction that no design defect exists if "a warning was present and effective to avoid that unreasonable danger"). Finally, the District Court clarified in its order and opinion denying Mutual's motion for judgment as a matter of law that the adequacy of sulindac's labeling had been part of what the jury was instructed to consider. 760 F. Supp. 2d 220, 231 (2011) ("[I]f the jury found that sulindac's risks outweighed its benefits, then it could consider whether the warning—regardless of its adequacy—reduced those risks . . . to such an extent that it eliminated the unreasonable danger").[2]

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[2] That Mutual's liability turned on the adequacy of sulindac's warnings is not unusual. Rather, New Hampshire—like a large majority of States—has adopted comment *k* to § 402A of the Restatement (Second) of Torts, which recognizes that it is "especially common in the field of drugs" for products to be "incapable of being made safe for their intended and ordinary use." Restatement 2d, at 353; *Bellotte* v. *Zayre Corp.*, 116 N. H. 52, 54–55, 352 A. 2d 723, 725 (1976). Under comment *k*, "[s]uch a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous." Restatement 2d, at 353–354. This Court has previously noted that, as of 1986, "a large number of courts" took comment *k* to mean that manufacturers "did not face

Thus, in accordance with New Hampshire law, the jury was presented with evidence relevant to, and was instructed to consider, whether Mutual had fulfilled its duty to label sulindac adequately so as to render the drug not "unreasonably dangerous." In holding Mutual liable, the jury determined that Mutual had breached that duty.

C

The duty imposed by federal law is far more readily apparent. As *PLIVA* made clear, federal law prevents generic drug manufacturers from changing their labels. See 564 U. S., at 617 ("Federal drug regulations, as interpreted by the FDA, prevented the Manufacturers from independently changing their generic drugs' safety labels"). See also 21 U. S. C. § 355(j)(2)(A)(v) ("[T]he labeling pro-posed for the new drug is the same as the labeling approved for the [approved brand-name] drug"); 21 CFR §§ 314.94(a)(8)(iii), 314.150(b)(10) (approval for a generic drug may be withdrawn if the generic drug's label "is no longer consistent with that for [the brand-name] drug"). Thus, federal law prohibited Mutual from taking the remedial action required to avoid liability under New Hampshire law.

D

When federal law forbids an action that state law requires, the state law is "without effect." *Maryland*, 451 U. S., at 746. Because it is impossible for Mutual and other similarly

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strict liability for side effects of properly manufactured prescription drugs that were accompanied by adequate warnings." *Bruesewitz* v. *Wyeth*, 562 U. S. 223, 234, n. 41 (2011).

Mutual withdrew its comment *k* defense "for purposes of the trial of this matter." Defendant's Notice of Withdrawal of Defenses, in Case No. 08–cv–358–JL (D NH), p. 1. However, as noted above, both respondent and the trial court injected the broader question of the adequacy of sulindac's label into the trial proceedings.

situated manufacturers to comply with both state and federal law,[3] New Hampshire's warning-based design-defect cause of action is pre-empted with respect to FDA-approved drugs sold in interstate commerce.[4]

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[3] JUSTICE BREYER argues that it is not "literally impossible" for Mutual to comply with both state and federal law because it could escape liability "either by not doing business in the relevant State or by paying the state penalty, say, damages, for failing to comply with, as here, a state-law tort standard." *Post*, at 493 (dissenting opinion). But, as discussed below, *infra*, at 488–490—leaving aside the rare case in which state or federal law actually requires a product to be pulled from the market—our pre-emption cases presume that a manufacturer's ability to stop selling does not turn impossibility into possibility. See, *e. g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 143 (1963) (There would be "impossibility of dual compliance" where "federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content"). And, of course, *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604 (2011), forecloses any argument that impossibility is defeated by the prospect that a manufacturer could "pa[y] the state penalty" for violating a state-law duty; that prospect would have defeated impossibility in *PLIVA* as well. See *id.*, at 618 ("[I]t was impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal-law duty to keep the label the same"). To hold otherwise would render impossibility pre-emption "all but meaningless." *Id.*, at 621.

[4] We do not address state design-defect claims that parallel the federal misbranding statute. The misbranding statute requires a manufacturer to pull even an FDA-approved drug from the market when it is "dangerous to health" even if "used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." 21 U. S. C. § 352(j); cf. *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 447 (2005) (state-law pesticide labeling requirement not pre-empted under express pre-emption provision, provided it was "equivalent to, and fully consistent with, [federal] misbranding provisions"). The parties and the Government appear to agree that a drug is misbranded under federal law only when liability is based on new and scientifically significant information that was not before the FDA. Because the jury was not asked to find whether new evidence concerning sulindac that had not been made available to the FDA rendered sulindac so dangerous as to be misbranded under the federal misbranding statute, the misbranding provision is not

IV

The Court of Appeals reasoned that Mutual could escape the impossibility of complying with both its federal- and state-law duties by "choos[ing] not to make [sulindac] at all." 678 F. 3d, at 37. We reject this "stop-selling" rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be "all but meaningless." *PLIVA*, 564 U. S., at 621.

The incoherence of the stop-selling theory becomes plain when viewed through the lens of our previous cases. In every instance in which the Court has found impossibility pre-emption, the "direct conflict" between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.

PLIVA is an obvious example: As discussed above, the *PLIVA* Court held that state failure-to-warn claims were pre-empted by the FDCA because it was impossible for drug manufacturers like PLIVA to comply with both the state-law duty to label their products in a way that rendered them reasonably safe and the federal-law duty not to change their drugs' labels. *Id.*, at 618–619. It would, of course, have been possible for drug manufacturers like PLIVA to pull their products from the market altogether. In so doing, they would have avoided liability under both state and federal law: Such manufacturers would neither have labeled their products in a way that rendered them unsafe nor impermissibly changed any federally approved label.

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applicable here. Cf. 760 F. Supp. 2d 220, 233 (NH 2011) (most of respondent's experts' testimony was "drawn directly from the medical literature or published FDA analyses").

In concluding that "it was impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal-law duty to keep the label the same," *id.*, at 618, the Court was undeterred by the prospect that PLIVA could have complied with both state and federal requirements by simply leaving the market. The Court of Appeals decision below had found that Mensing's state-law failure-to-warn claims escaped pre-emption based on the very same stop-selling rationale the First Circuit relied on in this case. See *Mensing* v. *Wyeth, Inc.*, 588 F. 3d 603, 611 (CA8 2009) ("[G]eneric defendants were not compelled to market metoclopramide. If they realized their label was insufficient . . . they could have simply stopped selling the product"). Moreover, Mensing advanced the stop-selling rationale in its petition for rehearing, which this Court denied. *PLIVA*, *supra*; Pet. for Reh'g in No. 09–993 etc., p. 2. Nonetheless, this Court squarely determined that it had been "impossible" for PLIVA to comply with both its state and federal duties. 564 U. S., at 618.[5]

Adopting the First Circuit's stop-selling rationale would mean that not only *PLIVA*, but also the vast majority—if not all—of the cases in which the Court has found impossibility pre-emption, were wrongly decided. Just as the prospect that a regulated actor could avoid liability under both state and federal law by simply leaving the market did not

[5] Respondent attempts to distinguish this case from *PLIVA*, arguing that "[w]here, as in *PLIVA*, state law imposes an affirmative duty on a manufacturer to improve the product's label, suspending sales does not *comply* with the state-law duty; it merely offers an indirect means of avoiding liability for noncompliance with that duty." Brief for Respondent 39. But that difference is purely semantic: The state-law duty in *PLIVA* to amend metoclopramide's label could just as easily have been phrased as a duty not to sell the drug without adequate warnings. At least where a State imposes liability based on a balancing of a product's harms and benefits in light of its labeling—rather than directly prohibiting the product's sale—the mere fact that a manufacturer may avoid liability by leaving the market does not defeat a claim of impossibility.

undermine the impossibility analysis in *PLIVA*, so it is irrelevant to our analysis here.

V

The dreadful injuries from which products liabilities cases arise often engender passionate responses. Today is no exception, as JUSTICE SOTOMAYOR's dissent (hereinafter the dissent) illustrates. But sympathy for respondent does not relieve us of the responsibility of following the law.

The dissent accuses us of incorrectly assuming "that federal law gives pharmaceutical companies a right to sell a federally approved drug free from common-law liability," *post*, at 497, but we make no such assumption. Rather, as discussed at length above, see *supra*, at 482–487, we hold that state-law design-defect claims like New Hampshire's that place a duty on manufacturers to render a drug safer by either altering its composition or altering its labeling are in conflict with federal laws that prohibit manufacturers from unilaterally altering drug composition or labeling. The dissent is quite correct that federal law establishes no safe harbor for drug companies—but it does prevent them from taking certain remedial measures. Where state law imposes a duty to take such remedial measures, it "actual[ly] conflict[s] with federal law" by making it "'impossible for a private party to comply with both state and federal requirements.'" *Freightliner Corp.* v. *Myrick*, 514 U. S. 280, 287 (1995) (quoting *English*, 496 U. S., at 78–79). The dissent seems to acknowledge that point when it concedes that, "if federal law requires a particular product label to include a complete list of ingredients while state law specifically forbids that labeling practice, there is little question that state law 'must yield.'" *Post*, at 502 (quoting *Felder* v. *Casey*, 487 U. S. 131, 138 (1988)). What the dissent does not see is that *that is this case*: Federal law requires a very specific label for sulindac, and state law forbids the use of that label.

The dissent responds that New Hampshire law "merely create[s] an incentive" to alter sulindac's label or composi-

tion, *post*, at 502, but does not impose any actual "legal obligation," *post*, at 508. The contours of that argument are difficult to discern. Perhaps the dissent is drawing a distinction between common-law "exposure to liability," *post*, at 507, and a statutory "legal mandate," *ibid.* But the distinction between common law and statutory law is irrelevant to the argument at hand: In violating a common-law duty, as surely as by violating a statutory duty, a party contravenes the law. While it is true that, in a certain sense, common-law duties give a manufacturer the choice "between exiting the market or continuing to sell while knowing it may have to pay compensation to consumers injured by its product," *post*, at 511, statutory "mandate[s]" do precisely the same thing: They require a manufacturer to choose between leaving the market and accepting the consequences of its actions (in the form of a fine or other sanction). See generally Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972) (discussing liability rules). And, in any event, *PLIVA*—which the dissent agrees involved a state-law "requirement that conflicted with federal law," *post*, at 508—dealt with *common-law* failure-to-warn claims, see *PLIVA*, *supra*, at 611–612. Because *PLIVA* controls the instant case, the dissent is reduced to fighting a rearguard action against its reasoning despite ostensibly swearing fealty to its holding.

To suggest that *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431 (2005), is to the contrary is simply misleading. The dissent is correct that *Bates* held a Texas state-law design-defect claim not to be pre-empted. But, it did so because the design-defect claim in question was not a "requirement '*for labeling or packaging*' " and thus fell outside the class of claims covered by the express pre-emption provision at issue in that case. *Id.*, at 443–444 (emphasis in original). Indeed, contrary to the impression one might draw from the dissent, *post*, at 507–508, the *Bates* Court actually *blessed*

the lower court's determination that the State's design-defect claim imposed a pre-emptable "requirement": "The Court of Appeals did, however, correctly hold that the term 'requirements' in § 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties." *Bates*, *supra*, at 443. The dissent offers no compelling reason why the "common-law duty" in this case should not similarly be viewed as a "requirement." We agree, of course, that "determining precisely what, if any, specific requirement a state common-law claim imposes is important." *Post*, at 507, n. 5. As *Bates* makes clear, "[t]he proper inquiry calls for an examination of the elements of the common-law duty at issue; it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action." 544 U. S., at 445 (citation omitted). Here, as we have tried to make clear, the duty to ensure that one's products are not "unreasonably dangerous" imposed by New Hampshire's design-defect cause of action, *Vautour*, 147 N. H., at 153, 784 A. 2d, at 1181, involves a duty to make one of several changes. In cases where it is impossible—in fact or by law—to alter a product's design (and thus to increase the product's "usefulness" or decrease its "risk of danger"), the duty to render a product "reasonably safe" boils down to a duty to ensure "the presence and efficacy of a warning to avoid an unreasonable risk of harm from hidden dangers or from foreseeable uses." *Id.*, at 154, 784 A. 2d, at 1182. The duty to redesign sulindac's label was thus a part of the common-law duty at issue—not merely an action Mutual might have been prompted to take by the adverse jury verdict here.

Finally, the dissent laments that we have ignored "Congress' explicit efforts to preserve state common-law liability." *Post*, at 520. We have not. Suffice to say, the Court would welcome Congress' "explicit" resolution of the difficult pre-emption questions that arise in the prescription drug context. That issue has repeatedly vexed the Court—and produced widely divergent views—in recent years. See,

e. g., *Wyeth* v. *Levine*, 555 U. S. 555 (2009); *PLIVA*, 564 U. S. 604. As the dissent concedes, however, the FDCA's treatment of prescription drugs includes neither an express pre-emption clause (as in the vaccine context, 42 U. S. C. § 300aa–22(b)(1)), nor an express non-pre-emption clause (as in the over-the-counter drug context, 21 U. S. C. §§ 379r(e), 379s(d)). In the absence of that sort of "explicit" expression of congressional intent, we are left to divine Congress' will from the duties the statute imposes. That federal law forbids Mutual to take actions required of it by state tort law evinces an intent to pre-empt.

* * *

This case arises out of tragic circumstances. A combination of factors combined to produce the rare and devastating injuries that respondent suffered: the FDA's decision to approve the sale of sulindac and the warnings that accompanied the drug at the time it was prescribed, the decision by respondent's physician to prescribe sulindac despite its known risks, and Congress' decision to regulate the manufacture and sale of generic drugs in a way that reduces their cost to patients but leaves generic drug manufacturers incapable of modifying either the drugs' compositions or their warnings. Respondent's situation is tragic and evokes deep sympathy, but a straightforward application of pre-emption law requires that the judgment below be reversed.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

It is not literally impossible here for a company like petitioner to comply with conflicting state and federal law. A company can comply with both either by not doing business in the relevant State or by paying the state penalty, say, damages, for failing to comply with, as here, a state-law tort standard. See *post*, at 511–513 (SOTOMAYOR, J., dissenting). But conflicting state law that requires a company to with-

draw from the State or pay a sizable damages remedy in order to avoid the conflict between state and federal law may nonetheless "'stan[d] as an obstacle to the accomplishment' of" the federal law's objective, in which case the relevant state law is pre-empted. *Post*, at 512 (quoting *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 373 (2000)).

Normally, for the reasons I set forth in *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 503 (1996) (opinion concurring in part and concurring in judgment), in deciding whether there is such a conflict I would pay particular attention to the views of the relevant agency, here the Food and Drug Administration (FDA). Where the statute contains no clear pre-emption command, courts may infer that the administrative agency has a degree of leeway to determine the extent to which governing statutes, rules, regulations, or other administrative actions have pre-emptive effect. See *id.*, at 505–506 (citing *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 739–741 (1996); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 721 (1985); *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1*, 469 U. S. 256, 261–262 (1985); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984)). See also *Wyeth* v. *Levine*, 555 U. S. 555, 576–577 (2009). Cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). The FDA is responsible for administering the relevant federal statutes. And the question of pre-emption may call for considerable drug-related expertise. Indeed, one might infer that, the more medically valuable the drug, the less likely Congress intended to permit a State to drive it from the marketplace.

At the same time, the agency can develop an informed position on the pre-emption question by providing interested parties with an opportunity to present their views. It can translate its understandings into particular pre-emptive intentions accompanying its various rules and regulations. And "[i]t can communicate those intentions . . . through

statements in 'regulations, preambles, interpretive statements, and responses to comments.'" *Medtronic*, *supra*, at 506 (opinion of BREYER, J.) (quoting *Hillsborough*, *supra*, at 718).

Here, however, I cannot give special weight to the FDA's views. For one thing, as far as the briefing reveals, the FDA, in developing its views, has held no hearings on the matter or solicited the opinions, arguments, and views of the public in other ways. For another thing, the FDA has set forth its positions only in briefs filed in litigation, not in regulations, interpretations, or similar agency work product. See *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 212–213 (1988) ("[A]gency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice" are entitled to less than ordinary weight). Cf. *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000).

Finally, the FDA has set forth conflicting views on this general matter in different briefs filed at different times. Compare *Wyeth*, *supra*, at 577, 579, 580, n. 13 (noting that the FDA had previously found *no* pre-emption, that the United States now argued *for* pre-emption, and that this new position was not entitled to deference), with *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 613, n. 3, 615–617 (2011) (declining to defer to the United States' argument against pre-emption and, instead, finding pre-emption), and with Brief for United States as *Amicus Curiae* 12–13 (now arguing, again, for pre-emption). See *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981 (2005) (agency views that vary over time are accorded less weight); *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 41–42 (1983) (same); *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 502, n. 20 (2002) (same).

Without giving the agency's views special weight, I would conclude that it is not impossible for petitioner to comply with both state and federal regulatory schemes and that the

federal regulatory scheme does not pre-empt state common law (read as potentially requiring petitioner to pay damages or leave the market). As two former FDA Commissioners tell us, the FDA has long believed that state tort litigation can "supplemen[t] the agency's regulatory and enforcement activities." Brief for Donald Kennedy et al. as *Amici Curiae* 5. See also *Wyeth*, *supra*, at 578 ("In keeping with Congress' decision not to pre-empt common-law tort suits, it appears that the FDA traditionally regarded state law as a complementary form of drug regulation").

Moreover, unlike the federal statute at issue in *Medtronic*, the statute before us contains no general pre-emption clause. See 518 U. S., at 481–482. Cf. *Wyeth*, *supra*, at 574 (presence of pre-emption clause could show that "Congress thought state-law suits posed an obstacle to its objectives"). Furthermore, I have found no convincing reason to believe that removing this particular drug from New Hampshire's market, or requiring damages payments for it there, would be so harmful that it would seriously undercut the purposes of the federal statutory scheme. Cf. *post*, at 515–517.

Finally, similarly situated defendants in other cases remain free to argue for "obstacle pre-emption" in respect to damages payments or market withdrawal, and demonstrate the impossibility-of-compliance type of conflict that, in their particular cases, might create true incompatibility between state and federal regulatory schemes.

For these reasons, I respectfully dissent.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

In *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604 (2011), this Court expanded the scope of impossibility pre-emption to immunize generic drug manufacturers from state-law failure-to-warn claims. Today, the Court unnecessarily and unwisely extends its holding in *PLIVA* to pre-empt New Hampshire's law governing design defects with respect to generic drugs.

The Court takes this step by concluding that petitioner Mutual Pharmaceutical was held liable for a failure-to-warn claim in disguise, even though the District Court clearly rejected such a claim and instead allowed liability on a distinct theory. See *infra*, at 509–510. Of greater consequence, the Court appears to justify its revision of respondent Karen Bartlett's state-law claim through an implicit and undefended assumption that federal law gives pharmaceutical companies a right to sell a federally approved drug free from common-law liability. Remarkably, the Court derives this proposition from a federal law that, in order to protect consumers, prohibits manufacturers from distributing new drugs in commerce without federal regulatory approval, and specifically disavows any intent to displace state law absent a direct and positive conflict.

Karen Bartlett was grievously injured by a drug that a jury found was unreasonably dangerous. The jury relied upon evidence that the drug posed a higher than normal risk of causing the serious skin reaction that produced her horrific injuries; carried other risks; and possessed no apparent offsetting benefits compared to similar pain relievers, like aspirin. See 760 F. Supp. 2d 220, 233–241, 243–244 (NH 2011). The Court laments her "tragic" situation, *ante*, at 493, but responsibility for the fact that Karen Bartlett has been deprived of a remedy for her injuries rests with this Court. If our established pre-emption principles were properly applied in this case, and if New Hampshire law were correctly construed, then federal law would pose no barrier to Karen Bartlett's recovery. I respectfully dissent.

I

I begin with "two cornerstones of our pre-emption jurisprudence," *Wyeth* v. *Levine*, 555 U. S. 555, 565 (2009), that should control this case but are conspicuously absent from the majority opinion. First, "'the purpose of Congress is the ultimate touchstone' in every pre-emption case." *Ibid.*

(quoting *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996)). Second, we start from the "assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). "That assumption," we have explained, "applies with particular force when," as is the case here, "Congress has legislated in a field traditionally occupied by the States." *Altria Group, Inc.* v. *Good*, 555 U. S. 70, 77 (2008).[1]

The Court applied both of these principles to the Federal Food, Drug, and Cosmetic Act (FDCA), ch. 675, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.*, in *Levine*, where we held that a state failure-to-warn claim against a brand-name drug manufacturer was not pre-empted by federal law. 555 U. S., at 581. Tracing the history of federal drug regulation from the Federal Food and Drugs Act of 1906, 34 Stat. 768, up to the FDCA and its major amendments, the Court explained that federal drug law and state common-law liability have long been understood to operate in tandem to promote consumer safety. See *Levine*, 555 U. S., at 566–568, 574. That basic principle, which the majority opinion elides, is essential to understanding this case.

The FDCA prohibits the "introduction into interstate commerce [of] any new drug" without prior approval from the United States Food and Drug Administration (FDA). 21 U. S. C. § 355(a). Brand-name and generic drug manufacturers are required to make different showings to receive

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[1] The majority's failure to adhere to the presumption against pre-emption is well illustrated by the fact that the majority calls on Congress to provide greater clarity with regard to the "difficult pre-emption questions that arise in the prescription drug context." *Ante*, at 492. Certainly, clear direction from Congress on pre-emption questions is useful. But the whole point of the presumption against pre-emption is that congressional ambiguity should cut in favor of preserving state autonomy. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

agency approval in this premarketing review process. See *ante*, at 476–477. But in either case, the FDA's permission to market a drug has never been regarded as a final stamp of approval of the drug's safety. Under the FDCA, manufacturers, who have greater "access to information about their drugs" than the FDA, *Levine*, 555 U. S., at 578–579, retain the ultimate responsibility for the safety of the products they sell. In addition to their ongoing obligations to monitor a drug's risks and to report adverse drug responses to the FDA, see 21 CFR §§ 314.80, 314.81, 314.98 (2012), manufacturers may not sell a drug that is "deemed to be misbranded" because it is "dangerous to health" when used in the dosage or manner called for in the drug's label, 21 U. S. C. § 352(j); see § 331(a); Brief for United States as *Amicus Curiae* 30–31 (hereinafter U. S. Brief) (indicating that the misbranding prohibition may apply to a drug that was previously approved for sale when significant new scientific evidence demonstrates that the drug is unsafe).

Beyond federal requirements, state common law plays an important "complementary" role to federal drug regulation. *Levine*, 555 U. S., at 578. Federal law in this area was initially intended to "supplemen[t] the protection for consumers already provided by state regulation and common-law liability." *Id.*, at 566. And as Congress "enlarged the FDA's powers," it "took care to preserve state law." *Id.*, at 567. In the 1962 amendments to the FDCA, which established the FDA's premarketing review in its modern form, Congress adopted a saving clause providing that the amendments should not be construed to invalidate any provision of state law absent "a direct and positive conflict." § 202, 76 Stat. 793. And in the years since, with "state common-law suits 'continu[ing] unabated despite . . . FDA regulation,'" *Levine*, 555 U. S., at 567 (quoting *Riegel* v. *Medtronic, Inc.*, 552 U. S. 312, 340 (2008) (GINSBURG, J., dissenting)), Congress has not enacted a pre-emption provision for prescription drugs (whether brand name or generic) even as it

enacted such provisions with respect to other products regulated by the FDA.[2]

Congress' preservation of a role for state law generally, and common-law remedies specifically, reflects a realistic understanding of the limitations of *ex ante* federal regulatory review in this context. On its own, even rigorous preapproval clinical testing of drugs is "generally . . . incapable of detecting adverse effects that occur infrequently, have long latency periods, or affect subpopulations not included or adequately represented in the studies." Kessler & Vladeck, A Critical Examination of the FDA's Efforts To Preempt Failure-to-Warn Claims, 96 Geo. L. J. 461, 471 (2008); see National Academies, Institute of Medicine, The Future of Drug Safety: Promoting and Protecting the Health of the Public 37–38 (2007) (hereinafter Future of Drug Safety) (discussing limitations "inherent" to a system of premarket clinical trials). Moreover, the FDA, which is tasked with monitoring thousands of drugs on the market and considering new drug applications, faces significant resource constraints that limit its ability to protect the public from dangerous drugs. See *Levine*, 555 U. S., at 578–579, and n. 11; Brief for Former FDA Commissioner Donald Kennedy et al. as *Amici Curiae* 6–7, 12–20. Tort suits can help fill the gaps in federal regulation by "serv[ing] as a catalyst" to identify previously unknown drug dangers. *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 451 (2005).

Perhaps most significant, state common law provides injured consumers like Karen Bartlett with an opportunity to seek redress that is not available under federal law.

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[2] See 21 U. S. C. § 360k(a) (medical devices); § 379r (labeling requirements for nonprescription drugs); § 379s (labeling and packaging requirements for cosmetics); 42 U. S. C. § 300aa–22(b)(1) (vaccines). Instructively, Congress included a saving clause in the statutes addressing nonprescription drugs and cosmetics, which makes clear that the express pre-emption provisions in these statutes do not affect state product liability law. See 21 U. S. C. §§ 379r(e), 379s(d).

"[U]nlike most administrative and legislative regulations," common-law claims "necessarily perform an important remedial role in compensating accident victims." *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 64 (2002). While the Court has not always been consistent on this issue, it has repeatedly cautioned against reading federal statutes to "remove all means of judicial recourse for those injured" when Congress did not provide a federal remedy. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 251 (1984); see, *e. g.*, *Bates*, 544 U. S., at 449; *Lohr*, 518 U. S., at 487 (plurality opinion). And in fact, the legislative history of the FDCA suggests that Congress chose not to create a federal cause of action for damages precisely because it believed that state tort law would allow injured consumers to obtain compensation. See *Levine*, 555 U. S., at 574–575, and n. 7.

II

In light of this background, Mutual should face an uphill climb to show that federal law pre-empts a New Hampshire strict-liability claim against a generic drug manufacturer for defective design. The majority nevertheless accepts Mutual's argument that "compliance with both federal and state [law was] a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963); see *ante*, at 480. But if state and federal law are properly understood, it is clear that New Hampshire's design-defect claim did not impose a legal obligation that Mutual had to violate federal law to satisfy.

A

Impossibility pre-emption "is a demanding defense," *Levine*, 555 U. S., at 573, that requires the defendant to show an "irreconcilable conflict" between federal and state legal obligations, *Silkwood*, 464 U. S., at 256. The logic underlying true impossibility pre-emption is that when state and federal law impose irreconcilable affirmative requirements,

no detailed "inquiry into congressional design" is necessary because the inference that Congress would have intended federal law to displace the conflicting state requirement "is inescapable." *Florida Lime*, 373 U. S., at 142–143. So, for example, if federal law requires a particular product label to include a complete list of ingredients while state law specifically forbids that labeling practice, there is little question that state law "'must yield.'" *Felder* v. *Casey*, 487 U. S. 131, 138 (1988).

The key inquiry for impossibility pre-emption, then, is to identify whether state and federal law impose directly conflicting affirmative legal obligations such that state law "require[s] the doing of an act which is unlawful under" federal law. *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272, 292 (1987). Impossibility does not exist where the laws of one sovereign permit an activity that the laws of the other sovereign restricts or even prohibits. See *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 31 (1996); *Michigan Canners & Freezers Assn., Inc.* v. *Agricultural Marketing and Bargaining Bd.*, 467 U. S. 461, 478, n. 21 (1984). So, to modify the previous example, if federal law permitted (but did not require) a labeling practice that state law prohibited, there would be no irreconcilable conflict; a manufacturer could comply with the more stringent regulation. And by the same logic, impossibility does not exist where one sovereign's laws merely create an incentive to take an action that the other sovereign has not authorized because it is possible to comply with both laws.

Of course, there are other types of pre-emption. Courts may find that state laws that incentivize what federal law discourages or forbid what federal law authorizes are pre-empted for reasons apart from impossibility: The state laws may fall within the scope of an express pre-emption provision, pose an obstacle to federal purposes and objectives, or intrude upon a field that Congress intended for federal law to

occupy exclusively. See *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372–373 (2000). But absent a direct conflict between two mutually incompatible legal requirements, there is no impossibility and courts may not automatically assume that Congress intended for state law to give way. Instead, a more careful inquiry into congressional intent is called for, and that inquiry should be informed by the presumption against pre-emption.

In keeping with the strict standard for impossibility, cases that actually find pre-emption on that basis are rare. See Abrams, Plenary Power Preemption, 99 Va. L. Rev. 601, 608 (2013). *PLIVA* is an outlier, as the Court found impossibility because a generic drug manufacturer could not strengthen its product label to come into line with a state-law duty to warn without the exercise of judgment by the FDA. See 564 U. S., at 618–624. But nothing in *PLIVA*, nor any other precedent, dictates finding impossibility pre-emption here.

B

To assess whether it is physically impossible for Mutual to comply with both federal and state law, it is necessary to identify with precision the relevant legal obligations imposed under New Hampshire's design-defect cause of action.

The majority insists that Mutual was required by New Hampshire's design-defect law to strengthen its warning label. In taking this position, the majority effectively recharacterizes Bartlett's design-defect claim as a *de facto* failure-to-warn claim. The majority then relies on that recharacterization to hold that the jury found Mutual liable for failing to fulfill its duty to label sulindac adequately, which *PLIVA* forbids because a generic drug manufacturer cannot independently alter its safety label. *Ante*, at 486; see *PLIVA*, 564 U. S., at 617. But the majority's assertion that Mutual was held liable in this case for violating a legal obligation to change its label is inconsistent with both New Hampshire state law and the record.

For its part, Mutual, in addition to making the argument now embraced by the majority, contends that New Hampshire's design-defect law effectively required it to change the chemical composition of sulindac. Mutual claims that it was physically impossible to comply with that duty consistent with federal law because drug manufacturers may not change the chemical composition of their products so as to create new drugs without submitting a new drug application for FDA approval. See 21 CFR §§ 310.3(h), 314.70(b)(2)(i). But just as New Hampshire's design-defect law did not impose a legal obligation for Mutual to change its label, it also did not mandate that Mutual change the drug's design.

1

a

Following blackletter products liability law under § 402A of the Restatement (Second) of Torts (1963–1964) (hereinafter Second Restatement), New Hampshire recognizes strict liability for three different types of product defects: manufacturing defects, design defects, and warning defects. See *Cheshire Medical Center* v. *W. R. Grace & Co.*, 49 F. 3d 26, 29 (CA1 1995). Because the District Court granted Mutual summary judgment on Bartlett's failure-to-warn claim, only New Hampshire's design-defect cause of action remains at issue in this case.

A product has a defective design under New Hampshire law if it "poses unreasonable dangers to consumers." *Thibault* v. *Sears, Roebuck & Co.*, 118 N. H. 802, 807, 395 A. 2d 843, 846 (1978). To determine whether a product is unreasonably dangerous, a jury is asked to make a risk-benefit assessment by considering a nonexhaustive list of factors. See *ante*, at 483. In addition, New Hampshire has specifically rejected the doctrine, advocated by the Restatement (Third) of Torts: Products Liability § 2(b) (1997) (hereinafter Third Restatement), that a plaintiff must present evidence of a reasonable alternative design to show that a product's

design is defective. Instead, "while proof of an alternative design is relevant in a design defect case," it is "neither a controlling factor nor an essential element." *Vautour* v. *Body Masters Sports Industries, Inc.*, 147 N. H. 150, 156, 784 A. 2d 1178, 1183 (2001).

While some jurisdictions have declined to apply design-defect liability to prescription drugs, New Hampshire, in common with many other jurisdictions, does subject prescriptions drugs to this distinct form of strict products liability. See 678 F. 3d 30, 35 (CA1 2012) (citing *Brochu* v. *Ortho Pharmaceutical Corp.*, 642 F. 2d 652, 655 (CA1 1981)); see also Third Restatement § 6, Comment *f* (collecting cases from other jurisdictions). Drug manufacturers in New Hampshire have an affirmative defense under comment *k* to § 402A of the Second Restatement, which exempts "[u]navoidably unsafe products" from strict liability if the product is properly manufactured and labeled. As explained by the lower courts in this case, see 678 F. 3d, at 36; 731 F. Supp. 2d 135, 150–151 (NH 2010), New Hampshire takes a case-by-case approach to comment *k* under which a defendant seeking to invoke the defense must first show that the product is highly useful and that the danger imposed by the product could not have been avoided through a feasible alternative design. See *Brochu*, 642 F. 2d, at 657. Comment *k* did not factor into the jury's assessment of liability in this case because Mutual abandoned a comment *k* defense before trial. *Ante*, at 485–486, n. 2.[3]

[3] Though the majority does not rely on comment *k* to find pre-emption, it misleadingly implies that New Hampshire, like "a large majority of States," has applied comment *k* categorically to prescription drugs to exempt manufacturers from "'strict liability for side effects of properly manufactured prescription drugs that [are] accompanied by adequate warnings.'" *Ante*, at 485–486, n. 2 (quoting *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 234, n. 41 (2011)). That is incorrect. The majority also neglects to mention that while some courts have applied comment *k* categorically to prescription drug designs, "[m]ost courts have stated that there is no justification for giving all prescription drug manufacturers blanket immu-

b

The design-defect claim that was applied to Mutual subjects the manufacturer of an unreasonably dangerous product to liability, but it does not require that manufacturer to take any specific action that is forbidden by federal law. Specifically, and contrary to the majority, see *ante*, at 484, New Hampshire's design-defect law did not require Mutual to change its warning label. A drug's warning label is just one factor in a nonexclusive list for evaluating whether a drug is unreasonably dangerous, see *Vautour*, 147 N. H., at 156, 784 A. 2d, at 1183, and an adequate label is therefore neither a necessary nor a sufficient condition for avoiding design-defect liability. Likewise, New Hampshire law imposed no duty on Mutual to change sulindac's chemical composition. The New Hampshire Supreme Court has held that proof of an alternative feasible design is not an element of a design-defect claim, see *Kelleher* v. *Marvin Lumber & Cedar Co.*, 152 N. H. 813, 831, 891 A. 2d 477, 492 (2006), and as the majority recognizes, *ante*, at 484, sulindac was not realistically capable of being redesigned anyway because it is a single-molecule drug.[4]

To be sure, New Hampshire's design-defect claim creates an incentive for a drug manufacturer to make changes to its product, including to the drug's label, to try to avoid liability. And respondent overstates her case somewhat when she suggests that New Hampshire's strict-liability law is purely compensatory. See Brief for Respondent 19. As is typically true of strict-liability regimes, New Hampshire's law,

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nity from strict liability under comment k." 2 American Law of Products Liability 3d § 17.45, p. 108 (2010). Like New Hampshire courts, these courts apply comment *k* on a case-by-case basis. See 1 L. Frumer & M. Friedman, Products Liability § 8.07[5], pp. 8–287 to 8–293 (2012).

[4] Because of this feature of New Hampshire law, it is unnecessary to consider whether the pre-emption analysis would differ in a jurisdiction that required proof of a feasible alternative design as an element of liability.

which mandates compensation only for "defective" products, serves both compensatory and regulatory purposes. See *Heath* v. *Sears, Roebuck & Co.*, 123 N. H. 512, 521–522, 464 A. 2d 288, 293 (1983). But exposure to liability, and the "incidental regulatory effects" that flow from that exposure, *Goodyear Atomic Corp.* v. *Miller*, 486 U. S. 174, 185–186 (1988), is not equivalent to a legal mandate for a regulated party to take (or refrain from taking) a specific action. This difference is a significant one: A mandate leaves no choice for a party that wishes to comply with the law, whereas an incentive may only influence a choice.

Our cases reflect this distinction. In *Bates*, for example, we rejected an argument that design-defect claims brought against a pesticide manufacturer were pre-empted because they would likely "induce" the manufacturer to change its product label and thus run afoul of an express pre-emption provision forbidding state labeling "requirements" that were different or in addition to federal requirements. 544 U. S., at 444–446. A requirement, we explained, "is a rule of law that must be obeyed." *Id.*, at 445. "[A]n event, such as a jury verdict, that merely motivates an optional decision" does not rise to that level. *Ibid.*[5]

[5] The majority suggests my account of *Bates* is "simply misleading," *ante*, at 491, but it simply misses the point. I recognize that, under the Court's precedents, common-law duties may qualify as "requirements," at least as that term has been used in express pre-emption provisions in federal law. See *Riegel* v. *Medtronic, Inc.*, 552 U. S. 312, 323–324 (2008). But determining precisely what, if any, specific requirement a state common-law claim imposes is important. In *Bates*, the lower court had accepted the same basic argument that the majority advances here: that the plaintiffs' design-defect claim that a pesticide was "unreasonably dangerous" was "merely a disguised claim for failure to warn" because success on the claim that the pesticide was dangerous to crops in soil above a certain pH level would "necessarily induce" a manufacturer to change its product's label to avoid liability. *Dow Agrosciences LLC* v. *Bates*, 332 F. 3d 323, 332–333 (CA5 2003). This Court explicitly rejected the notion that because design-defect liability might lead a manufacturer to make a label change, it meant that the State's design-defect claim imposed a

So too here. The fact that imposing strict liability for injuries caused by a defective drug design might make a drug manufacturer want to change its label or design (or both) does not mean the manufacturer was actually required by state law to take either action. And absent such a legal obligation, the majority's impossibility argument does not get off the ground, because there was no state requirement that it was physically impossible for Mutual to comply with while also following federal law. The case is therefore unlike *PLIVA*, where it was "undisputed" that applicable state tort law "require[d] a drug manufacturer that is or should be aware of its product's danger" to strengthen its label—a requirement that conflicted with federal law preventing the manufacturer from doing so unilaterally, 564 U. S., at 611, 614, 624. New Hampshire's design-defect law did not require Mutual to do anything other than to compensate consumers who were injured by an unreasonably dangerous drug.

2

Moreover, the trial record in this case confirms that, contrary to the majority's insistence, Mutual was not held liable for "breach[ing] [its] duty" "to label sulindac adequately." *Ante*, at 486.

When Bartlett filed suit against Mutual, she raised distinct claims based on design defect and failure to warn. App. 102–108; see 659 F. Supp. 2d 279, 282 (NH 2009). Pursuing both claims was consistent with New Hampshire law's recognition that "design defect and failure to warn claims are separate." *LeBlanc* v. *American Honda Motor Co.*, 141 N. H.

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requirement for labeling or packaging. See 544 U. S., at 445–446. The majority contends that this case is different because the duty to redesign sulindac's label was an element of New Hampshire's design-defect law. *Ante*, at 492. But it is not. See *supra*, at 506–507. Rather, altering a product label is merely one step a manufacturer might take to prevent its product from being considered unreasonably dangerous, and it is a step that New Hampshire law recognizes may be insufficient. See *infra*, at 511.

579, 586, 688 A. 2d 556, 562 (1997). After the District Court granted summary judgment to Mutual on the failure-to-warn claim, the court repeatedly explained that an alleged failure to warn by Mutual could not and did not provide the basis for Bartlett's recovery. See 760 F. Supp. 2d, at 248–249.[6]

The majority notes that the District Court admitted evidence regarding sulindac's label. *Ante*, at 484–485. But the court did so because the label remained relevant for the more limited purpose of assessing, in combination with other factors, whether sulindac's design was defective because the product was unreasonably dangerous. See 678 F. 3d, at 41. The District Court's instructions to the jury adhered to this limited purpose. The court first told the jury to determine whether sulindac was unreasonably dangerous by weighing its danger against its utility. App. 513. The court further instructed the jury that if it determined that sulindac was unreasonably dangerous without reference to the warning label, it could then consider the presence and efficacy of the label to evaluate whether the product was unreasonably dangerous "even with its warning." *Id.*, at 513–514. In other words, to hold Mutual liable, the jury was required to find that sulindac "was unreasonably dangerous *despite* its warning, not because of it." *Id.*, at 341. The District Court also

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[6] For example, in a ruling on proposed jury instructions, the District Court made clear that "Bartlett cannot be allowed to circumvent this court's summary judgment ruling by using Sulindac's warning to establish that the drug is unreasonably dangerous (i. e., arguing that Sulindac is unreasonably dangerous *because* of its warning), where this court has already ruled that any inadequacy in the warning did not cause Bartlett's injuries." App. 343. Doing so, the court explained, "would effectively turn this case back into a failure-to-warn case, rendering the summary judgment ruling meaningless." *Ibid.*

The District Court later told counsel that it had removed a failure-to-warn instruction from the jury instructions because "[t]his is not a failure to warn case," and the court admonished counsel to "tread carefully" in arguing about the warning label because the label's adequacy was "not an issue before this jury." *Id.*, at 496.

explained to the jury that because Bartlett's claim addressed only whether sulindac's design was defective, Mutual's conduct, "which included any failure to change its warning, was 'not relevant to this case.' " 760 F. Supp. 2d, at 248.

The distinction drawn by the District Court between permissible and impermissible uses of evidence regarding sulindac's label is faithful to New Hampshire law. That law recognizes that the effectiveness of a warning label is just one relevant factor in determining whether a product's design is unreasonably dangerous, and that design-defect and failure-to-warn claims are "separate." *LeBlanc*, 141 N. H., at 586, 688 A. 2d, at 562.[7] In short, as the District Court made clear, Mutual was not held liable for "failing to change" its warning. 760 F. Supp. 2d, at 248–249.

C

Given the distinction that New Hampshire draws between failure-to-warn claims and design-defect claims, as well as the clear and repeated statements by the trial judge that Mutual's liability was not predicated on breaching a duty to label sulindac adequately, on what basis does the majority reach a contrary conclusion? Though the majority insists otherwise, *ante*, at 490, it appears to rely principally on an implicit assumption about rights conferred by federal premarket approval under the FDCA. After correctly observing that changing sulindac's chemical composition would create a new drug that would have to go through its own approval process, the majority reasons that Mutual must

[7] To the extent the majority believes that the District Court in practice allowed the adequacy of the warning label to play a greater role at trial than it should have, see *ante*, at 484–485, that is irrelevant to the question before the Court. Statements by counsel, even if improper, do not change the state-law cause of action that we evaluate for pre-emption purposes. And the Court of Appeals specifically concluded that the District Court's jury instructions were appropriate and that "[i]f Mutual wanted a further caution in the instructions" concerning its warning label, then Mutual "should have sought it." 678 F. 3d 30, 41–42 (CA1 2012).

have been under a state-law duty to change its label because it had no other option to avoid liability while continuing to sell its product. *Ante*, at 483–484. But that conclusion is based on a false premise.

A manufacturer of a drug that is unreasonably dangerous under New Hampshire law has multiple options: It can change the drug's design or label in an effort to alter its risk-benefit profile, remove the drug from the market, or pay compensation as a cost of doing business. If federal law or the drug's chemical properties take the redesign option off the table, then that does not mean the manufacturer suddenly has a legal obligation under state law to improve the drug's label. Indeed, such a view of state law makes very little sense here because even if Mutual had strengthened its label to fully account for sulindac's risks, the company might still have faced liability for having a defective design. See *Thibault*, 118 N. H., at 808, 395 A. 2d, at 847 (explaining that strict liability "may attach even though . . . there was an adequate warning"). When a manufacturer cannot change the label or when doing so would not make the drug safe, the manufacturer may still choose between exiting the market or continuing to sell while knowing it may have to pay compensation to consumers injured by its product.[8]

[8] The majority's suggestion that a manufacturer's option of continuing to sell while paying compensation is akin to violating a statutory mandate and then suffering the consequence (such as paying a fine) is flawed. See *ante*, at 491. In that scenario, the manufacturer would have violated the law, and the fact that the law is enforced through monetary sanctions (rather than through an injunction or imprisonment) would not change that. Here, no matter how many times the majority insists otherwise, *ante*, at 492, a manufacturer who sells a drug whose design is found unreasonably dangerous based on a balance of factors has not violated a state law requiring it to change its label. In both cases, the manufacturer may owe money. But only in the former will it have failed to follow the law. Cf. *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 563 (2012) (recognizing that a condition that triggers a tax is not necessarily a "legal command" to take a certain action).

From a manufacturer's perspective, that may be an unwelcome choice. But it is a choice that a sovereign State may impose to protect its citizens from dangerous drugs or at least ensure that seriously injured consumers receive compensation. That is, a State may impose such a choice unless the FDCA gives manufacturers an absolute right to sell their products free from common-law liability, or state law otherwise "stands as an obstacle to the accomplishment" of federal objectives. *Crosby*, 530 U. S., at 373 (internal quotation marks omitted). Because the majority does not rely on obstacle pre-emption, it must believe that a manufacturer that received FDA premarket approval has a right not only to keep its drug on the market unless and until the FDA revokes approval, but also to be free from state-law liability that makes doing so more expensive. That proposition is fundamentally inconsistent with the FDCA's text, structure, saving clause, and history. See *supra*, at 498–501; *Levine*, 555 U. S., at 583 (THOMAS, J., concurring in judgment).

It is simply incorrect to say that federal law presupposes that drug manufacturers have a right to continue to sell a drug free from liability once it has been approved. Nothing in the language of the FDCA, which is framed as a prohibition on distribution without FDA approval, see 21 U. S. C. § 355(a), suggests such a right. Federal law itself bars the sale of previously approved drugs if new information comes to light demonstrating that the drug is "dangerous to health" and thus "misbranded." See §§ 331(a), 352(j); see *supra*, at 499.[9] Even outside that scenario, manufacturers regularly

[9] The majority properly leaves open the question whether state design-defect claims that parallel the federal misbranding statute are pre-empted. See *ante*, at 487–488, n. 4. The majority fails to appreciate, however, that this statute undermines its impossibility argument (as compared to an argument based on obstacle pre-emption) because it shows that there is no federal right or obligation to continue to sell a drug like sulindac that was previously approved. In fact, the statute demonstrates that sometimes a drug manufacturer like Mutual may have a federal duty not to sell its drug.

take drugs off the market when evidence emerges about a drug's risks, particularly when safer drugs that provide the same therapeutic benefits are available.[10] According to the FDA, while it has formal authority to withdraw approval for a drug based on new adverse information, see § 355(e), it is far more common for a manufacturer to stop selling its product voluntarily after the FDA advises the manufacturer that the drug is unsafe and that its risk-benefit profile cannot be adequately addressed through labeling changes or other measures. See U. S. Brief 5.

New Hampshire's design-defect cause of action thus does no more than provide an impetus for an action that is permitted and sometimes encouraged or even required by federal law.

D

The majority derides any suggestion that Mutual's ability to "stop selling" sulindac is relevant to the validity of its impossibility pre-emption defense. *Ante*, at 475, 488. But the majority's argument is built on the mistaken premise that Mutual is legally obligated by New Hampshire's design-defect law to modify its label in a way that federal law forbids. It is not. See *supra*, at 506–508. For that reason, rejecting impossibility pre-emption here would not render the doctrine "a dead letter" or "'all but meaningless.'" *Ante*, at 475, 488 (quoting *PLIVA*, 564 U. S., at 621). On the other hand, it is the majority that "work[s] a revolution in this Court's [impossibility] pre-emption case law," *ante*, at 475, by inferring a state-law requirement from the steps a manufac-

[10] See Government Accountability Office, Drug Safety: Improvement Needed in FDA's Postmarket Decision-making and Oversight Process 10 (GAO–06–402, 2006) (noting that 10 drugs were voluntarily withdrawn for safety reasons between 2000 and 2006); Wysowski & Swartz, Adverse Drug Event Surveillance and Drug Withdrawals in the United States, 1969–2002, 165 Archives Internal Med. 1363 (2005) (noting that more than 75 drugs and drug products were withdrawn from the market for safety reasons between 1969 and 2002).

turer might wish to take to avoid or mitigate its exposure to liability.

Not all products can be made safe for sale with an improved warning or a tweak in design. New Hampshire, through its design-defect law, has made a judgment that some drugs that were initially approved for distribution turn out to be inherently and unreasonably dangerous and should therefore not be sold unless the manufacturer is willing to compensate injured consumers. Congressional intent to pre-empt such a cause of action cannot be gleaned from the existence of federal specifications that apply to the product if it is sold. Instead, whether New Hampshire's design-defect cause of action is pre-empted depends on assessing whether it poses an obstacle to a federal policy to approve sulindac for use. Yet the majority skips that analysis and instead finds impossibility where it does not exist by relying on a question-begging assumption that Congress intended for Mutual to have a way to continue selling sulindac without incurring common-law liability. See *ante*, at 483–484.

The distinction between impossibility and obstacle pre-emption is an important one. While obstacle pre-emption can be abused when courts apply an overly broad conception of the relevant federal purpose to find pre-emption, see *Levine*, 555 U. S., at 601–602 (THOMAS, J., concurring in judgment), it is a useful framework for a case like this one because it would at least lead the Court to ask the right questions.

For example, properly evaluating the asserted conflict here through the lens of obstacle pre-emption would allow the Court to consider evidence about whether Congress intended the FDA to make an optimal safety determination and set a maximum safety standard (in which case state tort law would undermine the purpose) rather than a minimal safety threshold (in which case state tort law could supplement it). See, *e. g.*, *Williamson* v. *Mazda Motor of America, Inc.*, 562 U. S. 323, 335 (2011). By contrast, the majori-

ty's overbroad impossibility framework takes no account of how federal drug-safety review actually works. Though the majority gestures to the rigorous nature of the FDA's review of new drug applications, *ante*, at 476–477, nothing in the majority's reasoning turns on how the FDA's premarketing review operates or on the agency's capacity to engage in postmarketing review.

In taking the approach it does, the majority replaces careful assessment of regulatory structure with an *ipse dixit* that pharmaceutical companies must have a way to "escape liability," *ante*, at 484, while continuing to sell a drug that received FDA approval. As a result, the majority effectively makes a highly contested policy judgment about the relationship between FDA review and state tort law—treating the FDA as the sole guardian of drug safety—without defending its judgment and without considering whether that is the policy judgment that Congress made.[11]

III

While the majority never addresses obstacle pre-emption, Mutual did argue in the alternative that Bartlett's design-defect cause of action is pre-empted because it conflicts with the purposes and objectives of the FDCA, as supplemented by the Hatch-Waxman Act, 98 Stat. 1585. Though it presents a closer question than the impossibility argument on which the majority relies, I would reject Mutual's obstacle pre-emption defense as well.

Mutual's most substantial contention is that New Hampshire's design-defect claim frustrates the policy underlying

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[11] Defending a policy judgment that treats the FDA as the exclusive guarantor of drug safety would be no easy task in light of evidence that resource constraints and gaps in legal authority, among other factors, limit the agency's ability to safeguard public health. See Kessler & Vladeck, A Critical Examination of the FDA's Efforts To Preempt Failure-to-Warn Claims, 96 Geo. L. J. 461, 483–495 (2008); see also *Wyeth* v. *Levine*, 555 U. S. 555, 578–579, and n. 11 (2009).

the FDCA's broader scheme of vesting authority in the FDA as an expert agency to determine which drug designs should enter and remain in interstate commerce. The FDA, through an *amicus* brief filed by the United States, generally supports this argument. The FDA states that the question whether a design-defect claim[12] is pre-empted is "difficult and close," and it recognizes that "[s]everal factors do weigh in favor of finding no preemption," including the absence of textual support in the FDCA for the idea that an approved drug must be made available in any particular State. See U. S. Brief 12, 21–22. But the FDA ultimately contends that design-defect claims are pre-empted unless they parallel the FDCA's misbranding prohibition because the agency believes that permitting juries to balance the health risks and benefits of an FDA-approved drug would undermine the FDA's drug-safety determinations and could reduce access to drugs that the FDA has determined are safe and effective.

Our cases have "given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive.'" *Levine*, 555 U. S., at 576 (quoting *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 883 (2000)). But courts do not "defe[r] to an agency's *conclusion* that state law is pre-empted," 555 U. S., at 576, and the tension that the FDA identifies in an effort to justify complete pre-emption of design-defect claims for prescription drugs does not satisfy the " high threshold [that] must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act," *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 607

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[12] The FDA purports to address what it calls a "pure" design-defect claim, and it references the Third Restatement § 6 by way of illustration. The FDA's separate discussion of a "pure" design-defect claim is based on the premise that New Hampshire's design-defect claim turns on the adequacy of a drug's warning. See U. S. Brief 20. But that is incorrect. See *supra*, at 507.

(2011) (plurality opinion) (internal quotation marks omitted); see *Silkwood*, 464 U. S., at 256. Given the FDCA's core purpose of protecting consumers, our recognition in *Levine* that state tort law generally complements the statute's safety goals, the practical limits on the FDA's ability to monitor and promptly address concerns about drug safety once a drug is in the market, see *supra*, at 500, 515–516, and n. 11, and the absence of any federal remedy for injured consumers, I would reject this broad obstacle pre-emption argument as well.[13]

IV

The most troubling aspect of the majority's decision to once again expand the scope of this Court's traditionally narrow impossibility pre-emption doctrine is what it implies about the relationship between federal premarket review and state common-law remedies more generally. Central to the majority's holding is an assumption that manufacturers must have a way to avoid state-law liability while keeping particular products in commerce. See *ante*, at 482–484, 488. This assumption, it seems, will always create an automatic conflict between a federal premarket review requirement and state-law design-defect liability because premarket review, by definition, prevents manufacturers from unilaterally changing their products' designs.[14] That is true, for example, of the designs (*i. e.*, the chemical composition) of brand-name drugs under the FDCA no less than it is for generic drugs. See *ante*, at 477.

If the creation of such an automatic conflict is the ultimate endpoint of the majority's continued expansion of impossi-

[13] I note that we are not confronted with a case in which the FDA promulgated "lawful specific regulations describing" whether and under what circumstances state design-defect liability interferes with "the safe drug-related medical care" sought through the FDCA. *Levine*, 555 U. S., at 582 (BREYER, J., concurring). See also *ante*, at 495 (BREYER, J., dissenting).

[14] Or at least it creates an automatic conflict with the caveat that design-defect claims that parallel a federal duty for manufacturers to withdraw a product might not be pre-empted. See *ante*, at 487–488, n. 4.

bility pre-emption, then the result is frankly astonishing. Congress adopted the FDCA's premarketing approval requirement in 1938 and then strengthened it in 1962 in response to serious public-health episodes involving unsafe drugs. See Future of Drug Safety 152. Yet by the majority's lights, the very act of creating that requirement in order to "safeguard the consumer," *United States* v. *Sullivan*, 332 U. S. 689, 696 (1948), also created by operation of law a shield for drug manufacturers to avoid paying common-law damages under state laws that are also designed to protect consumers. That is so notwithstanding Congress' effort to disclaim any intent to pre-empt all state law. See *supra*, at 499–500. The majority's reasoning thus "has the 'perverse effect' of granting broad immunity 'to an entire industry that, in the judgment of Congress, needed more stringent regulation.'" *Riegel*, 552 U. S., at 338 (GINSBURG, J., dissenting) (quoting *Lohr*, 518 U. S., at 487 (plurality opinion)).

This expanded notion of impossibility pre-emption threatens to disturb a considerable amount of state law. The FDCA's premarket approval process for prescription drugs has provided a model for the regulation of many other products.[15] In some statutes, Congress has paired premarket regulatory review with express pre-emption provisions that limit the application of state common-law remedies, including, in some instances, claims for defective product design. See, *e. g.*, *Riegel*, 552 U. S., at 323–325; see *supra*, at 500, and n. 2. In other instances, such as with prescription drugs, it has not. Under the majority's approach, it appears that design-defect claims are categorically displaced either way, and Congress' efforts to set the boundaries of pre-emption more precisely were largely academic. This could have serious consequences for product safety. State design-defect laws play an important role not only in discovering risks,

[15] See, *e. g.*, 7 U. S. C. § 136a (pesticides); 21 U. S. C. § 348 (food additives); § 360b (animal drugs); §§ 360c(a)(1)(C), 360e (certain medical devices); § 379e (color additives).

but also in providing incentives for manufacturers to remove dangerous products from the market promptly. See *Levine*, 555 U. S., at 578–579; *Bates*, 544 U. S., at 451; see also Conk, Is There a Design Defect in the Restatement (Third) of Torts: Products Liability? 109 Yale L. J. 1087, 1130 (2000) ("The tort system can encourage FDA regulatory vigor and competence"). If manufacturers of products that require preapproval are given *de facto* immunity from design-defect liability, then the public will have to rely exclusively on imperfect federal agencies with limited resources and sometimes limited legal authority to recall approved products. And consumers injured by those products will have no recourse.

The manner in which Congress has addressed pre-emption with respect to vaccines is particularly instructive. "[V]accines have been subject to the same federal premarket approval process as prescription drugs," and prior to Congress' intervention, "compensation for vaccine-related injuries ha[d] been left largely to the States." *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 226 (2011). In 1986, in response to a rise in tort suits that produced instability in the vaccine market, Congress enacted the National Childhood Vaccine Injury Act (Vaccine Act or Act), 42 U. S. C. § 300aa–22(b)(1). The Act established a no-fault compensation program funded through an excise tax on vaccines to compensate individuals injured or killed by vaccine side effects. "The *quid pro quo* for this" system, the Court stated in *Bruesewitz*, "was the provision of significant tort-liability protections for vaccine manufacturers." 562 U. S., at 229.

While Members of this Court disagreed on the scope of the tort protections the Vaccine Act was intended to offer, the Act's history demonstrates that Congress is perfectly capable of responding when it believes state tort law may compromise significant federal objectives under a scheme of premarket regulatory review for products it wants to make available. And it illustrates that "an important reason to

require that preemption decisions be made by Congress," rather than by courts on the basis of an expanded implied pre-emption doctrine, is Congress' ability to tie its pre-emption decisions "to some alternative means for securing compensation." Metzger, Federalism and Federal Agency Reform, 111 Colum. L. Rev. 1, 33 (2011). By instead reaching out to find pre-emption in a context where Congress never intended it, the majority leaves consumers like Karen Bartlett to bear enormous losses on their own.

* * *

The Court recognizes that "[t]his case arises out of tragic circumstances." *Ante*, at 493. And I do not doubt that Members of the majority personally feel sympathy for Karen Bartlett. But the Court's solemn affirmation that it merely discharges its duty to "follo[w] the law," *ante*, at 490, and gives effect to Congress' policy judgment, rather than its own, is hard to accept. By once again expanding the scope of impossibility pre-emption, the Court turns Congress' intent on its head and arrives at a holding that is irreconcilable with our precedents. As a result, the Court has left a seriously injured consumer without any remedy despite Congress' explicit efforts to preserve state common-law liability.

I respectfully dissent.

Per Curiam

RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* SCHAD

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

No. 12–1084. Decided June 24, 2013

After respondent Schad was convicted of first-degree murder and sentenced to death, a series of state- and federal-court proceedings ensued, during which the Ninth Circuit affirmed the District Court's denial of Schad's habeas claim of ineffective assistance of counsel at sentencing and denied Schad's motion to vacate its judgment and remand the case in light of *Martinez* v. *Ryan*, 566 U. S. 1. This Court denied Schad's subsequent petition for certiorari. On remand, the Ninth Circuit denied Schad's motion to stay the mandate. Rather than issuing the mandate, however, the court *sua sponte* construed Schad's request as a motion to reconsider its prior denial of his motion to vacate and remand in light of *Martinez* and remanded the case for consideration of Schad's ineffective-assistance-of-counsel claim.

Held: The Ninth Circuit's failure to issue the mandate constituted an abuse of discretion. Federal Rule of Appellate Procedure 41(d)(2)(D) provides that "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Even assuming that the Rule admits of exceptions, a court of appeals abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on a petition, absent extraordinary circumstances. See *Calderon* v. *Thompson*, 523 U. S. 538, 550. Here, there is no indication that any extraordinary circumstances called for the Ninth Circuit to revisit an argument *sua sponte* that it already explicitly rejected. Cf. *Bell* v. *Thompson*, 545 U. S. 794.

Certiorari granted; reversed and remanded.

PER CURIAM.

Respondent Edward Schad was convicted of first-degree murder and sentenced to death. After an extensive series of state- and federal-court proceedings concluded with this Court's denial of respondent's petitions for certiorari and for rehearing, the Ninth Circuit declined to issue its mandate as normally required by Federal Rule of Appellate Procedure

41(d)(2)(D). The Ninth Circuit instead, *sua sponte*, construed respondent's motion to stay the mandate pending the Ninth Circuit's decision in a separate en banc case as a motion to reconsider a motion that it had denied six months earlier. Based on its review of that previously rejected motion, the court issued a stay a few days before respondent's scheduled execution. Even assuming, as we did in *Bell* v. *Thompson*, 545 U. S. 794 (2005), that Rule 41(d)(2)(D) admits of any exceptions, the Ninth Circuit did not demonstrate that exceptional circumstances justified withholding its mandate. As a result, we conclude that the Ninth Circuit's failure to issue its mandate constituted an abuse of discretion.

I

In 1985, an Arizona jury found respondent guilty of first-degree murder for the 1978 strangling of 74-year-old Lorimer Grove.[1] The court sentenced respondent to death. After respondent's conviction and sentence were affirmed on direct review, see *State* v. *Schad*, 163 Ariz. 411, 788 P. 2d 1162 (1989), and *Schad* v. *Arizona*, 501 U. S. 624 (1991), respondent again sought state habeas relief, alleging that his trial counsel rendered ineffective assistance at sentencing by failing to discover and present sufficient mitigating evidence. The state courts denied relief.

In August 1998, respondent sought federal habeas relief. He again raised a claim of ineffective assistance at sentencing for failure to present sufficient mitigating evidence. The District Court denied respondent's request for an evidentiary hearing to present new mitigating evidence, concluding that respondent was not diligent in developing the evidence during his state habeas proceedings. *Schad* v. *Schriro*, 454 F. Supp. 2d 897 (Ariz. 2006). The District Court alternatively held that the proffered new evidence did not demon-

[1] A state habeas court vacated an earlier guilty verdict and death sentence due to an error in jury instructions. See *State* v. *Schad*, 142 Ariz. 619, 691 P. 2d 710 (1984).

strate that trial counsel's performance was deficient. *Id.*, at 940–947. The Ninth Circuit affirmed in part, reversed in part, and remanded to the District Court for a hearing to determine whether respondent's state habeas counsel was diligent in developing the state evidentiary record. *Schad* v. *Ryan*, 606 F. 3d 1022 (2010). Arizona petitioned for certiorari. This Court granted the petition, vacated the Ninth Circuit's opinion, and remanded for further proceedings in light of *Cullen* v. *Pinholster*, 563 U. S. 170 (2011). See *Ryan* v. *Schad*, 563 U. S. 932 (2011). On remand, the Ninth Circuit affirmed the District Court's denial of habeas relief. *Schad* v. *Ryan*, 671 F. 3d 708, 726 (2011). The Ninth Circuit subsequently denied a motion for rehearing and rehearing en banc on February 28, 2012.

On July 10, 2012, respondent filed in the Ninth Circuit the first motion directly at issue in this case. This motion asked the court to vacate its judgment and remand to the District Court for additional proceedings in light of this Court's decision in *Martinez* v. *Ryan*, 566 U. S. 1 (2012).[2] The Ninth Circuit denied respondent's motion on July 27, 2012. Respondent then filed a petition for certiorari. This Court denied the petition on October 9, 2012, 568 U. S. 945, and denied a petition for rehearing on January 7, 2013. 568 U. S. 1117.

Respondent returned to the Ninth Circuit that day and filed a motion requesting a stay of the mandate in light of a pending Ninth Circuit en banc case addressing the interaction between *Pinholster* and *Martinez*. The Ninth Circuit denied the motion on February 1, 2013, "declin[ing] to issue an indefinite stay of the mandate that would unduly interfere with Arizona's execution process." Order in No. 07–99005, Doc. 102, p. 1. But instead of issuing the mandate, the court decided *sua sponte* to construe respondent's motion "as a motion to reconsider our prior denial of his Motion to Vacate

[2] *Martinez*, 566 U. S. 1, was decided on March 20, 2012. We are unaware of any explanation for respondent's delay in bringing his *Martinez*-based argument to the Ninth Circuit's attention.

Judgment and Remand in light of *Martinez*," which the court had denied on July 27, 2012. *Id.*, at 2. The court ordered briefing and, in a divided opinion, remanded the case to the District Court to determine whether respondent could establish that he received ineffective assistance of postconviction counsel under *Martinez*, whether he could demonstrate prejudice as a result, and whether his underlying claim of ineffective assistance of trial counsel had merit. No. 07–99005 (Feb. 26, 2013), App. to Pet. for Cert. A–13 to A–15, 2013 WL 791610, *6. Judge Graber dissented based on her conclusion that respondent could not show prejudice. *Id.*, at A–16 to A–17, 2013 WL 791610, *7. Arizona set an execution date of March 6, 2013, which prompted respondent to file a motion for stay of execution on February 26, 2013. The Ninth Circuit panel granted the motion on March 1, 2013, with Judge Graber again noting her dissent.

On March 4, 2013, Arizona filed a petition for rehearing and rehearing en banc with the Ninth Circuit. The court denied the petition the same day, with eight judges dissenting in two separate opinions. 709 F. 3d 855.

On March 4, Arizona filed an application to vacate the stay of execution in this Court, along with a petition for certiorari. This Court denied the application, with JUSTICES SCALIA and ALITO noting that they would grant it. 568 U. S. 1222. We now consider the petition.

II

Federal Rule of Appellate Procedure 41(d)(2)(D) sets forth the default rule that "[t]he court of appeals *must issue the mandate immediately* when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." (Emphasis added.) The reason for this Rule is straightforward: "[T]he stay of mandate is entered solely to allow this Court time to consider a petition for certiorari." *Bell*, 545 U. S., at 806. Hence, once this Court has denied a petition, there is generally no need for further action from the lower

courts. See *ibid.* ("[A] decision by this Court denying discretionary review usually signals the end of litigation"). In *Bell*, Tennessee argued that Rule 41(d)(2)(D) "admits of no exceptions, so the mandate should have issued on the date" the Court of Appeals received notice of the Supreme Court's denial of certiorari. *Id.*, at 803. There was no need to resolve this issue in *Bell* because we concluded that the Sixth Circuit had abused its discretion even if Rule 41(d)(2)(D) authorized a stay of the mandate after denial of certiorari. *Id.*, at 803–804. As in *Bell*, we need not resolve this issue to determine that the Ninth Circuit abused its discretion here.

Bell recognized that when state-court judgments are reviewed in federal habeas proceedings, "finality and comity concerns," based in principles of federalism, demand that federal courts "accord the appropriate level of respect to" state judgments by allowing them to be enforced when federal proceedings conclude. *Id.*, at 812–813. As we noted, States have an "'"interest in the finality of convictions that have survived direct review within the state court system."'" *Id.*, at 813 (quoting *Calderon* v. *Thompson*, 523 U. S. 538, 555 (1998), in turn quoting *Brecht* v. *Abrahamson*, 507 U. S. 619, 635 (1993)). Elsewhere, we explained that "'the profound interests in repose' attaching to the mandate of a court of appeals" dictate that "the power [to withdraw the mandate] can be exercised only in extraordinary circumstances." *Calderon*, *supra*, at 550 (quoting 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3938, p. 712 (2d ed. 1996)). Deviation from normal mandate procedures is a power "of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon*, *supra*, at 550. Even assuming a court of appeals has authority to do so, it abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the petition, unless extraordinary circumstances justify that action.

Applying this standard in *Bell*, we found no extraordinary circumstances that could constitute a miscarriage of justice.

There, a capital defendant unsuccessfully alleged in state postconviction proceedings that his trial counsel had been ineffective by failing to introduce sufficient mitigating evidence in the penalty phase of trial. 545 U. S., at 797. On federal habeas review, he made the same argument. *Id.*, at 798. After the Sixth Circuit affirmed, the defendant filed a petition for rehearing that "placed substantial emphasis" on his argument that the Sixth Circuit had overlooked new psychiatrist evidence. *Id.*, at 800. While the Sixth Circuit denied the petition, it stayed the issuance of its mandate while the defendant sought certiorari and, later, rehearing from the denial of the writ. *Ibid.*

When this Court denied the petition for rehearing, the Sixth Circuit did not issue its mandate. Instead, the Sixth Circuit waited five months (and until two days before the scheduled execution) to issue an amended opinion that vacated the District Court's denial of habeas and remanded for an evidentiary hearing on the ineffective-assistance-of-counsel claim. *Id.*, at 800–801. This Court reversed that decision, holding that the Sixth Circuit had abused its discretion due to its delay in issuing the mandate without notifying the parties, its reliance on a previously rejected argument, and its disregard of comity and federalism principles.

In this case, the Ninth Circuit similarly abused its discretion when it did not issue the mandate. As in *Bell*, the Ninth Circuit here declined to issue the mandate based on an argument it had considered and rejected months earlier. And, by the time of the Ninth Circuit's February 1, 2013, decision not to issue its mandate, it had been over 10 months since we decided *Martinez* and nearly 7 months since respondent unsuccessfully asked the Ninth Circuit to reconsider its decision in light of *Martinez*.[3]

[3] Respondent did not even present the motion that the Ninth Circuit ultimately reinstated until more than 4 months after the Ninth Circuit denied respondent's request for panel rehearing and rehearing en banc and more than 3½ months after *Martinez* was decided.

Further, there is no doubt that the arguments presented in the rejected July 10, 2012, motion were identical to those accepted by the Ninth Circuit the following February. Respondent styled his July 10 motion a "Motion to Vacate Judgment and Remand to the District Court for Additional Proceedings in Light of *Martinez* v. *Ryan*." No. 07–99005 (CA9), Doc. 88, p. 1. As its title suggests, the only claim presented in that motion was that respondent's postconviction counsel should have developed more evidence to support his ineffective-assistance-of-trial-counsel claim. Here, as in *Bell*, respondent's July 10 motion "pressed the same arguments that eventually were adopted by the Court of Appeals." 545 U. S., at 806. These arguments were pressed so strongly in the July 10 motion that "[i]t is difficult to see how . . . counsel could have been clearer." *Id.*, at 808. The Ninth Circuit had a full "opportunity to consider these arguments" but declined to do so, *id.*, at 806, which "support[s] our determination that the decision to withhold the mandate was in error," *id.*, at 806–807. We presume that the Ninth Circuit carefully considers each motion a capital defendant presents on habeas review. See *id.*, at 808 (rejecting the notion that "judges cannot be relied upon to read past the first page of a petition for rehearing"). As a result, there is no indication that there were any extraordinary circumstances here that called for the court to revisit an argument *sua sponte* that it already explicitly rejected.

Finally, this case presents an additional issue not present in *Bell*. In refusing to issue the mandate, the Ninth Circuit panel relied heavily upon *Beardslee* v. *Brown*, 393 F. 3d 899, 901 (CA9 2004) (*per curiam*). *Beardslee*, which precedes our *Bell* decision by more than six months, asserts the Ninth Circuit's inherent authority to withhold a mandate. See App. to Pet. for Cert. A–3 to A–4, 2013 WL 791610, *1. But *Beardslee* was based on the Sixth Circuit's decision in *Bell*, which we reversed. See *Beardslee*, *supra*, at 901 (citing *Thompson* v. *Bell*, 373 F. 3d 688, 691–692 (2004)). That

opinion, thus, provides no support for the Ninth Circuit's decision.

In light of the foregoing, we hold that the Ninth Circuit abused its discretion when it neglected to issue its mandate. The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The Ninth Circuit's judgment is reversed, the stay of execution is vacated, and the case is remanded with instructions to issue the mandate immediately and without any further proceedings.

It is so ordered.

Syllabus

SHELBY COUNTY, ALABAMA *v.* HOLDER, ATTORNEY GENERAL, ET AL.

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

No. 12–96. Argued February 27, 2013—Decided June 25, 2013

The Voting Rights Act of 1965 was enacted to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309. Section 2 of the Act, which bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color," 42 U. S. C. § 1973(a), applies nationwide, is permanent, and is not at issue in this case. Other sections apply only to some parts of the country. Section 4 of the Act provides the "coverage formula," defining the "covered jurisdictions" as States or political subdivisions that maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s. § 1973b(b). In those covered jurisdictions, § 5 of the Act provides that no change in voting procedures can take effect until approved by specified federal authorities in Washington, D. C. § 1973c(a). Such approval is known as "preclearance."

The coverage formula and preclearance requirement were initially set to expire after five years, but the Act has been reauthorized several times. In 2006, the Act was reauthorized for an additional 25 years, but the coverage formula was not changed. Coverage still turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at that time. Shortly after the 2006 reauthorization, a Texas utility district sought to bail out from the Act's coverage and, in the alternative, challenged the Act's constitutionality. This Court resolved the challenge on statutory grounds, but expressed serious doubts about the Act's continued constitutionality. See *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193.

Petitioner Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General in Federal District Court in Washington, D. C., seeking a declaratory judgment that § 4(b) and § 5 are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing

§ 4(b)'s coverage formula. The D. C. Circuit affirmed. After surveying the evidence in the record, that court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, that § 5 was therefore still necessary, and that the coverage formula continued to pass constitutional muster.

Held: Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis for subjecting jurisdictions to preclearance. Pp. 542–557.

(a) In *Northwest Austin*, this Court noted that the Voting Rights Act "imposes current burdens and must be justified by current needs" and concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U. S., at 203. These basic principles guide review of the question presented here. Pp. 542–550.

(1) State legislation may not contravene federal law. States retain broad autonomy, however, in structuring their governments and pursuing legislative objectives. Indeed, the Tenth Amendment reserves to the States all powers not specifically granted to the Federal Government, including "the power to regulate elections." *Gregory* v. *Ashcroft*, 501 U. S. 452, 461–462. There is also a "fundamental principle of equal sovereignty" among the States, which is highly pertinent in assessing disparate treatment of States. *Northwest Austin*, *supra*, at 203.

The Voting Rights Act sharply departs from these basic principles. It requires States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own. And despite the tradition of equal sovereignty, the Act applies to only nine States (and additional counties). That is why, in 1966, this Court described the Act as "stringent" and "potent," *Katzenbach*, 383 U. S., at 308, 315, 337. The Court nonetheless upheld the Act, concluding that such an "uncommon exercise of congressional power" could be justified by "exceptional conditions." *Id.*, at 334. Pp. 542–545.

(2) In 1966, these departures were justified by the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century," *Katzenbach*, 383 U. S., at 308. At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. The Act was limited to areas where Congress found "evidence of actual voting discrimination," and the covered jurisdictions shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points

below the national average." *Id.*, at 330. The Court explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* The Court therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* Pp. 545–546.

(3) Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, "[v]oter turnout and registration rates" in covered jurisdictions "now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin*, *supra*, at 202. The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years. Yet the Act has not eased § 5's restrictions or narrowed the scope of § 4's coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger. Because § 5 applies only to those jurisdictions singled out by § 4, the Court turns to consider that provision. Pp. 547–550.

(b) Section 4's formula is unconstitutional in light of current conditions. Pp. 550–556.

(1) In 1966, the coverage formula was "rational in both practice and theory." *Katzenbach*, *supra*, at 330. It looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, the "coverage formula raise[d] serious constitutional questions." *Northwest Austin*, *supra*, at 204. Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years. And voter registration and turnout numbers in covered States have risen dramatically. In 1965, the States could be divided into those with a recent history of voting tests and low voter registration and turnout and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. Pp. 550–551.

(2) The Government attempts to defend the formula on grounds that it is "reverse-engineered"—Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. *Katzenbach* did not sanction such an approach, reasoning instead that the coverage formula was rational because the "formula . . . was relevant to the problem." 383 U. S., at 329, 330. The Government has a fallback

Syllabus

argument—because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965. But this does not look to "current political conditions," *Northwest Austin*, *supra*, at 203, instead relying on a comparison between the States in 1965. But history did not end in 1965. In assessing the "current need[ ]" for a preclearance system treating States differently from one another today, history since 1965 cannot be ignored. The Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. Pp. 551–553.

(3) Respondents also rely heavily on data from the record compiled by Congress before reauthorizing the Act. Regardless of how one looks at that record, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that clearly distinguished the covered jurisdictions from the rest of the Nation in 1965. *Katzenbach*, *supra*, at 308, 315, 331; *Northwest Austin*, *supra*, at 201. But a more fundamental problem remains: Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. Pp. 553–555.

679 F. 3d 848, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 557. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 559.

Bert W. Rein argued the cause for petitioner. With him on the briefs were *William S. Consovoy*, *Thomas R. McCarthy*, *Brendan J. Morrissey*, and *Frank C. Ellis, Jr.*

Solicitor General Verrilli argued the cause for the federal respondent. With him on the brief were *Assistant Attorney General Perez*, *Deputy Solicitor General Srinivasan*, *Sarah E. Harrington*, and *Diana K. Flynn.*

Debo P. Adegbile argued the cause for respondents Bobby Pierson et al. *M. Laughlin McDonald*, *Nancy G. Abudu*, *Steven R. Shapiro*, *Kim Keenan*, *Arthur B. Spitzer*, and *David I. Schoen* filed a brief for respondent-intervenor Bobby Pierson et al. *Mr. Adegbile*, *Elise C. Boddie*, *Ryan P. Haygood*, *Dale E. Ho*, *Natasha M. Korgaonkar*, *Leah C. Aden*, *Joshua*

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Civin, *Samuel Spital*, *William J. Honan*, *Harold Barry Vasios*, *Marisa Marinelli*, and *Robert J. Burns* filed a brief for respondent-intervenor Earl Cunningham et al. *Jon M. Greenbaum*, *Mark A. Posner*, *Maura Eileen O'Connor*, and *John M. Nonna* filed a brief for respondent-intervenor Bobby Lee Harris.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama by *Luther Strange*, Attorney General, *John C. Neiman, Jr.*, Solicitor General, *Andrew L. Brasher*, Deputy Solicitor General, and *Kasdin E. Miller*, Assistant Solicitor General; for the State of Alaska by *Michael C. Geraghty*, Attorney General, *Margaret Paton Walsh*, *Joanne M. Grace*, and *Ruth Botstein*; for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *David R. Cole*, Solicitor General, and *Michele L. Forney*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Sam Olens* of Georgia, *Alan Wilson* of South Carolina, and *Marty J. Jackley* of South Dakota; for the State of Texas by *Greg Abbott*, Attorney General, *Jonathan F. Mitchell*, Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Andrew S. Oldham*, Deputy Solicitor General, and *Matthew H. Frederick*, Assistant Solicitor General; for the Abraham Lincoln Foundation for Public Policy Research, Inc., et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Gary G. Kreep*; for the American Unity Legal Defense Fund by *John J. Park, Jr.*, and *Frank B. Strickland*; for the Center for Constitutional Jurisprudence by *Christian J. Ward*, *Scott A. Keller*, *April Farris*, *John C. Eastman*, and *Anthony T. Caso*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for the National Black Chamber of Commerce by *David B. Rivkin, Jr.*, *Andrew M. Grossman*, and *Lee A. Casey*; for Project 21 by *Erik S. Jaffe*; for the Reason Foundation by *Douglas R. Cox*, *Tyler R. Green*, and *Manuel S. Klausner*; for the Southeastern Legal Foundation by *Aaron M. Streett* and *Shannon Lee Goessling*; and for John Nix et al. by *Michael A. Carvin*, *Hashim M. Mooppan*, and *Michael E. Rosman*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, and *Cecelia C. Chang*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Kamala D. Harris* of California, *Jim Hood* of Mississippi, and *Roy Cooper* of North Carolina; for the City of New York et al. by *Michael A. Cardozo* and *Leonard J. Koerner*; for the Alabama Legislative Black Caucus et al. by *James U. Blacksher*; for the American Bar Association by *Laurel G. Bellows* and *Jessica L. Ellsworth*; for Asian American Public Interest Groups by *Monte Cooper*; for the Brennan Center for Justice at

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5

NYU School of Law by *Paul M. Smith*, *Michael B. DeSanctis*, *Jessica Ring Amunson*, *Wendy Weiser*, and *Sidney S. Rosdeitcher*; for Constitutional Law Scholars et al. by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *David H. Gans*; for Historians et al. by *Derek T. Ho* and *David L. Schwarz*; for Jurisdictions That Have Bailed Out by *J. Gerald Hebert*, *Paul S. Ryan*, and *Tara Malloy*; for the Leadership Conference on Civil and Human Rights et al. by *Matthew M. Hoffman*, *Lisa M. Bornstein*, *Stephen J. Pollak*, *John Townsend Rich*, and *Sirisha V. Kalicheti*; for National Latino Organizations by *Mark E. Haddad*, *Juan Cartagena*, *Carter G. Phillips*, *Thomas A. Saenz*, and *Nina Perales*; for the National Lawyers Guild by *David Gespass*; for the Navajo Nation et al. by *Judith M. Dworkin* and *Patricia A. Ferguson-Bohnee*; for Political Science and Law Professors by *Anita Earls* and *Allison Riggs*; for Section 5 Litigation Intervenors by *Michael B. de Leeuw*, *Ezra D. Rosenberg*, *Gary Bledsoe*, *Jose Garza*, *David Honig*, *Robert S. Notzon*, and *Luis R. Vera, Jr.*; for Joaquin Avila et al. by *Kieran P. Ringgenberg* and *Perry M. Grossman*; for Patricia A. Broussard et al. by *Ms. Broussard*, *pro se*; for Gabriel Chin et al. by *Jeffrey T. Green*, *Robert N. Hochman*, and *Sarah O'Rourke Schrup*; for Richard L. Engstrom et al. by *Peter Buscemi*; for Marcia L. Fudge et al. by *Danielle Spinelli* and *Danielle Conley*; for Senator C. Bradley Hutto et al. by *Garrard R. Beeney*, *Michael A. Cooper*, and *Peter A. Steciuk*; for Ellen D. Katz et al. by *Lisa S. Blatt*, *Charles G. Curtis, Jr.*, and *Anthony J. Franze*; for Congressman John Lewis by *Deborah N. Archer* and *Aderson B. François*; for Representative F. James Sensenbrenner, Jr., et al. by *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *Kevin K. Russell*; and for Dick Thornburgh et al. by *Douglas Hallward-Driemeier* and *Elizabeth N. Dewar*.

Briefs of *amici curiae* were filed for Merced County, California, by *James N. Fincher*, *Marguerite Mary Leoni*, and *Christopher E. Skinnell*; for the Alaska Federation of Natives et al. by *James T. Tucker* and *Natalie A. Landreth*; for the Cato Institute by *Ilya Shapiro*; for the Judicial Education Project by *Richard K. Willard*, *Shannen W. Coffin*, and *Carrie Severino*; for the Landmark Legal Foundation by *Richard P. Hutchison*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the National Bar Association by *Jonathan M. Cohen*, *Mark A. Packman*, and *John Page*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard*, *Deborah J. La Fetra*, *Joshua P. Thompson*, and *Ralph W. Kasarda*; for

of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.*, at 334. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 203–204 (2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).

Former Government Officials by *Jeffrey M. Harris* and *Mario Loyola*; for Veterans of the Mississippi Civil Rights Movement by *Mr. François* and *Peggy Cooper Davis*; and for Senate Majority Leader Harry M. Reid by *Marc E. Elias*, *John M. Devaney*, and *Noah Guzzo Purcell*.

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin*, 557 U. S., at 203.

I

A

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation."

"The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Id.*, at 197. In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African-Americans from voting. *Katzenbach*, 383 U. S., at 310. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African-Americans barely improved. *Id.*, at 313–314.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437. The current ver-

sion forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U. S. C. § 1973(a). Both the Federal Government and individuals have sued to enforce § 2, see, *e. g.*, *Johnson* v. *De Grandy*, 512 U. S. 997 (1994), and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U. S. C. § 1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. § 4(c), *id.*, at 438–439. A covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4(a), *id.*, at 438. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. See 28 CFR pt. 51, App. (2012).

In those jurisdictions, § 4 of the Act banned all such tests or devices. § 4(a), 79 Stat. 438. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D. C.—either the Attorney General or a court of three judges. *Id.*, at 439. A jurisdiction could obtain such "preclearance" only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." *Ibid.*

Sections 4 and 5 were intended to be temporary; they were set to expire after five years. See § 4(a), *id.*, at 438; *Northwest Austin*, *supra,* at 199. In *South Carolina* v. *Katzenbach*, we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale." 383 U. S., at 308.

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in § 4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. Voting Rights Act Amendments of 1970, §§ 3–4, 84 Stat. 315. That swept in several counties in California, New Hampshire, and New York. See 28 CFR pt. 51, App. Congress also extended the ban in § 4(a) on tests and devices nationwide. § 6, 84 Stat. 315.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Voting Rights Act Amendments of 1975, §§ 101, 202, 89 Stat. 400, 401. Congress also amended the definition of "test or device" to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. § 203, *id.*, at 401–402. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. See 28 CFR pt. 51, App. Congress correspondingly amended § 2 and § 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color. §§ 203, 206, 89 Stat. 401, 402. Finally, Congress made the nationwide ban on tests and devices permanent. § 102, *id.*, at 400.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. See Voting Rights Act

Amendments, 96 Stat. 131. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a §2 suit, in the ten years prior to seeking bailout. §2, *id.*, at 131–133.

We upheld each of these reauthorizations against constitutional challenge. See *Georgia* v. *United States*, 411 U. S. 526 (1973); *City of Rome* v. *United States*, 446 U. S. 156 (1980); *Lopez* v. *Monterey County*, 525 U. S. 266 (1999).

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577. Congress also amended §5 to prohibit more conduct than before. §5, *id.*, at 580– 581; see *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 341 (2000) (*Bossier II*); *Georgia* v. *Ashcroft*, 539 U. S. 461, 479 (2003). Section 5 now forbids voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice." 42 U. S. C. §§1973c(b)–(d).

Shortly after this reauthorization, a Texas utility district brought suit, seeking to bail out from the Act's coverage and, in the alternative, challenging the Act's constitutionality. See *Northwest Austin*, 557 U. S., at 200–201. A three-judge District Court explained that only a State or political subdivision was eligible to seek bailout under the statute, and concluded that the utility district was not a political subdivision, a term that encompassed only "counties, parishes, and voter-registering subunits." *Northwest Austin Municipal Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 232 (DC 2008). The District Court also rejected the constitutional challenge. *Id.*, at 283.

We reversed. We explained that "'normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Northwest Austin*, *supra,* at 205 (quoting *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (1984) (*per curiam*)). Concluding that "underlying constitutional concerns," among other things, "compel[led] a broader reading of the bailout provision," we construed the statute to allow the utility district to seek bailout. *Northwest Austin*, 557 U. S., at 207. In doing so we expressed serious doubts about the Act's continued constitutionality.

We explained that § 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.*, at 202, 203 (internal quotation marks omitted). We also noted that "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id.,* at 202. Finally, we questioned whether the problems that § 5 meant to address were still "concentrated in the jurisdictions singled out for preclearance." *Id.,* at 203.

Eight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional. Ultimately, however, the Court's construction of the bailout provision left the constitutional issues for another day.

B

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. See App. 87a–92a. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D. C., seeking a declaratory judgment that § 4(b) and § 5 of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their en-

forcement. The District Court ruled against the county and upheld the Act. 811 F. Supp. 2d 424, 508 (2011). The court found that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing the § 4(b) coverage formula.

The Court of Appeals for the D. C. Circuit affirmed. In assessing § 5, the D. C. Circuit considered six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful § 2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, § 5 preclearance suits involving covered jurisdictions, and the deterrent effect of § 5. See 679 F. 3d 848, 862–863 (2012). After extensive analysis of the record, the court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that § 5 was therefore still necessary. *Id.*, at 873.

Turning to § 4, the D. C. Circuit noted that the evidence for singling out the covered jurisdictions was "less robust" and that the issue presented "a close question." *Id.*, at 879. But the court looked to data comparing the number of successful § 2 suits in the different parts of the country. Coupling that evidence with the deterrent effect of § 5, the court concluded that the statute continued "to single out the jurisdictions in which discrimination is concentrated," and thus held that the coverage formula passed constitutional muster. *Id.*, at 883.

Judge Williams dissented. He found "no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout." *Id.*, at 891. Rather, to the extent there was any correlation, it actually went the other way: "condemnation under § 4(b) is a marker of *higher* black registration and turnout." *Ibid.* (emphasis added). Judge Williams also found that "[c]overed jurisdictions have *far more* black officeholders as a proportion of the black popula-

tion than do uncovered ones." *Id.*, at 892. As to the evidence of successful § 2 suits, Judge Williams disaggregated the reported cases by State, and concluded that "[t]he five worst uncovered jurisdictions . . . have worse records than eight of the covered jurisdictions." *Id.*, at 897. He also noted that two covered jurisdictions—Arizona and Alaska—had not had any successful reported § 2 suit brought against them during the entire 24 years covered by the data. *Ibid.* Judge Williams would have held the coverage formula of § 4(b) "irrational" and unconstitutional. *Id.*, at 885.

We granted certiorari. 568 U. S. 1006 (2012).

II

In *Northwest Austin*, we stated that "the Act imposes current burdens and must be justified by current needs." 557 U. S., at 203. And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Ibid.* These basic principles guide our review of the question before us.*

A

The Constitution and laws of the United States are "the supreme Law of the Land." U. S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. See 1 Rec-

*Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*, see Juris. Statement i, and Brief for Federal Appellee 29–30, in *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, O. T. 2008, No. 08–322, and accordingly *Northwest Austin* guides our review under both Amendments in this case.

ords of the Federal Convention of 1787, pp. 21, 164–168 (M. Farrand ed. 1911); 2 *id.*, at 27–29, 390–392.

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States*, 564 U. S. 211, 221 (2011). But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Ibid.* (internal quotation marks omitted).

More specifically, "'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Gregory* v. *Ashcroft*, 501 U. S. 452, 461–462 (1991) (quoting *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973); some internal quotation marks omitted). Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, § 4, cl. 1; see also *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, *ante*, at 7–9. But States have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington* v. *Rash*, 380 U. S. 89, 91 (1965) (internal quotation marks omitted); see also *Arizona*, *ante*, at 15–17. And "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 161 (1892). Drawing lines for congressional districts is likewise "primarily the duty and responsibility of the State." *Perry* v. *Perez*, 565 U. S. 388, 392 (2012) (*per curiam*) (internal quotation marks omitted).

Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin*, *supra*, at 203 (emphasis added; citing *United States* v. *Louisiana*, 363 U. S. 1, 16 (1960); *Lessee of Pollard* v. *Hagan*, 3 How. 212, 223 (1845); and *Texas* v. *White*, 7 Wall. 700, 725–726 (1869)). Over one hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." *Coyle* v. *Smith*, 221 U. S. 559, 567 (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.*, at 580. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. 383 U. S., at 328–329. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. 557 U. S., at 203.

The Voting Rights Act sharply departs from these basic principles. It suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C." *Id.*, at 202. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. See 28 CFR §§ 51.9, 51.37. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal

legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation." 679 F. 3d, at 884 (Williams, J., dissenting) (case below).

All this explains why, when we first upheld the Act in 1966, we described it as "stringent" and "potent." *Katzenbach*, 383 U. S., at 308, 315, 337. We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." *Id.*, at 334. We have since noted that the Act "authorizes federal intrusion into sensitive areas of state and local policymaking," *Lopez*, 525 U. S., at 282, and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 500–501 (1992). As we reiterated in *Northwest Austin*, the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system." 557 U. S., at 211.

B

In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U. S., at 308. Several States had enacted a variety of requirements and tests "specifically designed to prevent" African-Americans from voting. *Id.*, at 310. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." *Id.*, at 314. Shortly before

enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *Id.*, at 313. Those figures were roughly 50 percentage points or more below the figures for whites. *Ibid.*

In short, we concluded that "[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Id.*, at 334, 335. We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years. *Id.*, at 333; *Northwest Austin*, *supra*, at 199.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *Katzenbach*, 383 U. S., at 328. The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id.*, at 330. We explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* We therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. *Id.*, at 308. The formula ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant." *Id.*, at 315.

C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin*, 557 U. S., at 202. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See § 6, 84 Stat. 315; § 102, 89 Stat. 400.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." § 2(b)(1), 120 Stat. 577. The House Report elaborated that "the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." H. R. Rep. No. 109–478, p. 12 (2006). That Report also explained that there have been "significant increases in the number of African-Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act. *Id.*, at 18.

The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These

are the numbers that were before Congress when it reauthorized the Act in 2006:

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

See S. Rep. No. 109–295, p. 11 (2006); H. R. Rep. No. 109–478, at 12. The 2004 figures come from the Census Bureau. Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Table 4b). The preclearance statistics are also illuminating. In the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes. H. R. Rep. No. 109–478, at 22. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent. S. Rep. No. 109–295, at 13.

There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. See § 2(b)(1), 120 Stat. 577. During the "Freedom Summer" of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African-American voters. See *United States* v.

Price, 383 U. S. 787, 790 (1966). On "Bloody Sunday" in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African-American enfranchisement. See *Northwest Austin*, 557 U. S., at 220, n. 3 (THOMAS, J., concurring in judgment in part and dissenting in part). Today both of those towns are governed by African-American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. See 42 U. S. C. § 1973b(a)(8). Congress also expanded the prohibitions in § 5. We had previously interpreted § 5 to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups. See *Bossier II*, 528 U. S., at 324, 335–336. In 2006, Congress amended § 5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose, see 42 U. S. C. § 1973c(c), even though we had stated that such broadening of § 5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality," *Bossier II*, *supra*, at 336 (citation and internal quotation marks omitted). In addition, Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." § 1973c(b). In light of those two amendments, the bar that covered jurisdictions

must clear has been raised even as the conditions justifying that requirement have dramatically improved.

We have also previously highlighted the concern that "the preclearance requirements in one State [might] be unconstitutional in another." *Northwest Austin*, 557 U. S., at 203; see *Georgia* v. *Ashcroft*, 539 U. S., at 491 (KENNEDY, J., concurring) ("considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5"). Nothing has happened since to alleviate this troubling concern about the current application of § 5.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions.

III

A

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." *Katzenbach*, 383 U. S., at 330. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." *Northwest Austin*, 557 U. S., at 204. As we explained, a statute's "current burdens" must be justified by "current needs," and

any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Id.*, at 203. The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. §6, 84 Stat. 315; §102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. H. R. Rep. No. 109–478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, *e. g.*, *Katzenbach*, *supra*, at 313, 329–330. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

B

The Government's defense of the formula is limited. First, the Government contends that the formula is "reverse-engineered": Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Brief for Federal Respondent 48–49. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.

The Government suggests that *Katzenbach* sanctioned such an approach, but the analysis in *Katzenbach* was quite different. *Katzenbach* reasoned that the coverage formula was rational because the "formula . . . was relevant to the

problem": "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U. S., at 329, 330.

Here, by contrast, the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to "extraordinary legislation otherwise unfamiliar to our federal system," *Northwest Austin*, *supra*, at 211—that failure to establish even relevance is fatal.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. Brief for Federal Respondent 49–50. This argument does not look to "current political conditions," *Northwest Austin*, *supra*, at 203, but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966. See *Katzenbach*, *supra*, at 308 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.").

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[ ]" for a preclearance system

that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. See *Rice* v. *Cayetano*, 528 U. S. 495, 512 (2000) ("Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment."). To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin*, and we make it clear again today.

C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh §2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Compare, *e. g.*,

679 F. 3d, at 873–883 (case below), with *id.*, at 889–902 (Williams, J., dissenting). Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach*, 383 U. S., at 308, 315, 331; *Northwest Austin*, 557 U. S., at 201.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, see *post*, at 580 (opinion of GINSBURG, J.), we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. *Post*, at 581–587. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The

county was selected based on that formula, and may challenge it in court.

D

The dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819), with the following emphasis: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Post*, at 567 (emphasis in dissent). But this case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is "consist[ent] with the letter and spirit of the constitution." The dissent states that "[i]t cannot tenably be maintained" that this is an issue with regard to the Voting Rights Act, *ibid.*, but four years ago, in an opinion joined by two of today's dissenters, the Court expressly stated that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions," *Northwest Austin*, *supra*, at 204. The dissent does not explain how those "serious constitutional questions" became untenable in four short years.

The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary. At the risk of repetition, *Katzenbach* indicated that the Act was "uncommon" and "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions. 383 U. S., at 334, 335. Multiple decisions since have reaffirmed the Act's "extraordinary" nature. See, *e. g.*, *Northwest Austin*, *supra*, at 211. Yet the dissent goes so far as to suggest instead that the preclearance requirement and disparate treatment of the States should be upheld into the future "unless there [is] no or almost no evidence of unconstitutional action by States." *Post*, at 590.

In other ways as well, the dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin*'s emphasis on its significance. *Northwest Austin* also emphasized the "dramatic" progress since 1965, 557 U. S., at 201, but the dissent describes current levels of discrimination as "flagrant," "widespread," and "pervasive," *post*, at 565, 575 (internal quotation marks omitted). Despite the fact that *Northwest Austin* requires an Act's "disparate geographic coverage" to be "sufficiently related" to its targeted problems, 557 U. S., at 203, the dissent maintains that an Act's limited coverage actually eases Congress's burdens, and suggests that a fortuitous relationship should suffice. Although *Northwest Austin* stated definitively that "current burdens" must be justified by "current needs," *ibid.*, the dissent argues that the coverage formula can be justified by history, and that the required showing can be weaker on reenactment than when the law was first passed.

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

* * *

Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Vot-

ing Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley*, 502 U. S., at 500–501. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in full but write separately to explain that I would find § 5 of the Voting Rights Act unconstitutional as well. The Court's opinion sets forth the reasons.

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." *Ante*, at 534. In the face of "unremitting and ingenious defiance" of citizens' constitutionally protected right to vote, § 5 was necessary to give effect to the Fifteenth Amendment in particular regions of the country. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966). Though § 5's preclearance require-

ment represented a "shar[p] depart[ure]" from "basic principles" of federalism and the equal sovereignty of the States, *ante,* at 542, 544, the Court upheld the measure against early constitutional challenges because it was necessary at the time to address "voting discrimination where it persist[ed] on a pervasive scale," *Katzenbach*, *supra*, at 308.

Today, our Nation has changed. "[T]he conditions that originally justified [§ 5] no longer characterize voting in the covered jurisdictions." *Ante,* at 535. As the Court explains: "'Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.'" *Ante,* at 540 (quoting *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 202 (2009)).

In spite of these improvements, however, Congress *increased* the already significant burdens of § 5. Following its reenactment in 2006, the Voting Rights Act was amended to "prohibit more conduct than before." *Ante,* at 539. "Section 5 now forbids voting changes with 'any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, 'to elect their preferred candidates of choice.'" *Ibid.* While the pre-2006 version of the Act went well beyond protection guaranteed under the Constitution, see *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 480–482 (1997), it now goes even further.

It is, thus, quite fitting that the Court repeatedly points out that this legislation is "extraordinary" and "unprecedented" and recognizes the significant constitutional problems created by Congress' decision to raise "the bar that covered jurisdictions must clear," even as "the conditions justifying that requirement have dramatically improved." *Ante,* at 549–550. However one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5. As the Court aptly notes: "[N]o one can fairly say that [the record] shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination

that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time." *Ante*, at 554. Indeed, circumstances in the covered jurisdictions can no longer be characterized as "exceptional" or "unique." *Ante*, at 555. "The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." *Northwest Austin*, *supra*, at 226 (THOMAS, J., concurring in judgment in part and dissenting in part). Section 5 is, thus, unconstitutional.

While the Court claims to "issue no holding on § 5 itself," *ante*, at 557, its own opinion compellingly demonstrates that Congress has failed to justify "'current burdens'" with a record demonstrating "'current needs.'" See *ante*, at 542 (quoting *Northwest Austin*, *supra*, at 203). By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court's opinion, I would find § 5 unconstitutional.

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

In the Court's view, the very success of §5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, §5 remains justifiable,[1] this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would

[1] The Court purports to declare unconstitutional only the coverage formula set out in §4(b). See *ante*, at 557. But without that formula, §5 is immobilized.

guard against backsliding. Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.

I

"[V]oting discrimination still exists; no one doubts that." *Ante*, at 536. But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA or Act) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the "blight of racial discrimination in voting" continued to "infec[t] the electoral process in parts of our country." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966). Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens. *Id.*, at 311. To take just one example, the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary elections, *Nixon* v. *Herndon*, 273 U. S. 536, 541; in 1944, the Court struck down a "reenacted" and slightly altered version of the same law, *Smith* v. *Allwright*, 321 U. S. 649, 658; and in 1953, the Court once again confronted an attempt by Texas to "circumven[t]" the Fifteenth Amendment by adopting yet another variant of the all-white primary, *Terry* v. *Adams*, 345 U. S. 461, 469.

During this era, the Court recognized that discrimination against minority voters was a quintessentially political problem requiring a political solution. As Justice Holmes explained: If "the great mass of the white population intends to keep the blacks from voting," "relief from [that] great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." *Giles* v. *Harris*, 189 U. S. 475, 488 (1903).

Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of "the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds." *Katzenbach*, 383 U. S., at 313. But circumstances reduced the ameliorative potential of these legislative Acts:

> "Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls." *Id.*, at 314 (footnote omitted).

Patently, a new approach was needed.

Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution's commands were most virulent—the VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by §5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes. 79 Stat. 439, codified at 42 U. S. C. § 1973c(a). A change will be approved unless DOJ finds it has "the purpose [or] . . . the effect of denying or abridging the right to vote on account of race or color." *Ibid.* In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia.

After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and

Amendments Act of 2006 (hereinafter 2006 Reauthorization), § 2(b)(1), 120 Stat. 577. On that matter of cause and effects there can be no genuine doubt.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. *City of Rome* v. *United States*, 446 U. S. 156, 181 (1980). Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." *Ibid.* (quoting H. R. Rep. No. 94–196, p. 10 (1975)). See also *Shaw* v. *Reno*, 509 U. S. 630, 640 (1993) ("[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices" such as voting dilution). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." *Id.*, at 642. Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. Grofman & Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution in the

South 301, 319 (C. Davidson & B. Grofman eds. 1994) (hereinafter Quiet Revolution). A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. *Shaw*, 509 U. S., at 640–641; *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 569 (1969); *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964). See also H. R. Rep. No. 109–478, p. 6 (2006) (although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").

In response to evidence of these substituted barriers, Congress reauthorized the VRA for 5 years in 1970, for 7 years in 1975, and for 25 years in 1982. *Ante*, at 538–539. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. *Ante*, at 539. As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA's preclearance mechanism remained an appropriate response to the problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. S. Rep. No. 109–295, p. 2 (2006). In April 2006, the Senate followed suit, with hearings of its own. *Ibid.* In May 2006, the bills that became the VRA's reauthorization were introduced in both Houses. *Ibid.* The House held further hearings of considerable length, as did the Senate, which continued to hold hearings into June and July. H. R. Rep. No. 109–478, at 5;

S. Rep. No. 109–295, at 3–4. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. 152 Cong. Rec. 14303–14304 (2006); Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L. J. 174, 182–183 (2007) (hereinafter Persily). The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. 152 Cong. Rec. 15325 (2006). President Bush signed it a week later, on July 27, 2006, recognizing the need for "further work . . . in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect." 152 Cong. Rec. 16946–16947 (2006).

In the long course of the legislative process, Congress "amassed a sizable record." *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 205 (2009). See also 679 F. 3d 848, 865–873 (CADC 2012) (describing the "extensive record" supporting Congress' determination that "serious and widespread intentional discrimination persisted in covered jurisdictions"). The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, and received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. H. R. Rep. No. 109–478, at 5, 11–12; S. Rep. No. 109–295, at 2–4, 15. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." 679 F. 3d, at 866.

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority

voter registration and turnout and the number of minority elected officials. 2006 Reauthorization § 2(b)(1). But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §§ 2(b)(2)–(3), 120 Stat. 577. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. §§ 2(b)(4)–(5), *id.*, at 577–578. The overall record demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(9), *id.*, at 578.

Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. 42 U. S. C. §§ 1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

II

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886). When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation."[2] In choosing this language, the Amendment's framers invoked Chief Justice Marshall's formulation of the scope of Congress' powers under the Necessary and Proper Clause:

> "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819) (emphasis added).

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in *Northwest Austin*,[3] is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve. Notably, "the Founders' first successful amendment told Congress that it could 'make no law' over a

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[2] The Constitution uses the words "right to vote" in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact "appropriate legislation" to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U. S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections. U. S. Const., Art. I, §4 ("[T]he Congress may at any time by Law make or alter" regulations concerning the "Times, Places and Manner of holding Elections for Senators and Representatives."); *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, *ante*, at 8.

[3] Acknowledging the existence of "serious constitutional questions," see *ante*, at 555 (internal quotation marks omitted), does not suggest how those questions should be answered.

certain domain"; in contrast, the Civil War Amendments used "language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality" and provided "sweeping enforcement powers . . . to enact 'appropriate' legislation targeting state abuses." A. Amar, America's Constitution: A Biography 361, 363, 399 (2005). See also McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 182 (1997) (quoting Civil War-era framer: "[T]he remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative.").

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use "all means which are appropriate, which are plainly adapted" to the constitutional ends declared by these Amendments. *McCulloch*, 4 Wheat., at 421. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. "It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach* v. *Morgan*, 384 U. S. 641, 653 (1966).

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its judgments in this domain should garner. *South Carolina* v. *Katzenbach* supplies the standard of review: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U. S., at 324. Faced with subsequent reauthorizations of the VRA, the

Court has reaffirmed this standard. *E. g.*, *City of Rome*, 446 U. S., at 178. Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed "rational means."

For three reasons, legislation reauthorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that pre-existing record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality and Congress has adhered to the very model the Court has upheld. See *id.*, at 174 ("The appellants are asking us to do nothing less than overrule our decision in *South Carolina* v. *Katzenbach* . . . , in which we upheld the constitutionality of the Act."); *Lopez* v. *Monterey County*, 525 U. S. 266, 283 (1999) (similar).

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. Cf. *Grutter* v. *Bollinger*, 539 U. S. 306, 343 (2003) (anticipating, but not guaranteeing, that, in 25 years, "the use of racial preferences [in higher education] will no longer be necessary").

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See Persily 193–194.

This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are "adapted to carry out the objects the amendments have in view." *Ex parte Virginia*, 100 U. S. 339, 346 (1880). The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that "Congress could rationally have determined that [its chosen] provisions were appropriate methods." *City of Rome*, 446 U. S., at 176–177.

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, to be working to advance the Legislature's legitimate objective.

III

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch*, 4 Wheat., at 421: Congress may choose any means "appropriate" and "plainly adapted to" a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise.

A

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. See *City of Rome*, 446 U. S., at 181 (identifying "information on the number and types of

submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General" as a primary basis for upholding the 1975 reauthorization). On that score, the record before Congress was huge. In fact, Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess., 172 (2006) (hereinafter Evidence of Continued Need).

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. H. R. Rep. No. 109–478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, see 679 F. 3d, at 867, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process," H. R. Rep. No. 109–478, at 21. On top of that, over the same time period DOJ and private plaintiffs succeeded in more than 100 actions to enforce the §5 preclearance requirements. 1 Evidence of Continued Need 186, 250.

In addition to blocking proposed voting changes through preclearance, DOJ may request more information from a jurisdiction proposing a change. In turn, the jurisdiction may modify or withdraw the proposed change. The number of such modifications or withdrawals provides an indication of how many discriminatory proposals are deterred without need for formal objection. Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982. H. R. Rep. No. 109–478, at 40–41.[4] Congress also received empirical studies

[4] This number includes only changes actually proposed. Congress also received evidence that many covered jurisdictions engaged in an "informal consultation process" with DOJ before formally submitting a proposal, so

finding that DOJ's requests for more information had a significant effect on the degree to which covered jurisdictions "compl[ied] with their obligatio[n]" to protect minority voting rights. 2 Evidence of Continued Need 2555.

Congress also received evidence that litigation under §2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. 1 *id.*, at 97. An illegal scheme might be in place for several election cycles before a §2 plaintiff can gather sufficient evidence to challenge it. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., 92 (2005) (hereinafter Section 5 Hearing). And litigation places a heavy financial burden on minority voters. See *id.*, at 84. Congress also received evidence that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a §2 claim, and clearance by DOJ substantially reduces the likelihood that a §2 claim will be mounted. Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess.,

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that the deterrent effect of preclearance was far broader than the formal submissions alone suggest. The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., 53–54 (2006). All agree that an unsupported assertion about "deterrence" would not be sufficient to justify keeping a remedy in place in perpetuity. See *ante*, at 550. But it was certainly reasonable for Congress to consider the testimony of witnesses who had worked with officials in covered jurisdictions and observed a real-world deterrent effect.

13, 120–121 (2006). See also Brief for State of New York et al. as *Amici Curiae* 8–9 (Section 5 "reduc[es] the likelihood that a jurisdiction will face costly and protracted Section 2 litigation.").

The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy. Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which §5 continues to protect minority voting rights. Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization:

- In 1995, Mississippi sought to reenact a dual voter registration system, "which was initially enacted in 1892 to disenfranchise Black voters," and for that reason, was struck down by a federal court in 1987. H. R. Rep. No. 109–478, at 39.
- Following the 2000 census, the city of Albany, Georgia, proposed a redistricting plan that DOJ found to be "designed with the purpose to limit and retrogress the increased black voting strength . . . in the city as a whole." *Id.*, at 37 (internal quotation marks omitted).
- In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town's election after "an unprecedented number" of African-American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen. *Id.*, at 36–37.
- In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore "the mark of intentional discrimination that could give rise to an equal protection violation," and ordered the district redrawn in compliance with the VRA.

League of United Latin American Citizens v. *Perry*, 548 U. S. 399, 440 (2006). In response, Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the §5 preclearance requirement. See Order in *League of United Latin American Citizens* v. *Texas*, No. 06–cv–1046 (WD Tex., Dec. 5, 2006), Doc. 8.

- In 2003, after African-Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African-American members of the school board, was found to be an "'exact replica'" of an earlier voting scheme that, a federal court had determined, violated the VRA. 811 F. Supp. 2d 424, 483 (DC 2011). See also S. Rep. No. 109–295, at 309. DOJ invoked §5 to block the proposal.
- In 1993, the city of Millen, Georgia, proposed to delay the election in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives. 1 Section 5 Hearing 744. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits. *Id.*, at 816.
- In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce the availability of early voting in that election at polling places near a historically black university. 679 F. 3d, at 865–866.
- In 1990, Dallas County, Alabama, whose county seat is the city of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory,

> noting that it would have disqualified many citizens from voting "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so." 1 Section 5 Hearing 356.

These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress' conclusion that "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive." 679 F. 3d, at 865.[5]

Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an "avalanche of case studies of voting rights violations in the covered jurisdictions," ranging from "outright intimidation and violence against minority voters" to "more subtle forms of voting rights deprivations." Persily 202. This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting.

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization § 2(b)(1). But Congress also found that voting discrimination had evolved into

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[5] For an illustration postdating the 2006 reauthorization, see *South Carolina* v. *United States*, 898 F. Supp. 2d 30 (DC 2012), which involved a South Carolina voter-identification law enacted in 2011. Concerned that the law would burden minority voters, DOJ brought a §5 enforcement action to block the law's implementation. In the course of the litigation, South Carolina officials agreed to binding interpretations that made it "far easier than some might have expected or feared" for South Carolina citizens to vote. *Id.*, at 37. A three-judge panel precleared the law after adopting both interpretations as an express "condition of preclearance." *Id.*, at 37–38. Two of the judges commented that the case demonstrated "the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.*, at 54 (Bates, J., concurring).

subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. §§2(b)(2), (9). Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA. *City of Rome*, 446 U. S., at 180–182 (congressional reauthorization of the preclearance requirement was justified based on "the number and nature of objections interposed by the Attorney General" since the prior reauthorization; extension was "necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination" (internal quotation marks omitted)). Facing such evidence then, the Court expressly rejected the argument that disparities in voter turnout and number of elected officials were the only metrics capable of justifying reauthorization of the VRA. *Ibid.*

B

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in §4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. *Ante*, at 545–546. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." *Ante*, at 552. But the Court ignores that "what's past is prologue." W. Shakespeare, The Tempest, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, The Life of Reason 284 (1905). Congress was espe-

cially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization § 2(b)(9).

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs." *Northwest Austin*, 557 U. S., at 203.

Congress learned of these conditions through a report, known as the Katz study, that looked at § 2 suits between 1982 and 2004. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., 964–1124 (2005) (hereinafter Impact and Effectiveness). Because the private right of action authorized by § 2 of the VRA applies nationwide, a comparison of § 2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would expect that the rate of successful § 2 lawsuits would be roughly the same in both areas.[6] The study's findings, however, indicated that racial discrimination in voting remains "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U. S., at 203.

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. Impact and Effectiveness 974. Controlling for population, there were nearly *four* times as many successful § 2 cases in covered jurisdictions as there were in noncovered

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[6] Because preclearance occurs only in covered jurisdictions and can be expected to stop the most obviously objectionable measures, one would expect a *lower* rate of successful §2 lawsuits in those jurisdictions if the risk of voting discrimination there were the same as elsewhere in the country.

jurisdictions. 679 F. 3d, at 874. The Katz study further found that §2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. Impact and Effectiveness 974. From these findings—ignored by the Court—Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. H. R. Rep. No. 109–478, at 34–35. While racially polarized voting alone does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically outvoted and having their interests underrepresented in legislatures. Second, "when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." Ansolabehere, Persily, & Stewart, Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act, 126 Harv. L. Rev. Forum 205, 209 (2013).

In other words, a governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive "will inevitably discriminate against a racial group." *Ibid.* Just as buildings in California have a greater need to be earthquake proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic litera-

ture. See 2006 Reauthorization § 2(b)(3), 120 Stat. 577 ("The continued evidence of racially polarized voting in each of the jurisdictions covered by the [preclearance requirement] demonstrates that racial and language minorities remain politically vulnerable."); H. R. Rep. No. 109–478, at 35; Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution 21, 22.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded covered jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to "bail out" of preclearance, and for court-ordered "bail ins." See *Northwest Austin*, 557 U. S., at 199. The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U. S. C. § 1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. § 1973a(c) (2006 ed.).

Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H. R. Rep. No. 109–478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so"). Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also

worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a–3a.

This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. See *ante*, at 551. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat[e about] what [the] record shows." *Ante*, at 553. One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

A

Shelby County launched a purely facial challenge to the VRA's 2006 reauthorization. "A facial challenge to a legislative Act," the Court has other times said, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987).

"[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610–611 (1973). Instead, the "judicial Power" is limited to deciding particular "Cases" and "Controversies." U. S. Const., Art. III, § 2. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick*, 413 U. S., at 610. Yet the Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

Alabama is home to Selma, site of the "Bloody Sunday" beatings of civil-rights demonstrators that served as the catalyst for the VRA's enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama's capital, where he called for passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King's words, "the arc of the moral universe is long, but it bends toward justice." G. May, Bending Toward Justice:

The Voting Rights Act and the Transformation of American Democracy 144 (2013).

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi. 679 F. 3d, at 897 (Williams, J., dissenting). In other words, even while subject to the restraining effect of §5, Alabama was found to have "deni[ed] or abridge[d]" voting rights "on account of race or color" more frequently than nearly all other States in the Union. 42 U. S. C. § 1973(a). This fact prompted the dissenting judge below to concede that "a more narrowly tailored coverage formula" capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting "might be defensible." 679 F. 3d, at 897 (opinion of Williams, J.). That is an understatement. Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to §5's preclearance requirement.[7]

A few examples suffice to demonstrate that, at least in Alabama, the "current burdens" imposed by §5's preclearance requirement are "justified by current needs." *Northwest Austin*, 557 U. S., at 203. In the interim between the VRA's 1982 and 2006 reauthorizations, this Court twice confronted purposeful racial discrimination in Alabama. In *Pleasant Grove* v. *United States*, 479 U. S. 462 (1987), the Court held that Pleasant Grove—a city in Jefferson County, Shelby County's neighbor—engaged in purposeful discrimi-

[7] This lawsuit was filed by Shelby County, a political subdivision of Alabama, rather than by the State itself. Nevertheless, it is appropriate to judge Shelby County's constitutional challenge in light of instances of discrimination statewide because Shelby County is subject to §5's preclearance requirement by virtue of *Alabama's* designation as a covered jurisdiction under §4(b) of the VRA. See *ante*, at 540. In any event, Shelby County's recent record of employing an at-large electoral system tainted by intentional racial discrimination is by itself sufficient to justify subjecting the county to §5's preclearance mandate. See *infra*, at 583–584.

nation by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. The city had "shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws," and its strategic annexations appeared to be an attempt "to provide for the growth of a monolithic white voting block" for "the impermissible purpose of minimizing future black voting strength." *Id.*, at 465, 471–472.

Two years before *Pleasant Grove*, the Court in *Hunter* v. *Underwood*, 471 U. S. 222 (1985), struck down a provision of the Alabama Constitution that prohibited individuals convicted of misdemeanor offenses "involving moral turpitude" from voting. *Id.*, at 223 (internal quotation marks omitted). The provision violated the Fourteenth Amendment's Equal Protection Clause, the Court unanimously concluded, because "its original enactment was motivated by a desire to discriminate against blacks on account of race[,] and the [provision] continues to this day to have that effect." *Id.*, at 233.

Pleasant Grove and *Hunter* were not anomalies. In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated § 2. *Dillard* v. *Crenshaw Cty.*, 640 F. Supp. 1347, 1354–1363 (MD Ala. 1986). Summarizing its findings, the court stated that "[f]rom the late 1800's through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." *Id.*, at 1360.

The *Dillard* litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. *Dillard* v. *Baldwin Cty. Bd. of Ed.*, 686 F. Supp. 1459, 1461 (MD Ala. 1988). One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it. See *Dillard* v. *Crenshaw Cty.*, 748 F. Supp. 819 (MD Ala. 1990).

Although the *Dillard* litigation resulted in overhauls of numerous electoral systems tainted by racial discrimination, concerns about backsliding persist. In 2008, for example,

the city of Calera, located in Shelby County, requested preclearance of a redistricting plan that "would have eliminated the city's sole majority-black district, which had been created pursuant to the consent decree in *Dillard*." 811 F. Supp. 2d, at 443. Although DOJ objected to the plan, Calera forged ahead with elections based on the unprecleared voting changes, resulting in the defeat of the incumbent African-American councilman who represented the former majority-black district. *Ibid.* The city's defiance required DOJ to bring a §5 enforcement action that ultimately yielded appropriate redress, including restoration of the majority-black district. *Ibid.*; Brief for Respondent-Intervenor Cunningham et al. 20.

A recent Federal Bureau of Investigation (FBI) investigation provides a further window into the persistence of racial discrimination in state politics. See *United States* v. *McGregor*, 824 F. Supp. 2d 1339, 1344–1348 (MD Ala. 2011). Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the State Senate derisively refer to African-Americans as "Aborigines" and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African-American voter turnout. *Id.*, at 1345–1346 (internal quotation marks omitted). See also *id.*, at 1345 (legislators and their allies expressed concern that if the referendum were placed on the ballot, "'[e]very black, every illiterate' would be 'bused [to the polls] on HUD financed buses' "). These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010. *Id.*, at 1344–1345. The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the "recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem" in Alabama.

Id., at 1347. Racist sentiments, the judge observed, "remain regrettably entrenched in the high echelons of state government." *Ibid.*

These recent episodes forcefully demonstrate that §5's preclearance requirement is constitutional as applied to Alabama and its political subdivisions.[8] And under our case law, that conclusion should suffice to resolve this case. See *United States* v. *Raines*, 362 U. S. 17, 24–25 (1960) ("[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."). See also *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 743 (2003) (SCALIA, J., dissenting) (where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress' enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute "could constitutionally be applied to *some* jurisdictions").

This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress' enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court. See *United States* v. *Georgia*, 546 U. S. 151, 159 (2006) (Title II of the Americans with Disabilities Act of 1990 (ADA) validly abrogates state sovereign immunity "insofar as [it] creates a private cause of action . . . for conduct that *actually* violates the Fourteenth Amendment"); *Tennessee* v. *Lane*, 541 U. S. 509, 530–534 (2004) (Title II of the ADA is constitutional "as it applies to the class of cases implicating the fundamental right of access to the courts"); *Raines*, 362 U. S., at 24–26

[8] Congress continued preclearance over Alabama, including Shelby County, *after* considering evidence of current barriers there to minority voting clout. Shelby County, thus, is no "redhead" caught up in an arbitrary scheme. See *ante*, at 554.

(federal statute proscribing deprivations of the right to vote based on race was constitutional as applied to the state officials before the Court, even if it could not constitutionally be applied to other parties). A similar approach is warranted here.[9]

The VRA's exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§ 4(b) and 5 of the VRA, even though application of those provisions to the county falls well within the bounds of Congress' legislative authority. The severability provision states:

> "If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 42 U. S. C. §1973p.

In other words, even if the VRA could not constitutionally be applied to certain States—*e. g.*, Arizona and Alaska, see *ante*, at 542—§1973p calls for those unconstitutional applications to be severed, leaving the Act in place for jurisdictions as to which its application does not transgress constitutional limits.

Nevertheless, the Court suggests that limiting the jurisdictional scope of the VRA in an appropriate case would be to "try our hand at updating the statute." *Ante*, at 554.

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[9] The Court does not contest that Alabama's history of racial discrimination provides a sufficient basis for Congress to require Alabama and its political subdivisions to preclear electoral changes. Nevertheless, the Court asserts that Shelby County may prevail on its facial challenge to §4's coverage formula because it is subject to §5's preclearance requirement by virtue of that formula. See *ante*, at 554–555 ("The county was selected [for preclearance] based on th[e coverage] formula."). This misses the reality that Congress decided to subject Alabama to preclearance based on evidence of continuing constitutional violations in that State. See *supra*, at 585, n. 8.

Just last Term, however, the Court rejected this very argument when addressing a materially identical severability provision, explaining that such a provision is "Congress' explicit textual instruction to leave unaffected the remainder of [the Act]" if any particular "application is unconstitutional." *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 586 (2012) (plurality opinion) (internal quotation marks omitted); *id.*, at 645–646 (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part) (agreeing with the plurality's severability analysis). See also *Raines*, 362 U. S., at 23 (a statute capable of some constitutional applications may nonetheless be susceptible to a facial challenge only in "that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application"). Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today's demolition of the VRA.

B

The Court stops any application of §5 by holding that §4(b)'s coverage formula is unconstitutional. It pins this result, in large measure, to "the fundamental principle of equal sovereignty." *Ante*, at 542, 544–545, 556. In *Katzenbach*, however, the Court held, in no uncertain terms, that the principle "*applies only to the terms upon which States are admitted to the Union*, and not to the remedies for local evils which have subsequently appeared." 383 U. S., at 328–329 (emphasis added).

Katzenbach, the Court acknowledges, "rejected the notion that the [equal sovereignty] principle operate[s] as a bar on

differential treatment outside [the] context [of the admission of new States]." *Ante*, at 544 (citing 383 U. S., at 328–329; emphasis deleted). But the Court clouds that once clear understanding by citing dictum from *Northwest Austin* to convey that the principle of equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." *Ante*, at 544 (citing 557 U. S., at 203). See also *ante*, at 556 (relying on *Northwest Austin*'s "emphasis on [the] significance" of the equal-sovereignty principle). If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*'s limitation of the equal-sovereignty doctrine to "the admission of new States," the suggestion is untenable. *Northwest Austin* cited *Katzenbach*'s holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. 557 U. S., at 203–204. In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal-sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited "significance" of the equal-sovereignty principle.

Today's unprecedented extension of the equal-sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, *e. g.*, 28 U. S. C. §3704(a)(1) (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme "at any time during the period beginning January 1, 1976, and ending August 31, 1990"); 26 U. S. C. §142(*l*) (Environmental Protection Agency required to locate green building project in a State meeting specified population criteria); 42 U. S. C. §3796bb(b) (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with "a population density of fifty-two or fewer persons per

square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997"); §§13925, 13971 (similar population criteria for funding to combat rural domestic violence); §10136(c)(6) (specifying rules applicable to Nevada's Yucca Mountain nuclear waste site, and providing that "[n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987"). Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

Of gravest concern, Congress relied on our pathmarking *Katzenbach* decision in each reauthorization of the VRA. It had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality. See, *e. g.*, *United States* v. *Morrison*, 529 U. S. 598, 626–627 (2000) (confining preclearance regime to States with a record of discrimination bolstered the VRA's constitutionality). Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect. See Persily 195 ("[S]upporters of the Act sought to develop an evidentiary record for the principal purpose of explaining why the covered jurisdictions should remain covered, rather than justifying the coverage of certain jurisdictions but not others.").

In the Court's conception, it appears, defenders of the VRA could not prevail upon showing what the record overwhelmingly bears out, *i. e.*, that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. See Tr. of Oral Arg. 61–62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

C

The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. See, *e. g.*, *City of Boerne* v. *Flores*, 521 U. S. 507, 530 (1997) (legislative record "mention[ed] no episodes [of the kind the legislation aimed to check] occurring in the past 40 years"). No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress' bailiwick.

Instead, the Court strikes §4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." *Ante*, at 550. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. 2006 Reauthorization §§2(b)(3), (9). Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

But, the Court insists, the coverage formula is no good; it is based on "decades-old data and eradicated practices." *Ante*, at 551. Even if the legislative record shows, as engaging with it would reveal, that the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination, that is of no moment, as the Court sees it. Congress, the Court decrees, must "star[t] from scratch." *Ante*, at 556. I do not see why that should be so.

Congress' chore was different in 1965 than it was in 2006. In 1965, there were a "small number of States . . . which in most instances were familiar to Congress by name," on which Congress fixed its attention. *Katzenbach*, 383 U. S.,

at 328. In drafting the coverage formula, "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States" it sought to target. *Id.*, at 329. "The formula [Congress] eventually evolved to describe these areas" also captured a few States that had not been the subject of congressional factfinding. *Ibid.* Nevertheless, the Court upheld the formula in its entirety, finding it fair "to infer a significant danger of the evil" in all places the formula covered. *Ibid.*

The situation Congress faced in 2006, when it took up reauthorization of the coverage formula, was not the same. By then, the formula had been in effect for many years, and all of the jurisdictions covered by it were "familiar to Congress by name." *Id.*, at 328. The question before Congress: Was there still a sufficient basis to support continued application of the preclearance remedy in each of those already-identified places? There was at that point no chance that the formula might inadvertently sweep in new areas that were not the subject of congressional findings. And Congress could determine from the record whether the jurisdictions captured by the coverage formula still belonged under the preclearance regime. If they did, there was no need to alter the formula. That is why the Court, in addressing prior reauthorizations of the VRA, did not question the continuing "relevance" of the formula.

Consider once again the components of the record before Congress in 2006. The coverage provision identified a known list of places with an undisputed history of serious problems with racial discrimination in voting. Recent evidence relating to Alabama and its counties was there for all to see. Multiple Supreme Court decisions had upheld the coverage provision, most recently in 1999. There was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that preclearance was still having a substantial real-world effect, having stopped hundreds of

discriminatory voting changes in the covered jurisdictions since the last reauthorization. In addition, there was evidence that racial polarization in voting was higher in covered jurisdictions than elsewhere, increasing the vulnerability of minority citizens in those jurisdictions. And countless witnesses, reports, and case studies documented continuing problems with voting discrimination in those jurisdictions. In light of this record, Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas. And certainly Shelby County was no candidate for release through the mechanism Congress provided. See *supra*, at 581, 583–584.

The Court holds §4(b) invalid on the ground that it is "irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time." *Ante*, at 556. But the Court disregards what Congress set about to do in enacting the VRA. That extraordinary legislation scarcely stopped at the particular tests and devices that happened to exist in 1965. The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race. As the record for the 2006 reauthorization makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions. See *supra*, at 563–564, 566, 573–575.

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proved effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. *Ante*, at 552–553, 554, 556. With that belief, and the argument derived from it, history repeats itself. The same assumption—that the problem could be solved when particular methods of voting discrimination are identi-

fied and eliminated—was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the "variety and persistence" of measures designed to impair minority voting rights. *Katzenbach*, 383 U. S., at 311; *supra*, at 560. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.

Beyond question, the VRA is no ordinary legislation. It is extraordinary because Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the VRA, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years" he had served in the House. 152 Cong. Rec. 14230 (2006) (statement of Rep. Sensenbrenner). After exhaustive evidence gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." 2006 Reauthorization §2(b)(7), 120 Stat. 578. That determination of the body empowered to enforce the Civil War Amendments "by appropriate legislation" merits this Court's ut-

most respect. In my judgment, the Court errs egregiously by overriding Congress' decision.

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals.

Syllabus

KOONTZ *v.* ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 11–1447. Argued January 15, 2013—Decided June 25, 2013

Coy Koontz, Sr., whose estate is represented here by petitioner, sought permits to develop a section of his property from respondent St. Johns River Water Management District (District), which, consistent with Florida law, requires permit applicants wishing to build on wetlands to offset the resulting environmental damage. Koontz offered to mitigate the environmental effects of his development proposal by deeding to the District a conservation easement on nearly three-quarters of his property. The District rejected Koontz's proposal and informed him that it would approve construction only if he (1) reduced the size of his development and, *inter alia*, deeded to the District a conservation easement on the resulting larger remainder of his property or (2) hired contractors to make improvements to District-owned wetlands several miles away. Believing the District's demands to be excessive in light of the environmental effects his proposal would have caused, Koontz filed suit under a state law that provides money damages for agency action that is an "unreasonable exercise of the state's police power constituting a taking without just compensation."

The trial court found the District's actions unlawful because they failed the requirements of *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, and *Dolan* v. *City of Tigard*, 512 U. S. 374. Those cases held that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. The District Court of Appeal affirmed, but the State Supreme Court reversed on two grounds. First, it held that petitioner's claim failed because, unlike in *Nollan* or *Dolan*, the District *denied* the application. Second, the State Supreme Court held that a demand for money cannot give rise to a claim under *Nollan* and *Dolan*.

Held:

1. The government's demand for property from a land-use permit applicant must satisfy the *Nollan*/*Dolan* requirements even when it denies the permit. Pp. 604–611.

(a) The unconstitutional conditions doctrine vindicates the Constitution's enumerated rights by preventing the government from coercing

people into giving them up, and *Nollan* and *Dolan* represent a special application of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. The standard set out in *Nollan* and *Dolan* reflects the danger of governmental coercion in this context while accommodating the government's legitimate need to offset the public costs of development through land-use exactions. *Dolan*, *supra*, at 391; *Nollan*, *supra*, at 837. Pp. 604–606.

(b) The principles that undergird *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. Recognizing such a distinction would enable the government to evade the *Nollan*/*Dolan* limitations simply by phrasing its demands for property as conditions precedent to permit approval. This Court's unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. See, *e. g.*, *Frost & Frost Trucking Co.* v. *Railroad Comm'n of Cal.*, 271 U. S. 583, 592–593. It makes no difference that no property was actually taken in this case. Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. Nor does it matter that the District might have been able to deny Koontz's application outright without giving him the option of securing a permit by agreeing to spend money improving public lands. It is settled that the unconstitutional conditions doctrine applies even when the government threatens to withhold a gratuitous benefit. See, *e. g.*, *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 210. Pp. 606–609.

(c) The District concedes that the denial of a permit could give rise to a valid *Nollan*/*Dolan* claim, but urges that this Court should not review this particular denial because Koontz sued in the wrong court, for the wrong remedy, and at the wrong time. Most of its arguments raise questions of state law. But to the extent that respondent alleges a federal obstacle to adjudication of petitioner's claim, the Florida courts can consider respondent's arguments in the first instance on remand. Finally, the District errs in arguing that because it gave Koontz another avenue to obtain permit approval, this Court need not decide whether its demand for offsite improvements satisfied *Nollan* and *Dolan*. Had Koontz been offered at least one alternative that satisfied *Nollan* and *Dolan*, he would not have been subjected to an unconstitutional condition. But the District's offer to approve a less ambitious project does not obviate the need to apply *Nollan* and *Dolan* to the conditions

it imposed on its approval of the project Koontz actually proposed. Pp. 609–611.

2. The government's demand for property from a land-use permit applicant must satisfy the *Nollan*/*Dolan* requirements even when its demand is for money. Pp. 611–619.

(a) Contrary to respondent's argument, *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, where five Justices concluded that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest," *id.*, at 540 (KENNEDY, J., concurring in judgment and dissenting in part), does not control here, where the demand for money did burden the ownership of a specific parcel of land. Because of the direct link between the government's demand and a specific parcel of real property, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may deploy its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue. Pp. 613–615.

(b) The District argues that if monetary exactions are subject to *Nollan*/*Dolan* scrutiny, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. But the District exaggerates both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain. It is beyond dispute that "[t]axes and user fees . . . are not 'takings,'" *Brown* v. *Legal Foundation of Wash.*, 538 U. S. 216, 243, n. 2, yet this Court has repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained through taxation, *e. g.*, *id.*, at 232. Pp. 615–617.

(c) The Court's holding that monetary exactions are subject to scrutiny under *Nollan* and *Dolan* will not work a revolution in land-use law or unduly limit the discretion of local authorities to implement sensible land-use regulations. The rule that *Nollan* and *Dolan* apply to monetary exactions has been the settled law in some of our Nation's most populous States for many years, and the protections of those cases are often redundant with the requirements of state law. Pp. 618–619.

77 So. 3d 1220, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 619.

Paul J. Beard II argued the cause for petitioner. With him on the briefs were *Christopher V. Carlyle*, *Brian T. Hodges*, and *Michael D. Jones*.

Paul R. Q. Wolfson argued the cause for respondent. With him on the brief were *Catherine M. A. Carroll*, *William H. Congdon, Jr.*, and *Rachel D. Gray*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Moreno*, *Lewis S. Yelin*, *Katherine J. Barton*, *David C. Shilton*, *Earl H. Stockdale*, *Martin R. Cohen*, *David F. Coursen*, and *Karyn Wendelowski*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Rights Union by *Peter J. Ferrara*; for the Association of Florida Community Developers et al. by *Gary K. Hunter, Jr.*, *D. Kent Safriet*, *William H. Green*, and *Mohammad O. Jazil*; for the Atlantic Legal Foundation et al. by *Martin S. Kaufman*, *John Eastman*, and *Anthony T. Caso*; for the Institute for Justice et al. by *William H. Mellor*, *Dana Berliner*, *Robert McNamara*, and *Ilya Shapiro*; for the Land Use Institute, Ltd., by *Daniel L. Schmutter* and *John J. Reilly*; for the National Federation of Independent Business Small Business Legal Center by *Karen R. Harned*; and for Owners' Counsel of America by *Robert H. Thomas*.

Briefs of *amici curiae* urging affirmance were filed for the American Planning Association et al. by *Douglas T. Kendall* and *Elizabeth B. Wydra*; for Former Members of the National Research Council Committee on Mitigating Wetland Losses by *Janice L. Goldman-Carter* and *Royal C. Gardner*; and for the National Governors Association et al. by *John D. Echeverria* and *Lisa E. Soronen*.

Briefs of *amici curiae* were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Daniel L. Siegel*, Supervising Deputy Attorney General, *Susan Lee*, Acting Solicitor General, *Mark Breckler*, Chief Assistant Attorney General, *John Saurenman*, Senior Assistant Attorney General, and *Christie Vosburg*, Deputy Attorney General, and by the Attorneys General and former Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *George Jepsen* of Connecticut, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *James D. "Buddy" Caldwell* of Louisiana, *Martha Coakley* of Massachusetts, *Bill Schuette* of Michigan, *Steve Bullock* of Montana, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Gary King* of New Mexico; *Eric*

JUSTICE ALITO delivered the opinion of the Court.

Our decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District (or District) believes that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr.[1] The District did not approve his application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.

I

A

In 1972, petitioner purchased an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is

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T. Schneiderman of New York, *Ellen F. Rosenblum* of Oregon, *Guillermo Somoza-Colombani* of Puerto Rico, *Peter F. Kilmartin* of Rhode Island, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Robert M. McKenna* of Washington; for Hillcrest Property, LLP, by *David Smolker*; and for the National Association of Home Builders et al. by *Michael M. Berger*.

[1] For ease of reference, this opinion refers to both men as "petitioner."

located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100-foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found evidence of animals that often frequent developed areas: raccoons, rabbits, several species of birds, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

The same year that petitioner purchased his property, Florida enacted the Water Resources Act, which divided the State into five water management districts and authorized each district to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." 1972 Fla. Laws ch. 72–299, pt. IV, § 1(5), pp. 1115, 1116 (codified as amended at Fla. Stat. § 373.403(5) (2010)). Under the Act, a landowner wishing to undertake such construction must obtain from the relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district." 1972 Fla. Laws § 4(1), at 1118 (codified as amended at Fla. Stat. § 373.413(1)).

In 1984, in an effort to protect the State's rapidly diminishing wetlands, the Florida Legislature passed the Warren S.

Henderson Wetlands Protection Act, which made it illegal for anyone to "dredge or fill in, on, or over surface waters" without a Wetlands Resource Management (WRM) permit. 1984 Fla. Laws ch. 84–79, pt. VIII, § 403.905(1), pp. 204–205. Under the Henderson Act, permit applicants are required to provide "reasonable assurance" that proposed construction on wetlands is "not contrary to the public interest," as defined by an enumerated list of criteria. See Fla. Stat. § 373.414(1). Consistent with the Henderson Act, the St. Johns River Water Management District, the district with jurisdiction over petitioner's land, requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property.

The District considered the 11-acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwa-

ter management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent." App. 75.

Believing the District's demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused, petitioner filed suit in state court. Among other claims, he argued that he was entitled to relief under Fla. Stat. § 373.617(2), which allows owners to recover "monetary damages" if a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation."

B

The Florida Circuit Court granted the District's motion to dismiss on the ground that petitioner had not adequately exhausted his state-administrative remedies, but the Florida District Court of Appeal for the Fifth Circuit reversed. On remand, the State Circuit Court held a 2-day bench trial. After considering testimony from several experts who exam-

ined petitioner's property, the trial court found that the property's northern section had already been "seriously degraded" by extensive construction on the surrounding parcels. App. to Pet. for Cert. D–3. In light of this finding and petitioner's offer to dedicate nearly three-quarters of his land to the District, the trial court concluded that any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction. *Id.*, at D–11. It accordingly held the District's actions unlawful under our decisions in *Nollan* and *Dolan*.

The Florida District Court affirmed, 5 So. 3d 8 (2009), but the State Supreme Court reversed, 77 So. 3d 1220 (2011). A majority of that court distinguished *Nollan* and *Dolan* on two grounds. First, the majority thought it significant that in this case, unlike *Nollan* or *Dolan*, the District did not approve petitioner's application on the condition that he accede to the District's demands; instead, the District denied his application because he refused to make concessions. 77 So. 3d, at 1230. Second, the majority drew a distinction between a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money. 77 So. 3d, at 1229–1230. The majority acknowledged a division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*, and sided with those courts that have said it cannot. 77 So. 3d, at 1229–1230. Compare, *e. g.*, *McClung* v. *Sumner*, 548 F. 3d 1219, 1228 (CA9 2008), with *Ehrlich* v. *Culver City*, 12 Cal. 4th 854, 876, 911 P. 2d 429, 444 (1996); *Flower Mound* v. *Stafford Estates Ltd. Partnership*, 135 S. W. 3d 620, 640–641 (Tex. 2004). Two justices concurred in the result, arguing that petitioner had failed to exhaust his administrative remedies as required by state law before bringing an inverse condemnation suit that challenges the propriety of an agency action. 77 So. 3d, at 1231–1232; see *Key Haven Associated Enterprises, Inc.* v.

Board of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153, 159 (Fla. 1982).

Recognizing that the majority opinion rested on a question of federal constitutional law on which the lower courts are divided, we granted the petition for a writ of certiorari, 568 U. S. 936 (2012), and now reverse.

II

A

We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 545 (1983). See also, *e. g.*, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 59–60 (2006); *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 78 (1990). In *Perry* v. *Sindermann*, 408 U. S. 593 (1972), for example, we held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration. And in *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974), we concluded that a county impermissibly burdened the right to travel by extending healthcare benefits only to those indigent sick who had been residents of the county for at least one year. Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.

Nollan and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 547 (2005); *Dolan*, 512 U. S., at 385 (invoking "the well-settled doctrine of 'unconstitutional conditions' "). Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit

applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. See *id.*, at 384; *Nollan*, 483 U. S., at 831. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: Petitioner's proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926).

Nollan and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the

government demands and the social costs of the applicant's proposal. *Dolan*, *supra*, at 391; *Nollan*, 483 U. S., at 837. Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still prohibiting the government from engaging in "out-and-out . . . extortion" that would thwart the Fifth Amendment right to just compensation. *Ibid.* (internal quotation marks omitted). Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

B

The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. See, *e. g.*, *Perry*, *supra*, at 597 (explaining that the government "*may not deny* a benefit to a person on a basis that infringes his constitutionally protected interests" (emphasis added)); *Memorial Hospital*, *supra* (finding unconstitutional condition where government denied healthcare benefits). In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.

A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.

Under the Florida Supreme Court's approach, a government order stating that a permit is "approved if" the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. See *Frost & Frost Trucking Co.* v. *Railroad Comm'n of Cal.*, 271 U. S. 583, 592–593 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution"). See also *Flower Mound*, 135 S. W. 3d, at 639 ("The government cannot sidestep constitutional protections merely by rephrasing its decision from 'only if' to 'not unless' "). To do so here would effectively render *Nollan* and *Dolan* a dead letter.

The Florida Supreme Court puzzled over how the government's demand for property can violate the Takings Clause even though " 'no property of any kind was ever taken,' " 77 So. 3d, at 1225 (quoting 5 So. 3d, at 20 (Griffin, J., dissenting)); see also 77 So. 3d, at 1229–1230, but the unconstitutional conditions doctrine provides a ready answer. Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Nor does it make a difference, as respondent suggests, that the government might have been able to deny petitioner's application outright without giving him the option of secur-

ing a permit by agreeing to spend money to improve public lands. See *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. See, *e. g.*, *Regan*, 461 U. S. 540 (tax benefits); *Memorial Hospital*, 415 U. S. 250 (healthcare); *Perry*, 408 U. S. 593 (public employment); *United States* v. *Butler*, 297 U. S. 1, 71 (1936) (crop payments); *Frost*, *supra* (business license). Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. *E. g.*, *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 210 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech *even if he has no entitlement to that benefit*" (emphasis added; internal quotation marks omitted)); *Wieman* v. *Updegraff*, 344 U. S. 183, 191 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue"). Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights. See *Nollan*, *supra*, at 836–837 (explaining that "[t]he evident constitutional propriety" of prohibiting a land use "disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition").

That is not to say, however, that there is *no* relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular

remedy—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state-law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan*/*Dolan* unconstitutional conditions violation either here or in other cases.

C

At oral argument, respondent conceded that the denial of a permit could give rise to a valid claim under *Nollan* and *Dolan*, Tr. of Oral Arg. 33–34, but it urged that we should not review the particular denial at issue here because petitioner sued in the wrong court, for the wrong remedy, and at the wrong time. Most of respondent's objections to the posture of this case raise questions of Florida procedure that are not ours to decide. See *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975); *Murdock* v. *Memphis*, 20 Wall. 590, 626 (1875). But to the extent that respondent suggests that the posture of this case creates some federal obstacle to adjudicating petitioner's unconstitutional conditions claim, we remand for the Florida courts to consider that argument in the first instance.

Respondent argues that we should affirm because, rather than suing for damages in the Florida trial court as authorized by Fla. Stat. § 373.617, petitioner should have first sought judicial review of the denial of his permit in the Florida appellate court under the State's Administrative Procedure Act, see §§ 120.68(1), (2) (2010). The Florida Supreme Court has said that the appellate court is the "proper forum to resolve" a "claim that an agency has *applied* a . . . statute or rule in such a way that the aggrieved party's constitutional rights have been violated," *Key Haven Associated Enterprises*, 427 So. 2d, at 158, and respondent has argued

throughout this litigation that petitioner brought his unconstitutional conditions claim in the wrong forum. Two members of the Florida Supreme Court credited respondent's argument, 77 So. 3d, at 1231–1232, but four others refused to address it. We decline respondent's invitation to second-guess a State Supreme Court's treatment of its own procedural law.

Respondent also contends that we should affirm because petitioner sued for damages but is at most entitled to an injunction ordering that his permit issue without any conditions. But we need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state* law. Florida law allows property owners to sue for "damages" whenever a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. § 373.617. Whether that provision covers an unconstitutional conditions claim like the one at issue here is a question of state law that the Florida Supreme Court did not address and on which we will not opine.

For similar reasons, we decline to reach respondent's argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan*. The Florida Supreme Court did not reach the question whether respondent issued a demand of sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*. It relied instead on the Florida District Court of Appeal's characterization of respondent's behavior as a demand for *Nollan*/*Dolan* purposes. See 77 So. 3d, at 1224 (quoting 5 So. 3d, at 10). Whether that characterization is correct is beyond the scope of the questions the Court agreed to take up for review. If preserved, the issue remains open on remand for the Florida Supreme Court to address. This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*.

Finally, respondent argues that we need not decide whether its demand for offsite improvements satisfied *Nollan* and *Dolan* because it gave petitioner another avenue for obtaining permit approval. Specifically, respondent said that it would have approved a revised permit application that reduced the footprint of petitioner's proposed construction site from 3.7 acres to 1 acre and placed a conservation easement on the remaining 13.9 acres of petitioner's land. Respondent argues that regardless of whether its demands for offsite mitigation satisfied *Nollan* and *Dolan*, we must separately consider each of petitioner's options, one of which did not require any of the offsite work the trial court found objectionable.

Respondent's argument is flawed because the option to which it points—developing only 1 acre of the site and granting a conservation easement on the rest—involves the same issue as the option to build on 3.7 acres and perform offsite mitigation. We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition. But respondent's suggestion that we should treat its offer to let petitioner build on 1 acre as an alternative to offsite mitigation misapprehends the governmental benefit that petitioner was denied. Petitioner sought to develop 3.7 acres, but respondent in effect told petitioner that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands. Petitioner claims that he was wrongfully denied a permit to build on those 2.7 acres. For that reason, respondent's offer to approve a less ambitious building project does not obviate the need to determine whether the demand for offsite mitigation satisfied *Nollan* and *Dolan*.

III

We turn to the Florida Supreme Court's alternative holding that petitioner's claim fails because respondent asked

him to spend money rather than give up an easement on his land. A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. See *Rumsfeld*, 547 U. S., at 59–60. For that reason, we began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking. See *Dolan*, 512 U. S., at 384; *Nollan*, 483 U. S., at 831. The Florida Supreme Court held that petitioner's claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible interest in real property. 77 So. 3d, at 1230. Respondent and the dissent take the same position, citing the concurring and dissenting opinions in *Eastern Enterprises* v. *Apfel*, 524 U. S. 498 (1998), for the proposition that an obligation to spend money can never provide the basis for a takings claim. See *post*, at 623–626 (opinion of KAGAN, J.).

We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace, Rosenberg, The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees, 59 S. M. U. L. Rev. 177, 202–203 (2006), and they are functionally equivalent to other types of land-use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

A

In *Eastern Enterprises*, *supra*, the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families. A four-Justice plurality concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause. *Id.*, at 529–537. Although JUSTICE KENNEDY concurred in the result on due process grounds, he joined four other Justices in dissent in arguing that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest." *Id.*, at 540 (opinion concurring in judgment and dissenting in part); see *id.*, at 554–556 (BREYER, J., dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property"). Relying on the concurrence and dissent in *Eastern Enterprises*, respondent argues that a requirement that petitioner spend money improving public lands could not give rise to a taking.

Respondent's argument rests on a mistaken premise. Unlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here did "operate upon . . . an identified property interest" by directing the owner of a particular piece of property to make a monetary payment. *Id.*, at 540 (opinion of KENNEDY, J.). In this case, unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property. See *Armstrong* v. *United States*, 364 U. S. 40, 44–49 (1960); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 601–602 (1935); *United States* v. *Security Industrial Bank*, 459 U. S. 70, 77–78 (1982); see also *Palm Beach Cty.* v. *Cove Club Investors Ltd.*, 734 So. 2d 379, 383–

384 (1999) (the right to receive income from land is an interest in real property under Florida law). The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property.[2] Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

In this case, moreover, petitioner does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central*'s "essentially ad hoc, factual inquir[y]," 438 U. S., at 124, at all, much less extend that "already difficult and uncertain rule" to the "vast category of cases" in which someone believes that a regulation is too costly, *Eastern Enterprises*, 524 U. S., at 542 (opinion of KENNEDY, J.). Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "*per se* [takings] approach" is the proper mode of analysis under the Court's precedent. *Brown* v. *Legal Foundation of Wash.*, 538 U. S. 216, 235 (2003).

Finally, it bears emphasis that petitioner's claim does not implicate "normative considerations about the wisdom of

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[2] Thus, because the proposed offsite mitigation obligation in this case was tied to a particular parcel of land, this case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking. That is so even when the demand is considered "*outside* the permitting process." *Post*, at 626 (KAGAN, J., dissenting). The unconstitutional conditions analysis requires us to set aside petitioner's *permit application*, not his ownership of a particular parcel of real property.

government decisions." *Eastern Enterprises*, 524 U. S., at 545 (opinion of KENNEDY, J.). We are not here concerned with whether it would be "arbitrary or unfair" for respondent to order a landowner to make improvements to public lands that are nearby. *Id.*, at 554 (BREYER, J., dissenting). Whatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a *per se* taking similar to the taking of an easement or a lien. Cf. *Dolan*, 512 U. S., at 384; *Nollan*, 483 U. S., at 831.

B

Respondent and the dissent argue that if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. See *post*, at 626–628. We think they exaggerate both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.

It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'" *Brown*, *supra*, at 243, n. 2 (SCALIA, J., dissenting). We said as much in *County of Mobile* v. *Kimball*, 102 U. S. 691, 703 (1881), and our cases have been clear on that point ever since. *United States* v. *Sperry Corp.*, 493 U. S. 52, 62, n. 9 (1989); see *A. Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44 (1934); *Dane* v. *Jackson*, 256 U. S. 589, 599 (1921); *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614–615 (1899). This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.

At the same time, we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown*, *supra*, at 232, we were

unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156 (1998), and *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980), two earlier cases in which we treated confiscations of money as takings despite their functional similarity to a tax. Perhaps most closely analogous to the present case, we have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation. *Armstrong*, 364 U. S. 40; *Louisville Joint Stock Land Bank*, 295 U. S. 555.

Two facts emerge from those cases. The first is that the need to distinguish taxes from takings is not a creature of our holding today that monetary exactions are subject to scrutiny under *Nollan* and *Dolan*. Rather, the problem is inherent in this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.

Second, our cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice. *Brown* is illustrative. Similar to respondent in this case, the respondents in *Brown* argued that extending the protections of the Takings Clause to a bank account would open a Pandora's Box of constitutional challenges to taxes. Brief for Respondent Legal Foundation of Washington et al. 32 and Brief for Respondent Justices of the Washington Supreme Court 22, in *Brown* v. *Legal Foundation of Wash.*, O. T. 2002, No. 01–1325. But also like respondent here, the *Brown* respondents never claimed that they were exercising their power to levy taxes when they took the petitioners' property. Any such argument would have been implausible under state law; in Washington, taxes are levied by

the legislature, not the courts. See 538 U. S., at 242, n. 2 (SCALIA, J., dissenting).

The same dynamic is at work in this case because Florida law greatly circumscribes respondent's power to tax. See Fla. Stat. § 373.503 (authorizing respondent to impose ad valorem tax on properties within its jurisdiction); § 373.109 (authorizing respondent to charge permit application fees but providing that such fees "shall not exceed the cost . . . for processing, monitoring, and inspecting for compliance with the permit"). If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner's permit was improper under Florida law. Far from making that concession, respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land.[3]

This case does not require us to say more. We need not decide at precisely what point a land-use permitting charge denominated by the government as a "tax" becomes "so arbitrary . . . that it was not the exertion of taxation but a confiscation of property." *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24–25 (1916). For present purposes, it suffices to say that despite having long recognized that "the power of taxation should not be confused with the power of eminent domain," *Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 264 (1915), we have had little trouble distinguishing between the two.

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[3] Citing cases in which state courts have treated similar governmental demands for money differently, the dissent predicts that courts will "struggle to draw a coherent boundary" between taxes and excessive demands for money that violate *Nollan* and *Dolan*. *Post*, at 627. But the cases the dissent cites illustrate how the frequent need to decide whether a particular demand for money qualifies as a tax under state law, and the resulting state statutes and judicial precedents on point, greatly reduce the practical difficulty of resolving the same issue in federal constitutional cases like this one.

C

Finally, we disagree with the dissent's forecast that our decision will work a revolution in land-use law by depriving local governments of the ability to charge reasonable permitting fees. *Post*, at 626. Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it. See, *e. g.*, *Northern Ill. Home Builders Assn.* v. *County of Du Page*, 165 Ill. 2d 25, 31–32, 649 N. E. 2d 384, 388–389 (1995); *Home Builders Assn.* v. *Beavercreek*, 89 Ohio St. 3d 121, 128, 729 N. E. 2d 349, 356 (2000); *Flower Mound*, 135 S. W. 3d, at 640–641. Yet the "significant practical harm" the dissent predicts has not come to pass. *Post*, at 626. That is hardly surprising, for the dissent is correct that state law normally provides an independent check on excessive land-use permitting fees. *Post*, at 630.

The dissent criticizes the notion that the Federal Constitution places any meaningful limits on "whether one town is overcharging for sewage, or another is setting the price to sell liquor too high." *Post*, at 627. But only two pages later, it identifies three constraints on land-use permitting fees that it says the Federal Constitution imposes and suggests that the additional protections of *Nollan* and *Dolan* are not needed. *Post*, at 629. In any event, the dissent's argument that land-use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*. After all, the Due Process Clause protected the Nollans from an unfair allocation of public burdens, and they too could have argued that the government's demand for property amounted to a taking under the *Penn Central* framework. See *Nollan*, 483 U. S., at 838. We have repeatedly rejected the dissent's contention that other constitutional doctrines leave no room for the nexus and rough proportionality requirements of *Nollan* and

Dolan. Mindful of the special vulnerability of land-use permit applicants to extortionate demands for money, we do so again today.

* * *

We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money. The Court expresses no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

In the paradigmatic case triggering review under *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994), the government approves a building permit on the condition that the landowner relinquish an interest in real property, like an easement. The significant legal questions that the Court resolves today are whether *Nollan* and *Dolan* also apply when that case is varied in two ways. First, what if the government does not approve the permit, but instead demands that the condition be fulfilled before it will do so? Second, what if the condition entails not transferring real property, but simply paying money? This case also raises other, more fact-specific issues I will address: whether the government here imposed any condition at all, and whether petitioner Coy Koontz suffered any compensable injury.

I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the

owner's conveyance of a property interest (*i. e.*, imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i. e.*, imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require. Still, the condition-subsequent and condition-precedent situations differ in an important way. When the government grants a permit subject to the relinquishment of real property, and that condition does not satisfy *Nollan* and *Dolan*, then the government has taken the property and must pay just compensation under the Fifth Amendment. But when the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property. So far, we all agree.

Our core disagreement concerns the second question the Court addresses. The majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That runs roughshod over *Eastern Enterprises* v. *Apfel*, 524 U. S. 498 (1998), which held that the government may impose ordinary financial obligations without triggering the Takings Clause's protections. The boundaries of the majority's new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure, and would affirm the Florida Supreme Court's decision.

I also would affirm for two independent reasons establishing that Koontz cannot get the money damages he seeks.

First, respondent St. Johns River Water Management District (District) never demanded *anything* (including money) in exchange for a permit; the *Nollan-Dolan* standard therefore does not come into play (even assuming that test applies to demands for money). Second, no taking occurred in this case because Koontz never acceded to a demand (even had there been one), and so no property changed hands; as just noted, Koontz therefore cannot claim just compensation under the Fifth Amendment. The majority does not take issue with my first conclusion, and affirmatively agrees with my second. But the majority thinks Koontz might still be entitled to money damages, and remands to the Florida Supreme Court on that question. I do not see how, and expect that court will so rule.

I

Claims that government regulations violate the Takings Clause by unduly restricting the use of property are generally "governed by the standards set forth in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978)." *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 538 (2005). Under *Penn Central*, courts examine a regulation's "character" and "economic impact," asking whether the action goes beyond "adjusting the benefits and burdens of economic life to promote the common good" and whether it "interfere[s] with distinct investment-backed expectations." 438 U. S., at 124. That multi-factor test balances the government's manifest need to pass laws and regulations "adversely affect[ing] . . . economic values," *ibid.*, with our longstanding recognition that some regulation "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922).

Our decisions in *Nollan* and *Dolan* are different: They provide an independent layer of protection in "the special context of land-use exactions." *Lingle*, 544 U. S., at 538. In that situation, the "government demands that a landowner dedicate an easement" or surrender a piece of real property

"as a condition of obtaining a development permit." *Id.*, at 546. If the government appropriated such a property interest outside the permitting process, its action would constitute a taking, necessitating just compensation. *Id.*, at 547. *Nollan* and *Dolan* prevent the government from exploiting the landowner's permit application to evade the constitutional obligation to pay for the property. They do so, as the majority explains, by subjecting the government's demand to heightened scrutiny: The government may condition a land-use permit on the relinquishment of real property only if it shows a "nexus" and "rough proportionality" between the demand made and "the projected impact of the proposed development." *Dolan*, 512 U. S., at 386, 391; see *ante*, at 605–606. *Nollan* and *Dolan* thus serve not to address excessive regulatory burdens on land use (the function of *Penn Central*), but instead to stop the government from imposing an "unconstitutional condition"—a requirement that a person give up his constitutional right to receive just compensation "in exchange for a discretionary benefit" having "little or no relationship" to the property taken. *Lingle*, 544 U. S., at 547.

Accordingly, the *Nollan-Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for—or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking. That is why *Nollan* began by stating that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public . . . , rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking" requiring just compensation. 483 U. S., at 831. And it is why *Dolan* started by maintaining that "had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to [d]evelop her property on such a dedication, a taking

would have occurred." 512 U. S., at 384. Even the majority acknowledges this basic point about *Nollan* and *Dolan*: It too notes that those cases rest on the premise that "if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Ante*, at 612. Only if that is true could the government's demand for the property force a landowner to relinquish his constitutional right to just compensation.

Here, Koontz claims that the District demanded that he spend money to improve public wetlands, not that he hand over a real property interest. I assume for now that the District made that demand (although I think it did not, see *infra*, at 630–634). The key question then is: Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation? Only if the answer is yes does the *Nollan-Dolan* test apply.

But we have already answered that question no. *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, as the Court describes, involved a federal statute requiring a former mining company to pay a large sum of money for the health benefits of retired employees. Five Members of the Court determined that the law did not effect a taking, distinguishing between the appropriation of a specific property interest and the imposition of an order to pay money. JUSTICE KENNEDY acknowledged in his controlling opinion that the statute "impose[d] a staggering financial burden" (which influenced his conclusion that it violated due process). *Id.*, at 540 (opinion concurring in judgment and dissenting in part). Still, JUSTICE KENNEDY explained, the law did not effect a taking because it did not "operate upon or alter" a "specific and identified propert[y] or property right[ ]." *Id.*, at 540–541. Instead, "[t]he law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the prop-

erty it uses to do so." *Id.*, at 540. JUSTICE BREYER, writing for four more Justices, agreed. He stated that the Takings Clause applies only when the government appropriates a "specific interest in physical or intellectual property" or "a specific, separately identifiable fund of money"; by contrast, the Clause has no bearing when the government imposes "an ordinary liability to pay money." *Id.*, at 554–555 (dissenting opinion).

Thus, a requirement that a person pay money to repair public wetlands is not a taking. Such an order does not affect a "specific and identified propert[y] or property right[ ]"; it simply "imposes an obligation to perform an act" (the improvement of wetlands) that costs money. *Id.*, at 540–541 (opinion of KENNEDY, J.). To be sure, when a person spends money on the government's behalf, or pays money directly to the government, it "will reduce [his] net worth"—but that "can be said of any law which has an adverse economic effect" on someone. *Id.*, at 543. Because the government is merely imposing a "general liability" to pay money, *id.*, at 555 (BREYER, J., dissenting)—and therefore is "indifferent as to how the regulated entity elects to comply or the property it uses to do so," *id.*, at 540 (opinion of KENNEDY, J.)—the order to repair wetlands, viewed independent of the permitting process, does not constitute a taking. And that means the order does not trigger the *Nollan-Dolan* test, because it does not force Koontz to relinquish a constitutional right.

The majority tries to distinguish *Apfel* by asserting that the District's demand here was "closely analogous" (and "bears resemblance") to the seizure of a lien on property or an income stream from a parcel of land. *Ante*, at 613, 616. The majority thus seeks support from decisions like *Armstrong* v. *United States*, 364 U. S. 40 (1960), where this Court held that the government effected a taking when it extinguished a lien on several ships, and *Palm Beach Cty.* v. *Cove Club Investors Ltd.*, 734 So. 2d 379 (1999), where the Florida

Supreme Court held that the government committed a taking when it terminated a covenant entitling the beneficiary to an income stream from a piece of land.

But the majority's citations succeed only in showing what this case is *not*. When the government dissolves a lien, or appropriates a determinate income stream from a piece of property—or, for that matter, seizes a particular "bank account or [the] accrued interest" on it—the government indeed takes a "specific" and "identified property interest." *Apfel*, 524 U. S., at 540–541 (opinion of KENNEDY, J.). But nothing like that occurred here. The District did not demand any particular lien, or bank account, or income stream from property. It just ordered Koontz to spend or pay money (again, assuming it ordered anything at all). Koontz's liability would have been the same whether his property produced income or not—*e. g.*, even if all he wanted to build was a family home. And similarly, Koontz could meet that obligation from whatever source he chose—a checking account, shares of stock, a wealthy uncle; the District was "indifferent as to how [he] elect[ed] to [pay] or the property [he] use[d] to do so." *Id.*, at 540. No more than in *Apfel*, then, was the (supposed) demand here for a "specific and identified" piece of property, which the government could not take without paying for it. *Id.*, at 541.

The majority thus falls back on the sole way the District's alleged demand related to a property interest: The demand arose out of the permitting process for Koontz's land. See *ante*, at 613–614. But under the analytic framework that *Nollan* and *Dolan* established, that connection alone is insufficient to trigger heightened scrutiny. As I have described, the heightened standard of *Nollan* and *Dolan* is not a free-standing protection for land-use permit applicants; rather, it is "a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken"—

in exchange for a land-use permit. *Lingle*, 544 U. S., at 547 (internal quotation marks omitted); see *supra*, at 621–623. As such, *Nollan* and *Dolan* apply only if the demand at issue would have violated the Constitution independent of that proposed exchange. Or put otherwise, those cases apply only if the demand would have constituted a taking when executed *outside* the permitting process. And here, under *Apfel*, it would not.[1]

The majority's approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery. 524 U. S., at 541. Cities and towns across the Nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. See, *e. g.*, *Olympia* v. *Drebick*, 156 Wash. 2d 289, 305, 126 P. 3d 802, 809 (2006). Others cover the direct costs of providing services like sewage or water to the development. See, *e. g.*, *Krupp* v. *Breckenridge Sanitation Dist.*, 19 P. 3d 687, 691 (Colo. 2001). Still others are meant to limit the number of landowners who engage in a certain activity,

[1] The majority's sole response is that "[t]he unconstitutional conditions analysis requires us to set aside petitioner's *permit application*, not his ownership of a particular parcel of real property." *Ante*, at 614, n. 2. That mysterious sentence fails to make the majority's opinion cohere with the unconstitutional conditions doctrine, as anyone has ever known it. That doctrine applies only if imposing a condition directly—*i. e.*, independent of an exchange for a government benefit—would violate the Constitution. Here, *Apfel* makes clear that the District's condition would not do so: The government may (separate and apart from permitting) require a person—whether Koontz or anyone else—to pay or spend money without effecting a taking. The majority offers no theory to the contrary: It does not explain, as it must, why the District's condition was "unconstitutional."

as fees for liquor licenses do. See, *e. g.*, *Phillips* v. *Mobile*, 208 U. S. 472, 479 (1908); *BHA Investments, Inc.* v. *Idaho*, 138 Idaho 348, 63 P. 3d 474 (2003). All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.

That problem becomes still worse because the majority's distinction between monetary "exactions" and taxes is so hard to apply. *Ante*, at 615. The majority acknowledges, as it must, that taxes are not takings. See *ibid.* (This case "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners"). But once the majority decides that a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible "exaction," how is anyone to tell the two apart? The question, as JUSTICE BREYER's opinion in *Apfel* noted, "bristles with conceptual difficulties." 524 U. S., at 556. And practical ones, too: How to separate orders to pay money from . . . well, orders to pay money, so that a locality knows what it can (and cannot) do. State courts sometimes must confront the same question, as they enforce restrictions on localities' taxing power. And their decisions—contrary to the majority's blithe assertion, see *ante*, at 617—struggle to draw a coherent boundary. Because "[t]here is no set rule" by which to determine "in which category a particular" action belongs, *Eastern Diversified Properties, Inc.* v. *Montgomery Cty.*, 319 Md. 45, 53, 570 A. 2d 850, 854 (1990), courts often reach opposite conclusions about classifying nearly identical fees. Compare, *e. g.*, *Coulter* v. *Rawlins*, 662 P. 2d 888, 901–904 (Wyo. 1983) (holding that a fee to enhance parks, imposed as a permit condition, was a regulatory exaction), with *Home Builders Assn.* v. *West Des*

Moines, 644 N. W. 2d 339, 350 (Iowa 2002) (rejecting *Coulter* and holding that a nearly identical fee was a tax).[2] Nor does the majority's opinion provide any help with that issue: Perhaps its most striking feature is its refusal to say even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny.

Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish; the Court claims, after all, that its opinion is intended to have only limited impact on localities' land-use authority. See *ante*, at 605–606, 618. The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. See, *e. g.*, *Ehrlich* v. *Culver City*, 12 Cal. 4th 854, 911 P. 2d 429 (1996). *Dolan* itself suggested that limitation by underscoring that there "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination[ ] classifying entire areas of the city." 512 U. S., at 385. Maybe today's majority accepts that distinction; or then again, maybe not. At the least, the majority's refusal "to say more" about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money. *Ante*, at 617.

At bottom, the majority's analysis seems to grow out of a yen for a prophylactic rule: Unless *Nollan* and *Dolan* apply to monetary demands, the majority worries, "land-use permitting officials" could easily "evade the limitations" on exaction of real property interests that those decisions impose. *Ante*, at 612. But that is a prophylaxis in search of a prob-

[2] The majority argues that existing state-court precedent will "greatly reduce the practical difficulty" of developing a uniform standard for distinguishing taxes from monetary exactions in federal constitutional cases. *Ante*, at 617, n. 3. But how are those decisions to perform that feat if they themselves are all over the map?

lem. No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs. See, *e. g.*, *Krupp* v. *Breckenridge Sanitation Dist.*, 19 P. 3d, at 697; *Home Builders Assn. of Central Arizona* v. *Scottsdale*, 187 Ariz. 479, 486, 930 P. 2d 993, 1000 (1997); *McCarthy* v. *Leawood*, 257 Kan. 566, 579, 894 P. 2d 836, 845 (1995). And if officials were to impose a fee as a contrivance to take an easement (or other real property right), then a court could indeed apply *Nollan* and *Dolan*. See, *e. g.*, *Norwood* v. *Baker*, 172 U. S. 269 (1898) (preventing circumvention of the Takings Clause by prohibiting the government from imposing a special assessment for the full value of a property in advance of condemning it). That situation does not call for a rule extending, as the majority's does, to *all* monetary exactions. Finally, a court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan*, that simply "go[ ] too far." *Mahon*, 260 U. S., at 415; see *supra*, at 621.[3]

[3] Our *Penn Central* test protects against regulations that unduly burden an owner's use of his property: Unlike the *Nollan-Dolan* standard, that framework fits to a T a complaint (like Koontz's) that a permitting condition makes it inordinately expensive to develop land. And the Due Process Clause provides an additional backstop against excessive permitting fees by preventing a government from conditioning a land-use permit on a monetary requirement that is "basically arbitrary." *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 557–558 (1998) (BREYER, J., dissenting). My point is not, as the majority suggests, that these constraints do the same thing as *Nollan* and *Dolan*, and so make those decisions unnecessary. See *ante*, at 618. To the contrary, *Nollan* and *Dolan* provide developers with enhanced protection (and localities with correspondingly reduced flexibility). See *supra*, at 626–627. The question here has to do not with "overruling" those cases, but with extending them. *Ante*, at 618. My argument is that our prior caselaw struck the right balance: heightened scrutiny when the government uses the permitting process to demand

In sum, *Nollan* and *Dolan* restrain governments from using the permitting process to do what the Takings Clause would otherwise prevent—*i. e.*, take a specific property interest without just compensation. Those cases have no application when governments impose a general financial obligation as part of the permitting process, because under *Apfel* such an action does not otherwise trigger the Takings Clause's protections. By extending *Nollan* and *Dolan*'s heightened scrutiny to a simple payment demand, the majority threatens the heartland of local land-use regulation and service delivery, at a bare minimum depriving state and local governments of "necessary predictability." *Apfel*, 524 U. S., at 542 (opinion of KENNEDY, J.). That decision is unwarranted—and deeply unwise. I would keep *Nollan* and *Dolan* in their intended sphere and affirm the Florida Supreme Court.

II

I also would affirm the judgment below for two independent reasons, even assuming that a demand for money can trigger *Nollan* and *Dolan*. First, the District never demanded that Koontz give up anything (including money) as a condition for granting him a permit.[4] And second, because (as everyone agrees) no actual taking occurred, Koontz cannot claim just compensation even had the District made a demand. The majority nonetheless remands this case on the theory that Koontz might still be entitled to money damages. I cannot see how, and so would spare the Florida courts.

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property that the Takings Clause protects, and lesser scrutiny, but a continuing safeguard against abuse, when the government's demand is for something falling outside that Clause's scope.

[4] The Court declines to consider whether the District demanded anything from Koontz because the Florida Supreme Court did not reach the issue. See *ante*, at 610. But because the District raised this issue in its brief opposing certiorari, Brief in Opposition 14–18, both parties briefed and argued it on the merits, see Brief for Respondent 37–43; Reply Brief 7–8; Tr. of Oral Arg. 7–12, 27–28, 52–53, and it provides yet another ground to affirm the judgment below, I address the question.

A

Nollan and *Dolan* apply only when the government makes a "demand[ ]" that a landowner turn over property in exchange for a permit. *Lingle*, 544 U. S., at 546. I understand the majority to agree with that proposition: After all, the entire unconstitutional conditions doctrine, as the majority notes, rests on the fear that the government may use its control over benefits (like permits) to "coerc[e]" a person into giving up a constitutional right. *Ante*, at 605–606; see *ante*, at 610. A *Nollan-Dolan* claim therefore depends on a showing of government coercion, not relevant in an ordinary challenge to a permit denial. See *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 703 (1999) (*Nollan* and *Dolan* were "not designed to address, and [are] not readily applicable to," a claim based on the mere "denial of [a] development" permit). Before applying *Nollan* and *Dolan*, a court must find that the permit denial occurred because the government made a demand of the landowner, which he rebuffed.

And unless *Nollan* and *Dolan* are to wreck land-use permitting throughout the country—to the detriment of both communities and property owners—that demand must be unequivocal. If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan*; observers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides' advantage. See W. Fischel, Regulatory Takings 346 (1995). But that danger would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan-Dolan* scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer. Hence the

need to reserve *Nollan* and *Dolan*, as we always have, for reviewing only what an official demands, not all he says in negotiations.

With that as backdrop, consider how this case arose. To arrest the loss of the State's rapidly diminishing wetlands, Florida law prevents landowners from filling or draining any such property without two permits. See *ante*, at 600–601. Koontz's property qualifies as a wetland, and he therefore needed the permits to embark on development. His applications, however, failed the District's preliminary review: The District found that they did not preserve wetlands or protect fish and wildlife to the extent Florida law required. See App. Exh. 19–20, 47. At that point, the District could simply have denied the applications; had it done so, the *Penn Central* test—not *Nollan* and *Dolan*—would have governed any takings claim Koontz might have brought. See *Del Monte Dunes*, 526 U. S., at 702–703.

Rather than reject the applications, however, the District suggested to Koontz ways he could modify them to meet legal requirements. The District proposed reducing the development's size or modifying its design to lessen the impact on wetlands. See App. Exh. 87–88, 91–92. Alternatively, the District raised several options for "off-site mitigation" that Koontz could undertake in a nearby nature preserve, thus compensating for the loss of wetlands his project would cause. *Id.*, at 90–91. The District never made any particular demand respecting an off-site project (or anything else); as Koontz testified at trial, that possibility was presented only in broad strokes, "[n]ot in any great detail." App. 103. And the District made clear that it welcomed additional proposals from Koontz to mitigate his project's damage to wetlands. See *id.*, at 75. Even at the final hearing on his applications, the District asked Koontz if he would "be willing to go back with the staff over the next month and renegotiate this thing and try to come up with" a solution. *Id.*, at 37. But Koontz refused, saying (through his lawyer) that

the proposal he submitted was "as good as it can get." *Id.*, at 41. The District therefore denied the applications, consistent with its original view that they failed to satisfy Florida law.

In short, the District never made a demand or set a condition—not to cede an identifiable property interest, not to undertake a particular mitigation project, not even to write a check to the government. Instead, the District suggested to Koontz several non-exclusive ways to make his applications conform to state law. The District's only hard-and-fast requirement was that Koontz do something—anything—to satisfy the relevant permitting criteria. Koontz's failure to obtain the permits therefore did not result from his refusal to accede to an allegedly extortionate demand or condition; rather, it arose from the legal deficiencies of his applications, combined with his unwillingness to correct them *by any means*. *Nollan* and *Dolan* were never meant to address such a run-of-the-mill denial of a land-use permit. As applications of the unconstitutional conditions doctrine, those decisions require a condition; and here, there was none.

Indeed, this case well illustrates the danger of extending *Nollan* and *Dolan* beyond their proper compass. Consider the matter from the standpoint of the District's lawyer. The District, she learns, has found that Koontz's permit applications do not satisfy legal requirements. It can deny the permits on that basis; or it can suggest ways for Koontz to bring his applications into compliance. If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice—even if he asks for guidance. As the Florida Supreme Court observed of this case: Were *Nollan* and *Dolan* to apply, the District would "opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation"; and property owners like Koontz then would "have no opportu-

nity to amend their applications or discuss mitigation options." 77 So. 3d 1220, 1231 (2011). Nothing in the Takings Clause requires that folly. I would therefore hold that the District did not impose an unconstitutional condition—because it did not impose a condition at all.

B

And finally, a third difficulty: Even if (1) money counted as "specific and identified propert[y]" under *Apfel* (though it doesn't), and (2) the District made a demand for it (though it didn't), (3) Koontz never paid a cent, so the District took nothing from him. As I have explained, that third point does not prevent Koontz from suing to invalidate the purported demand as an unconstitutional condition. See *supra*, at 619–620. But it does mean, as the majority agrees, that Koontz is not entitled to just compensation under the Takings Clause. See *ante*, at 608–609. He may obtain monetary relief under the Florida statute he invoked only if it authorizes damages *beyond* just compensation for a taking.

The majority remands that question to the Florida Supreme Court, and given how it disposes of the other issues here, I can understand why. As the majority indicates, a State could decide to create a damages remedy not only for a taking, but also for an unconstitutional conditions claim predicated on the Takings Clause. And that question is one of state law, which we usually do well to leave to state courts.

But as I look to the Florida statute here, I cannot help but see yet another reason why the Florida Supreme Court got this case right. That statute authorizes damages only for "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. § 373.617 (2010); see *ante*, at 610. In what legal universe could a law authorizing damages only for a "taking" also provide damages when (as all agree) no taking has occurred? I doubt that inside-out, upside-down universe is the State of

Florida. Certainly, none of the Florida courts in this case suggested that the majority's hypothesized remedy actually exists; rather, the trial and appellate courts imposed a damages remedy on the mistaken theory that there *had* been a taking (although of exactly what neither was clear). See App. to Pet. for Cert. C–2; 5 So. 3d 8 (2009). So I would, once more, affirm the Florida Supreme Court, not make it say again what it has already said—that Koontz is not entitled to money damages.

III

Nollan and *Dolan* are important decisions, designed to curb governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for. But for no fewer than three independent reasons, this case does not present that problem. First and foremost, the government commits a taking only when it appropriates a specific property interest, not when it requires a person to pay or spend money. Here, the District never took or threatened such an interest; it tried to extract from Koontz solely a commitment to spend money to repair public wetlands. Second, *Nollan* and *Dolan* can operate only when the government makes a demand of the permit applicant; the decisions' prerequisite, in other words, is a condition. Here, the District never made such a demand: It informed Koontz that his applications did not meet legal requirements; it offered suggestions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end. That is not the stuff of which an unconstitutional condition is made. And third, the Florida statute at issue here does not, in any event, offer a damages remedy for imposing such a condition. It provides relief only for a consummated taking, which did not occur here.

The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and local

governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision. I respectfully dissent.

Syllabus

ADOPTIVE COUPLE *v.* BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 12–399. Argued April 16, 2013—Decided June 25, 2013

The Indian Child Welfare Act of 1978 (ICWA), which establishes federal standards for state-court child custody proceedings involving Indian children, was enacted to address "the consequences . . . of abusive child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes," *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U. S. 30, 32. As relevant here, the ICWA bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child, 25 U. S. C. § 1912(f); conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the "breakup of the Indian family," § 1912(d); and provides placement preferences for the adoption of Indian children to members of the child's extended family, other members of the Indian child's tribe, and other Indian families, § 1915(a).

While Birth Mother was pregnant with Biological Father's child, their relationship ended and Biological Father (a member of the Cherokee Nation) agreed to relinquish his parental rights. Birth Mother put Baby Girl up for adoption through a private adoption agency and selected Adoptive Couple, non-Indians living in South Carolina. For the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl. About four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption. In the adoption proceedings, Biological Father sought custody and stated that he did not consent to the adoption. Following a trial, which took place when Baby Girl was two years old, the South Carolina Family Court denied Adoptive Couple's adoption petition and awarded custody to Biological Father. At the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met. The State Supreme Court affirmed, concluding that the ICWA applied because the child custody proceeding related to an Indian child; that Biological Fa-

ther was a "parent" under the ICWA; that §§ 1912(d) and (f) barred the termination of his parental rights; and that had his rights been terminated, § 1915(a)'s adoption-placement preferences would have applied.

Held:

1. Assuming for the sake of argument that Biological Father is a "parent" under the ICWA, neither § 1912(f) nor § 1912(d) bars the termination of his parental rights. Pp. 646–654.

(a) Section 1912(f) conditions the involuntary termination of parental rights on a heightened showing regarding the merits of the parent's "continued custody of the child." The adjective "continued" plainly refers to a pre-existing state under ordinary dictionary definitions. The phrase "continued custody" thus refers to custody that a parent already has (or at least had at some point in the past). As a result, § 1912(f) does not apply where the Indian parent *never* had custody of the Indian child. This reading comports with the statutory text, which demonstrates that the ICWA was designed primarily to counteract the unwarranted *removal* of Indian children from Indian families. See § 1901(4). But the ICWA's primary goal is not implicated when an Indian child's adoption is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights. Nonbinding guidelines issued by the Bureau of Indian Affairs (BIA) demonstrate that the BIA envisioned that § 1912(f)'s standard would apply only to termination of a *custodial* parent's rights. Under this reading, Biological Father should not have been able to invoke § 1912(f) in this case because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings. Pp. 647–651.

(b) Section 1912(d) conditions an involuntary termination of parental rights with respect to an Indian child on a showing "that active efforts have been made to provide remedial services . . . designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Consistent with this text, § 1912(d) applies only when an Indian family's "breakup" would be precipitated by terminating parental rights. The term "breakup" refers in this context to "[t]he discontinuance of a relationship," American Heritage Dictionary 235 (3d ed. 1992), or "an ending as an effective entity," Webster's Third New International Dictionary 273 (1961). But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" to be "discontinu[ed]" and no "effective entity" to be "end[ed]" by terminating the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and § 1912(d) is inapplicable. This interpretation is consistent with the explicit congressional purpose

Syllabus

of setting certain "standards for the removal of Indian children from their families," § 1902, and with BIA Guidelines. Section 1912(d)'s proximity to §§ 1912(e) and (f), which both condition the outcome of proceedings on the merits of an Indian child's "continued custody" with his parent, strongly suggests that the phrase "breakup of the Indian family" should be read in harmony with the "continued custody" requirement. Pp. 651–654.

2. Section 1915(a)'s adoption-placement preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. No party other than Adoptive Couple sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. Biological Father is not covered by § 1915(a) because he did not seek to adopt Baby Girl; instead, he argued that his parental rights should not be terminated in the first place. And custody was never sought by Baby Girl's paternal grandparents, other members of the Cherokee Nation, or other Indian families. Pp. 654–656.

398 S. C. 625, 731 S. E. 2d 550, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and BREYER, JJ., joined. THOMAS, J., *post*, p. 656, and BREYER, J., *post*, p. 666, filed concurring opinions. SCALIA, J., filed a dissenting opinion, *post*, p. 667. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, and in which SCALIA, J., joined in part, *post*, p. 668.

Lisa S. Blatt argued the cause for petitioners. With her on the briefs were *Christopher S. Rhee*, *R. Reeves Anderson*, *Bob Wood*, and *Mark Fiddler*.

Paul D. Clement argued the cause for respondent Guardian ad Litem. With him on the briefs were *Kelsi Brown Corkran* and *Thomas P. Lowndes*.

Charles A. Rothfeld argued the cause for respondent Birth Father et al. With him on the brief for Birth Father were *Andrew J. Pincus*, *Paul W. Hughes*, *Michael B. Kimberly*, *Jeffrey A. Meyer*, and *John S. Nichols*. *Todd Hembree*, *Chrissi Ross Nimmo*, *Lloyd B. Miller*, *William R. Perry*, *Anne D. Noto*, *Colin Cloud Hampson*, and *Carter G. Phillips* filed a brief for respondent Cherokee Nation.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance.

Counsel

With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Moreno*, *Deputy Assistant Attorney General Shenkman*, *Joseph R. Palmore*, *Amber Blaha*, and *Hilary C. Tompkins*.*

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*Briefs of *amici curiae* urging reversal were filed for the Adoptive Parents Committee, Inc., by *Frederick J. Magovern*; for the American Academy of Adoption Attorneys by *Philip J. McCarthy, Jr.*, and *Mary Beck*; for Birth Mother by *Gregory G. Garre* and *Lori Alvino McGill*; for Child Advocacy Organizations by *Theane Evangelis Kapur*, *Joshua S. Lipshutz*, and *Barbara B. Woodhouse*; for the Christian Alliance for Indian Child Welfare by *Jon Metropoulos*; for the Citizens Equal Rights Foundation by *James J. Devine, Jr.*; for the National Council for Adoption by *John Jerabek*; for Joan Heifetz Hollinger et al. by *Mark W. Mosier*; and for Bonnie Hofer et al. by *Randall Tietjen* and *Thomas L. Hamlin*.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *Dawn R. Williams*, Assistant Attorney General, and *Paula S. Bickett* and *Michael F. Valenzuela*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Michael C. Geraghty* of Alaska, *Kamala D. Harris* of California, *John W. Suthers* of Colorado, *George Jepsen* of Connecticut, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Janet T. Mills* of Maine, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Gary K. King* of New Mexico, *Eric T. Schneiderman* of New York, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Robert W. Ferguson* of Washington, and *J. B. Van Hollen* of Wisconsin; for Adult Pre-ICWA Indian Adoptees by *Edward C. DuMont* and *Alan E. Schoenfeld*; for the American Civil Liberties Union et al. by *Stephen L. Pevar* and *Steven R. Shapiro*; for the Association of American Indian Affairs et al. by *Jack F. Trope*; for Casey Family Programs et al. by *Patricia A. Millett*, *Hyland Hunt*, *Martin Guggenheim*, *Alexandra Kim McKay*, *Diane L. Redleaf*, *Matthew D. Slater*, and *Faith R. Roessel*; for Current and Former Members of Congress by *Kathleen M. Sullivan*; for Family Law Professors by *Vernle C. Durocher, Jr.*; for the Friends Committee on National Legislation et al. by *Philip M. Baker-Shenk*; for Hamline University School of Law Child Advocacy Clinic by *Mary Jo Brooks Hunter*; for the Inter Tribal Council of Arizona et al. by *Joe P. Sparks*, *Samuel F. Daughety*, and *Amanda Sampson Lomayesva*; for the Lower Sioux Indian Community et al. by *Jennifer Yatskis Dukart*, *Bruce Jones*, *Richard A. Duncan*, *Joseph Halloran*, *Jessica Intermill*, *Andrew Small*, and *Dennis Peterson*; for the National Latina/o Psychological Association et al. by *David M. Gische*; for the National Native American Bar Association by

JUSTICE ALITO delivered the opinion of the Court.

This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.

Contrary to the State Supreme Court's ruling, we hold that 25 U. S. C. § 1912(f)—which bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child—does not apply when, as here, the relevant parent never had custody of the child. We further hold that § 1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the "breakup of the Indian family"—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child.

Robert N. Clinton and *Patricia Ferguson-Bohnee*; for the Navajo Nation by *Marcelino R. Gomez* and *K. Andrew Fitzgerald*; for the Oklahoma Indian Child Welfare Association by *Kelly Gaines Stoner*; for Professors of Indian Law by *Stuart Banner* and *Angela Riley*; for the Seminole Nation of Oklahoma by *Eugene K. Bertman* and *Jennifer Henshaw McBee*; for the Seminole Tribe of Florida et al. by *Jerry C. Straus*, *Geoffrey D. Strommer*, *Gregory A. Smith*, and *Joseph H. Webster*; for the Tanana Chiefs Conference, Inc., et al. by *Heather Kendall*, *Paul M. Smith*, *Thomas J. Perrelli*, and *Jessica Ring Amunson*; and for Wisconsin Tribes by *Colette Routel*, *Sheila Corbine*, *Howard J. Bichler*, *Kris M. Goodwill*, and *Robert W. Orcutt*.

Briefs of *amici curiae* were filed for the Minnesota Department of Human Services et al. by *Scott H. Ikeda*; for 63 California Indian Tribes by *Dorothy Alther*, *Mark Radoff*, *Delia Parr*, and *Maureen H. Geary*; and for Abby Abinanti by *Ms. Abinanti*, *pro se*.

Finally, we clarify that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child. We accordingly reverse the South Carolina Supreme Court's judgment and remand for further proceedings.

I

"The Indian Child Welfare Act of 1978 (ICWA or Act), 92 Stat. 3069, 25 U. S. C. §§ 1901–1963, was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U. S. 30, 32 (1989). Congress found that "an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." § 1901(4). This "wholesale removal of Indian children from their homes" prompted Congress to enact the ICWA, which establishes federal standards that govern state-court child custody proceedings involving Indian children. *Id.*, at 32, 36 (internal quotation marks omitted); see also § 1902 (declaring that the ICWA establishes "minimum Federal standards for the removal of Indian children from their families").[1]

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[1] It is undisputed that Baby Girl is an "Indian child" as defined by the ICWA because she is an unmarried minor who "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," § 1903(4)(b). See Brief for Respondent Birth Father 1, 51, n. 22; Brief for Respondent Cherokee Nation 1; Brief for Petitioners 44 ("Baby Girl's eligibility for membership in the Cherokee Nation depends solely upon a lineal blood relationship with a tribal ancestor"). It is also undisputed that the present case concerns a "child custody proceeding," which the ICWA defines to include proceedings that involve "termination of parental rights" and "adoptive placement," § 1903(1).

Three provisions of the ICWA are especially relevant to this case. *First*, "[a]ny party seeking" an involuntary termination of parental rights to an Indian child under state law must demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." § 1912(d). *Second*, a state court may not involuntarily terminate parental rights to an Indian child "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912(f). *Third*, with respect to adoptive placements for an Indian child under state law, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." § 1915(a).

II

In this case, Birth Mother (who is predominantly Hispanic) and Biological Father (who is a member of the Cherokee Nation) became engaged in December 2008. One month later, Birth Mother informed Biological Father, who lived about four hours away, that she was pregnant. After learning of the pregnancy, Biological Father asked Birth Mother to move up the date of the wedding. He also refused to provide any financial support until after the two had married. The couple's relationship deteriorated, and Birth Mother broke off the engagement in May 2009. In June, Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights. Biological Father responded via text message that he relinquished his rights.

Birth Mother then decided to put Baby Girl up for adoption. Because Birth Mother believed that Biological Father

had Cherokee Indian heritage, her attorney contacted the Cherokee Nation to determine whether Biological Father was formally enrolled. The inquiry letter misspelled Biological Father's first name and incorrectly stated his birthday, and the Cherokee Nation responded that, based on the information provided, it could not verify Biological Father's membership in the tribal records.

Working through a private adoption agency, Birth Mother selected Adoptive Couple, non-Indians living in South Carolina, to adopt Baby Girl. Adoptive Couple supported Birth Mother both emotionally and financially throughout her pregnancy. Adoptive Couple was present at Baby Girl's birth in Oklahoma on September 15, 2009, and Adoptive Father even cut the umbilical cord. The next morning, Birth Mother signed forms relinquishing her parental rights and consenting to the adoption. Adoptive Couple initiated adoption proceedings in South Carolina a few days later, and returned there with Baby Girl. After returning to South Carolina, Adoptive Couple allowed Birth Mother to visit and communicate with Baby Girl.

It is undisputed that, for the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl, even though he had the ability to do so. Indeed, Biological Father "made no meaningful attempts to assume his responsibility of parenthood" during this period. App. to Pet. for Cert. 122a (Sealed; internal quotation marks omitted).

Approximately four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption. (This was the first notification that they had provided to Biological Father regarding the adoption proceeding.) Biological Father signed papers stating that he accepted service and that he was "not contesting the adoption." App. 37. But Biological Father later testified that, at the time he signed the papers, he thought that he was

relinquishing his rights to Birth Mother, not to Adoptive Couple.

Biological Father contacted a lawyer the day after signing the papers, and subsequently requested a stay of the adoption proceedings.[2] In the adoption proceedings, Biological Father sought custody and stated that he did not consent to Baby Girl's adoption. Moreover, Biological Father took a paternity test, which verified that he was Baby Girl's biological father.

A trial took place in the South Carolina Family Court in September 2011, by which time Baby Girl was two years old. 398 S. C. 625, 634–635, 731 S. E. 2d 550, 555–556 (2012). The Family Court concluded that Adoptive Couple had not carried the heightened burden under § 1912(f) of proving that Baby Girl would suffer serious emotional or physical damage if Biological Father had custody. See *id.*, at 648–651, 731 S. E. 2d, at 562–564. The Family Court therefore denied Adoptive Couple's petition for adoption and awarded custody to Biological Father. *Id.*, at 629, 636, 731 S. E. 2d, at 552, 556. On December 31, 2011, at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met.[3]

The South Carolina Supreme Court affirmed the Family Court's denial of the adoption and the award of custody to Biological Father. *Id.*, at 629, 731 S. E. 2d, at 552. The State Supreme Court first determined that the ICWA applied because the case involved a child custody proceeding relating to an Indian child. *Id.*, at 637, 643, n. 18, 731 S. E.

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[2] Around the same time, the Cherokee Nation identified Biological Father as a registered member and concluded that Baby Girl was an "Indian child" as defined in the ICWA. The Cherokee Nation intervened in the litigation approximately three months later.

[3] According to the guardian ad litem, Biological Father allowed Baby Girl to speak with Adoptive Couple by telephone the following day, but then cut off all communication between them. Moreover, according to Birth Mother, Biological Father has made no attempt to contact her since the time he took custody of Baby Girl.

2d, at 556, 560, n. 18. It also concluded that Biological Father fell within the ICWA's definition of a "'parent.'" *Id.*, at 644, 731 S. E. 2d, at 560. The court then held that two separate provisions of the ICWA barred the termination of Biological Father's parental rights. First, the court held that Adoptive Couple had not shown that "active efforts ha[d] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." § 1912(d); see also *id.*, at 647–648, 731 S. E. 2d, at 562. Second, the court concluded that Adoptive Couple had not shown that Biological Father's "custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt." *Id.*, at 648–649, 731 S. E. 2d, at 562–563 (citing § 1912(f)). Finally, the court stated that, even if it had decided to terminate Biological Father's parental rights, § 1915(a)'s adoption-placement preferences would have applied. *Id.*, at 655–657, 731 S. E. 2d, at 566–567. We granted certiorari. 568 U. S. 1081 (2013).

III

It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law. See Tr. of Oral Arg. 49; 398 S. C., at 644, n. 19, 731 S. E. 2d, at 560, n. 19 ("Under state law, [Biological] Father's consent to the adoption would not have been required"). The South Carolina Supreme Court held, however, that Biological Father is a "parent" under the ICWA and that two statutory provisions—namely, §§ 1912(f) and 1912(d)—bar the termination of his parental rights. In this Court, Adoptive Couple contends that Biological Father is not a "parent" and that §§ 1912(f) and (d) are inapplicable. We need not—and therefore do not—decide whether Biological Father is a "parent." See § 1903(9) (defining "parent").[4] Rather, assuming for the sake of argu-

[4] If Biological Father is not a "parent" under the ICWA, then §§ 1912(f) and (d)—which relate to proceedings involving possible termination of "pa-

ment that he is a "parent," we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights.

A

Section 1912(f) addresses the involuntary termination of parental rights with respect to an Indian child. Specifically, § 1912(f) provides that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (Emphasis added.) The South Carolina Supreme Court held that Adoptive Couple failed to satisfy § 1912(f) because they did not make a heightened showing that Biological Father's "*prospective* legal and physical custody" would likely result in serious damage to the child. 398 S. C., at 651, 731 S. E. 2d, at 564 (emphasis added). That holding was error.

Section 1912(f) conditions the involuntary termination of parental rights on a showing regarding the merits of "*continued* custody of the child by the parent." (Emphasis added.) The adjective "continued" plainly refers to a preexisting state. As JUSTICE SOTOMAYOR concedes, *post*, at 678 (dissenting opinion) (hereinafter the dissent), "continued" means "[c]arried on or kept up without cessation" or "[e]xtended in space without interruption or breach of conne[ct]ion." Compact Edition of the Oxford English Dictionary 909 (1981 reprint of 1971 ed.) (Compact OED); see also American Heritage Dictionary 288 (1981) (defining "continue" in the following manner: "1. To go on with a particular action or in a particular condition; persist. . . . 3. To remain in the same state, capacity, or place"); Webster's Third New International Dictionary 493 (1961) (Webster's) (defining "continued"

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rental" rights—are inapplicable. Because we conclude that these provisions are inapplicable for other reasons, however, we need not decide whether Biological Father is a "parent."

as "stretching out in time or space esp. without interruption"); *Aguilar* v. *FDIC*, 63 F. 3d 1059, 1062 (CA11 1995) (*per curiam*) (suggesting that the phrase "continue an action" means "go on with . . . an action" that is "preexisting"). The term "continued" also can mean "resumed after interruption." Webster's 493; see American Heritage Dictionary 288. The phrase "continued custody" therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, § 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child.[5]

Biological Father's contrary reading of § 1912(f) is nonsensical. Pointing to the provision's requirement that "[n]o termination of parental rights may be ordered . . . in the absence of a determination" relating to "the continued custody of the child by the parent," Biological Father contends that if a determination relating to "continued custody" is inapposite in cases where there is no "custody," the statutory text *prohibits* termination. See Brief for Respondent Birth Father 39. But it would be absurd to think that Congress enacted a provision that *permits* termination of a custodial parent's rights, while simultaneously *prohibiting* termination of a noncustodial parent's rights. If the statute draws any distinction between custodial and noncustodial parents, that distinction surely does not provide greater protection for noncustodial parents.[6]

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[5] With a torrent of words, the dissent attempts to obscure the fact that its interpretation simply cannot be squared with the statutory text. A biological father's "continued custody" of a child cannot be assessed if the father never had custody at all, and the use of a different phrase—"termination of parental rights"—cannot change that. In addition, the dissent's reliance on subsection headings, *post*, at 676, overlooks the fact that those headings were not actually enacted by Congress. See 92 Stat. 3071–3072.

[6] The dissent criticizes us for allegedly concluding that a biological father qualifies for "substantive" statutory protections "only when [he] has physical or state-recognized legal custody." *Post*, at 670, 673–674. But the dis-

Our reading of § 1912(f) comports with the statutory text demonstrating that the primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts. The statutory text expressly highlights the primary problem that the statute was intended to solve: "[A]n alarmingly high percentage of Indian families [were being] broken up by the *removal*, often unwarranted, of their children from them by nontribal public and private agencies." § 1901(4) (emphasis added); see also § 1902 (explaining that the ICWA establishes "minimum Federal standards for the *removal* of Indian children from their families" (emphasis added)); *Holyfield*, 490 U. S., at 32–34. And if the legislative history of the ICWA is thought to be relevant, it further underscores that the Act was primarily intended to stem the unwarranted removal of Indian children from intact Indian families. See, *e. g.*, H. R. Rep. No. 95–1386, p. 8 (1978) (explaining that, as relevant here, "[t]he purpose of [the ICWA] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the *removal* of Indian children from their families and the placement of such children in foster or adoptive homes" (emphasis added)); *id.*, at 9 (decrying the "wholesale separation of Indian children" from their Indian families); *id.*, at 22 (discussing "the removal" of Indian children from their parents pursuant to §§ 1912(e) and (f)). In sum, when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.

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sent undercuts its own point when it states that "numerous" ICWA provisions not at issue here afford "meaningful" protections to biological fathers regardless of whether they ever had custody. *Post*, at 672–674, and nn. 1, 2.

The dissent fails to dispute that nonbinding guidelines issued by the Bureau of Indian Affairs (BIA) shortly after the ICWA's enactment demonstrate that the BIA envisioned that § 1912(f)'s standard would apply only to termination of a *custodial* parent's rights. Specifically, the BIA stated that, under § 1912(f), "[a] child may not be *removed* simply because there is someone else willing to raise the child who is likely to do a better job"; instead, "[i]t must be shown that . . . it is dangerous for the child to *remain* with his or her *present* custodians." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67593 (1979) (emphasis added) (hereinafter Guidelines). Indeed, the Guidelines recognized that § 1912(f) applies only when there is pre-existing custody to evaluate. See *ibid.* ("[T]he issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed").

Under our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings. As an initial matter, it is undisputed that Biological Father never had *physical* custody of Baby Girl. And as a matter of both South Carolina and Oklahoma law, Biological Father never had *legal* custody either. See S. C. Code Ann. § 63–17–20(B) (2010) ("Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child"); Okla. Stat., Tit. 10, § 7800 (West Cum. Supp. 2013) ("Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction").[7]

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[7] In an effort to rebut our supposed conclusion that "Congress *could not* possibly have intended" to require legal termination of Biological Father's rights with respect to Baby Girl, the dissent asserts that a minority of States afford (or used to afford) protection to similarly situated biological

In sum, the South Carolina Supreme Court erred in finding that § 1912(f) barred termination of Biological Father's parental rights.

B

Section 1912(d) provides that "[a]ny party" seeking to terminate parental rights to an Indian child under state law "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed *to prevent the breakup of the Indian family* and that these efforts have proved unsuccessful." (Emphasis added.) The South Carolina Supreme Court found that Biological Father's parental rights could not be terminated because Adoptive Couple had not demonstrated that Biological Father had been provided remedial services in accordance with § 1912(d). 398 S. C., at 647–648, 731 S. E. 2d, at 562. We disagree.

Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family's "breakup" would be precipitated by the termination of the parent's rights. The term "breakup" refers in this context to "[t]he discontinuance of a relationship," American Heritage Dictionary 235 (3d ed. 1992), or "an ending as an effective entity," Webster's 273 (defining "breakup" as "a disruption or dissolution into component parts: an ending as an effective entity"). See also Compact OED 1076 (defining "break-up" as, *inter alia*, a "disruption, separation into parts, disintegration"). But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" that would be "discontinu[ed]"—and no "effective

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fathers. See *post*, at 684–685, and n. 12 (emphasis added). This is entirely beside the point, because we merely conclude that, based on the statute's text and structure, Congress *did not* extend the heightened protections of §§ 1912(d) and (f) to all biological fathers. The fact that state laws may provide certain protections to biological fathers who have abandoned their children and who have never had custody of their children in no way undermines our analysis of these two federal statutory provisions.

entity" that would be "end[ed]"—by the termination of the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and § 1912(d) is inapplicable.

Our interpretation of § 1912(d) is, like our interpretation of § 1912(f), consistent with the explicit congressional purpose of providing certain "standards for the *removal* of Indian children from their families." § 1902 (emphasis added); see also, *e. g.*, § 1901(4); *Holyfield*, 490 U. S., at 32–34. In addition, the BIA's Guidelines confirm that remedial services under § 1912(d) are intended "to alleviate the need to *remove* the Indian child from his or her parents or Indian custodians," not to facilitate a *transfer* of the child *to* an Indian parent. See 44 Fed. Reg., at 67592 (emphasis added).

Our interpretation of (d) is also confirmed by the provision's placement next to §§ 1912(e) and (f), both of which condition the outcome of proceedings on the merits of an Indian child's "continued custody" with his parent. That these three provisions appear adjacent to each other strongly suggests that the phrase "breakup of the Indian family" should be read in harmony with the "continued custody" requirement. See *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988) (explaining that statutory construction "is a holistic endeavor" and that "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). None of these three provisions *creates* parental rights for unwed fathers where no such rights would otherwise exist. Instead, Indian parents who are already part of an "Indian family" are provided with access to "remedial services and rehabilitative programs" under § 1912(d) so that their "custody" might be "continued" in a way that avoids foster-care placement under § 1912(e) or termination of parental rights under § 1912(f). In other words, the provision of "remedial services and rehabilitative programs" under § 1912(d) supports

the "continued custody" that is protected by §§ 1912(e) and (f).[8]

Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families. It would, however, be unusual to apply § 1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child. The decision below illustrates this point. The South Carolina Supreme Court held that § 1912(d) mandated measures such as "attempting to stimulate [Biological] Father's desire to be a parent." 398 S. C., at 647, 731 S. E. 2d, at 562. But if prospective adoptive parents were required to engage in the bizarre undertaking of "stimulat[ing]" a biological father's "desire to be a parent," it would surely dissuade some of them from seeking to adopt Indian children.[9] And this would, in turn, unnecessarily place vulnerable Indian children at a unique

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[8] The dissent claims that our reasoning "necessarily extends to *all* Indian parents who have never had custody of their children," even if those parents have visitation rights. *Post*, at 670, 679–681. As an initial matter, the dissent's concern about the effect of our decision on individuals with visitation rights will be implicated, at most, in a relatively small class of cases. For example, our interpretation of § 1912(d) would implicate the dissent's concern only in the case of a parent who abandoned his or her child prior to birth and *never* had physical or legal custody, but *did* have some sort of visitation rights. Moreover, in cases where this concern is implicated, such parents might receive "comparable" protections under state law. See *post*, at 682. And in any event, it is the *dissent's* interpretation that would have far-reaching consequences: Under the dissent's reading, *any* biological parent—even a sperm donor—would enjoy the heightened protections of §§ 1912(d) and (f), even if he abandoned the mother and the child immediately after conception. *Post*, at 680, n. 8.

[9] Biological Father and the Solicitor General argue that a tribe or state agency *could* provide the requisite remedial services under § 1912(d). Brief for Respondent Birth Father 43; Brief for United States as *Amicus Curiae* 22. But what if they don't? And if they don't, would the adoptive parents have to undertake the task?

disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.[10]

In sum, the South Carolina Supreme Court erred in finding that § 1912(d) barred termination of Biological Father's parental rights.

IV

In the decision below, the South Carolina Supreme Court suggested that if it had terminated Biological Father's rights, then § 1915(a)'s preferences for the adoptive placement of an Indian child would have been applicable. 398 S. C., at 655–657, 731 S. E. 2d, at 566–567. In so doing, however, the court failed to recognize a critical limitation on the scope of § 1915(a).

Section 1915(a) provides that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." Contrary to the South Carolina Supreme Court's suggestion, § 1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no "preference" to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward.

In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. See Brief for Petitioners 19, 55; Brief for Respondent Birth Father 48; Reply Brief for Petitioners 13. Biological Father is not covered by § 1915(a) because he did not seek to *adopt* Baby Girl; instead, he argued that his parental rights should not be terminated in the first

[10] The dissent repeatedly mischaracterizes our opinion. As our detailed discussion of the terms of the ICWA makes clear, our decision is not based on a "[p]olicy disagreement with Congress' judgment." *Post,* at 669; see also *post,* at 675, 688.

place.[11] Moreover, Baby Girl's paternal grandparents never sought custody of Baby Girl. See Brief for Petitioners 55; Reply Brief for Petitioners 13; 398 S. C., at 699, 731 S. E. 2d, at 590 (Kittredge, J., dissenting) (noting that the "paternal grandparents are not parties to this action"). Nor did other members of the Cherokee Nation or "other Indian families" seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened in—the adoption proceedings. See Brief for Respondent Cherokee Nation 21–22; Reply Brief for Petitioners 13–14.[12]

* * *

The ICWA was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme

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[11] Section 1915(c) also provides that, in the case of an adoptive placement under § 1915(a), "if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in [§ 1915(b)]." Although we need not decide the issue here, it may be the case that an Indian child's tribe could alter § 1915's preferences in a way that includes a biological father whose rights were terminated, but who has now reformed. See § 1915(c). If a tribe were to take such an approach, however, the court would still have the power to determine whether "good cause" exists to disregard the tribe's order of preference. See §§ 1915(a), (c); *In re Adoption of T. R. M.*, 525 N. E. 2d 298, 313 (Ind. 1988).

[12] To be sure, an employee of the Cherokee Nation testified that the Cherokee Nation certifies families to be adoptive parents and that there are approximately 100 such families "that are ready to take children that want to be adopted." Record 446. However, this testimony was only a general statement regarding the Cherokee Nation's practices; it did not demonstrate that a specific Indian family was willing to adopt Baby Girl, let alone that such a family formally sought such adoption in the South Carolina courts. See Reply Brief for Petitioners 13–14; see also Brief for Respondent Cherokee Nation 21–22.

Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context. Nor do § 1915(a)'s rebuttable adoption preferences apply when no alternative party has formally sought to adopt the child. We therefore reverse the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in full but write separately to explain why constitutional avoidance compels this outcome. Each party in this case has put forward a plausible interpretation of the relevant sections of the Indian Child Welfare Act (ICWA). However, the interpretations offered by respondent Birth Father and the United States raise significant constitutional problems as applied to this case. Because the Court's decision avoids those problems, I concur in its interpretation.

I

This case arises out of a contested state-court adoption proceeding. Adoption proceedings are adjudicated in state family courts across the country every day, and "domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U. S. 393, 404 (1975). Indeed, "[t]he whole subject of the do-

mestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U. S. 586, 593–594 (1890). Nevertheless, when Adoptive Couple filed a petition in South Carolina Family Court to finalize their adoption of Baby Girl, Birth Father, who had relinquished his parental rights via a text message to Birth Mother, claimed a federal right under the ICWA to block the adoption and to obtain custody.

The ICWA establishes "federal standards that govern state-court child custody proceedings involving Indian children." *Ante*, at 642. The ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U. S. C. § 1903(4). As relevant, the ICWA defines "child custody proceeding," § 1903(1), to include "adoptive placement," which means "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption," § 1903(1)(iv), and "termination of parental rights," which means "any action resulting in the termination of the parent-child relationship," § 1903(1)(ii).

The ICWA restricts a state court's ability to terminate the parental rights of an Indian parent in two relevant ways. Section 1912(f) prohibits a state court from involuntarily terminating parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Section 1912(d) prohibits a state court from terminating parental rights until the court is satisfied "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." A third provision creates specific place-

ment preferences for the adoption of Indian children, which favor placement with Indians over other adoptive families. § 1915(a). Operating together, these requirements often lead to different outcomes than would result under state law. That is precisely what happened here. See *ante*, at 646 ("It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law").

The ICWA recognizes States' inherent "jurisdiction over Indian child custody proceedings," § 1901(5), but asserts that federal regulation is necessary because States "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," *ibid.* However, Congress may regulate areas of traditional state concern only if the Constitution grants it such power. Amdt. 10 ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). The threshold question, then, is whether the Constitution grants Congress power to override state custody law whenever an Indian is involved.

II

The ICWA asserts that the Indian Commerce Clause, Art. I, § 8, cl. 3, and "other constitutional authority" provide Congress with "plenary power over Indian affairs." § 1901(1). The reference to "other constitutional authority" is not illuminating, and I am aware of no other enumerated power that could even arguably support Congress' intrusion into this area of traditional state authority. See Fletcher, The Supreme Court and Federal Indian Policy, 85 Neb. L. Rev. 121, 137 (2006) ("As a matter of federal constitutional law, the Indian Commerce Clause grants Congress the only explicit constitutional authority to deal with Indian tribes"); Natelson, The Original Understanding of the Indian Commerce Clause, 85 Denver U. L. Rev. 201, 210 (2007) (herein-

after Natelson) (evaluating, and rejecting, other potential sources of authority supporting congressional power over Indians). The assertion of plenary authority must, therefore, stand or fall on Congress' power under the Indian Commerce Clause. Although this Court has said that the "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 192 (1989), neither the text nor the original understanding of the Clause supports Congress' claim to such "plenary" power.

A

The Indian Commerce Clause gives Congress authority "[t]o regulate *Commerce* . . . with the Indian tribes." Art. I, § 8, cl. 3 (emphasis added). "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States* v. *Lopez*, 514 U. S. 549, 585 (1995) (THOMAS, J., concurring). See also 1 S. Johnson, A Dictionary of the English Language 361 (4th rev. ed. 1773) (reprint 1978) (defining commerce as "Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick"). "[W]hen Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably." *Lopez*, 514 U. S., at 586 (THOMAS, J., concurring). The term "commerce" did not include economic activity such as "manufacturing and agriculture," *ibid.*, let alone noneconomic activity such as adoption of children.

Furthermore, the term "commerce with Indian tribes" was invariably used during the time of the founding to mean "'trade with Indians.'" See, *e. g.*, Natelson 215–216, and n. 97 (citing 18th-century sources); Report of Committee on Indian Affairs (Feb. 20, 1787), in 32 Journals of the Continental Congress 1774–1789, pp. 66, 68 (R. Hill ed. 1936) (hereinafter J. Cont'l Cong.) (using the phrase "commerce with the

Indians" to mean trade with the Indians). And regulation of Indian commerce generally referred to legal structures governing "the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters." Natelson 216, and n. 99.

The Indian Commerce Clause contains an additional textual limitation relevant to this case: Congress is given the power to regulate Commerce "with the Indian *tribes*." The Clause does not give Congress the power to regulate commerce with all Indian *persons* any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States. A straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions—"commerce"—taking place with established Indian communities—"tribes." That power is far from "plenary."

B

Congress' assertion of "plenary power" over Indian affairs is also inconsistent with the history of the Indian Commerce Clause. At the time of the founding, the Clause was understood to reserve to the States general police powers with respect to Indians who were citizens of the several States. The Clause instead conferred on Congress the much narrower power to regulate trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State.

1

Before the Revolution, most Colonies adopted their own regulations governing Indian trade. See Natelson 219, and n. 121 (citing colonial laws). Such regulations were necessary because colonial traders all too often abused their Indian trading partners, through fraud, exorbitant prices, extortion, and physical invasion of Indian territory, among other things. See 1 F. Prucha, The Great Father 18–20

(1984) (hereinafter Prucha); Natelson 220, and n. 122. These abuses sometimes provoked violent Indian retaliation. See Prucha 20. To mitigate these conflicts, most Colonies extensively regulated traders engaged in commerce with Indian tribes. See, *e. g.*, Ordinance To Regulate Indian Affairs, Statutes of South Carolina (Aug. 31, 1751), in 16 Early American Indian Documents: Treaties and Laws, 1607–1789, pp. 331–334 (A. Vaughan & D. Rosen eds. 1998).[1] Over time, commercial regulation at the colonial level proved largely ineffective, in part because "[t]here was no uniformity among the colonies, no two sets of like regulations." Prucha 21.

Recognizing the need for uniform regulation of trade with the Indians, Benjamin Franklin proposed his own "articles of confederation" to the Continental Congress on July 21, 1775, which reflected his view that central control over Indian affairs should predominate over local control. 2 J. Cont'l Cong. 195–199 (W. Ford ed. 1905). Franklin's proposal was not enacted, but in November 1775, Congress empowered a Committee to draft regulations for the Indian trade. 3 *id.*, at 364, 366. On July 12, 1776, the Committee submitted a draft of the Articles of Confederation to Congress, which incorporated many of Franklin's proposals. 5 *id.*, at 545, n. 1, 546. The draft prohibited States from waging offensive war against the Indians without congressional authorization and granted Congress the exclusive power to acquire land from the Indians outside state boundaries, once those boundaries had been established. *Id.*, at 549. This

[1] South Carolina, for example, required traders to be licensed, to be of good moral character, and to post a bond. Ordinance To Regulate Indian Affairs, in 16 Early American Indian Documents, at 331–334. A potential applicant's name was posted publicly before issuing the license, so anyone with objections had an opportunity to raise them. *Id.*, at 332. Restrictions were placed on employing agents, *id.*, at 333–334, and names of potential agents had to be disclosed, *id.*, at 333. Traders who violated these rules were subject to substantial penalties. *Id.*, at 331, 334.

version also gave Congress "the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians." *Id.*, at 550.

On August 20, 1776, the Committee of the Whole presented to Congress a revised draft, which provided Congress with "the sole and exclusive right and power of . . . regulating the trade, and managing all affairs with the Indians." *Id.*, at 672, 681–682. Some delegates feared that the Articles gave Congress excessive power to interfere with States' jurisdiction over affairs with Indians residing within state boundaries. After further deliberation, the final result was a clause that included a broad grant of congressional authority with two significant exceptions: "The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." Articles of Confederation, Art. IX, cl. 4. As a result, Congress retained exclusive jurisdiction over Indian affairs outside the borders of the States; the States retained exclusive jurisdiction over relations with Member-Indians;[2] and Congress and the States "exercise[d] concurrent jurisdiction over transactions with tribal Indians within state boundaries, but congressional decisions would have to be in compliance with local law." Natelson 230. The drafting of the Articles of Confederation reveals the delegates' concern with protecting the power of the States to regulate Indian persons who were politically incorporated into the States. This concern for state power reemerged during the drafting of the Constitution.

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[2] Although Indians were generally considered "members" of a State if they paid taxes or were citizens, see Natelson 230, the precise definition of the term was "not yet settled" at the time of the founding and was "a question of frequent perplexity and contention in the federal councils," The Federalist No. 42, p. 269 (C. Rossiter ed. 1961) (J. Madison).

The drafting history of the Constitutional Convention also supports a limited construction of the Indian Commerce Clause. On July 24, 1787, the Convention elected a drafting committee—the Committee of Detail—and charged it to "report a Constitution conformable to the Resolutions passed by the Convention." 2 Records of the Federal Convention of 1787, p. 106 (M. Farrand rev. 1966) (J. Madison). During the Committee's deliberations, John Rutledge, the chairman, suggested incorporating an Indian affairs power into the Constitution. *Id.*, at 137, n. 6, 143. The first draft reported back to the Convention, however, provided Congress with authority "[t]o regulate commerce with foreign nations, and among the several States," *id.*, at 181 (J. Madison) (Aug. 6, 1787), but did not include any specific Indian affairs clause. On August 18, James Madison proposed that the Federal Government be granted several additional powers, including the power "[t]o regulate *affairs* with the Indians as well within as without the limits of the U. States." *Id.*, at 324 (emphasis added). On August 22, Rutledge delivered the Committee of Detail's second report, which modified Madison's proposed clause. The Committee proposed to add to Congress' power "[t]o regulate commerce with foreign nations, and among the several States" the words, "and with Indians, within the Limits of any State, not subject to the laws thereof." *Id.*, at 366–367 (Journal). The Committee's version, which echoed the Articles of Confederation, was far narrower than Madison's proposal. On August 31, the revised draft was submitted to a Committee of Eleven for further action. *Id.*, at 473 (Journal), 481 (J. Madison). That Committee recommended adding to the Commerce Clause the phrase, "and with the Indian tribes," *id.*, at 493 (Journal), which the Convention ultimately adopted.

It is, thus, clear that the Framers of the Constitution were alert to the difference between the power to regulate trade with the Indians and the power to regulate all Indian affairs.

By limiting Congress' power to the former, the Framers declined to grant Congress the same broad powers over Indian affairs conferred by the Articles of Confederation. See Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069, 1090 (2004).

During the ratification debates, opposition to the Indian Commerce Clause was nearly nonexistent. See Natelson 248 (noting that Robert Yates, a New York Anti-Federalist, was "almost the only writer who objected to any part [of] the Commerce Clause—a clear indication that its scope was understood to be fairly narrow" (footnote omitted)). Given the Anti-Federalists' vehement opposition to the Constitution's other grants of power to the Federal Government, this silence is revealing. The ratifiers almost certainly understood the Clause to confer a relatively modest power on Congress—namely, the power to regulate trade with Indian tribes living beyond state borders. And this feature of the Constitution was welcomed by Federalists and Anti-Federalists alike due to the considerable interest in expanding trade with such Indian tribes. See, *e. g.*, The Federalist No. 42, p. 269 (C. Rossiter ed. 1961) (J. Madison) (praising the Constitution for removing the obstacles that had existed under the Articles of Confederation to federal control over "*trade* with Indians" (emphasis added)); 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 580 (2d ed. 1863) (Adam Stephens, at the Virginia ratifying convention, June 23, 1788, describing the Indian tribes residing near the Mississippi and "the variety of articles which might be obtained to advantage by trading with these people"); The Federalist No. 24, at 158 (A. Hamilton) (arguing that frontier garrisons would "be keys to the trade with the Indian nations"); Brutus X, N. Y. J., Jan. 24, 1788, in 15 The Documentary History of the Ratification of the Constitution 462, 465 (J. Kaminski & G. Saladino eds. 2012) (conceding that there must be a standing army for some purposes, including "trade with the Indians"). There

is little evidence that the ratifiers of the Constitution understood the Indian Commerce Clause to confer anything resembling plenary power over Indian affairs. See Natelson 247–250.

III

In light of the original understanding of the Indian Commerce Clause, the constitutional problems that would be created by application of the ICWA here are evident. First, the statute deals with "child custody proceeding[s]," § 1903(1), not "commerce." It was enacted in response to concerns that "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." § 1901(4). The perceived problem was that many Indian children were "placed in non-Indian foster and adoptive homes and institutions." *Ibid.* This problem, however, had nothing to do with commerce.

Second, the portions of the ICWA at issue here do not regulate Indian tribes as tribes. Sections 1912(d) and (f) and § 1915(a) apply to all child custody proceedings involving an Indian child, regardless of whether an Indian tribe is involved. This case thus does not directly implicate Congress' power to "legislate in respect to Indian *tribes*." *United States* v. *Lara*, 541 U. S. 193, 200 (2004) (emphasis added). Baby Girl was never domiciled on an Indian reservation, and the Cherokee Nation had no jurisdiction over her. Cf. *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U. S. 30, 53–54 (1989) (holding that the Indian Tribe had exclusive jurisdiction over child custody proceedings, even though the children were born off the reservation, because the children were "domiciled" on the reservation for purposes of the ICWA). Although Birth Father is a registered member of the Cherokee Nation, he did not live on a reservation either. He was, thus, subject to the laws of the State in which he resided (Oklahoma) and of the State where his daughter resided during the custody proceedings (South Carolina).

Nothing in the Indian Commerce Clause permits Congress to enact special laws applicable to Birth Father merely because of his status as an Indian.[3]

Because adoption proceedings like this one involve neither "commerce" nor "Indian tribes," there is simply no constitutional basis for Congress' assertion of authority over such proceedings. Also, the notion that Congress can direct state courts to apply different rules of evidence and procedure merely because a person of Indian descent is involved raises absurd possibilities. Such plenary power would allow Congress to dictate specific rules of criminal procedure for state-court prosecutions against Indian defendants. Likewise, it would allow Congress to substitute federal law for state law when contract disputes involve Indians. But the Constitution does not grant Congress power to override state law whenever that law happens to be applied to Indians. Accordingly, application of the ICWA to these child custody proceedings would be unconstitutional.

* * *

Because the Court's plausible interpretation of the relevant sections of the ICWA avoids these constitutional problems, I concur.

JUSTICE BREYER, concurring.

I join the Court's opinion with three observations. First, the statute does not directly explain how to treat an absentee Indian father who had next-to-no involvement with his child in the first few months of her life. That category of fathers

[3] Petitioners and the guardian ad litem contend that applying the ICWA to child custody proceedings on the basis of race implicates equal protection concerns. See Brief for Petitioners 45 (arguing that the statute would be unconstitutional "if unwed fathers with no preexisting substantive parental rights receive a statutory preference based solely on the Indian child's race"); Brief for Respondent Guardian ad Litem 48–49 (same). I need not address this argument because I am satisfied that Congress lacks authority to regulate the child custody proceedings in this case.

may include some who would prove highly unsuitable parents, some who would be suitable, and a range of others in between. Most of those who fall within that category seem to fall outside the scope of the language of 25 U. S. C. §§ 1912(d) and (f). Thus, while I agree that the better reading of the statute is, as the majority concludes, to exclude most of those fathers, *ante*, at 647–648, 651–652, I also understand the risk that, from a policy perspective, the Court's interpretation could prove to exclude too many, see *post*, at 679–680, 689 (SOTOMAYOR, J., dissenting).

Second, we should decide here no more than is necessary. Thus, this case does not involve a father with visitation rights or a father who has paid "all of his child support obligations." *Post*, at 680. Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child. See *ibid.*, n. 8. The Court need not, and in my view does not, now decide whether or how §§ 1912(d) and (f) apply where those circumstances are present.

Third, other statutory provisions not now before us may nonetheless prove relevant in cases of this kind. Section 1915(a) grants an adoptive "preference" to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families . . . in the absence of good cause to the contrary." Further, §1915(c) allows the "Indian child's tribe" to "establish a different order of preference by resolution." Could these provisions allow an absentee father to reenter the special statutory order of preference with support from the tribe, and subject to a court's consideration of "good cause"? I raise, but do not here try to answer, the question.

JUSTICE SCALIA, dissenting.

I join JUSTICE SOTOMAYOR's dissent except as to one detail. I reject the conclusion that the Court draws from the words "continued custody" in 25 U. S. C. § 1912(f) not because

"literalness may strangle meaning," see *post*, at 678, but because there is no reason that "continued" must refer to custody in the past rather than custody in the future. I read the provision as requiring the court to satisfy itself (beyond a reasonable doubt) not merely that initial or temporary custody is not "likely to result in serious emotional or physical damage to the child," but that continued custody is not likely to do so. See Webster's New International Dictionary 577 (2d ed. 1950) (defining "continued" as "[p]rotracted in time or space, esp. without interruption; constant"). For the reasons set forth in JUSTICE SOTOMAYOR's dissent, that connotation is much more in accord with the rest of the statute.

While I am at it, I will add one thought. The Court's opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is "in the best interest of the child." It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do. This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, and with whom JUSTICE SCALIA joins in part, dissenting.

A casual reader of the Court's opinion could be forgiven for thinking this an easy case, one in which the text of the applicable statute clearly points the way to the only sensible result. In truth, however, the path from the text of the Indian Child Welfare Act of 1978 (ICWA or Act) to the result the Court reaches is anything but clear, and its result anything but right.

The reader's first clue that the majority's supposedly straightforward reasoning is flawed is that not all Members

who adopt its interpretation believe it is compelled by the text of the statute, see *ante*, at 656 (THOMAS, J., concurring); nor are they all willing to accept the consequences it will necessarily have beyond the specific factual scenario confronted here, see *ante*, at 666–667 (BREYER, J., concurring). The second clue is that the majority begins its analysis by plucking out of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it. That is not how we ordinarily read statutes. The third clue is that the majority openly professes its aversion to Congress' explicitly stated purpose in enacting the statute. The majority expresses concern that reading the Act to mean what it says will make it more difficult to place Indian children in adoptive homes, see *ante*, at 653–654, 655–656, but the Congress that enacted the statute announced its intent to stop "an alarmingly high percentage of Indian families [from being] broken up" by, among other things, a trend of "plac[ing] [Indian children] in non-Indian . . . adoptive homes." 25 U. S. C. § 1901(4). Policy disagreement with Congress' judgment is not a valid reason for this Court to distort the provisions of the Act. Unlike the majority, I cannot adopt a reading of ICWA that is contrary to both its text and its stated purpose. I respectfully dissent.

I

Beginning its reading with the last clause of § 1912(f), the majority concludes that a single phrase appearing there—"continued custody"—means that the entirety of the subsection is inapplicable to any parent, however committed, who has not previously had physical or legal custody of his child. Working back to front, the majority then concludes that § 1912(d), tainted by its association with § 1912(f), is also inapplicable; in the majority's view, a family bond that does not take custodial form is not a family bond worth preserving from "breakup." Because there are apparently no limits on the contaminating power of this single phrase, the majority

does not stop there. Under its reading, § 1903(9), which makes biological fathers "parent[s]" under this federal statute (and where, again, the phrase "continued custody" does not appear), has substantive force only when a birth father has physical or state-recognized legal custody of his daughter.

When it excludes noncustodial biological fathers from the Act's substantive protections, this textually backward reading misapprehends ICWA's structure and scope. Moreover, notwithstanding the majority's focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to *all* Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting. The majority thereby transforms a statute that was intended to provide uniform federal standards for child custody proceedings involving Indian children and their biological parents into an illogical piecemeal scheme.

A

Better to start at the beginning and consider the operation of the statute as a whole. Cf. *ante*, at 652 ("[S]tatutory construction 'is a holistic endeavor[,]' and . . . '[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme'" (quoting *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988))).

ICWA commences with express findings. Congress recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," 25 U. S. C. § 1901(3), and it found that this resource was threatened. State authorities insufficiently sensitive to "the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families" were breaking up Indian families and moving Indian children to non-Indian homes and institutions. See §§ 1901(4)–(5). As § 1901(4) makes clear, and as this Court

recognized in *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U. S. 30, 33 (1989), adoptive placements of Indian children with non-Indian families contributed significantly to the overall problem. See § 1901(4) (finding that "an alarmingly high percentage of [Indian] children are placed in non-Indian . . . adoptive homes").

Consistent with these findings, Congress declared its purpose "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards" applicable to child custody proceedings involving Indian children. § 1902. Section 1903 then goes on to establish the reach of these protections through its definitional provisions. For present purposes, two of these definitions are crucial to understanding the statute's full scope.

First, ICWA defines the term "parent" broadly to mean "any biological parent . . . of an Indian child or any Indian person who has lawfully adopted an Indian child." § 1903(9). It is undisputed that Baby Girl is an "Indian child" within the meaning of the statute, see § 1903(4); *ante*, at 642, n. 1, and Birth Father consequently qualifies as a "parent" under the Act. The statutory definition of parent "does not include the unwed father where paternity has not been acknowledged or established," § 1903(9), but Birth Father's biological paternity has never been questioned by any party and was confirmed by a DNA test during the state-court proceedings, App. to Pet. for Cert. 109a (Sealed).

Petitioners and Baby Girl's guardian ad litem devote many pages of briefing to arguing that the term "parent" should be defined with reference to the law of the State in which an ICWA child custody proceeding takes place. See Brief for Petitioners 19–29; Brief for Respondent Guardian ad Litem 32–41. These arguments, however, are inconsistent with our recognition in *Holyfield* that Congress intended the critical terms of the statute to have uniform federal definitions. See 490 U. S., at 44–45. It is therefore unsurprising, al-

though far from unimportant, that the majority assumes for the purposes of its analysis that Birth Father is an ICWA "parent." See *ante,* at 646–647.

Second, the Act's comprehensive definition of "child custody proceeding" includes not only "'adoptive placement[s],'" "'preadoptive placement[s],'" and "'foster care placement[s],'" but also "'termination of parental rights'" proceedings. § 1903(1). This last category encompasses "*any* action resulting in the termination of the *parent-child relationship*," § 1903(1)(ii) (emphasis added). So far, then, it is clear that Birth Father has a federally recognized status as Baby Girl's "parent" and that his "parent-child relationship" with her is subject to the protections of the Act.

These protections are numerous. Had Birth Father petitioned to remove this proceeding to tribal court, for example, the state court would have been obligated to transfer it absent an objection from Birth Mother or good cause to the contrary. See § 1911(b). Any voluntary consent Birth Father gave to Baby Girl's adoption would have been invalid unless written and executed before a judge and would have been revocable up to the time a final decree of adoption was entered.[1] See §§ 1913(a), (c). And § 1912, the center of the dispute here, sets forth procedural and substantive standards applicable in "involuntary proceeding[s] in a State court," including foster care placements of Indian children and termination of parental rights proceedings. § 1912(a). I consider § 1912's provisions in order.

Section 1912(a) requires that any party seeking "termination of parental rights t[o] an Indian child" provide notice to

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[1] For this reason, the South Carolina Supreme Court held that Birth Father did not give valid consent to Baby Girl's adoption when, four months after her birth, he signed papers stating that he accepted service and was not contesting the adoption. See 398 S. C. 625, 645–646, 731 S. E. 2d 550, 561 (2012). See also *ante,* at 644–645. Petitioners do not challenge this aspect of the South Carolina court's holding.

both the child's "parent or Indian custodian" and the child's tribe "of the pending proceedings and of their right of intervention." Section 1912(b) mandates that counsel be provided for an indigent "parent or Indian custodian" in any "termination proceeding." Section 1912(c) also gives all "part[ies]" to a termination proceeding—which, thanks to §§ 1912(a) and (b), will always include a biological father if he desires to be present—the right to inspect all material "reports or other documents filed with the court." By providing notice, counsel, and access to relevant documents, the statute ensures a biological father's meaningful participation in an adoption proceeding where the termination of his parental rights is at issue.

These protections are consonant with the principle, recognized in our cases, that the biological bond between parent and child is meaningful. "[A] natural parent's desire for and right to the companionship, care, custody, and management of his or her children," we have explained, "is an interest far more precious than any property right." *Santosky* v. *Kramer*, 455 U. S. 745, 758–759 (1982) (internal quotation marks omitted). See also *infra*, at 686–687. Although the Constitution does not compel the protection of a biological father's parent-child relationship until he has taken steps to cultivate it, this Court has nevertheless recognized that "the biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Lehr* v. *Robertson*, 463 U. S. 248, 262 (1983). Federal recognition of a parent-child relationship between a birth father and his child is consistent with ICWA's purpose of providing greater protection for the familial bonds between Indian parents and their children than state law may afford.

The majority does not and cannot reasonably dispute that ICWA grants biological fathers, as "parent[s]," the right to be present at a termination of parental rights proceeding and

to have their views and claims heard there.[2] But the majority gives with one hand and takes away with the other. Having assumed a uniform federal definition of "parent" that confers certain procedural rights, the majority then illogically concludes that ICWA's *substantive* protections are available only to a subset of "parent[s]": those who have previously had physical or state-recognized legal custody of his or her child. The statute does not support this departure.

Section 1912(d) provides:

> "Any party seeking to effect a foster care placement of, or *termination of parental rights to*, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." (Emphasis added.)

In other words, subsection (d) requires that an attempt be made to cure familial deficiencies before the drastic measures of foster care placement or termination of parental rights can be taken.

The majority would hold that the use of the phrase "breakup of the Indian family" in this subsection means that it does not apply where a birth father has not previously had custody of his child. *Ante,* at 651. But there is nothing about this capacious phrase that licenses such a narrowing construction. As the majority notes, "breakup" means "'[t]he discontinuance of a relationship.'" *Ibid.* (quoting American Heritage Dictionary 235 (3d ed. 1992)). So far, all of § 1912's provisions expressly apply in actions aimed at terminating the "parent-child relationship" that exists between a birth father and his child, and they extend to it meaningful protections. As a logical matter, that relation-

[2] Petitioners concede that, assuming Birth Father is a "parent" under ICWA, the notice and counsel provisions of 25 U. S. C. §§ 1912(a) and (b) apply to him. See Tr. of Oral Arg. 13.

ship is fully capable of being preserved via remedial services and rehabilitation programs. See *infra*, at 682–684. Nothing in the text of subsection (d) indicates that this blood relationship should be excluded from the category of familial "relationships" that the provision aims to save from "discontinuance."

The majority, reaching the contrary conclusion, asserts baldly that "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]' . . . by the termination of the Indian parent's rights." *Ante*, at 651–652. Says who? Certainly not the statute. Section 1903 recognizes Birth Father as Baby Girl's "parent," and, in conjunction with ICWA's other provisions, it further establishes that their "parent-child relationship" is protected under federal law. In the face of these broad definitions, the majority has no warrant to substitute its own policy views for Congress' by saying that "no 'relationship'" exists between Birth Father and Baby Girl simply because, based on the hotly contested facts of this case, it views their family bond as insufficiently substantial to deserve protection.[3] *Ibid.*

The majority states that its "interpretation of § 1912(d) is . . . confirmed by the provision's placement next to §§ 1912(e)

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[3] The majority's discussion of § 1912(d) repeatedly references Birth Father's purported "abandon[ment]" of Baby Girl, *ante*, at 651–652, 653, and n. 8, and it contends that its holding with regard to this provision is limited to such circumstances, see *ante*, at 653, n. 8; see also *ante*, at 667 (BREYER, J., concurring). While I would welcome any limitations on the majority's holding given that it is contrary to the language and purpose of the statute, the majority never explains either the textual basis or the precise scope of its "abandon[ment]" limitation. I expect that the majority's inexact use of the term "abandon[ment]" will sow confusion, because it is a commonly used term of art in state family law that does not have a uniform meaning from State to State. See generally 1 J. Hollinger, Adoption Law and Practice § 4.04[1][a][ii] (2012) (discussing various state-law standards for establishing parental abandonment of a child).

and (f)," both of which use the phrase "'continued custody.'" *Ante*, at 652. This is the only aspect of the majority's argument regarding § 1912(d) that is based on ICWA's actual text rather than layers of assertion superimposed on the text; but the conclusion the majority draws from the juxtaposition of these provisions is exactly backward.

Section 1912(f) is paired with § 1912(e), and as the majority notes, both come on the heels of the requirement of rehabilitative efforts just reviewed. The language of the two provisions is nearly identical; subsection (e) is headed "Foster care placement orders," and subsection (f), the relevant provision here, is headed "Parental rights termination orders." Subsection (f) reads in its entirety:

> "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912(f).[4]

The immediate inference to be drawn from the statute's structure is that subsections (e) and (f) work in tandem with the rehabilitative efforts required by (d). Under subsection (d), state authorities must attempt to provide "remedial services and rehabilitative programs" aimed at avoiding foster care placement or termination of parental rights; (e) and (f), in turn, bar state authorities from ordering foster care or terminating parental rights until these curative efforts have failed and it is established that the child will suffer "serious

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[4] The full text of subsection (e) is as follows:

"No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912(e).

emotional or physical damage" if his or her familial situation is not altered. Nothing in subsections (a) through (d) suggests a limitation on the types of parental relationships that are protected by any of the provisions of § 1912, and there is nothing in the structure of § 1912 that would lead a reader to expect subsection (e) or (f) to introduce any such qualification. Indeed, both subsections, in their opening lines, refer back to the prior provisions of § 1912 with the phrase "in such proceeding." This language indicates, quite logically, that in actions where subsections (a), (b), (c), and (d) apply, (e) and (f) apply too.[5]

All this, and still the most telling textual evidence is yet to come: The text of the subsection begins by announcing, "[n]o termination of parental rights may be ordered" unless the specified evidentiary showing is made. To repeat, a "termination of parental rights" includes "*any* action resulting in the termination of the parent-child relationship," 25 U. S. C. § 1903(1)(ii) (emphasis added), including the relationship Birth Father, as an ICWA "parent," has with Baby Girl. The majority's reading disregards the Act's sweeping definition of "termination of parental rights," which is not limited to terminations of custodial relationships.

The entire foundation of the majority's argument that subsection (f) does not apply is the lonely phrase "continued custody." It simply cannot bear the interpretive weight the majority would place on it.

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[5] For these reasons, I reject the argument advanced by the United States that subsection (d) applies in the circumstances of this case but subsection (f) does not. See Brief for United States as *Amicus Curiae* 24–26. The United States' position is contrary to the interrelated nature of §§ 1912(d), (e), and (f). Under the reading that the United States proposes, in a case such as this one the curative provision would stand alone; ICWA would provide no evidentiary or substantive standards by which to measure whether foster care placement or termination of parental rights could be ordered in the event that rehabilitative efforts did not succeed. Such a scheme would be oddly incomplete.

Because a primary dictionary definition of "continued" is "'carried on or kept up without cessation,'" *ante*, at 647 (brackets omitted), the majority concludes that § 1912(f) "does not apply in cases where the Indian parent *never* had custody of the Indian child," *ante*, at 648. Emphasizing that Birth Father never had physical custody or, under state law, legal custody of Baby Girl, the majority finds the statute inapplicable here. *Ante*, at 650. But "literalness may strangle meaning." *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44 (1946). See also *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341–345 (1997) (noting that a term that may "[a]t first blush" seem unambiguous can prove otherwise when examined in the context of the statute as a whole).[6] In light of the structure of § 1912, which indicates that subsection (f) is applicable to the same actions to which subsections (a) through (d) are applicable; the use of the phrase "such proceeding[s]" at the start of subsection (f) to reinforce this structural inference; and finally, the provision's explicit statement that it applies to "termination of parental rights" proceedings, the necessary conclusion is that the word "custody" does not strictly denote a state-recognized custodial relationship. If one refers back to the Act's definitional section, this conclusion is not surprising. Section 1903(1) includes "any action resulting in the termination of the parent-child relationship" within the meaning of "child custody proceeding," thereby belying any congressional intent to give the term "custody" a narrow and exclusive definition throughout the statute.

In keeping with § 1903(1) and the structure and language of § 1912 overall, the phrase "continued custody" is most sensibly read to refer generally to the continuation of the parent-child relationship that an ICWA "parent" has with

[6] The majority's interpretation is unpersuasive even if one focuses exclusively on the phrase "continued custody" because, as JUSTICE SCALIA explains, *ante*, at 667 (dissenting opinion), nothing about the adjective "continued" mandates the retrospective, rather than prospective, application of § 1912(f)'s standard.

his or her child. A court applying § 1912(f) where the parent does not have pre-existing custody should, as Birth Father argues, determine whether the party seeking termination of parental rights has established that the continuation of the parent-child relationship will result in "serious emotional or physical damage to the child."[7]

The majority is willing to assume, for the sake of argument, that Birth Father is a "parent" within the meaning of ICWA. But the majority fails to account for all that follows from that assumption. The majority repeatedly passes over the term "termination of parental rights" that, as defined by § 1903, clearly encompasses an action aimed at severing Birth Father's "parent-child relationship" with Baby Girl. The majority chooses instead to focus on phrases not statutorily defined that it then uses to exclude Birth Father from the benefits of his parental status. When one must disregard a statute's use of terms that have been explicitly defined by Congress, that should be a signal that one is distorting, rather than faithfully reading, the law in question.

B

The majority also does not acknowledge the full implications of its assumption that there are some ICWA "parent[s]" to whom §§ 1912(d) and (f) do not apply. Its discussion focuses on Birth Father's particular actions, but nothing in the majority's reasoning limits its manufactured class of semi-protected ICWA parents to biological fathers who failed to

[7] The majority overlooks Birth Father's principal arguments when it dismisses his reading of § 1912(f) as "nonsensical." *Ante*, at 648. He does argue that *if* one accepts petitioners' view that it is impossible to make a determination of likely harm when a parent lacks custody, *then* the consequence would be that "'[n]o termination of parental rights may be ordered.'" Brief for Respondent Birth Father 39 (quoting § 1912(f)). But Birth Father's primary arguments assume that it is indeed possible to make a determination of likely harm in the circumstances of this case, and that parental rights can be terminated if § 1912(f) is met. See *id.*, at 40–42.

support their child's mother during pregnancy. Its logic would apply equally to noncustodial fathers who have actively participated in their child's upbringing.

Consider an Indian father who, though he has never had custody of his biological child, visits her and pays all of his child support obligations.[8] Suppose that, due to deficiencies

[8] The majority attempts to minimize the consequences of its holding by asserting that the parent-child relationships of noncustodial fathers with visitation rights will be at stake in an ICWA proceeding in only "a relatively small class of cases." *Ante*, at 653, n. 8. But it offers no support for this assertion, beyond speculating that there will not be many fathers affected by its interpretation of § 1912(d) because it is qualified by an "abandon[ment]" limitation. *Ante*, at 653, n. 8. Tellingly, the majority has nothing to say about § 1912(f), despite the fact that its interpretation of that provision is not limited in a similar way. In any event, this example by no means exhausts the class of semiprotected ICWA parents that the majority's opinion creates. It also includes, for example, biological fathers who have not yet established a relationship with their child because the child's mother never informed them of the pregnancy, see, *e. g.*, *In re Termination of Parental Rights of Biological Parents of Baby Boy W.*, 1999 OK 74, 988 P. 2d 1270, told them falsely that the pregnancy ended in miscarriage or termination, see, *e. g.*, *A Child's Hope, LLC* v. *Doe*, 178 N. C. App. 96, 630 S. E. 2d 673 (2006), or otherwise obstructed the father's involvement in the child's life, see, *e. g.*, *In re Baby Girl W.*, 728 S. W. 2d 545 (Mo. App. 1987) (birth mother moved and did not inform father of her whereabouts); *In re Petition of Doe*, 159 Ill. 2d 347, 638 N. E. 2d 181 (1994) (father paid pregnancy expenses until birth mother cut off contact with him and told him that their child had died shortly after birth). And it includes biological fathers who did not contribute to pregnancy expenses because they were unable to do so, whether because the father lacked sufficient means, the expenses were covered by a third party, or the birth mother did not pass on the relevant bills. See, *e. g.*, *In re Adoption of B. V.*, 2001 UT App 290, ¶¶ 24–31, 33 P. 3d 1083, 1087–1088.

The majority expresses the concern that my reading of the statute would produce "far-reaching consequences," because "even a sperm donor" would be entitled to ICWA's protections. *Ante*, at 653, n. 8. If there are any examples of women who go to the trouble and expense of artificial insemination and then carry the child to term, only to put the child up for adoption or be found so unfit as mothers that state authorities attempt an involuntary adoptive placement—thereby necessitating termination of the parental rights of the sperm donor father—the majority does

in the care the child received from her custodial parent, the State placed the child with a foster family and proposed her ultimate adoption by them. Clearly, the father's parental rights would have to be terminated before the adoption could go forward.[9] On the majority's view, notwithstanding the fact that this father would be a "parent" under ICWA, he would not receive the benefit of either § 1912(d) or § 1912(f). Presumably the court considering the adoption petition would have to apply some standard to determine whether termination of his parental rights was appropriate. But from whence would that standard come?

Not from the statute Congress drafted, according to the majority. The majority suggests that it might come from state law. See *ante*, at 653, n. 8. But it is incongruous to suppose that Congress intended a patchwork of federal and state law to apply in termination of parental rights proceedings. Congress enacted a statute aimed at protecting the familial relationships between Indian parents and their children because it concluded that state authorities "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U. S. C. § 1901(5). It provided a "minimum Federal standar[d]," § 1902, for termination of parental rights that is more demanding than the showing of unfitness under a high "clear and convincing evidence" standard that is the norm in the States, see 1 J. Hol-

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not cite them. As between a possibly overinclusive interpretation of the statute that covers this unlikely class of cases, and the majority's underinclusive interpretation that has the very real consequence of denying ICWA's protections to all noncustodial biological fathers, it is surely the majority's reading that is contrary to ICWA's design.

[9] With a few exceptions not relevant here, before a final decree of adoption may be entered, one of two things must happen: "[T]he biological parents must either voluntarily relinquish their parental rights or have their rights involuntarily terminated." 2 A. Haralambie, Handling Child Custody, Abuse and Adoption Cases § 14.1, pp. 764–765 (3d ed. 2009) (footnote omitted).

linger, Adoption Law and Practice § 2.10 (2012); *Santosky*, 455 U. S., at 767–768.

While some States might provide protections comparable to § 1912(d)'s required remedial efforts and § 1912(f)'s heightened standard for termination of parental rights, many will provide less. There is no reason to believe Congress wished to leave protection of the parental rights of a subset of ICWA "parent[s]" dependent on the happenstance of where a particular "child custody proceeding" takes place. I would apply, as the statute construed in its totality commands, the standards Congress provided in §§ 1912(d) and (f) to the termination of all ICWA "parent[s']" parent-child relationships.

II

The majority's textually strained and illogical reading of the statute might be explicable, if not justified, if there were reason to believe that it avoided anomalous results or furthered a clear congressional policy. But neither of these conditions is present here.

A

With respect to § 1912(d), the majority states that it would be "unusual" to apply a rehabilitation requirement where a natural parent has never had custody of his child. *Ante*, at 653. The majority does not support this bare assertion, and in fact state child welfare authorities can and do provide reunification services for biological fathers who have not previously had custody of their children.[10] And notwith-

[10] See, *e. g.*, Cal. Welf. & Inst. Code Ann. § 361.5(a) (West Cum. Supp. 2013); *Francisco G.* v. *Superior Court*, 91 Cal. App. 4th 586, 596, 110 Cal. Rptr. 2d 679, 687 (2001) (stating that "the juvenile court 'may' order reunification services for a biological father if the court determines that the services will benefit the child"); *In re T. B. W.*, 312 Ga. App. 733, 734–735, 719 S. E. 2d 589, 591 (2011) (describing reunification services provided to biological father beginning when "he had yet to establish his paternity" under state law, including efforts to facilitate visitation and involving father in family " 'team meetings' "); *In re Guardianship of DMH*, 161 N. J. 365, 390–394, 736 A. 2d 1261, 1275–1276 (1999) (discussing what constitutes

standing the South Carolina Supreme Court's imprecise interpretation of the provision, see 398 S. C., at 647–648, 731 S. E. 2d, at 562, § 1912(d) does not require the prospective adoptive family to themselves undertake the mandated rehabilitative efforts. Rather, it requires the party seeking termination of parental rights to "satisfy the court that active efforts have been made" to provide appropriate remedial services.

In other words, the prospective adoptive couple have to make an evidentiary showing, not undertake person-to-person remedial outreach. The services themselves might be attempted by the Indian child's tribe, a state agency, or a private adoption agency. Such remedial efforts are a familiar requirement of child welfare law, including federal child welfare policy. See 42 U. S. C. § 671(a)(15)(B) (requiring States receiving federal funds for foster care and adoption assistance to make "reasonable efforts . . . to preserve and reunify families" prior to foster care placement or removal of a child from its home).

There is nothing "bizarre," *ante*, at 653, about placing on the party seeking to terminate a father's parental rights the burden of showing that the step is necessary as well as justified. "For . . . natural parents, . . . the consequence of an erroneous termination [of parental rights] is the unnecessary destruction of their natural family." *Santosky*, 455 U. S., at 766. In any event, the question is a nonissue in this case given the family court's finding that Birth Father is "a fit and proper person to have custody of his child" who "has demonstrated [his] ability to parent effectively" and who possesses "unwavering love for this child." App. to

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"reasonable efforts" to reunify a noncustodial biological father with his children in accordance with New Jersey statutory requirements); *In re Bernard T.*, 319 S. W. 3d 586, 600 (Tenn. 2010) (stating that "in appropriate circumstances, the Department [of Children's Services] must make reasonable efforts to reunite a child with his or her biological parents or legal parents or even with the child's putative biological father").

Pet. for Cert. 128a (Sealed). Petitioners cannot show that rehabilitative efforts have "proved unsuccessful," 25 U. S. C. § 1912(d), because Birth Father is not in need of rehabilitation.[11]

B

On a more general level, the majority intimates that ICWA grants Birth Father an undeserved windfall: in the majority's words, an "ICWA trump card" he can "play . . . at the eleventh hour to override the mother's decision and the child's best interests." *Ante*, at 656. The implicit argument is that Congress could not possibly have intended to recognize a parent-child relationship between Birth Father and Baby Girl that would have to be legally terminated (either by valid consent or involuntary termination) before the adoption could proceed.

But this supposed anomaly is illusory. In fact, the law of at least 15 States did precisely that at the time ICWA was passed.[12] And the law of a number of States still does so.

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[11] The majority's concerns about what might happen if no state or tribal authority stepped in to provide remedial services are therefore irrelevant here. *Ante*, at 653, n. 9. But as a general matter, if a parent has rights that are an obstacle to an adoption, the state- and federal-law safeguards of those rights must be honored, irrespective of prospective adoptive parents' understandable and valid desire to see the adoption finalized. "We must remember that the purpose of an adoption is to provide a home for a child, not a child for a home." *In re Petition of Doe*, 159 Ill. 2d, at 368, 638 N. E. 2d, at 190 (Heiple, J., supplemental opinion supporting denial of rehearing).

[12] See Ariz. Rev. Stat. Ann. § 8–106(A)(1)(c) (1974–1983 West Supp.) (consent of both natural parents necessary); Iowa Code §§ 600.3(2), 600A.2, 600A.8 (1977) (same); Ill. Comp. Stat., ch. 40, § 1510 (West 1977) (same); Nev. Rev. Stat. §§ 127.040, 127.090 (1971) (same); R. I. Gen. Laws §§ 15–7–5, 15–7–7 (Bobbs-Merrill 1970) (same); Conn. Gen. Stat. §§ 45–61d, 45–61i(b)(2) (1979) (natural father's consent required if paternity acknowledged or judicially established); Fla. Stat. § 63.062 (1979) (same); Ore. Rev. Stat. §§ 109.092, 109.312 (1975) (same); S. D. Codified Laws §§ 25–6–1.1, 25–6–4 (Allen Smith 1976) (natural father's consent required if mother identifies him or if paternity is judicially established); Ky. Rev. Stat. Ann.

The State of Arizona, for example, requires that notice of an adoption petition be given to all "potential father[s]" and that they be informed of their "right to seek custody." Ariz. Rev. Stat. Ann. §§ 8–106(G) to (J) (West Cum. Supp. 2012). In Washington, an "alleged father['s]" consent to adoption is required absent the termination of his parental rights, Wash. Rev. Code §§ 26.33.020(1), 26.33.160(1)(b) (2012); and those rights may be terminated only "upon a showing by clear, cogent, and convincing evidence" not only that termination is in the best interest of the child and that the father is withholding his consent to adoption contrary to the child's best interests, but also that the father "has failed to perform parental duties under circumstances showing a substantial lack of regard for his parental obligations," § 26.33.120(2).[13]

Without doubt, laws protecting biological fathers' parental rights can lead—even outside the context of ICWA—to outcomes that are painful and distressing for both would-be adoptive families, who lose a much wanted child, and children who must make a difficult transition. See, *e. g.*, *In re Adoption of Tobias D.*, 2012 ME 45, ¶27, 40 A. 3d 990, 999 (recognizing that award of custody of 2½-year-old child to biological

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§§ 199.500, 199.607 (Bobbs-Merrill Cum. Supp. 1980) (same); Ala. Code § 26–10–3 (Michie 1977) (natural father's consent required when paternity judicially established); Minn. Stat. §§ 259.24(a), 259.26(3)(a), (e), (f), 259.261 (1978) (natural father's consent required when identified on birth certificate, paternity judicially established, or paternity asserted by affidavit); N. H. Rev. Stat. Ann. § 170–B:5(I)(d) (1977) (natural father's consent required if he files notice of intent to claim paternity within set time from notice of prospective adoption); Wash. Rev. Code §§ 26.32.040(5), 26.32.085 (1976) (natural father's consent required if paternity acknowledged, judicially established, or he files notice of intent to claim paternity within set time from notice of prospective adoption); W. Va. Code Ann. § 48–4–1 (Michie Cum. Supp. 1979) (natural father's consent required if father admits paternity by any means). See also Del. Code Ann., Tit. 13, § 908(2) (Michie Cum. Supp. 1980) (natural father's consent required unless court finds that dispensing with consent requirement is in best interests of the child); Wyo. Stat. Ann. §§ 1–22–108, 1–22–109 (Michie 1988) (same).

[13] See also, *e. g.*, Nev. Rev. Stat. §§ 127.040(1)(a), 128.150 (2011).

father under applicable state law once paternity is established will result in the "difficult and painful" necessity of "removing the child from the only home he has ever known"). On the other hand, these rules recognize that biological fathers have a valid interest in a relationship with their child. See *supra*, at 673. And children have a reciprocal interest in knowing their biological parents. See *Santosky*, 455 U. S., at 760–761, n. 11 (describing the foreclosure of a newborn child's opportunity to "ever know his natural parents" as a "los[s] [that] cannot be measured"). These rules also reflect the understanding that the biological bond between a parent and a child is a strong foundation on which a stable and caring relationship may be built. Many jurisdictions apply a custodial preference for a fit natural parent over a party lacking this biological link. See, *e. g.*, *Ex parte Terry*, 494 So. 2d 628, 632 (Ala. 1986); *Appeal of H. R.*, 581 A. 2d 1141, 1177 (D. C. 1990) (opinion of Ferren, J.); *Stuhr* v. *Stuhr*, 240 Neb. 239, 245, 481 N. W. 2d 212, 216 (1992); *In re Michael B.*, 80 N. Y. 2d 299, 309, 604 N. E. 2d 122, 127 (1992). Cf. *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816, 845 (1977) (distinguishing a natural parent's "liberty interest in family privacy," which has its source "in intrinsic human rights," with a foster parent's parallel interest in his or her relationship with a child, which has its "origins in an arrangement in which the State has been a partner from the outset"). This preference is founded in the "presumption that fit parents act in the best interests of their children." *Troxel* v. *Granville*, 530 U. S. 57, 68 (2000) (plurality opinion). "'[H]istorically [the law] has recognized that natural bonds of affection [will] lead parents'" to promote their child's well-being. *Ibid.* (quoting *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979)).

Balancing the legitimate interests of unwed biological fathers against the need for stability in a child's family situation is difficult, to be sure, and States have, over the years, taken different approaches to the problem. Some States,

like South Carolina, have opted to hew to the constitutional baseline established by this Court's precedents and do not require a biological father's consent to adoption unless he has provided financial support during pregnancy. See *Quilloin* v. *Walcott*, 434 U. S. 246, 254–256 (1978); *Lehr*, 463 U. S., at 261. Other States, however, have decided to give the rights of biological fathers more robust protection and to afford them consent rights on the basis of their biological link to the child. At the time that ICWA was passed, as noted, over one-fourth of States did so. See *supra*, at 684, and n. 12.

ICWA, on a straightforward reading of the statute, is consistent with the law of those States that protected, and protect, birth fathers' rights more vigorously. This reading can hardly be said to generate an anomaly. ICWA, as all acknowledge, was "the product of rising concern . . . [about] abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families." *Holyfield*, 490 U. S., at 32. It stands to reason that the Act would not render the legal status of an Indian father's relationship with his biological child fragile, but would instead grant it a degree of protection commensurate with the more robust state-law standards.[14]

C

The majority also protests that a contrary result to the one it reaches would interfere with the adoption of Indian

[14] It bears emphasizing that the ICWA standard for termination of parental rights of which Birth Father claims the benefit is more protective than, but not out of step with, the clear and convincing standard generally applied in state courts when termination of parental rights is sought. Birth Father does not claim that he is entitled to custody of Baby Girl unless petitioners can satisfy the demanding standard of § 1912(f). See Brief for Respondent Birth Father 40, n. 15. The question of custody would be analyzed independently, as it was by the South Carolina Supreme Court. Of course, it will often be the case that custody is subsequently granted to a child's fit parent, consistent with the presumption that a natural parent will act in the best interests of his child. See *supra*, at 686 and this page.

children. *Ante,* at 653–654, 655–656. This claim is the most perplexing of all. A central purpose of ICWA is to "promote the stability and security of Indian . . . families," 25 U. S. C. § 1902, in part by countering the trend of placing "an alarmingly high percentage of [Indian] children . . . in non-Indian foster and adoptive homes and institutions." § 1901(4). The Act accomplishes this goal by, first, protecting the familial bonds of Indian parents and children, see *supra,* at 671–679; and, second, establishing placement preferences should an adoption take place, see § 1915(a). ICWA does not interfere with the adoption of Indian children except to the extent that it attempts to avert the necessity of adoptive placement and makes adoptions of Indian children by non-Indian families less likely.

The majority may consider this scheme unwise. But no principle of construction licenses a court to interpret a statute with a view to averting the very consequences Congress expressly stated it was trying to bring about. Instead, it is the "'judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.'" *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 298 (2010) (quoting *United States* v. *Bornstein*, 423 U. S. 303, 310 (1976)).

The majority further claims that its reading is consistent with the "primary" purpose of the Act, which in the majority's view was to prevent the dissolution of "intact" Indian families. *Ante,* at 649. We may not, however, give effect only to congressional goals we designate "primary" while casting aside others classed as "secondary"; we must apply the entire statute Congress has written. While there are indications that central among Congress' concerns in enacting ICWA was the removal of Indian children from homes in which Indian parents or other guardians had custody of them, see, *e. g.,* §§ 1901(4), 1902, Congress also recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,"

§ 1901(3). As we observed in *Holyfield*, ICWA protects not only Indian parents' interests but also those of Indian tribes. See 490 U. S., at 34, 52. A tribe's interest in its next generation of citizens is adversely affected by the placement of Indian children in homes with no connection to the tribe, whether or not those children were initially in the custody of an Indian parent.[15]

Moreover, the majority's focus on "intact" families, *ante*, at 649, begs the question of what Congress set out to accomplish with ICWA. In an ideal world, perhaps all parents would be perfect. They would live up to their parental responsibilities by providing the fullest possible financial and emotional support to their children. They would never suffer mental health problems, lose their jobs, struggle with substance dependency, or encounter any of the other multitudinous personal crises that can make it difficult to meet these responsibilities. In an ideal world parents would never become estranged and leave their children caught in the middle. But we do not live in such a world. Even happy families do not always fit the custodial-parent mold for which the majority would reserve ICWA's substantive protections; unhappy families all too often do not. They are families nonetheless. Congress understood as much. ICWA's definitions of "parent" and "termination of parental rights" provided in § 1903 sweep broadly. They should be honored.

D

The majority does not rely on the theory pressed by petitioners and the guardian ad litem that the canon of constitutional avoidance compels the conclusion that ICWA is inapplicable here. See Brief for Petitioners 43–51; Brief for Respondent Guardian ad Litem 48–58. It states instead

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[15] Birth Father is a registered member of the Cherokee Nation, a fact of which Birth Mother was aware at the time of her pregnancy and of which she informed her attorney. See 398 S. C. 625, 632–633, 731 S. E. 2d 550, 554 (2012).

that it finds the statute clear.[16] *Ante*, at 656. But the majority nevertheless offers the suggestion that a contrary result would create an equal protection problem. *Ibid.* Cf. Brief for Petitioners 44–47; Brief for Respondent Guardian ad Litem 53–55.

It is difficult to make sense of this suggestion in light of our precedents, which squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications. See *United States* v. *Antelope*, 430 U. S. 641, 645–647 (1977); *Morton* v. *Mancari*, 417 U. S. 535, 553–554 (1974). The majority's repeated, analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee by ancestry do nothing to elucidate its intimation that the statute may violate the Equal Protection Clause as applied here. See *ante*, at 641, 646; see also *ante*, at 655 (stating that ICWA "would put certain vulnerable children at a great disadvantage solely because an ancestor—*even a remote one*—was an Indian" (emphasis added)). I see no ground for this Court to second-guess the membership requirements of federally recognized Indian tribes, which are independent political entities. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 72, n. 32 (1978). I am particularly averse to doing so when the Federal Government requires Indian tribes, as a prerequisite for official recognition, to make "descen[t] from a historical Indian tribe" a condition of membership. 25 CFR § 83.7(e) (2012).

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[16] JUSTICE THOMAS concurs in the majority's interpretation because, although he finds the statute susceptible of more than one plausible reading, he believes that the majority's reading avoids "significant constitutional problems" concerning whether ICWA exceeds Congress' authority under the Indian Commerce Clause. *Ante*, at 656, 657–666. No party advanced this argument, and it is inconsistent with this Court's precedents holding that Congress has "broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive," founded not only on the Indian Commerce Clause but also the Treaty Clause. *United States* v. *Lara*, 541 U. S. 193, 200–201 (2004) (internal quotation marks omitted).

The majority's treatment of this issue, in the end, does no more than create a lingering mood of disapprobation of the criteria for membership adopted by the Cherokee Nation that, in turn, make Baby Girl an "Indian child" under the statute. Its hints at lurking constitutional problems are, by its own account, irrelevant to its statutory analysis, and accordingly need not detain us any longer.

III

Because I would affirm the South Carolina Supreme Court on the ground that § 1912 bars the termination of Birth Father's parental rights, I would not reach the question of the applicability of the adoptive placement preferences of § 1915. I note, however, that the majority does not and cannot foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation may formally petition for adoption of Baby Girl. If these parties do so, and if on remand Birth Father's parental rights are terminated so that an adoption becomes possible, they will then be entitled to consideration under the order of preference established in § 1915. The majority cannot rule prospectively that § 1915 would not apply to an adoption petition that has not yet been filed. Indeed, the statute applies "[i]n *any* adoptive placement of an Indian child under State law," 25 U. S. C. § 1915(a) (emphasis added), and contains no temporal qualifications. It would indeed be an odd result for this Court, in the name of the child's best interests, cf. *ante*, at 654, to purport to exclude from the proceedings possible custodians for Baby Girl, such as her paternal grandparents, who may have well-established relationships with her.

* * *

The majority opinion turns § 1912 upside down, reading it from bottom to top in order to reach a conclusion that is manifestly contrary to Congress' express purpose in enacting ICWA: preserving the familial bonds between Indian parents

and their children and, more broadly, Indian tribes' relationships with the future citizens who are "vital to [their] continued existence and integrity." § 1901(3).

The majority casts Birth Father as responsible for the painful circumstances in this case, suggesting that he intervened "at the eleventh hour to override the mother's decision and the child's best interests," *ante*, at 656. I have no wish to minimize the trauma of removing a 27-month-old child from her adoptive family. It bears remembering, however, that Birth Father took action to assert his parental rights when Baby Girl was four months old, as soon as he learned of the impending adoption. As the South Carolina Supreme Court recognized, "'[h]ad the mandate of . . . ICWA been followed [in 2010], . . . much potential anguish might have been avoided[;] and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation."'" 398 S. C., at 652, 731 S. E. 2d, at 564 (quoting *Holyfield*, 490 U. S., at 53–54).

The majority's hollow literalism distorts the statute and ignores Congress' purpose in order to rectify a perceived wrong that, while heartbreaking at the time, was a correct application of federal law and that in any case cannot be undone. Baby Girl has now resided with her father for 18 months. However difficult it must have been for her to leave Adoptive Couple's home when she was just over 2 years old, it will be equally devastating now if, at the age of 3½, she is again removed from her home and sent to live halfway across the country. Such a fate is not foreordained, of course. But it can be said with certainty that the anguish this case has caused will only be compounded by today's decision.

I believe that the South Carolina Supreme Court's judgment was correct, and I would affirm it. I respectfully dissent.

Syllabus

HOLLINGSWORTH ET AL. *v.* PERRY ET AL.

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

No. 12–144. Argued March 26, 2013—Decided June 26, 2013

After the California Supreme Court held that limiting marriage to opposite-sex couples violated the California Constitution, state voters passed a ballot initiative known as Proposition 8, amending the State Constitution to define marriage as a union between a man and a woman. Respondents, same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and naming as defendants California's Governor and other state and local officials responsible for enforcing California's marriage laws. The officials refused to defend the law, so the District Court allowed petitioners—the initiative's official proponents—to intervene to defend it. After a bench trial, the court declared Proposition 8 unconstitutional and enjoined the public officials named as defendants from enforcing the law. Those officials elected not to appeal, but petitioners did. The Ninth Circuit certified a question to the California Supreme Court: whether official proponents of a ballot initiative have authority to assert the State's interest in defending the constitutionality of the initiative when public officials refuse to do so. After the California Supreme Court answered in the affirmative, the Ninth Circuit concluded that petitioners had standing under federal law to defend Proposition 8's constitutionality. On the merits, the court affirmed the District Court's order.

Held: Petitioners did not have standing to appeal the District Court's order. Pp. 704–715.

(a) Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." § 2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. In other words, the litigant must seek a remedy for a personal and tangible harm. Although most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, Article III demands that an "actual controversy" persist throughout all stages of litigation. *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 91. Standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64. The parties do not contest that respondents had stand-

ing to initiate this case against the California officials responsible for enforcing Proposition 8. But once the District Court issued its order, respondents no longer had any injury to redress, and the state officials chose not to appeal. The only individuals who sought to appeal were petitioners, who had intervened in the District Court, but they had not been ordered to do or refrain from doing anything. Their only interest was to vindicate the constitutional validity of a generally applicable California law. As this Court has repeatedly held, such a "generalized grievance"—no matter how sincere—is insufficient to confer standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 573–574. Petitioners claim that the California Constitution and election laws give them a "'unique,' 'special,' and 'distinct' role in the initiative process," Reply Brief 5, but that is only true during the process of enacting the law. Once Proposition 8 was approved, it became a duly enacted constitutional amendment. Petitioners have no role—special or otherwise—in its enforcement. They therefore have no "personal stake" in defending its enforcement that is distinguishable from the general interest of every California citizen. No matter how deeply committed petitioners may be to upholding Proposition 8, that is not a particularized interest sufficient to create a case or controversy under Article III. Pp. 704–707.

(b) Petitioners' arguments to the contrary are unpersuasive. Pp. 707–714.

(1) They claim that they may assert the State's interest on the State's behalf, but it is a "fundamental restriction on our authority" that "[i]n the ordinary course, a litigant . . . cannot rest a claim to relief on the legal rights or interests of third parties." *Powers* v. *Ohio*, 499 U. S. 400, 410. In *Diamond* v. *Charles*, 476 U. S. 54, for example, a pediatrician engaged in private practice was not permitted to defend the constitutionality of Illinois' abortion law after the State chose not to appeal an adverse ruling. The state attorney general's "letter of interest," explaining that the State's interest in the proceeding was "'essentially co-terminous with'" Diamond's position, *id.*, at 61, was insufficient, since Diamond was unable to assert an injury of his own, *id.*, at 65. Pp. 707–709.

(2) Petitioners contend the California Supreme Court's determination that they were authorized under California law to assert the State's interest in the validity of Proposition 8 means that they "need no more show a personal injury, separate from the State's indisputable interest in the validity of its law, than would California's Attorney General or did the legislative leaders held to have standing in *Karcher v. May*, 484 U. S. 72 (1987)." Reply Brief 6. But far from supporting petitioners' standing, *Karcher* is compelling precedent against it. In that case,

after the New Jersey attorney general refused to defend the constitutionality of a state law, leaders of New Jersey's Legislature were permitted to appear, in their official capacities, in the District Court and Court of Appeals to defend the law. What is significant about *Karcher*, however, is what happened after the Court of Appeals decision. The legislators lost their leadership positions, but nevertheless sought to appeal to this Court. The Court held that they could not do so. Although they could participate in the lawsuit in their official capacities as presiding officers of the legislature, as soon as they lost that capacity, they lost standing. 484 U. S., at 81. Petitioners here hold no office and have always participated in this litigation solely as private parties. Pp. 709–711.

(3) Nor is support found in dicta in *Arizonans for Official English* v. *Arizona*, *supra*. There, in expressing "grave doubts" about the standing of ballot initiative sponsors to defend the constitutionality of an Arizona initiative, the Court noted that it was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Id.*, at 65. Petitioners argue that, by virtue of the California Supreme Court's decision, they *are* authorized to act as "agents of the people of California." Brief for Petitioners 15. But that Court never described petitioners as "agents of the people." All the California Supreme Court's decision stands for is that, so far as California is concerned, petitioners may "assert legal arguments in defense of the state's interest in the validity of the initiative measure" in federal court. *Perry* v. *Brown*, 52 Cal. 4th 1116, 1159, 265 P. 3d 1002, 1029. That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under this Court's precedents. Petitioners are also plainly not agents of the State. As an initial matter, petitioners' newfound claim of agency is inconsistent with their representations to the District Court, where they claimed to represent their *own* interests as official proponents. More to the point, the basic features of an agency relationship are missing here: Petitioners are not subject to the control of any principal, and they owe no fiduciary obligation to anyone. As one *amicus* puts it, "the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it." Brief for Walter Dellinger 23. Pp. 711–714.

(c) The Court does not question California's sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts. But standing in federal court is a question of federal law, not state law. No matter its reasons, the fact

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that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override this Court's settled law to the contrary. Article III's requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in the federal system of separated powers. States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse. Pp. 714–715.

671 F. 3d 1052, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, GINSBURG, BREYER, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS, ALITO, and SOTOMAYOR, JJ., joined, *post*, p. 715.

Charles J. Cooper argued the cause for petitioners. With him on the briefs were *David H. Thompson*, *Howard C. Nielson, Jr.*, *Peter A. Patterson*, *Andrew P. Pugno*, *David Austin R. Nimocks*, and *James A. Campbell.*

Theodore B. Olson argued the cause for respondents. With him on the brief for respondent Perry et al. were *Matthew D. McGill*, *Amir C. Tayrani*, *Jeremy M. Goldman*, *David Boies*, *Theodore J. Boutrous, Jr.*, *Christopher D. Dusseault*, *Theane Evangelis Kapur*, *Enrique A. Monagas*, and *Joshua S. Lipshutz.* *Dennis J. Herrera*, *Therese M. Stewart*, *Christine Van Aken*, *Vince Chhabria*, and *Mollie M. Lee* filed a brief for respondent City and County of San Francisco.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Srinivasan*, *Pratik A. Shah*, *Michael Jay Singer*, and *Jeffrey E. Sandberg.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, and *Thomas M. Fisher*, Solicitor General, by *Kenneth Cuccinelli*, Attorney General of Virginia, and *E. Duncan Getchell*, Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Tom C. Horne* of Arizona, *John W. Suthers* of Colorado, *Sam Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The public is currently engaged in an active political debate over whether same-sex couples should be allowed to

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Schmidt of Kansas, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty Jackley* of South Dakota, *Greg Abbott* of Texas, *John E. Swallow* of Utah, *Patrick Morrisey* of West Virginia, and *J. B. Van Hollen* of Wisconsin; for the State of Michigan by *Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, *Aaron D. Lindstrom*, Assistant Solicitor General, and *Joseph E. Potchen* and *Tonya C. Jeter*, Assistant Attorneys General; for the American Civil Rights Union by *Peter J. Ferrara*; for the Becket Fund for Religious Liberty by *Eric Rassbach*, *Lori Halstead Windham*, and *Adèle Auxier Keim*; for Catholic Answers et al. by *Charles S. Limandri*, *Kimberlee Wood Colby*, and *Patrick T. Gillen*; for Catholics for the Common Good et al. by *Robert A. Destro*; for the Center for Constitutional Jurisprudence by *John C. Eastman*, *Anthony T. Caso*, and *Edwin Meese III*; for Citizens United et al. by *William J. Olson*, *Michael Boos*, *Herbert W. Titus*, *John S. Miles*, and *Jeremiah L. Morgan*; for the Coalition of African American Pastors USA et al. by *Lynn D. Wardle*; for the Eagle Forum Education & Legal Defense Fund, Inc., by *Lawrence J. Joseph*; for the Ethics and Public Policy Center by *M. Edward Whelan III*; for the Family Research Council by *Paul Benjamin Linton*, *Christopher M. Gacek*, and *Thomas L. Brejcha, Jr.*; for the Foundation for Moral Law by *John A. Eidsmoe*; for the High Impact Leadership Coalition by *Cleta Mitchell*; for International Jurists et al. by *W. Cole Durham, Jr.*, and *Robert Theron Smith*; for Judicial Watch, Inc., et al. by *Paul J. Orfanedes*, *Chris Fedeli*, and *Julie Axelrod*; for Liberty Counsel, Inc., et al. by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, *Mary E. McAlister*, and *Rena M. Lindevaldsen*; for the Liberty, Life and Law Foundation et al. by *Deborah J. Dewart*; for the Lighted Candle Society by *George M. Weaver* and *John L. Harmer*; for the Marriage Anti-Defamation Alliance by *Michael D. Dean*; for Minnesota for Marriage by *Teresa Stanton Collett*; for the National Association of Evangelicals et al. by *Von G. Keetch*, *Alexander Dushku*, and *R. Shawn Gunnarson*; for Parents and Friends of Ex-Gays & Gays by *Dean R. Broyles*; for Patrick Henry College by *Michael P. Farris* and *John Warwick Montgomery*; for Scholars of History et al. by *William C. Duncan*; for Social Science Professors by *Abram J. Pafford*; for Thirty-Seven Scholars of Federalism and Judicial Restraint by *Robert F. Nagel*, *pro se*; for the Thomas More Law Center et al. by

marry. That question has also given rise to litigation. In this case, petitioners, who oppose same-sex marriage, ask us to decide whether the Equal Protection Clause "prohibits the State of California from defining marriage as the union of a

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Richard Thompson and *Robert H. Tyler*; for the United States Conference of Catholic Bishops by *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, and *Michael F. Moses*; for the Westboro Baptist Church by *Margie J. Phelps*; for Helen M. Alvaré by *Ms. Alvaré, pro se*; for David Benkof et al. by *Herbert G. Grey*; for David Boyle by *Mr. Boyle, pro se*; for Paul McHugh by *Gerard V. Bradley*; and for Matthew B. O'Brien by *Kristen K. Waggoner*. *Irving L. Gornstein*, *Jonathan D. Hacker*, and *Anton Metlitsky* filed a brief for Walter Dellinger urging vacatur.

Briefs of *amici curiae* urging affirmance were filed for the State of California by *Kamala D. Harris*, Attorney General, *Daniel J. Powell*, Deputy Attorney General, *Rochelle C. East*, Chief Deputy Attorney General, *Kathleen A. Kenealy*, Chief Assistant Attorney General, and *Tamar Pachter*, Supervising Deputy Attorney General; for the Commonwealth of Massachusetts et al. by *Martha Coakley*, Attorney General of Massachusetts, and *Jonathan B. Miller*, *Maura T. Healey*, *Gabrielle Viator*, and *Genevieve C. Nadeau*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *George Jepsen* of Connecticut, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Eric T. Schneiderman* of New York, *Ellen F. Rosenblum* of Oregon, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for Adoption and Child Welfare Advocates by *Michael F. Sturley* and *Lynn E. Blais*; for the American Anthropological Association et al. by *Sonya D. Winner*; for American Companies by *E. Joshua Rosenkranz*, *Karen G. Johnson-McKewan*, *Andrew D. Silverman*, *Michael K. Gottlieb*, and *Andrew G. Celli, Jr.*; for the American Federation of Labor and Congress of Industrial Organizations et al. by *Nicole G. Berner*, *Patrick J. Szymanski*, and *Lynn K. Rhinehart*; for the American Humanist Association et al. by *Elizabeth L. Hileman*; for the American Jewish Committee by *Douglas Laycock*, *Marc D. Stern*, and *Thomas C. Berg*; for the American Psychological Association et al. by *Paul M. Smith*, *Nathalie F. P. Gilfoyle*, and *William F. Sheehan*; for the American Sociological Association by *Carmine D. Boccuzzi, Jr.*, and *Scott Thompson*; for the Anti-Defamation League et al. by *Christopher T. Handman*, *Dominic F. Perella*, and *Steven M. Freeman*; for the Beverly Hills Bar Association et al. by *Irving H. Greines* and *Cynthia E. Tobisman*; for

man and a woman." Pet. for Cert. i. Respondents, same-sex couples who wish to marry, view the issue in somewhat different terms: For them, it is whether California—having previously recognized the right of same-sex couples to marry—may reverse that decision through a referendum.

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the Bishops of the Episcopal Church in the State of California et al. by *Jeffrey S. Trachtman*, *Norman C. Simon*, *Joshua D. Glick*, and *Jason M. Moff*; for the California Council of Churches et al. by *Eric Alan Isaacson* and *Stacey Marie Kaplan*; for the California Teachers Association et al. by *Christopher L. Lebsock* and *Arthur N. Bailey, Jr.*; for the Cato Institute et al. by *Robert A. Levy*, *Ilya Shapiro*, *Douglas T. Kendall*, *Elizabeth B. Wydra*, *David H. Gans*, and *Judith E. Schaeffer*; for Erwin Chemerinsky et al. by *Elizabeth J. Cabraser*, *Kelly M. Dermody*, *Brendan P. Glackin*, *Anne B. Shaver*, *Alison M. Stocking*, *Lisa J. Cisneros*, and *Rachel J. Geman*; for the Family Equality Council et al. by *William J. Hibsher*, *K. Lee Marshall*, *David Greene*, *Katherine Keating*, and *Barbara Bennett Woodhouse*; for Harold Hongju Koh et al. by *Ruth N. Borenstein* and *Marc A. Hearron*; for GLMA: Health Professionals Advancing LGBT Equality by *Nicholas M. O'Donnell* and *Hector Vargas*; for Garden State Equality by *Lawrence S. Lustberg*; for International Human Rights Advocates by *Tejinder Singh*; for the Lambda Legal Defense and Education Fund, Inc., et al. by *Jon W. Davidson*, *Jennifer C. Pizer*, *Camilla B. Taylor*, *Gary D. Buseck*, *Mary L. Bonauto*, *Hayley Gorenberg*, and *Susan L. Sommer*; for the Leadership Conference on Civil and Human Rights et al. by *Jonathan S. Franklin*, *Lisa M. Bornstein*, and *Anne M. Rodgers*; for Marriage Equality USA by *Martin N. Buchanan*; for the National Center for Lesbian Rights by *Shannon P. Minter* and *Christopher F. Stoll*; for the National Organization for Women Foundation et al. by *Rebecca Edelson* and *Michael D. Rips*; for the National Women's Law Center et al. by *David C. Codell*, *Marcia D. Greenberger*, *Emily J. Martin*, *Barbara B. Brown*, *Stephen B. Kinnaird*, and *Jennifer S. Baldocchi*; for Parents, Families and Friends of Lesbians and Gays, Inc., by *Andrew J. Davis* and *Jiyun Cameron Lee*; for the Southern Poverty Law Center by *Jon B. Streeter*; for Survivors of Sexual Orientation Change Therapies by *Sanford Jay Rosen*; for the Utah Pride Center et al. by *Paul C. Burke*, *John W. Mackay*, *Brett L. Tolman*, *Jacquelyn D. Rogers*, *Mica McKinney*, and *Adam D. Wentz*; for the Women's Equal Rights Legal Defense and Education Fund by *Gloria R. Allred*; for William N. Eskridge, Jr., et al. by *Kathleen M. O'Sullivan*; for Gary J. Gates by *Marjorie Press Lindblom* and *Sarah E. Piepmeier*; for Chris Kluwe et al. by *John A. Dragseth* and *Timothy R. Holbrook*; for Kenneth B. Mehlman et al. by *Seth P. Waxman*,

Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual "case" or "controversy." As used in the Constitution, those words do not include every sort of dispute, but only those "historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). This is an essential limit on our power: It ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives.

For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have "standing," which requires, among other things, that it have suffered a concrete and particularized injury. Because we find that

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Paul R. Q. Wolfson, Alan E. Schoenfeld, Mark C. Fleming, and *Felicia H. Ellsworth*; for Maria Nieto by *David A. Kettel*; for California Assembly Speaker John A. Pérez et al. by *Laura W. Brill*; for Edward D. Stein et al. by *Frederick A. Brodie, Michael J. Kass,* and *Kevin M. Fong*; and for Jonathan D. Wallace et al. by *Mr. Wallace, pro se.*

Briefs of *amici curiae* were filed for the American Academy of Matrimonial Lawyers et al. by *Diana E. Richmond, Louis P. Feuchtbaum,* and *Richard B. Rosenthal*; for Bay Area Lawyers for Individual Freedom et al. by *Jerome C. Roth* and *Michelle T. Friedland*; for California Professors of Family Law by *Herma Hill Kay, Joan Heifetz Hollinger, Sean M. SeLegue,* and *John S. Throckmorton*; for the Columbia Law School Sexuality & Gender Law Clinic et al. by *Suzanne B. Goldberg*; for Bruce Ackerman et al. by *Lori Alvino McGill* and *Jessica E. Phillips*; for Equality California by *Christopher G. Caldwell* and *Albert Giang*; for the Howard University School of Law Civil Rights Clinic by *Aderson Bellegarde François* and *Benjamin G. Shatz*; for the Organization of American Historians et al. by *Catherine E. Stetson* and *Mary Helen Wimberly*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard* and *Harold E. Johnson*; for Political Science Professors by *Robert A. Long, Jr.,* and *Mark W. Mosier*; for Robert P. George et al. by *Mr. George, pro se*; for Leon R. Kass et al. by *Nelson Lund* and *Kenneth A. Klukowski*; for the Honorable Judith S. Kaye (Retired) et al. by *Ethan P. Schulman, Scott L. Winkelman,* and *Chiemi D. Suzuki*; for Daniel N. Robinson by *Kevin T. Snider*; and for Rev. Rick Yramategui et al. by *William K. Rentz.*

petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.

I

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. *In re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384. Later that year, California voters passed the ballot initiative at the center of this dispute, known as Proposition 8. That proposition amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. Shortly thereafter, the California Supreme Court rejected a procedural challenge to the amendment, and held that the proposition was properly enacted under California law. *Strauss* v. *Horton*, 46 Cal. 4th 364, 474–475, 207 P. 3d 48, 122 (2009).

According to the California Supreme Court, Proposition 8 created a "narrow and limited exception" to the state constitutional rights otherwise guaranteed to same-sex couples. *Id.*, at 388, 207 P. 3d, at 61. Under California law, same-sex couples have a right to enter into relationships recognized by the State as "domestic partnerships," which carry "the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses." Cal. Fam. Code Ann. § 297.5(a) (West 2004). In *In re Marriage Cases*, the California Supreme Court concluded that the California Constitution further guarantees same-sex couples "all of the constitutionally based incidents of marriage," including the right to have that marriage "officially recognized" as such by the State. 43 Cal. 4th, at 829, 183 P. 3d, at 433–434. Proposition 8, the court explained in *Strauss*, left those rights largely undisturbed, reserving only "the official *desig-*

nation of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law." 46 Cal. 4th, at 388, 207 P. 3d, at 61.

Respondents, two same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named as defendants California's Governor, attorney general, and various other state and local officials responsible for enforcing California's marriage laws. Those officials refused to defend the law, although they have continued to enforce it throughout this litigation. The District Court allowed petitioners—the official proponents of the initiative, see Cal. Elec. Code Ann. §342 (West 2003)—to intervene to defend it. After a 12-day bench trial, the District Court declared Proposition 8 unconstitutional, permanently enjoining the California officials named as defendants from enforcing the law, and "directing the official defendants that all persons under their control or supervision" shall not enforce it. *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (ND Cal. 2010).

Those officials elected not to appeal the District Court order. When petitioners did, the Ninth Circuit asked them to address "why this appeal should not be dismissed for lack of Article III standing." *Perry* v. *Schwarzenegger*, Civ. No. 10–16696 (CA9, Aug. 16, 2010), p. 2. After briefing and argument, the Ninth Circuit certified a question to the California Supreme Court:

> "Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public

officials charged with that duty refuse to do so." *Perry* v. *Schwarzenegger*, 628 F. 3d 1191, 1193 (2011).

The California Supreme Court agreed to decide the certified question, and answered in the affirmative. Without addressing whether the proponents have a particularized interest of their own in an initiative's validity, the court concluded that "[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." *Perry* v. *Brown*, 52 Cal. 4th 1116, 1127, 265 P. 3d 1002, 1007 (2011).

Relying on that answer, the Ninth Circuit concluded that petitioners had standing under federal law to defend the constitutionality of Proposition 8. California, it reasoned, " 'has standing to defend the constitutionality of its [laws],' " and States have the "prerogative, as independent sovereigns, to decide for themselves who may assert their interests." *Perry* v. *Brown*, 671 F. 3d 1052, 1070, 1071 (2012) (quoting *Diamond* v. *Charles*, 476 U. S. 54, 62 (1986)). "All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm." 671 F. 3d, at 1072.

On the merits, the Ninth Circuit affirmed the District Court. The court held the proposition unconstitutional under the rationale of our decision in *Romer* v. *Evans*, 517 U. S. 620 (1996). 671 F. 3d, at 1076, 1095. In the Ninth Circuit's view, *Romer* stands for the proposition that "the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others*, whether or not it was required to confer that right or benefit in the first place." 671 F. 3d, at 1083–1084.

The Ninth Circuit concluded that "taking away the official designation" of "marriage" from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage, did not further any legitimate interest of the State. *Id.*, at 1095. Proposition 8, in the court's view, violated the Equal Protection Clause because it served no purpose "but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships." *Ibid.*

We granted certiorari to review that determination, and directed that the parties also brief and argue "Whether petitioners have standing under Article III, § 2, of the Constitution in this case." 568 U. S. 1066 (2012).

II

Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." § 2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. This requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond*, *supra*, at 62.

The doctrine of standing, we recently explained, "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408 (2013). In light of this "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of

[an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines* v. *Byrd*, 521 U. S. 811, 820 (1997) (footnote omitted).

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an "actual controversy" persist throughout all stages of litigation. *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 90–91 (2013) (internal quotation marks omitted). That means that standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64 (1997). We therefore must decide whether petitioners had standing to appeal the District Court's order.

Respondents initiated this case in the District Court against the California officials responsible for enforcing Proposition 8. The parties do not contest that respondents had Article III standing to do so. Each couple expressed a desire to marry and obtain "official sanction" from the State, which was unavailable to them given the declaration in Proposition 8 that "marriage" in California is solely between a man and a woman. App. 59.

After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress—they had won—and the state officials chose not to appeal.

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a "personal and individual way." *Defenders of Wildlife*, *supra*, at 560, n. 1. He must possess a "direct stake in the outcome" of the case. *Arizonans for Official English*, *supra*, at 64 (internal quotation marks omitted). Here, however, petitioners had

no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Defenders of Wildlife*, *supra*, at 573–574; see *Lance* v. *Coffman*, 549 U. S. 437, 439 (2007) (*per curiam*) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."); *Allen* v. *Wright*, 468 U. S. 737, 754 (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"); *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923) ("The party who invokes the [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.").

Petitioners argue that the California Constitution and its election laws give them a "'unique,' 'special,' and 'distinct' role in the initiative process—one 'involving both authority and responsibilities that differ from other supporters of the measure.'" Reply Brief 5 (quoting 52 Cal. 4th, at 1126, 1142, 1160, 265 P. 3d, at 1006, 1017–1018, 1030). True enough—but only when it comes to the process of enacting the law. Upon submitting the proposed initiative to the attorney general, petitioners became the official "proponents" of Proposition 8. Cal. Elec. Code Ann. §342. As such, they were responsible for collecting the signatures required to qualify the measure for the ballot. §§9607–9609. After those signatures were collected, the proponents alone had the right to

file the measure with election officials to put it on the ballot. § 9032. Petitioners also possessed control over the arguments in favor of the initiative that would appear in California's ballot pamphlets. §§ 9064, 9065, 9067, 9069.

But once Proposition 8 was approved by the voters, the measure became "a duly enacted constitutional amendment or statute." 52 Cal. 4th, at 1147, 265 P. 3d, at 1021. Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. See *id.*, at 1159, 265 P. 3d, at 1029 (petitioners do not "possess any official authority . . . to directly enforce the initiative measure in question"). They therefore have no "personal stake" in defending its enforcement that is distinguishable from the general interest of every citizen of California. *Defenders of Wildlife*, 504 U. S., at 560–561.

Article III standing "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond*, 476 U. S., at 62. No matter how deeply committed petitioners may be to upholding Proposition 8 or how "zealous [their] advocacy," *post*, at 718 (KENNEDY, J., dissenting), that is not a "particularized" interest sufficient to create a case or controversy under Article III. *Defenders of Wildlife*, *supra*, at 560, and n. 1; see *Arizonans for Official English*, *supra*, at 65 ("Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated."); *Don't Bankrupt Washington Committee* v. *Continental Ill. Nat. Bank & Trust Co. of Chicago*, 460 U. S. 1077 (1983) (summarily dismissing, for lack of standing, appeal by an initiative proponent from a decision holding the initiative unconstitutional).

III

A

Without a judicially cognizable interest of their own, petitioners attempt to invoke that of someone else. They assert that even if *they* have no cognizable interest in appealing the

District Court's judgment, the State of California does, and they may assert that interest on the State's behalf. It is, however, a "fundamental restriction on our authority" that "[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991). There are "certain, limited exceptions" to that rule. *Ibid.* But even when we have allowed litigants to assert the interests of others, the litigants themselves still "must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute." *Id.*, at 411 (internal quotation marks omitted).

In *Diamond* v. *Charles*, for example, we refused to allow Diamond, a pediatrician engaged in private practice in Illinois, to defend the constitutionality of the State's abortion law. In that case, a group of physicians filed a constitutional challenge to the Illinois statute in federal court. The State initially defended the law, and Diamond, a professed "conscientious object[or] to abortions," intervened to defend it alongside the State. 476 U. S., at 57–58.

After the Seventh Circuit affirmed a permanent injunction against enforcing several provisions of the law, the State chose not to pursue an appeal to this Court. But when Diamond did, the state attorney general filed a "'letter of interest,'" explaining that the State's interest in the proceeding was "'essentially co-terminous with the position on the issues set forth by [Diamond].'" *Id.*, at 61. That was not enough, we held, to allow the appeal to proceed. As the Court explained, "[e]ven if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute, this [was] not one of them," because Diamond was not able to assert an injury in fact of his own. *Id.*, at 65 (footnote omitted). And without "any judicially cognizable interest," Diamond could not "maintain the litigation abandoned by the State." *Id.*, at 71.

For the reasons we have explained, petitioners have likewise not suffered an injury in fact, and therefore would ordinarily have no standing to assert the State's interests.

B

Petitioners contend that this case is different, because the California Supreme Court has determined that they are "authorized under California law to appear and assert the state's interest" in the validity of Proposition 8. 52 Cal. 4th, at 1127, 265 P. 3d, at 1007. The court below agreed: "All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm." 671 F. 3d, at 1072. As petitioners put it, they "need no more show a personal injury, separate from the State's indisputable interest in the validity of its law, than would California's Attorney General or did the legislative leaders held to have standing in *Karcher v. May*, 484 U. S. 72 (1987)." Reply Brief 6.

In *Karcher*, we held that two New Jersey state legislators—Speaker of the General Assembly Alan Karcher and President of the Senate Carmen Orechio—could intervene in a suit against the State to defend the constitutionality of a New Jersey law, after the New Jersey attorney general had declined to do so. 484 U. S., at 75, 81–82. "Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals," we held that the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature's behalf. *Id.*, at 82.

Far from supporting petitioners' standing, however, *Karcher* is compelling precedent against it. The legislators in that case intervened in their official capacities as Speaker and President of the legislature. No one doubts that a State

has a cognizable interest "in the continued enforceability" of its laws that is harmed by a judicial decision declaring a state law unconstitutional. *Maine* v. *Taylor*, 477 U. S. 131, 137 (1986). To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. See *Poindexter* v. *Greenhow*, 114 U. S. 270, 288 (1885) ("The State is a political corporate body [that] can act only through agents"). That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State's presiding legislative officers in *Karcher*. See 484 U. S., at 81–82.

What is significant about *Karcher* is what happened after the Court of Appeals decision in that case. Karcher and Orechio lost their positions as Speaker and President, but nevertheless sought to appeal to this Court. We held that they could not do so. We explained that while they were able to participate in the lawsuit in their official capacities as presiding officers of the incumbent legislature, "since they no longer hold those offices, they lack authority to pursue this appeal." *Id.*, at 81.

The point of *Karcher* is not that a State could authorize *private parties* to represent its interests; Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing. Petitioners here hold no office and have always participated in this litigation solely as private parties.

The cases relied upon by the dissent, see *post*, at 725–726, provide petitioners no more support. The dissent's primary authorities, in fact, do not discuss standing at all. See *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987); *United States* v. *Providence Journal Co.*, 485 U. S. 693 (1988). And none comes close to establishing that mere authorization to represent a third party's interests is sufficient to confer Article III standing on private parties with no injury of their own.

The dissent highlights the discretion exercised by special prosecutors appointed by federal courts to pursue contempt charges. See *post*, at 725 (citing *Young*, *supra*, at 807). Such prosecutors do enjoy a degree of independence in carrying out their appointed role, but no one would suppose that they are not subject to the ultimate authority of the court that appointed them. See also *Providence Journal*, *supra*, at 698–707 (recognizing further control exercised by the Solicitor General over special prosecutors).

The dissent's remaining cases, which at least consider standing, are readily distinguishable. See *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 771–778 (2000) (justifying *qui tam* actions based on a partial assignment of the Government's damages claim and a "well nigh conclusive" tradition of such actions in English and American courts dating back to the 13th century); *Whitmore* v. *Arkansas*, 495 U. S. 149, 162–164 (1990) (justifying "next friend" standing based on a similar history dating back to the 17th century, requiring the next friend to prove a disability of the real party in interest and a "significant relationship" with that party); *Gollust* v. *Mendell*, 501 U. S. 115, 124–125 (1991) (requiring plaintiff in shareholder-derivative suit to maintain a financial stake in the outcome of the litigation, to avoid "serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation").

C

Both petitioners and respondents seek support from dicta in *Arizonans for Official English* v. *Arizona*, 520 U. S. 43. The plaintiff in *Arizonans for Official English* filed a constitutional challenge to an Arizona ballot initiative declaring English "'the official language of the State of Arizona.'" *Id.*, at 48. After the District Court declared the initiative unconstitutional, Arizona's Governor announced that she would not pursue an appeal. Instead, the principal sponsor of the ballot initiative—the Arizonans for Official English

Committee—sought to defend the measure in the Ninth Circuit. *Id.*, at 55–56, 58. Analogizing the sponsors to the Arizona Legislature, the Ninth Circuit held that the committee was "qualified to defend [the initiative] on appeal," and affirmed the District Court. *Id.*, at 58, 61.

Before finding the case mooted by other events, this Court expressed "grave doubts" about the Ninth Circuit's standing analysis. *Id.*, at 66. We reiterated that "[s]tanding to defend on appeal in the place of an original defendant . . . demands that the litigant possess 'a direct stake in the outcome.'" *Id.*, at 64 (quoting *Diamond*, 476 U. S., at 62). We recognized that a legislator authorized by state law to represent the State's interest may satisfy standing requirements, as in *Karcher*, *supra*, at 82, but noted that the Arizona committee and its members were "not elected representatives, and we [we]re aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Arizonans for Official English*, *supra*, at 65.

Petitioners argue that, by virtue of the California Supreme Court's decision, they *are* authorized to act "'as agents of the people' of California." Brief for Petitioners 15 (quoting *Arizonans for Official English*, *supra*, at 65). But that court never described petitioners as "agents of the people," or of anyone else. Nor did the Ninth Circuit. The Ninth Circuit asked—and the California Supreme Court answered—only whether petitioners had "the authority to assert the State's interest in the initiative's validity." 628 F. 3d, at 1193; 52 Cal. 4th, at 1124, 265 P. 3d, at 1005. All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This "does not mean that the proponents become de facto public officials"; the authority they enjoy is "simply the authority to participate as parties in a court action and to assert legal arguments in defense of

the state's interest in the validity of the initiative measure." *Id.*, at 1159, 265 P. 3d, at 1029. That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under our precedents.

And petitioners are plainly not agents of the State—"formal" or otherwise, see *post*, at 721. As an initial matter, petitioners' newfound claim of agency is inconsistent with their representations to the District Court. When the proponents sought to intervene in this case, they did not purport to be agents of California. They argued instead that "no other party in this case w[ould] adequately represent *their interests as official proponents*." Motion To Intervene in No. 09–2292 (ND Cal.), p. 6 (emphasis added). It was their "unique legal status" as official proponents—not an agency relationship with the people of California—that petitioners claimed "endow[ed] them with a significantly protectable interest" in ensuring that the District Court not "undo[ ] all that they ha[d] done in obtaining . . . enactment" of Proposition 8. *Id.*, at 10, 11.

More to the point, the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. "An essential element of agency is the principal's right to control the agent's actions." 1 Restatement (Third) of Agency § 1.01, Comment *f* (2005) (hereinafter Restatement). Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California's attorney general, they are not elected at regular intervals—or elected at all. See Cal. Const., Art. V, § 11. No provision provides for their removal. As one *amicus* explains, "the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it." Brief for Walter Dellinger as *Amicus Curiae* 23.

"If the relationship between two persons is one of agency . . . , the agent owes a fiduciary obligation to the principal." 1 Restatement § 1.01, Comment *e*. But petitioners owe nothing of the sort to the people of California. Unlike California's elected officials, they have taken no oath of office. *E. g.*, Cal. Const., Art. XX, § 3 (prescribing the oath for "all public officers and employees, executive, legislative, and judicial"). As the California Supreme Court explained, petitioners are bound simply by "the same ethical constraints that apply to all other parties in a legal proceeding." 52 Cal. 4th, at 1159, 265 P. 3d, at 1029. They are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities.

Finally, the California Supreme Court stated that "[t]he question of who should bear responsibility for any attorney fee award . . . is *entirely distinct* from the question" before it. *Id.*, at 1161, 265 P. 3d, at 1031 (emphasis added). But it is hornbook law that "a principal has a duty to indemnify the agent against expenses and other losses incurred by the agent in defending against actions brought by third parties if the agent acted with actual authority in taking the action challenged by the third party's suit." 2 Restatement § 8.14, Comment *d*. If the issue of fees is entirely distinct from the authority question, then authority cannot be based on agency.

Neither the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and they plainly do not qualify as such.

IV

The dissent eloquently recounts the California Supreme Court's reasons for deciding that state law authorizes petitioners to defend Proposition 8. See *post*, at 717–719. We do not "disrespect[ ]" or "disparage[ ]" those reasons. *Post*, at 726. Nor do we question California's sovereign right to maintain an initiative process, or the right of initiative pro-

ponents to defend their initiatives in California courts, where Article III does not apply. But as the dissent acknowledges, see *post* this page and 716, standing in federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.

The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. "Refusing to entertain generalized grievances ensures that . . . courts exercise power that is judicial in nature," *Lance*, 549 U. S., at 441, and ensures that the Federal Judiciary respects "the proper—and properly limited—role of the courts in a democratic society," *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 341 (2006) (internal quotation marks omitted). States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.

* * *

We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE SOTOMAYOR join, dissenting.

The Court's opinion is correct to state, and the Supreme Court of California was careful to acknowledge, that a propo-

nent's standing to defend an initiative in federal court is a question of federal law. Proper resolution of the justiciability question requires, in this case, a threshold determination of state law. The state-law question is how California defines and elaborates the status and authority of an initiative's proponents who seek to intervene in court to defend the initiative after its adoption by the electorate. Those state-law issues have been addressed in a meticulous and unanimous opinion by the Supreme Court of California.

Under California law, a proponent has the authority to appear in court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty refuse to do so. The State deems such an appearance essential to the integrity of its initiative process. Yet the Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the State Supreme Court's definition of proponents' powers is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.

In my view Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court's view of how a State should make its laws or structure its government. The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied. The Court's decision also has implications for the 26 other States that use an initiative or popular referendum system and which, like California, may choose to have initiative proponents stand in for the

State when public officials decline to defend an initiative in litigation. See M. Waters, Initiative and Referendum Almanac 12 (2003). In my submission, the Article III requirement for a justiciable case or controversy does not prevent proponents from having their day in court.

These are the premises for this respectful dissent.

I

As the Court explains, the State of California sustained a concrete injury, sufficient to satisfy the requirements of Article III, when a United States District Court nullified a portion of its State Constitution. See *ante*, at 709–710 (citing *Maine* v. *Taylor*, 477 U. S. 131, 137 (1986)). To determine whether justiciability continues in appellate proceedings after the State Executive acquiesced in the District Court's adverse judgment, it is necessary to ascertain what persons, if any, have "authority under state law to represent the State's interests" in federal court. *Karcher* v. *May*, 484 U. S. 72, 82 (1987); see also *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 65 (1997).

As the Court notes, the California Elections Code does not on its face prescribe in express terms the duties or rights of proponents once the initiative becomes law. *Ante*, at 707. If that were the end of the matter, the Court's analysis would have somewhat more force. But it is not the end of the matter. It is for California, not this Court, to determine whether and to what extent the Elections Code provisions are instructive and relevant in determining the authority of proponents to assert the State's interest in postenactment judicial proceedings. And it is likewise not for this Court to say that a State must determine the substance and meaning of its laws by statute, or by judicial decision, or by a combination of the two. See *Sweezy* v. *New Hampshire*, 354 U. S. 234, 255 (1957) (plurality opinion); *Dreyer* v. *Illinois*, 187 U. S. 71, 84 (1902). That, too, is for the State to decide.

This Court, in determining the substance of state law, is "bound by a state court's construction of a state statute." *Wisconsin* v. *Mitchell*, 508 U. S. 476, 483 (1993). And the Supreme Court of California, in response to the certified question submitted to it in this case, has determined that State Elections Code provisions directed to initiative proponents do inform and instruct state law respecting the rights and status of proponents in postelection judicial proceedings. Here, in reliance on these statutes and the California Constitution, the State Supreme Court has held that proponents do have authority "under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." *Perry* v. *Brown*, 52 Cal. 4th 1116, 1127, 265 P. 3d 1002, 1007 (2011).

The reasons the Supreme Court of California gave for its holding have special relevance in the context of determining whether proponents have the authority to seek a federal-court remedy for the State's concrete, substantial, and continuing injury. As a class, official proponents are a small, identifiable group. See Cal. Elec. Code Ann. § 9001(a) (West Cum. Supp. 2013). Because many of their decisions must be unanimous, see §§ 9001(b)(1), 9002(b), they are necessarily few in number. Their identities are public. § 9001(b)(2). Their commitment is substantial. See §§ 9607–9609 (obtaining petition signatures); § 9001(c) (monetary fee); §§ 9065(d), 9067, 9069 (West 2003) (drafting arguments for official ballot pamphlet). They know and understand the purpose and operation of the proposed law, an important requisite in defending initiatives on complex matters such as taxation and insurance. Having gone to great lengths to convince voters to enact an initiative, they have a stake in the outcome and the necessary commitment to provide zealous advocacy.

Thus, in California, proponents play a "unique role . . . in the initiative process." 52 Cal. 4th, at 1152, 265 P. 3d, at

1024. They "have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative's enactment into law." *Ibid.*; see also *id.*, at 1160, 265 P. 3d, at 1030 (because of "their special relationship to the initiative measure," proponents are "the most obvious and logical private individuals to ably and vigorously defend the validity of the challenged measure on behalf of the interests of the voters who adopted the initiative into law"). Proponents' authority under state law is not a contrivance. It is not a fictional construct. It is the product of the California Constitution and the California Elections Code. There is no basis for this Court to set aside the California Supreme Court's determination of state law.

The Supreme Court of California explained that its holding was consistent with recent decisions from other States. *Id.*, at 1161–1165, 265 P. 3d, at 1031–1033. In *Sportsmen for I–143* v. *Fifteenth Jud. Ct.*, 308 Mont. 189, 40 P. 3d 400 (2002), the Montana Supreme Court unanimously held that because initiative sponsors "may be in the best position to defend their interpretation" of the initiative and had a "direct, substantial, legally protectable interest in" the lawsuit challenging that interpretation, they were "entitled to intervene as a matter of right." *Id.*, at 194–195, 40 P. 3d, at 403. The Alaska Supreme Court reached a similar unanimous result in *Alaskans for a Common Language Inc.* v. *Kritz*, 3 P. 3d 906 (2000). It noted that, except in extraordinary cases, "a sponsor's direct interest in legislation enacted through the initiative process and the concomitant need to avoid the appearance of [a conflict of interest] will ordinarily preclude courts from denying intervention as of right to a sponsoring group." *Id.*, at 914.

For these and other reasons, the Supreme Court of California held that the California Elections Code and Article II, §8, of the California Constitution afford proponents "the

authority . . . to assert the state's interest in the validity of the initiative" when state officials decline to do so. 52 Cal. 4th, at 1151, 265 P. 3d, at 1024. The court repeated this unanimous holding more than a half-dozen times and in no uncertain terms. See *id.*, at 1126, 1127, 1139, 1149, 1151, 1152, 1165, 265 P. 3d, at 1006, 1007, 1015, 1022, 1024, 1025, 1033; see also *id.*, at 1169–1170, 265 P. 3d, at 1036–1037 (Kennard, J., concurring). That should suffice to resolve the central issue on which the federal question turns.

II

A

The Court concludes that proponents lack sufficient ties to the state government. It notes that they "are not elected," "answer to no one," and lack "'a fiduciary obligation'" to the State. *Ante*, at 713–714 (quoting 1 Restatement (Third) of Agency § 1.01, Comments *e*, *f* (2005)). But what the Court deems deficiencies in the proponents' connection to the state government, the State Supreme Court saw as essential qualifications to defend the initiative system. The very object of the initiative system is to establish a lawmaking process that does not depend upon state officials. In California, the popular initiative is necessary to implement "the theory that all power of government ultimately resides in the people." 52 Cal. 4th, at 1140, 265 P. 3d, at 1016 (internal quotation marks omitted). The right to adopt initiatives has been described by the California courts as "one of the most precious rights of [the State's] democratic process." *Ibid.* (internal quotation marks omitted). That historic role for the initiative system "grew out of dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process." *Ibid.* The initiative's "primary purpose," then, "was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt." *Ibid.*

The California Supreme Court has determined that this purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding. See *id.*, at 1160, 265 P. 3d, at 1030; cf. *Alaskans for a Common Language*, *supra*, at 914 (noting that proponents must be allowed to defend an enacted initiative in order to avoid the perception, correct or not, "that the interests of [the proponents] were not being defended vigorously by the executive branch"). Giving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State's governmental structure. See 52 Cal. 4th, at 1126–1128, 265 P. 3d, at 1006–1007. And in light of the frequency with which initiatives' opponents resort to litigation, the impact of that veto could be substantial. K. Miller, Direct Democracy and the Courts 106 (2009) (185 of the 455 initiatives approved in Arizona, California, Colorado, Oregon, and Washington between 1900 and 2008 were challenged in court). As a consequence, California finds it necessary to vest the responsibility and right to defend a voter-approved initiative in the initiative's proponents when the State Executive declines to do so.

Yet today the Court demands that the State follow the Restatement of Agency. See *ante*, at 713–714. There are reasons, however, why California might conclude that a conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process. The State may not wish to associate itself with proponents or their views outside of the "extremely narrow and limited" context of this litigation, 52 Cal. 4th, at 1159, 265 P. 3d, at 1029, or to bear the cost of proponents' legal fees. The State may also wish to avoid the odd conflict of having a formal agent of the State (the initiative's proponent) arguing in favor of a law's validity while state officials (*e. g.*, the attorney general) contend in the same proceeding that it should be found invalid.

Furthermore, it is not clear who the principal in an agency relationship would be. It would make little sense if it were the Governor or attorney general, for that would frustrate the initiative system's purpose of circumventing elected officials who fail or refuse to effect the public will. *Id.*, at 1139–1140, 265 P. 3d, at 1016. If there is to be a principal, then, it must be the people of California, as the ultimate sovereign in the State. See *ibid.*, 265 P. 3d, at 1015–1016 ("'All political power is inherent in the people'" (quoting Cal. Const., Art. II, § 1)). But the Restatement may offer no workable example of an agent representing a principal composed of nearly 40 million residents of a State. Cf. 1 Restatement (Second) of Agency, p. 2, Scope Note (1957) (noting that the Restatement "does not state the special rules applicable to public officers"); 1 Restatement (First) of Agency, p. 4, Scope Note (1933) (same).

And if the Court's concern is that the proponents are unaccountable, that fear is neither well founded nor sufficient to overcome the contrary judgment of the State Supreme Court. It must be remembered that both elected officials and initiative proponents receive their authority to speak for the State of California directly from the people. The Court apparently believes that elected officials are acceptable "agents" of the State, see *ante*, at 709–710, but they are no more subject to ongoing supervision of their principal—*i. e.*, the people of the State—than are initiative proponents. At most, a Governor or attorney general can be recalled or voted out of office in a subsequent election, but proponents, too, can have their authority terminated or their initiative overridden by a subsequent ballot measure. Finally, proponents and their attorneys, like all other litigants and counsel who appear before a federal court, are subject to duties of candor, decorum, and respect for the tribunal and coparties alike, all of which guard against the possibility that initiative proponents will somehow fall short of the appropriate standards for federal litigation.

B

Contrary to the Court's suggestion, this Court's precedents do not indicate that a formal agency relationship is necessary. In *Karcher* v. *May*, 484 U. S. 72 (1987), the Speaker of the New Jersey Assembly (Karcher) and President of the New Jersey Senate (Orechio) intervened in support of a school moment-of-silence law that the State's Governor and attorney general declined to defend in court. In considering the question of standing, the Court looked to New Jersey law to determine whether Karcher and Orechio "had authority under state law to represent the State's interests in both the District Court and the Court of Appeals." *Id.*, at 82. The Court concluded that they did. Because the "New Jersey Supreme Court ha[d] granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment," the *Karcher* Court held that standing had been proper in the District Court and Court of Appeals. *Ibid.* By the time the case arrived in this Court, Karcher and Orechio had lost their presiding legislative offices, without which they lacked the authority to represent the State under New Jersey law. This, the Court held, deprived them of standing. *Id.*, at 81. Here, by contrast, proponents' authority under California law is not contingent on officeholder status, so their standing is unaffected by the fact that they "hold no office" in California's government. *Ante*, at 710.

Arizonans for Official English v. *Arizona*, 520 U. S. 43 (1997), is consistent with the premises of this dissent, not with the rationale of the Court's opinion. See *ante*, at 711–712. There, the Court noted its serious doubts as to the aspiring defenders' standing because there was "no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." 520 U. S., at 65. The Court did use the word "agents"; but, read in context, it

is evident that the Court's intention was not to demand a formal agency relationship in compliance with the Restatement. Rather, the Court used the term as shorthand for a party whom "state law authorizes" to "represent the State's interests" in court. *Ibid.*

Both the Court of Appeals and the Supreme Court of California were mindful of these precedents and sought to comply with them. The state court, noting the importance of *Arizonans for Official English*, expressed its understanding that "the high court's doubts as to the official initiative proponents' standing in that case were based, at least in substantial part, on the fact that the court was not aware of any 'Arizona law appointing initiative sponsors as agents of the people of Arizona to defend . . . the constitutionality of initiatives made law of the State.' " 52 Cal. 4th, at 1136–1137, 265 P. 3d, at 1013–1014 (quoting 520 U. S., at 65). Based on this passage, it concluded that "nothing in [*Arizonans for Official English*] indicates that if a state's law does authorize the official proponents of an initiative to assert the state's interest in the validity of a challenged state initiative when the public officials who ordinarily assert that interest have declined to do so, the proponents would not have standing to assert the state's interest in the initiative's validity in a federal lawsuit." 52 Cal. 4th, at 1137, 265 P. 3d, at 1014.

The Court of Appeals, too, was mindful of this requirement. *Perry* v. *Brown*, 671 F. 3d 1052, 1072–1073 (CA9 2012). Although that panel divided on the proper resolution of the merits of this case, it was unanimous in concluding that proponents satisfy the requirements of Article III. Compare *id.*, at 1070–1075 (majority opinion), with *id.*, at 1096–1097 (N. R. Smith, J., concurring in part and dissenting in part). Its central premise, ignored by the Court today, was that the "State's highest court [had] held that California law provides precisely what the *Arizonans* Court found lacking in Arizona law: it confers on the official proponents of an initiative the authority to assert the State's interests in

defending the constitutionality of that initiative, where the state officials who would ordinarily assume that responsibility choose not to do so." *Id.*, at 1072 (majority opinion). The Court of Appeals and the State Supreme Court did not ignore *Arizonans for Official English*; they were faithful to it.

C

The Court's approach in this case is also in tension with other cases in which the Court has permitted individuals to assert claims on behalf of the government or others. For instance, Federal Rule of Criminal Procedure 42(a)(2) allows a court to appoint a private attorney to investigate and prosecute potential instances of criminal contempt. Under the Rule, this special prosecutor is not the agent of the appointing judge; indeed, the prosecutor's "determination of which persons should be targets of [the] investigation, what methods of investigation should be used, what information will be sought as evidence," whom to charge, and other "decisions . . . critical to the conduct of a prosecution, are all made outside the supervision of the court." *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 807 (1987). Also, just as proponents have been authorized to represent the State of California, "'[p]rivate attorneys appointed to prosecute a criminal contempt action *represent the United States*,'" *United States* v. *Providence Journal Co.*, 485 U. S. 693, 700 (1988). They are "appointed solely to pursue the public interest in vindication of the court's authority," *Young*, *supra*, at 804, an interest that—like California's interest in the validity of its laws—is "unique to the sovereign," *Providence Journal Co.*, *supra*, at 700. And, although the Court dismisses the proponents' standing claim because initiative proponents "are not elected" and "decide for themselves, with no review, what arguments to make and how to make them" in defense of the enacted initiative, *ante*, at 713, those same charges could be leveled with equal if not greater force at the special prosecutors just discussed, see *Young*, *supra*, at 807.

Similar questions might also arise regarding *qui tam* actions, see, *e. g.*, *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 771–778 (2000); suits involving "next friends" litigating on behalf of a real party in interest, see, *e. g.*, *Whitmore* v. *Arkansas*, 495 U. S. 149, 161–166 (1990); or shareholder-derivative suits, see, *e. g.*, *Gollust* v. *Mendell*, 501 U. S. 115, 125–126 (1991). There is no more of an agency relationship in any of these settings than in the instant case, yet the Court has nonetheless permitted a party to assert the interests of another. That *qui tam* actions and "next friend" litigation may have a longer historical pedigree than the initiative process, see *ante*, at 711, is no basis for finding Article III's standing requirement met in those cases but lacking here. In short, the Court today unsettles its longtime understanding of the basis for jurisdiction in representative-party litigation, leaving the law unclear and the District Court's judgment, and its accompanying statewide injunction, effectively immune from appellate review.

III

There is much irony in the Court's approach to justiciability in this case. A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed. And rather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, see, *e. g.*, *Allen* v. *Wright*, 468 U. S. 737, 750–752 (1984), here the Court refuses to allow a State's authorized representatives to defend the outcome of a democratic election.

The Court's opinion disrespects and disparages both the political process in California and the well-stated opinion of

the California Supreme Court in this case. The California Supreme Court, not this Court, expresses concern for vigorous representation; the California Supreme Court, not this Court, recognizes the necessity to avoid conflicts of interest; the California Supreme Court, not this Court, comprehends the real interest at stake in this litigation and identifies the most proper party to defend that interest. The California Supreme Court's opinion reflects a better understanding of the dynamics and principles of Article III than does this Court's opinion.

Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject. As the California Supreme Court recognized, "the question before us involves a fundamental procedural issue that may arise with respect to *any* initiative measure, without regard to its subject matter." 52 Cal. 4th, at 1124, 265 P. 3d, at 1005 (emphasis in original). If a federal court must rule on a constitutional point that either confirms or rejects the will of the people expressed in an initiative, that is when it is most necessary, not least necessary, to insist on rules that ensure the most committed and vigorous adversary arguments to inform the rulings of the courts.

* * *

In the end, what the Court fails to grasp or accept is the basic premise of the initiative process. And it is this. The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over a century. "Through the structure of its government, and the character of those who exercise government authority, a State defines

itself as sovereign." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991). In California and the 26 other States that permit initiatives and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice by nullifying, for failure to comply with the Restatement of Agency, a State Supreme Court decision holding that state law authorizes an enacted initiative's proponents to defend the law if and when the State's usual legal advocates decline to do so. The Court's opinion fails to abide by precedent and misapplies basic principles of justiciability. Those errors necessitate this respectful dissent.

Syllabus

SEKHAR *v.* UNITED STATES

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

No. 12–357. Argued April 23, 2013—Decided June 26, 2013

Investments for the employee pension fund of the State of New York and its local governments are chosen by the fund's sole trustee, the State Comptroller. After the Comptroller's general counsel recommended against investing in a fund managed by FA Technology Ventures, the general counsel received anonymous e-mails demanding that he recommend the investment and threatening, if he did not, to disclose information about the general counsel's alleged affair to his wife, government officials, and the media. Some of the e-mails were traced to the home computer of petitioner Sekhar, a managing partner of FA Technology Ventures. Petitioner was convicted of attempted extortion, in violation of the Hobbs Act, 18 U. S. C. § 1951(a), which defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," § 1951(b)(2). The jury specified that the property petitioner attempted to extort was the general counsel's recommendation to approve the investment. The Second Circuit affirmed.

Held: Attempting to compel a person to recommend that his employer approve an investment does not constitute "the obtaining of property from another" under the Hobbs Act. Pp. 732–738.

(a) Absent other indication, "Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Neder* v. *United States*, 527 U. S. 1, 23. As far as is known, no case predating the Hobbs Act—English, federal, or state—ever identified conduct such as that charged here as extortionate. Extortion required the obtaining of items of value, typically cash, from the victim. The Act's text confirms that obtaining property requires "not only the deprivation but also the acquisition of property." *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393, 404. The property extorted must therefore be transferable—that is, capable of passing from one person to another, a defining feature lacking in the alleged property here. The genesis of the Hobbs Act reinforces that conclusion. Congress borrowed nearly verbatim the definition of extortion from a 1909 New York statute but did not copy the coercion provision of that statute. And in 1946, the time of the borrowing, New York courts had consistently held that the sort of *interference* with rights that occurred here was coercion.

Finally, this Court's own precedent demands reversal of petitioner's convictions. See *id.*, at 404–405. Pp. 732–737.

(b) The Government's defense of the theory of conviction is unpersuasive. No fluent speaker of English would say that "petitioner *obtained and exercised* the general counsel's right to make a recommendation," any more than he would say that a person "*obtained and exercised* another's right to free speech." He would say that "petitioner *forced* the general counsel to make a particular recommendation," just as he would say that a person "*forced* another to make a statement." Adopting the Government's theory here would not only make nonsense of words; it would collapse the longstanding distinction between extortion and coercion and ignore Congress's choice to penalize one but not the other. See *Scheidler*, *supra*, at 409. Pp. 737–738.

683 F. 3d 436, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, BREYER, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which KENNEDY and SOTOMAYOR, JJ., joined, *post*, p. 738.

Paul D. Clement argued the cause for petitioner. With him on the briefs was *George W. Hicks, Jr.*

Sarah E. Harrington argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Raman*, *Deputy Solicitor General Dreeben*, and *Joel M. Gershowitz*.*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether attempting to compel a person to recommend that his employer approve an investment constitutes "the obtaining of property from another" under 18 U. S. C. § 1951(b)(2).

I

New York's Common Retirement Fund is an employee pension fund for the State of New York and its local govern-

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**John D. Cline*, *Timothy Lynch*, *Ilya Shapiro*, and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

ments. As sole trustee of the Fund, the State Comptroller chooses Fund investments. When the Comptroller decides to approve an investment he issues a "Commitment." A Commitment, however, does not actually bind the Fund. For that to happen, the Fund and the recipient of the investment must enter into a limited partnership agreement. 683 F. 3d 436, 438 (CA2 2012).

Petitioner Giridhar Sekhar was a managing partner of FA Technology Ventures. In October 2009, the Comptroller's office was considering whether to invest in a fund managed by that firm. The office's general counsel made a written recommendation to the Comptroller not to invest in the fund, after learning that the Office of the New York Attorney General was investigating another fund managed by the firm. The Comptroller decided not to issue a Commitment and notified a partner of FA Technology Ventures. That partner had previously heard rumors that the general counsel was having an extramarital affair.

The general counsel then received a series of anonymous e-mails demanding that he recommend moving forward with the investment and threatening, if he did not, to disclose information about his alleged affair to his wife, government officials, and the media. App. 59–61. The general counsel contacted law enforcement, which traced some of the e-mails to petitioner's home computer and other e-mails to offices of FA Technology Ventures.

Petitioner was indicted for, and a jury convicted him of, attempted extortion, in violation of the Hobbs Act, 18 U. S. C. § 1951(a). That Act subjects a person to criminal liability if he "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." § 1951(a). The Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

§ 1951(b)(2).[1] On the verdict form, the jury was asked to specify the property that petitioner attempted to extort: (1) "the Commitment"; (2) "the Comptroller's approval of the Commitment"; or (3) "the General Counsel's recommendation to approve the Commitment." App. 141–142. The jury chose only the third option.

The Court of Appeals for the Second Circuit affirmed the conviction. The court held that the general counsel "had a property right in rendering sound legal advice to the Comptroller and, specifically, to recommend—free from threats—whether the Comptroller should issue a Commitment for [the funds]." 683 F. 3d, at 441. The court concluded that petitioner not only attempted to deprive the general counsel of his "property right," but that petitioner also "attempted to exercise that right by forcing the General Counsel to make a recommendation determined by [petitioner]." *Id.*, at 442.

We granted certiorari. 568 U. S. 1119 (2013).

II

A

Whether viewed from the standpoint of the common law, the text and genesis of the statute at issue here, or the jurisprudence of this Court's prior cases, what was charged in this case was not extortion.

It is a settled principle of interpretation that, absent other indication, "Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Neder* v. *United States*, 527 U. S. 1, 23 (1999).

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[1] Petitioner was also convicted of several counts of interstate transmission of extortionate threats, in violation of 18 U. S. C. § 875(d). Under § 875(d), a person is criminally liable if he, "with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee." In this case, both parties concede that the definition of "extortion" under the Hobbs Act also applies to the § 875(d) counts. We express no opinion on the validity of that concession.

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).

Or as Justice Frankfurter colorfully put it, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947).

The Hobbs Act punishes "extortion," one of the oldest crimes in our legal tradition, see E. Coke, The Third Part of the Institutes of the Laws of England 148–150 (1648) (reprint 2008). The crime originally applied only to extortionate action by public officials, but was later extended by statute to private extortion. See 4 C. Torcia, Wharton's Criminal Law §§ 695, 699 (14th ed. 1981). As far as is known, no case predating the Hobbs Act—English, federal, or state—ever identified conduct such as that charged here as extortionate. Extortion required the obtaining of items of value, typically cash, from the victim. See, *e. g.*, *People* v. *Whaley*, 6 Cow. 661 (N. Y. Sup. Ct. 1827) (justice of the peace properly indicted for extorting money); *Commonwealth* v. *Bagley*, 24 Mass. 279 (1828) (officer properly convicted for demanding a fee for letting a man out of prison); *Commonwealth* v. *Mitchell*, 66 Ky. 25 (1867) (jailer properly indicted for extorting money from prisoner); *Queen* v. *Woodward*, 11 Mod. 137, 88 Eng. Rep. 949 (K. B. 1707) (upholding indictment for extorting "money and a note"). It did not cover mere coercion to act, or to refrain from acting. See, *e. g.*, *King* v. *Burdett*, 1 Raym. Ld. 149, 91 Eng. Rep. 996 (K. B. 1696) (dictum) (extortion consisted of the "taking of money for the use of the stalls," not the deprivation of "free liberty to sell [one's] wares in the market according to law").

The text of the statute at issue confirms that the alleged property here cannot be extorted. Enacted in 1946, the Hobbs Act defines its crime of "extortion" as "the *obtaining of property from another*, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U. S. C. § 1951(b)(2) (emphasis added). Obtaining property requires "not only the deprivation but also the acquisition of property." *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393, 404 (2003) (citing *United States* v. *Enmons*, 410 U. S. 396, 400 (1973)). That is, it requires that the victim "part with" his property, R. Perkins & R. Boyce, Criminal Law 451 (3d ed. 1982), and that the extortionist "gain possession" of it, *Scheidler*, *supra*, at 403–404, n. 8; see also Webster's New International Dictionary 1682 (2d ed. 1949) (defining "obtain"); Murray, Note, Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms, 75 Notre Dame L. Rev. 691, 706 (1999) (Murray). The property extorted must therefore be *transferable*—that is, capable of passing from one person to another. The alleged property here lacks that defining feature.[2]

The genesis of the Hobbs Act reinforces that conclusion. The Act was modeled after § 850 of the New York Penal Law (1909), which was derived from the famous Field Code, a 19th-century model penal code, see 4 Commissioners of the Code, Penal Code of the State of New York § 613, p. 220 (1865) (reprint 1998). Congress borrowed, nearly verbatim, the New York statute's definition of extortion. See

[2] It may well be proper under the Hobbs Act for the Government to charge a person who obtains money by threatening a third party, who obtains funds belonging to a corporate or governmental entity by threatening the entity's agent, see 2 J. Bishop, Criminal Law § 408, p. 334, and n. 3 (9th ed. 1923) (citing *State* v. *Moore*, 1 Ind. 548 (1849)), or who obtains "goodwill and customer revenues" by threatening a market competitor, see, *e. g.*, *United States* v. *Zemek*, 634 F. 2d 1159, 1173 (CA9 1980). Each of these might be considered "obtaining property from another." We need not consider those situations, however, because the Government did not charge any of them here.

Scheidler, 537 U. S., at 403. The New York statute contained, in addition to the felony crime of extortion, a new (that is to say, nonexistent at common law) misdemeanor crime of coercion. Whereas the former required, as we have said, "'the criminal acquisition of . . . property,'" *ibid.*, the latter required merely the use of threats "to compel another person to do or to abstain from doing an act which such other such person has a legal right to do or to abstain from doing." N. Y. Penal Law § 530 (1909), earlier codified in N. Y. Penal Code § 653 (1881). Congress did not copy the coercion provision. The omission must have been deliberate, since it was perfectly clear that extortion did not include coercion. At the time of the borrowing (1946), New York courts had consistently held that the sort of *interference* with rights that occurred here was coercion. See, *e. g.*, *People* v. *Ginsberg*, 262 N. Y. 556, 188 N. E. 62 (1933) (*per curiam*) (compelling store owner to become a member of a trade association and to remove advertisements); *People* v. *Scotti*, 266 N. Y. 480, 195 N. E. 162 (App. Div. 1934) (compelling victim to enter into agreement with union); *People* v. *Kaplan*, 240 App. Div. 72, 74–75, 269 N. Y. S. 161, 163–164, aff'd, 264 N. Y. 675, 191 N. E. 621 (1934) (compelling union members to drop lawsuits against union leadership).[3]

[3] Also revealing, the New York code prohibited conspiracy "[t]o prevent another from *exercising a lawful trade or calling*, or doing any other lawful act, by force, threats, intimidation." N. Y. Penal Law § 580(5) (1909) (emphasis added). That separate codification, which Congress did not adopt, is further evidence that the New York crime of extortion (and hence the federal crime) did not reach interference with a person's right to ply a lawful trade, similar to the right claimed here.

Seeking to extract something from the void, the Government relies on cases that interpret a provision of the New York code defining the kinds of threats that qualify as threats to do "unlawful injury to the person or property," which is what the extortion statute requires. See N. Y. Penal Code § 553 (1881); N. Y. Penal Law § 851 (1909). Those cases held that they include threats to injure a business by preventing the return of workers from a strike, *People* v. *Barondess*, 133 N. Y. 649, 31 N. E. 240, 241–242 (1892) (*per curiam*), and threats to terminate a person's employment, *People ex rel. Short* v. *Warden*, 145 App. Div. 861, 130 N. Y. S. 698, 700–

And finally, this Court's own precedent similarly demands reversal of petitioner's convictions. In *Scheidler*, we held that protesters did not commit extortion under the Hobbs Act, even though they "interfered with, disrupted, and in some instances completely deprived" abortion clinics of their ability to run their business. 537 U. S., at 404–405. We reasoned that the protesters may have deprived the clinics of an "alleged property right," but they did not pursue or receive "'something of value from'" the clinics that they could then "exercise, transfer, or sell" themselves. *Id.*, at 405. The opinion supported its holding by citing the three New York coercion cases discussed above. See *id.*, at 405–406.

This case is easier than *Scheidler*, where one might at least have said that physical occupation of property amounted to obtaining that property. The deprivation alleged here is far more abstract. *Scheidler* rested its decision, as we do, on the term "obtaining." *Id.*, at 402, n. 6. The principle announced there—that a defendant must pursue something of value from the victim that can be exercised, transferred, or sold—applies with equal force here.[4]

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701 (1911), aff'd, 206 N. Y. 632, 99 N. E. 1116 (1912) (*per curiam*). Those cases are entirely inapposite here, where the issue is not what constitutes a qualifying *threat* but what constitutes *obtainable property.*

[4] The Government's attempt to distinguish *Scheidler* is unconvincing. In its view, had the protesters sought to force the clinics to provide services other than abortion, extortion would have been a proper charge. Petitioner committed extortion here, the Government says, because he did not merely attempt to prevent the general counsel from giving a recommendation but tried instead to force him to issue one. That distinction is, not to put too fine a point on it, nonsensical. It is coercion, not extortion, when a person is forced to do something and when he is forced to do nothing. See, *e. g.*, N. Y. Penal Law § 530 (1909) (it is a misdemeanor to coerce a "person to do or to abstain from doing an act"). Congress's enactment of the Hobbs Act did not, through the phrase "obtaining of property from another," suddenly transform every act that coerces affirmative conduct into a crime punishable for up to 20 years, while leaving those who "merely" coerce inaction immune from federal punishment.

Whether one considers the personal right at issue to be "property" in a broad sense or not, it certainly was not *obtainable property* under the Hobbs Act.[5]

B

The Government's shifting and imprecise characterization of the alleged property at issue betrays the weakness of its case. According to the jury's verdict form, the "property" that petitioner attempted to extort was "the General Counsel's recommendation to approve the Commitment." App. 142. But the Government expends minuscule effort in defending that theory of conviction. And for good reason—to wit, our decision in *Cleveland* v. *United States*, 531 U. S. 12 (2000), which reversed a business owner's mail-fraud conviction for "obtaining money or property" through misrepresentations made in an application for a video-poker license issued by the State. We held that a "license" is not "property" while in the State's hands and so cannot be "obtained" from the State. *Id.*, at 20–22. Even less so can an employee's yet-to-be-issued recommendation be called obtainable property, and less so still a yet-to-be-issued recommendation that would merely approve (but not effect) a particular investment.

Hence the Government's reliance on an alternative, more sophisticated (and sophistic) description of the property. Instead of defending the jury's description, the Government hinges its case on the general counsel's "intangible property

[5] The concurrence contends that the "right to make [a] recommendation" is not property. *Post*, at 741 (ALITO, J., concurring in judgment). We are not sure of that. If one defines property to include anything of value, surely some rights to make recommendations would qualify—for example, a member of the Pulitzer Prize Committee's right to recommend the recipient of the prize. We suppose that a prominent journalist would not give up that right (he cannot, of course, transfer it) for a significant sum of money—so it must be valuable. But the point relevant to the present case is that *it cannot be transferred*, so it cannot be the object of extortion under the statute.

right to give his disinterested legal opinion to his client free of improper outside interference." Brief for United States 39. But *what*, exactly, would the petitioner have obtained for himself? A right to give *his own* disinterested legal opinion to *his own* client free of improper interference? Or perhaps, a right to give *the general counsel's* disinterested legal opinion to *the general counsel's* client?

Either formulation sounds absurd, because it is. Clearly, petitioner's goal was not to acquire the general counsel's "intangible property right to give disinterested legal advice." It was to force the general counsel to offer advice that accorded with petitioner's wishes. But again, that is coercion, not extortion. See Murray 721–722. No fluent speaker of English would say that "petitioner *obtained and exercised* the general counsel's right to make a recommendation," any more than he would say that a person "*obtained and exercised* another's right to free speech." He would say that "petitioner *forced* the general counsel to make a particular recommendation," just as he would say that a person "*forced* another to make a statement." Adopting the Government's theory here would not only make nonsense of words; it would collapse the longstanding distinction between extortion and coercion and ignore Congress's choice to penalize one but not the other. See *Scheidler*, *supra*, at 409. That we cannot do.

The judgment of the Court of Appeals for the Second Circuit is reversed.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring in the judgment.

The question that we must decide in this case is whether "the General Counsel's recommendation to approve the Commitment," App. 142—or his right to make that recommendation—is property that is capable of being extorted under the Hobbs Act, 18 U. S. C. § 1951. In my view, neither one is.

I

The jury in this case returned a special verdict form and stated that the property that petitioner attempted to extort was "the General Counsel's recommendation to approve the Commitment." What the jury obviously meant by this was the general counsel's internal suggestion to his superior that the state government issue a nonbinding commitment to invest in a fund managed by FA Technology Ventures. We must therefore decide whether this nonbinding internal recommendation by a salaried state employee constitutes "property" within the meaning of the Hobbs Act, which defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." § 1951(b)(2).

The Hobbs Act does not define the term "property," but even at common law the offense of extortion was understood to include the obtaining of any thing of value. 2 E. Coke, The First Part of the Institutes of the Laws of England 368b (18th English ed. 1823) ("Extortion . . . is a great misprison, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing of or from any man"); 4 W. Blackstone, Commentaries *141 (extortion is "an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value"). See also 2 J. Bishop, Criminal Law § 401, pp. 331–332 (9th ed. 1923) ("In most cases, the thing obtained is money. . . . But probably anything of value will suffice"); 3 F. Wharton, A Treatise on Criminal Law § 1898, p. 2095 (11th ed. 1912) ("[I]t is enough if any valuable thing is received").

At the time Congress enacted the Hobbs Act, the contemporary edition of Black's Law Dictionary included an expansive definition of the term. See Black's Law Dictionary 1446 (3d ed. 1933). It stated: "[T]he term is said to extend to every species of valuable right and interest. . . . The word is also commonly used to denote everything which is the sub-

ject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate." *Id.*, at 1446–1447. And the lower courts have long given the term a similarly expansive construction. See, *e. g.*, *United States* v. *Tropiano*, 418 F. 2d 1069, 1075 (CA2 1969) ("The concept of property under the Hobbs Act . . . includes, in a broad sense, any valuable right considered as a source or element of wealth").

Despite the breadth of some of these formulations, however, the term "property" plainly does not reach everything that a person may hold dear; nor does it extend to everything that might in some indirect way portend the possibility of future economic gain. I do not suggest that the current lower court case law is necessarily correct, but it seems clear that the case now before us is an outlier and that the jury's verdict stretches the concept of property beyond the breaking point.

It is not customary to refer to an internal recommendation to make a government decision as a form of property. It would seem strange to say that the government or its employees have a property interest in their internal recommendations regarding such things as the issuance of a building permit, the content of an environmental impact statement, the approval of a new drug, or the indictment of an individual or a corporation. And it would be even stranger to say that a private party who might be affected by the government's decision can obtain a property interest in a recommendation to make the decision. See, *e. g.*, *Doyle* v. *University of Alabama*, 680 F. 2d 1323, 1326 (CA11 1982) ("Doyle had no protected property interest in the mere recommendation for a raise; thus she was not entitled to due process safeguards when the recommended raise was disapproved by the University").

Our decision in *Cleveland* v. *United States*, 531 U. S. 12 (2000), supports the conclusion that internal recommenda-

tions regarding government decisions are not property. In *Cleveland*, we vacated a business owner's conviction under the federal mail fraud statute, 18 U. S. C. § 1341, for "obtaining money or property" through misrepresentations made in an application for a video poker license issued by the State. We held that a video poker license is not property in the hands of the State. *Cleveland*, *supra*, at 15. I do not suggest that the concepts of property under the mail fraud statute and the Hobbs Act are necessarily the same. But surely a video poker license has a stronger claim to be classified as property than a mere internal recommendation that a state government take an initial step that might lead eventually to an investment that would be beneficial to private parties.

The Government has not cited any Hobbs Act case holding that an internal recommendation regarding a government decision constitutes property. Nor has the Government cited any other example of the use of the term "property" in this sense.*

The Second Circuit recharacterized the property that petitioner attempted to obtain as the general counsel's "right to make a recommendation consistent with his legal judgment." 683 F. 3d 436, 442 (2012). And the Government also presses that theory in this Court. Brief for United States 15, 34–45. According to the Government, the general counsel's property interest in his recommendation encompasses the right to make the recommendation. *Id.*, at 35–36. But this argument assumes that the recommendation itself is property. See *id.*, at 35 (the general counsel's "'recommenda-

*To recognize that an internal recommendation regarding a government decision is not property does not foreclose the possibility that threatening a government employee, as the government's agent, in order to secure government property could qualify as Hobbs Act extortion. Here, after all, petitioner's ultimate goal was to secure an investment of money from the government. But the jury found only that petitioner had attempted to obtain the general counsel's recommendation, so I have no occasion to consider whether a Hobbs Act conviction could have been sustained on a different legal theory.

tion' and his 'right to make the recommendation' are merely different expressions of the same property"). If an internal recommendation regarding a government decision does not constitute property, then surely a government employee's right to make such a recommendation is not property either (nor could it be deemed a *property* right).

II

The Government argues that the recommendation was the general counsel's *personal* property because it was inextricably related to his right to pursue his profession as an attorney. See *id.*, at 34–35. But that argument is clearly wrong: If the general counsel had left the State's employ before submitting the recommendation, he could not have taken the recommendation with him, and he certainly could not have given it or sold it to someone else. Therefore, it is obvious that the recommendation (and the right to make it) were inextricably related to the general counsel's position with the government, and not to his broader personal right to pursue the practice of law.

The general counsel's job surely had economic value to him, as did his labor as a lawyer, his law license, and his reputation as an attorney. But the indictment did not allege, and the jury did not find, that petitioner attempted to obtain those things. Nor would such a theory make sense in the context of this case. Petitioner did not, for example, seek the general counsel's legal advice or demand that the general counsel represent him in a legal proceeding. Cf. *United States* v. *Thompson*, 647 F. 3d 180, 186–187 (CA5 2011) (a person's labor is property capable of being extorted). Nor did petitioner attempt to enhance his own ability to compete with the general counsel for legal work by threatening to do something that would, say, tarnish the general counsel's reputation or cause his law license to be revoked. Cf. *Tropiano*, 418 F. 2d, at 1071–1072, 1075–1077 (threats to competitor in order to obtain customers constitute extortion); *United*

States v. *Zemek*, 634 F. 2d 1159, 1173–1174 (CA9 1980) (same); *United States* v. *Coffey*, 361 F. Supp. 2d 102, 108–109 (EDNY 2005) (the right to pursue a lawful business is extortable property under the Hobbs Act).

The Court holds that petitioner's conduct does not amount to attempted extortion, but for a different reason: According to the Court, the alleged property that petitioner pursued was not transferrable and therefore is not capable of being "obtained." *Ante*, at 734, 736–737. Because I do not believe that the item in question constitutes property, it is unnecessary for me to determine whether or not petitioner sought to obtain it.

* * *

If Congress had wanted to classify internal recommendations pertaining to government decisions as property, I think it would have spoken more clearly than it did in the Hobbs Act. But even if the Hobbs Act were ambiguous on this point, the rule of lenity would counsel in favor of an interpretation of the statute that does not reach so broadly, see *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393, 409 (2003). This is not to say that the Government could not have prosecuted petitioner for extortion on these same facts under some other theory. The question before us is whether the general counsel's recommendation—or the right to make it—constitutes property under the Hobbs Act. In my view, neither one does.

For these reasons, I concur in the Court's judgment.

Syllabus

UNITED STATES *v.* WINDSOR, EXECUTOR OF THE ESTATE OF SPYER, ET AL.

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

No. 12–307. Argued March 27, 2013—Decided June 26, 2013

The State of New York recognizes the marriage of New York residents Edith Windsor and Thea Spyer, who wed in Ontario, Canada, in 2007. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by § 3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act—a law providing rules of construction for over 1,000 federal laws and the whole realm of federal regulations—to define "marriage" and "spouse" as excluding same-sex partners. Windsor paid $363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied. Windsor brought this refund suit, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment. While the suit was pending, the Attorney General notified the Speaker of the House of Representatives that the Department of Justice would no longer defend § 3's constitutionality. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend § 3's constitutionality. The District Court permitted the intervention. On the merits, the court ruled against the United States, finding § 3 unconstitutional and ordering the Treasury to refund Windsor's tax with interest. The Second Circuit affirmed. The United States has not complied with the judgment.

Held:

1. This Court has jurisdiction to consider the merits of the case. This case clearly presented a concrete disagreement between opposing parties that was suitable for judicial resolution in the District Court, but the Executive's decision not to defend § 3's constitutionality in court while continuing to deny refunds and assess deficiencies introduces a complication. Given the Government's concession, *amicus* contends, once the District Court ordered the refund, the case should have ended and the appeal been dismissed. But this argument elides the distinction between Article III's jurisdictional requirements and the prudential limits on its exercise, which are "essentially matters of judicial self-governance." *Warth* v. *Seldin*, 422 U. S. 490, 500. Here, the United States retains a stake sufficient to support Article III jurisdiction on

appeal and in this Court. The refund it was ordered to pay Windsor is "a real and immediate economic injury," *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599, even if the Executive disagrees with § 3 of DOMA. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. Cf. *INS* v. *Chadha*, 462 U. S. 919.

Prudential considerations, however, demand that there be "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—prudential factors that counsel against hearing this case are subject to "countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power." *Warth*, *supra*, at 500–501. One such consideration is the extent to which adversarial presentation of the issues is ensured by the participation of *amici curiae* prepared to defend with vigor the legislative Act's constitutionality. See *Chadha*, *supra*, at 940. Here, BLAG's substantial adversarial argument for § 3's constitutionality satisfies prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. This conclusion does not mean that it is appropriate for the Executive as a routine exercise to challenge statutes in court instead of making the case to Congress for amendment or repeal. But this case is not routine, and BLAG's capable defense ensures that the prudential issues do not cloud the merits question, which is of immediate importance to the Federal Government and to hundreds of thousands of persons. Pp. 755–763.

2. DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. Pp. 763–775.

(a) By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States. Congress has enacted discrete statutes to regulate the meaning of marriage in order to further federal policy, but DOMA, with a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations, has a far greater reach. Its operation is also directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. Assessing the validity of that intervention requires discussing the historical and traditional extent of state power and authority over marriage.

Subject to certain constitutional guarantees, see, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States,"

Sosna v. *Iowa*, 419 U. S. 393, 404. The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States," *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379, 383–384. Marriage laws may vary from State to State, but they are consistent within each State.

DOMA rejects this long-established precept. The State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. But the Federal Government uses the state-defined class for the opposite purpose—to impose restrictions and disabilities. The question is whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment, since what New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect. New York's actions were a proper exercise of its sovereign authority. They reflect both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality. Pp. 763–769.

(b) By seeking to injure the very class New York seeks to protect, DOMA violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534–535. DOMA cannot survive under these principles. Its unusual deviation from the tradition of recognizing and accepting state definitions of marriage operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. DOMA's avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

DOMA's history of enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. BLAG's arguments are just as candid about the congressional purpose. DOMA's operation in practice confirms this purpose. It frustrates New York's

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objective of eliminating inequality by writing inequality into the entire United States Code.

DOMA's principal effect is to identify and make unequal a subset of state-sanctioned marriages. It contrives to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State. It also forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. Pp. 769–774.

699 F. 3d 169, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, *post*, p. 775. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ROBERTS, C. J., joined as to Part I, *post*, p. 778. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined as to Parts II and III, *post*, p. 802.

Vicki C. Jackson, by appointment of the Court, 568 U. S. 1078, argued the cause as *amicus curiae* (jurisdiction). With her on the briefs were *Patricia A. Millett*, *Ruthanne M. Deutsch*, *Michael C. Small*, and *Beth Heifetz*.

Deputy Solicitor General Srinivasan argued the cause for the United States (jurisdiction). With him on the briefs were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Eric J. Feigin*, *Michael Jay Singer*, and *August E. Flentje*.

Paul D. Clement argued the cause for respondent Bipartisan Legal Advisory Group of the United States House of Representatives (jurisdiction). With him on the briefs were *H. Christopher Bartolomucci*, *Nicholas J. Nelson*, *Kerry W. Kircher*, *Mary Beth Walker*, and *Eleni M. Roumel*. *Roberta A. Kaplan*, *Walter Rieman*, *Jaren Janghorbani*, *Colin S. Kelly*, *Arthur Eisenberg*, *Mariko Hirose*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *James D. Esseks*, *Joshua A. Block*, *Leslie Cooper*, and *Steven R. Shapiro* filed briefs for respondent Windsor.

Mr. Clement argued the cause for respondent Bipartisan Legal Advisory Group of the United States House of Representatives (merits). With him on the briefs were *Messrs. Bartolomucci*, *Nelson*, and *Kircher*, and *Mses. Walker* and *Roumel*.

Solicitor General Verrilli argued the cause for the United States (merits). With him on the brief were *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Srinivasan*, *Pratik A. Shah*, and *Messrs. Singer* and *Flentje*.

Ms. Kaplan argued the cause for respondent Windsor (merits). With her on the brief were *Andrew J. Ehrlich*, *Mr. Janghorbani*, *Julie E. Fink*, *Joshua D. Kaye*, *Mr. Eisenberg*, *Mses. Hirose* and *Karlan*, *Messrs. Fisher* and *Esseks*, *Rose A. Saxe*, and *Messrs. Block*, *Cooper*, and *Shapiro*.*

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*Briefs of *amici curiae* urging reversal (merits) were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, and *Thomas M. Fisher*, Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Tom C. Horne* of Arizona, *Sam Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Wayne Stenehjem* of North Dakota, *Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Greg Abbott* of Texas, *John E. Swallow* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Patrick Morrisey* of West Virginia, and *J. B. Van Hollen* of Wisconsin; for the American Civil Rights Union by *Peter J. Ferrara*; for the Becket Fund for Religious Liberty by *Eric Rassbach*, *Lori Halstead Windham*, and *Adèle Auxier Keim*; for the Beverly LaHaye Institute et al. by *Steven W. Fitschen*; for Catholic Answers et al. by *Charles S. Limandri*, *Kimberlee Wood Colby*, and *Patrick T. Gillen*; for the Chaplain Alliance for Religious Liberty et al. by *R. Bradley Lewis*; for Citizens United's National Committee for Family, Faith and Prayer et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Michael Boos*; for the Coalition for the Protection of Marriage by *Monte Neil Stewart*; for Concerned Women for America by *Holly L. Carmichael*; for the Eagle Forum Education & Legal Defense Fund, Inc., by *Lawrence J. Joseph*; for the Family Research Council by *Paul Benjamin Linton*, *Thomas Brejcha*, and *Christopher M. Gacek*; for the Foundation for Moral Law by *John A. Eidsmoe*; for International Jurists and Academics by *W. Cole Durham, Jr.*,

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Wind-

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pro se, and *Robert T. Smith*; for Law Professors by *Lynn D. Wardle*, *pro se*; for the Liberty, Life and Law Foundation et al. by *Deborah J. Dewart*; for Manhattan Declaration Inc. by *John Mauck*; for the National Association of Evangelicals et al. by *Von G. Keetch*, *Alexander Dushku*, and *R. Shawn Gunnarson*; for the National Organization for Marriage by *William C. Duncan*; for Parents and Friends of Ex-Gays & Gays by *Dean R. Broyles*; for Social Science Professors by *Abram J. Pafford*; for the United States Conference of Catholic Bishops by *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, and *Michael F. Moses*; for the Westboro Baptist Church by *Margie J. Phelps*; for Helen M. Alvaré by *Ms. Alvaré*, *pro se*; for David Boyle by *Mr. Boyle*, *pro se*; for Robert P. George et al. by *Mr. George*, *pro se*; for United States Senator Orrin G. Hatch et al. by *Michael L. Stern*; for Paul McHugh by *Gerard V. Bradley*; for Matthew B. O'Brien by *Kristen K. Waggoner*; and for Dovid Z. Schwartz by *Mr. Schwartz*, *pro se*.

G. Eric Brunstad, Jr., *Collin O'Connor Udell*, *Matthew J. Delude*, *Constance Beverley*, *Alicia M. Farley*, and *Amy Thayer* filed a brief for the Honorable John K. Olson as *amicus curiae* urging affirmance (jurisdiction).

Briefs of *amici curiae* urging affirmance (merits) were filed for 172 Members of the United States House of Representatives et al. by *Miriam R. Nemetz*, *Richard B. Katskee*, *Michael B. Kimberly*, and *Heather C. Sawyer*; for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Cecelia C. Chang*, Deputy Solicitor General, and *Andrew W. Amend* and *Mark H. Shawhan*, Assistant Solicitors General, *Martha Coakley*, Attorney General of Massachusetts, and *Maura T. Healey*, *Jonathan B. Miller*, and *Joshua D. Jacobson*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for the American Bar Association by *Laurel G. Bellows* and *Travis J. Tu*; for the American Federation of Labor and Congress of Industrial Organizations et al. by *Nicole G. Berner*, *Lynn K. Rhinehart*, *Patrick*

sor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, how-

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J. Szymanski, *Alice O'Brien*, and *Jason Walta*; for the American Humanist Association et al. by *Elizabeth L. Hileman*; for the American Jewish Committee by *Douglas Laycock*, *Marc D. Stern*, and *Thomas C. Berg*; for the American Psychological Association et al. by *William F. Sheehan, Paul M. Smith*, and *Nathalie F. P. Gilfoyle*; for the American Sociological Association by *Carmine D. Boccuzzi, Jr.*; for the Anti-Defamation League et al. by *Douglas Hallward-Driemeier* and *Steven M. Freeman*; for Bishops of the Episcopal Church et al. by *Jeffrey S. Trachtman, Norman C. Simon, Joshua D. Glick*, and *Jason M. Moff*; for the Cato Institute et al. by *Douglas T. Kendall, Elizabeth B. Wydra, David H. Gans, Judith E. Schaeffer, Robert A. Levy*, and *Ilya Shapiro*; for Citizens for Responsibility and Ethics in Washington by *Alan B. Morrison, Anne L. Weismann*, and *Melanie Sloan*; for Family and Child Welfare Law Professors by *H. Rodgin Cohen, Sharon L. Nelles, Garrard R. Beeney, Laura W. Brill*, and *Joan Heifetz Hollinger, pro se*; for the Family Equality Council et al. by *William J. Hibsher, K. Lee Marshall, Katherine Keating*, and *Barbara Bennett Woodhouse*; for Federalism Scholars by *Roy T. Englert, Jr.*, and *Ernest A. Young, pro se*; for Former Federal Election Commission Officials by *Trevor Potter, pro se*; for Former Federal Intelligence Officer by *James F. Segroves*; for Gay & Lesbian Advocates & Defenders et al. by *Gary D. Buseck, Mary L. Bonauto, Susan L. Sommer, Jon W. Davidson, Tara L. Borelli, Paul M. Smith, Luke C. Platzer*, and *Melissa A. Cox*; for GLMA: Health Professionals Advancing LGBT Equality by *Nicholas M. O'Donnell* and *Hector Vargas*; for Historians et al. by *Catherine R. Connors*; for the Institute for Justice by *William H. Mellor, Robert J. McNamara*, and *Paul M. Sherman*; for the Leadership Conference on Civil and Human Rights et al. by *Jonathan S. Franklin, Lisa Bornstein, Anne M. Rodgers, Shannon P. Minter, Christopher F. Stoll*, and *Timothy S. Fisher*; for the NAACP Legal Defense and Educational Fund, Inc., by *Elise C. Boddie, Rachel M. Kleinman, Ria Tabacco Mar*, and *Joshua Civin*; for the National Women's Law Center et al. by *David C. Codell, Marcia D. Greenberger, Emily J. Martin, Barbara B. Brown, Stephen B. Kinnaird*, and *Jennifer S. Baldocchi*; for the Partnership for New York City by *Marc Wolinsky* and *Kevin S. Schwartz*; for Political Science Professors by *Robert A. Long, Jr.*, and *Mark W. Mosier*; for Scholars of the Constitutional Rights of Children by *J. Robert Brown, Catherine E. Smith*, and *Kyle C. Velte*; for Services and Advocacy for Gay, Lesbian, Bisexual and Trans-

ever, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconsti-

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gender Elders et al. by *Joseph F. Tringali* and *Robert E. Rains*; for Survivors of Sexual Orientation Change Therapies by *Sanford Jay Rosen*; for 278 Employers and Organizations Representing Employers by *Sabin Willett*, *Mary T. Huser*, *Susan Baker Manning*, and *John A. Polito*; for the Utah Pride Center et al. by *Paul C. Burke*, *John W. Mackay*, *Brett L. Tolman*, *Jacquelyn D. Rogers*, *Mica McKinney*, and *Adam D. Wentz*; for Bruce Ackerman et al. by *Lori Alvino McGill* and *Jessica E. Phillips*; for Former Senator Bill Bradley et al. by *Kevin K. Russell*; for Gary J. Gates by *Marjorie Press Lindblom* and *Sarah E. Piepmeier*; for Nan D. Hunter et al. by *Ms. Hunter* and *Suzanne B. Goldberg*, both *pro se*; for the Honorable Lawrence J. Korb et al. by *Carter G. Phillips* and *Eamon P. Joyce*; for the Honorable John K. Olson by *Messrs. Brunstad*, *Udell*, and *Delude*, and *Mses. Beverley*, *Farley*, and *Thayer*; and for Donna E. Shalala et al. by *Lisa S. Blatt*, *Christopher S. Rhee*, and *Ara Beth Gershengorn*.

Briefs of *amici curiae* (jurisdiction) were filed for Citizens United's National Committee for Family, Faith and Prayer et al. by *Messrs. Titus*, *Olson*, *Miles*, *Morgan*, and *Boos*; for Constitutional Jurisprudence by *John C. Eastman*, *Anthony T. Caso*, and *Edwin Meese III*; for Constitutional Law Scholars by *Andrew J. Pincus*, *Charles A. Rothfeld*, and *Jeffrey A. Meyer*; for the Empire State Pride Agenda et al. by *Peter T. Barbur*; and for Former Attorney General Edwin Meese III et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Cecilia Noland-Heil*, *Laura Hernandez*, and *Erik Zimmerman*.

Briefs of *amici curiae* (merits) were filed for the Center for Fair Administration of Taxes by *A. Lavar Taylor*; for Family Law Professors et al. by *Walter Dellinger*, *Dawn Sestito*, and *Amy R. Lucas*; for Former Senior Justice Department Officials et al. by *Paul R. Q. Wolfson*, *Alan E. Schoenfeld*, *Mark C. Fleming*, and *Felicia H. Ellsworth*; for Liberty Counsel by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister*; for the Los Angeles County Bar Association et al. by *Anita Susan Brenner*; for the Organization of American Historians et al. by *Catherine E. Stetson* and *Mary Helen Wimberly*; and for OutServe-SLDN Inc. by *Abbe David Lowell* and *Christopher D. Man.*

tutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, *e. g.*, *Baehr* v. *Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA or Act), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U. S. C. § 1738C.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of "marriage" and "spouse." Section 3 of DOMA provides as follows:

> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U. S. C. § 7.

The definitional provision does not by its terms prohibit States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO–04–353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one. See 699 F. 3d 169, 177–178 (CA2 2012).

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." 26 U. S. C. § 2056(a). Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA's § 3. Noting that "the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples," App. 184, the Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny," *id.*, at 191. The Department of Justice has submitted many § 530D letters over the years refusing to

defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although "the President . . . instructed the Department not to defend the statute in *Windsor*," he also decided "that Section 3 will continue to be enforced by the Executive Branch" and that the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." *Id.*, at 191–193. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised." *Id.*, at 192.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG's motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).

On the merits of the tax refund suit, the District Court ruled against the United States. It held that § 3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit

affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce § 3 of DOMA.

In granting certiorari on the question of the constitutionality of § 3 of DOMA, the Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. 568 U. S. 1066 (2012). All parties agree that the Court has jurisdiction to decide this case; and, with the case in that framework, the Court appointed Professor Vicki Jackson as *amicus curiae* to argue the position that the Court lacks jurisdiction to hear the dispute. 568 U. S. 1078 (2012). She has ably discharged her duties.

In an unrelated case, the United States Court of Appeals for the First Circuit has also held § 3 of DOMA to be unconstitutional. A petition for certiorari has been filed in that case. Pet. for Cert. in *Bipartisan Legal Advisory Group* v. *Gill*, O. T. 2012, No. 12–13.

II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here.

There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution. "[A] taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599 (2007) (plurality opinion) (emphasis deleted). Windsor suffered a redressable injury

when she was required to pay estate taxes from which, in her view, she was exempt but for the alleged invalidity of § 3 of DOMA.

The decision of the Executive not to defend the constitutionality of § 3 in court while continuing to deny refunds and to assess deficiencies does introduce a complication. Even though the Executive's current position was announced before the District Court entered its judgment, the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. Windsor, the Government, BLAG, and the *amicus* appear to agree upon that point. The disagreement is over the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court.

The *amicus'* position is that, given the Government's concession that § 3 is unconstitutional, once the District Court ordered the refund the case should have ended; and the *amicus* argues the Court of Appeals should have dismissed the appeal. The *amicus* submits that once the President agreed with Windsor's legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the *amicus* reasons, it is inappropriate for this Court to grant certiorari and proceed to rule on the merits; for the United States seeks no redress from the judgment entered against it.

This position, however, elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise. See *Warth* v. *Seldin*,

422 U. S. 490, 498 (1975). The latter are "essentially matters of judicial self-governance." *Id.*, at 500. The Court has kept these two strands separate: "Article III standing, which enforces the Constitution's case-or-controversy requirement, see *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–562 (1992); and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction,' *Allen* [v. *Wright*,] 468 U. S. [737,] 751 [(1984)]." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 11–12 (2004).

The requirements of Article III standing are familiar:

> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural or hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (footnote and citations omitted).

Rules of prudential standing, by contrast, are more flexible "rule[s] . . . of federal appellate practice," *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 333 (1980), designed to protect the courts from "decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights," *Warth*, *supra*, at 500.

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An

order directing the Treasury to pay money is "a real and immediate economic injury," *Hein*, 551 U. S., at 599, indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with § 3 of DOMA, which results in Windsor's liability for the tax. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling.

This Court confronted a comparable case in *INS* v. *Chadha*, 462 U. S. 919 (1983). A statute by its terms allowed one House of Congress to order the Immigration and Naturalization Service (INS) to deport the respondent Chadha. There, as here, the Executive determined that the statute was unconstitutional, and "the INS presented the Executive's views on the constitutionality of the House action to the Court of Appeals." *Id.*, at 930. The INS, however, continued to abide by the statute, and "the INS brief to the Court of Appeals did not alter the agency's decision to comply with the House action ordering deportation of Chadha." *Ibid.* This Court held "that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take," *ibid.*, regardless of whether the agency welcomed the judgment. The necessity of a "case or controversy" to satisfy Article III was defined as a requirement that the Court's "'decision will have real meaning: if we rule for Chadha, he will not be

deported; if we uphold [the statute], the INS will execute its order and deport him.' " *Id.*, at 939–940 (quoting *Chadha* v. *INS*, 634 F. 2d 408, 419 (CA9 1980)). This conclusion was not dictum. It was a necessary predicate to the Court's holding that "prior to Congress' intervention, there was adequate Art. III adverseness." 462 U. S., at 939. The holdings of cases are instructive, and the words of *Chadha* make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III. In short, even where "the Government largely agree[s] with the opposing party on the merits of the controversy," there is sufficient adverseness and an "adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party." *Id.*, at 940, n. 12.

It is true that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Roper*, *supra*, at 333; see also *Camreta* v. *Greene*, 563 U. S. 692, 703–704 (2011) ("As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so"). But this rule "does not have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted . . . at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Roper*, *supra*, at 333–334.

While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems inherent in the Executive's unusual position require some further discussion. The Executive's agreement with Windsor's legal argument raises the risk that instead of a " 'real, earnest and vital controversy,' " the Court faces a "friendly, non-adversary, proceeding . . . [in which] 'a party beaten in the legislature [seeks to] transfer to the

courts an inquiry as to the constitutionality of the legislative act.'" *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 345 (1892)). Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

There are, of course, reasons to hear a case and issue a ruling even when one party is reluctant to prevail in its position. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to "countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power." *Warth*, 422 U. S., at 500–501. One consideration is the extent to which adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative Act. With respect to this prudential aspect of standing as well, the *Chadha* Court encountered a similar situation. It noted that "there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of [this case] in the absence of any participant supporting the validity of [the statute]. The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress." 462 U. S., at 940. *Chadha* was not an anomaly in this respect. The Court adopts the practice of entertaining arguments made by an *amicus* when the Solicitor General confesses error with respect to a judgment below, even if the confession is in effect an admission that an Act of Congress is unconstitutional. See, *e. g.*, *Dickerson* v. *United States*, 530 U. S. 428 (2000).

In the case now before the Court the attorneys for BLAG present a substantial argument for the constitutionality of § 3 of DOMA. BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations. For instance, the opinion of the Court of Appeals for the First Circuit, addressing the validity of DOMA in a case involving regulations of the Department of Health and Human Services, likely would be vacated with instructions to dismiss, its ruling and guidance also then erased. See *Massachusetts* v. *United States Dept. of Health and Human Servs.*, 682 F. 3d 1 (CA1 2012). Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent. That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. True, the very extent of DOMA's mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circumstances, the very term "prudential" counsels that it is a proper exercise of the Court's responsibility to take jurisdiction. For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the Dis-

trict Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.

The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Zivotofsky* v. *Clinton*, 566 U. S. 189, 196 (2012) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.

The Court's jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance. Yet the difficulty the Executive faces should be acknowledged. When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice. Still, there is no

suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise. But this case is not routine. And the capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits.

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for

same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N. Y. Laws p. 749 (codified at N. Y. Dom. Rel. Law Ann. §§ 10–a, 10–b, 13 (West Cum. Supp. 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. *Hillman* v. *Maretta*, 569 U. S. 483 (2013); see also *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981); *Wissner* v. *Wissner*, 338 U. S. 655 (1950). This is one example of the general principle that when the Federal Government acts in the ex-

ercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. 8 U. S. C. § 1186a(b)(1) (2006 ed. and Supp. V). And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships. 42 U. S. C. § 1382c(d)(2).

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003); An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts no. 09–13; *Varnum* v. *Brien*, 763 N. W. 2d 862 (Iowa 2009); Vt. Stat. Ann., Tit. 15, § 8 (2010); N. H. Rev. Stat. Ann. § 457:1–a (West Supp. 2012); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D. C. Reg. 27 (Dec. 18, 2009); N. Y. Dom. Rel. Law Ann. § 10–a (West Supp. 2013);

Wash. Rev. Code § 26.04.010 (2012); Citizen Initiative, Same-Sex Marriage, Question 1 (Me. 2012) (results online at http://www.maine.gov/sos/cec/elec/2012/tab-ref-2012.html (all Internet sources as visited June 18, 2013, and available in Clerk of Court's case file)); Md. Fam. Law Code Ann. § 2–201 (Lexis 2012); An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws ch. 19 (2013); An act relating to marriage; providing for civil marriage between two persons; providing for exemptions and protections based on religious association, 2013 Minn. Laws ch. 74; An Act Relating to Domestic Relations—Persons Eligible to Marry, 2013 R. I. Laws ch. 4.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1 (1967); but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U. S. 393, 404 (1975).

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams* v. *North Carolina*, 317 U. S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid.* "[T]he States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United

States on the subject of marriage and divorce." *Haddock* v. *Haddock*, 201 U. S. 562, 575 (1906); see also *In re Burrus*, 136 U. S. 586, 593–594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva* v. *Ballentine*, 351 U. S. 570 (1956), for example, the Court held that, "[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin," under the Copyright Act "requires a reference to the law of the State which created those legal relationships" because "there is no federal law of domestic relations." *Id.*, at 580. In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. See *Ankenbrandt* v. *Richards*, 504 U. S. 689, 703 (1992). Federal courts will not hear divorce and custody cases even if they arise in diversity because of "the virtually exclusive primacy . . . of the States in the regulation of domestic relations." *Id.*, at 714 (Blackmun, J., concurring in judgment).

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379, 383–384 (1930). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare Vt. Stat. Ann., Tit. 18, § 5142 (2012), with N. H. Rev. Stat. Ann. § 457:4 (West Supp. 2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry,

but a handful—such as Iowa and Washington, see Iowa Code § 595.19 (2009); Wash. Rev. Code § 26.04.020 (2012)—prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer* v. *Evans*, 517 U. S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U. S. 32, 37–38 (1928)).

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding "to the initiative of those who [sought] a voice in shaping the destiny of their own times." *Bond* v. *United States*, 564 U. S. 211, 221 (2011). These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence* v. *Texas*, 539 U. S. 558, 567 (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.

See U. S. Const., Amdt. 5; *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534–535 (1973). In determining whether a law is motived by an improper animus or purpose, "'[d]iscriminations of an unusual character'" especially require careful consideration. *Supra*, at 768 (quoting *Romer*, *supra*, at 633). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H. R. Rep. No. 104–664,

pp. 12–13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.*, at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." *Massachusetts*, 682 F. 3d, at 12–13. The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a systemwide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. See 5 U. S. C. §§ 8901(5), 8905. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. See 11 U. S. C. §§ 101(14A),

507(a)(1)(A), 523(a)(5), (15). It forces them to follow a complicated procedure to file their state and federal taxes jointly. Technical Bulletin TB–55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); Brief for Federalism Scholars as *Amici Curiae* 34. It prohibits them from being buried together in veterans' cemeteries. National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008).

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] . . . a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," 18 U. S. C. § 115(a)(1)(A), with the intent to influence or retaliate against that official, § 115(a)(1). Although a "spouse" qualifies as a member of the officer's "immediate family," § 115(c)(2), DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. See 26 U. S. C. § 106; Treas. Reg. § 1.106–1, 26 CFR § 1.106–1 (2012); IRS Private Letter Ruling 9850011 (Sept. 10, 1998). And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. See Social Security Administration, Social Security Survivors Benefits 5 (2012) (benefits available to a surviving spouse caring for the couple's child), online at http://www.ssa.gov/pubs/EN-05-10084.pdf.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid

eligibility. See 20 U. S. C. § 1087nn(b). Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from "participat[ing] personally and substantially" in matters as to which they or their spouses have a financial interest. 18 U. S. C. § 208(a). A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, see 2 U. S. C. § 31–2(a)(1), and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See 5 U. S. C. App. §§ 102(a), (e). Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

* * *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling*, 347 U. S., at 499–500; *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 217–218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

CHIEF JUSTICE ROBERTS, dissenting.

I agree with JUSTICE SCALIA that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with JUSTICE SCALIA that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world. *Post*, at 796 (dissenting opinion).

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state

variations had involved differences over something—as the majority puts it—"thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." *Ante*, at 763. That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the "principal purpose," *ante*, at 772, of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," *ante*, at 768, may continue to utilize the traditional definition of marriage.

The majority goes out of its way to make this explicit in the penultimate sentence of its opinion. It states that "[t]his opinion and its holding are confined to those lawful marriages," *ante*, at 775—referring to same-sex marriages that a State has already recognized as a result of the local "community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality," *ante*, at 769. JUSTICE SCALIA believes this is a "'bald, unreasoned disclaime[r].'" *Post*, at 798. In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to

adopt. The dominant theme of the majority opinion is that the Federal Government's intrusion into an area "central to state domestic relations law applicable to its residents and citizens" is sufficiently "unusual" to set off alarm bells. *Ante*, at 766, 770. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.

The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State and Federal Governments, emphasizing that DOMA "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." *Ante*, at 768. But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would "vary, subject to constitutional guarantees, from one State to the next." *Ibid.* Thus, while "[t]he State's power in defining the marital relation is of central relevance" to the majority's decision to strike down DOMA here, *ibid.*, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case. See *ante,* at 769.

It is not just this central feature of the majority's analysis that is unique to DOMA, but many considerations on the periphery as well. For example, the majority focuses on the legislative history and title of this particular Act, *ante*, at 770–771; those statute-specific considerations will, of course, be irrelevant in future cases about different statutes. The majority emphasizes that DOMA was a "systemwide enactment with no identified connection to any particular area of federal law," but a State's definition of marriage "is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of off-

spring, property interests, and the enforcement of marital responsibilities.' " *Ante*, at 771, 766. And the federal decision undermined (in the majority's view) the "dignity [already] conferred by the States in the exercise of their sovereign power," *ante*, at 770, whereas a State's decision whether to expand the definition of marriage from its traditional contours involves no similar concern.

We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case, and we hold today that we lack jurisdiction to consider it in the particular context of *Hollingsworth* v. *Perry*, *ante*, p. 693. I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA's constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

I

A

The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone

but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the "judicial Power," a power to decide not abstract questions but real, concrete "Cases" and "Controversies." Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?

The answer lies at the heart of the jurisdictional portion of today's opinion, where a single sentence lays bare the majority's vision of our role. The Court says that we have the power to decide this case because if we did not, then our "primary role in determining the constitutionality of a law" (at least one that "has inflicted real injury on a plaintiff") would "become only secondary to the President's." *Ante*, at 762. But wait, the reader wonders—Windsor won below, and so *cured* her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we "undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is." *Ibid.* (internal quotation marks and brackets omitted).

That is jaw-dropping. It is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere "primary" in its role.

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of "primary" power, and so created branches of government that would be "perfectly co-ordinate by the terms of their common commission," none of which

branches could "pretend to an exclusive or superior right of settling the boundaries between their respective powers." The Federalist, No. 49, p. 314 (C. Rossiter ed. 1961) (J. Madison). The people did this to protect themselves. They did it to guard their right to self-rule against the black-robed supremacy that today's majority finds so attractive. So it was that Madison could confidently state, with no fear of contradiction, that there was nothing of "greater intrinsic value" or "stamped with the authority of more enlightened patrons of liberty" than a government of separate and coordinate powers. *Id.*, No. 47, at 301.

For this reason we are quite forbidden to say what the law is whenever (as today's opinion asserts) "'an Act of Congress is alleged to conflict with the Constitution.'" *Ante*, at 762. We can do so only when that allegation will determine the outcome of a lawsuit, and is contradicted by the other party. The "judicial Power" is not, as the majority believes, the power "'to say what the law is,'" *ibid.*, giving the Supreme Court the "primary role in determining the constitutionality of laws." The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit. See, *e. g.*, Basic Law for the Federal Republic of Germany, Art. 93. The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. Sometimes (though not always) the parties before the court disagree not with regard to the facts of their case (or not *only* with regard to the facts) but with regard to the applicable law—in which event (and *only* in which event) it becomes the "'province and duty of the judicial department to say what the law is.'" *Ante*, at 762.

In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court, it is not a separate, free-standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become "'the province and duty of the judicial department to say what the law is.'" That is why, in 1793, we politely declined the Washington Administration's request to "say what the law is" on a particular treaty matter that was not the subject of a concrete legal controversy. 3 Correspondence and Public Papers of John Jay 486–489 (H. Johnston ed. 1893). And that is why, as our opinions have said, some questions of law will *never* be presented to this Court, because there will never be anyone with standing to bring a lawsuit. See *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 227 (1974); *United States* v. *Richardson*, 418 U. S. 166, 179 (1974). As Justice Brandeis put it, we cannot "pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding"; absent a "'real, earnest and vital controversy between individuals,'" we have neither any work to do nor any power to do it. *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (concurring opinion) (quoting *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 345 (1892)). Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

That is completely absent here. Windsor's injury was cured by the judgment in her favor. And while, in ordinary circumstances, the United States is injured by a directive to pay a tax refund, this suit is far from ordinary. Whatever injury the United States has suffered will surely not be redressed by the action that it, as a litigant, asks us to take. The final sentence of the Solicitor General's brief on the merits reads: "For the foregoing reasons, the judgment of the

court of appeals *should be affirmed*." Brief for United States (merits) 54 (emphasis added). That will not cure the Government's injury, but carve it into stone. One could spend many fruitless afternoons ransacking our library for any other petitioner's brief seeking an affirmance of the judgment against it.[1] What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct. And the same was true in the Court of Appeals: Neither party sought to undo the judgment for Windsor, and so that court should have dismissed the appeal (just as we should dismiss) for lack of jurisdiction. Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.

We have never before agreed to speak—to "say what the law is"—where there is no controversy before us. In the more than two centuries that this Court has existed as an institution, we have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question's answer. The United States reluctantly conceded that at oral argument. See Tr. of Oral Arg. 19–20.

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[1] For an even more advanced scavenger hunt, one might search the annals of Anglo-American law for another "Motion to Dismiss" like the one the United States filed in District Court: It argued that the court should agree "with Plaintiff and the United States" and "*not* dismiss" the complaint. (Emphasis mine.) Then, having gotten exactly what it asked for, the United States promptly appealed.

The closest we have ever come to what the Court blesses today was our opinion in *INS* v. *Chadha*, 462 U. S. 919 (1983). But in that case, two parties to the litigation disagreed with the position of the United States and with the court below: the House and Senate, which had intervened in the case. Because *Chadha* concerned the validity of a mode of congressional action—the one-house legislative veto—the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers. The Executive choosing not to defend that power,[2] we permitted the House and Senate to intervene. Nothing like that is present here.

To be sure, the Court in *Chadha* said that statutory aggrieved-party status was "not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional." *Id.*, at 930–931. But in a footnote to that statement, the Court acknowledged Article III's separate requirement of a "justiciable case or controversy," and stated that *this* requirement was satisfied "because of the presence of the two Houses of Congress as adverse parties." *Id.*, at 931, n. 6. Later in its opinion, the *Chadha* Court remarked that the United States' announced intention to enforce the statute also sufficed to permit judicial review, even absent congressional participation. *Id.*, at

[2] There the Justice Department's refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers. There is no justification for the Justice Department's abandoning the law in the present case. The majority opinion makes a point of scolding the President for his "failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions," *ante*, at 762. But the rebuke is tongue-in-cheek, for the majority gladly gives the President what he wants. Contrary to all precedent, it decides this case (and even decides it the way the President wishes) *despite* his abandonment of the defense and the consequent absence of a case or controversy.

939. That remark is true, as a description of the judicial review conducted in the Court of Appeals, where the Houses of Congress had not intervened. (The case originated in the Court of Appeals, since it sought review of agency action under 8 U. S. C. § 1105a(a) (1976 ed.).) There, absent a judgment setting aside the INS order, Chadha faced deportation. This passage of our opinion seems to be addressing that initial standing in the Court of Appeals, as indicated by its quotation from the lower court's opinion, 462 U. S., at 939–940. But if it was addressing standing to pursue the appeal, the remark was both the purest dictum (as congressional intervention at that point made the required adverseness "beyond doubt," *id.*, at 939), and quite incorrect. When a private party has a judicial decree safely in hand to prevent his injury, additional judicial action requires that a party injured by the decree *seek to undo it.* In *Chadha*, the intervening House and Senate fulfilled that requirement. Here no one does.

The majority's discussion of the requirements of Article III bears no resemblance to our jurisprudence. It accuses the *amicus* (appointed to argue against our jurisdiction) of "elid[ing] the distinction between . . . the jurisdictional requirements of Article III and the prudential limits on its exercise." *Ante*, at 756. It then proceeds to call the requirement of adverseness a "prudential" aspect of standing. *Of standing.* That is incomprehensible. A plaintiff (or appellant) can have all the standing in the world—satisfying all three standing requirements of *Lujan* that the majority so carefully quotes, *ante*, at 757—and yet no Article III controversy may be before the court. Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint. It is not the *amicus* that has done the eliding of distinctions, but the majority, calling the quite separate Article III requirement of adverseness between the parties an element (which it then pronounces a "prudential" element) of stand-

ing. The question here is not whether, as the majority puts it, "the United States retains a stake sufficient to support Article III jurisdiction," *ibid.*, the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not.

I find it wryly amusing that the majority seeks to dismiss the requirement of party-adverseness as nothing more than a "prudential" aspect of the sole Article III requirement of standing. (Relegating a jurisdictional requirement to "prudential" status is a wondrous device, enabling courts to ignore the requirement whenever they believe it "prudent"—which is to say, a good idea.) Half a century ago, a Court similarly bent upon announcing its view regarding the constitutionality of a federal statute achieved that goal by effecting a remarkably similar *but completely opposite* distortion of the principles limiting our jurisdiction. The Court's notorious opinion in *Flast* v. *Cohen*, 392 U. S. 83, 98–101 (1968), held that *standing* was merely an element (which it pronounced to be a "prudential" element) of the sole Article III requirement of *adverseness*. We have been living with the chaos created by that power-grabbing decision ever since, see *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587 (2007), as we will have to live with the chaos created by this one.

The authorities the majority cites fall miles short of supporting the counterintuitive notion that an Article III "controversy" can exist without disagreement between the parties. In *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326 (1980), the District Court had entered judgment in the individual plaintiff's favor based on the defendant bank's offer to pay the full amount claimed. The plaintiff, however, sought to appeal the District Court's denial of class certification under Federal Rule of Civil Procedure 23. There was a continuing dispute between the parties concerning the issue raised on appeal. The same is true of the other case cited by the majority, *Camreta* v. *Greene*, 563 U. S. 692 (2011).

There the District Court found that the defendant state officers had violated the Fourth Amendment, but rendered judgment in their favor because they were entitled to official immunity, application of the Fourth Amendment to their conduct not having been clear at the time of violation. The officers sought to appeal the holding of Fourth Amendment violation, which would circumscribe their future conduct; the plaintiff continued to insist that a Fourth Amendment violation had occurred. The "prudential" discretion to which both those cases refer was the discretion to *deny* an appeal even when a live controversy exists—not the discretion to *grant* one when it does not. The majority can cite no case in which this Court entertained an appeal in which both parties urged us to affirm the judgment below. And that is because the existence of a controversy is not a "prudential" requirement that we have invented, but an essential element of an Article III case or controversy. The majority's notion that a case between friendly parties can be entertained so long as "adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor" the other side of the issue, *ante*, at 760, effects a breathtaking revolution in our Article III jurisprudence.

It may be argued that if what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement. This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional, see Presidential Authority to

Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (Nov. 2, 1994)—in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive's determination of unconstitutionality would have escaped this Court's desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Or the President could have evaded presentation of the constitutional issue to this Court simply by declining to appeal the District Court and Court of Appeals dispositions he agreed with. Be sure of this much: If a President wants to insulate his judgment of unconstitutionality from our review, he can. What the views urged in this dissent produce is not insulation from judicial review but insulation from Executive contrivance.

The majority brandishes the famous sentence from *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Ante*, at 762 (internal quotation marks omitted). But that sentence neither says nor implies that it is *always* the province and duty of the Court to say what the law is—much less that its responsibility in that regard is a "primary" one. The very next sentence of Chief Justice Marshall's opinion makes the crucial qualification that today's majority ignores: "*Those who apply the rule to particular cases*, must of necessity expound and interpret that rule." 1 Cranch, at 177 (emphasis added). Only when a "particular case" is before us—that is, a controversy that it is our business to resolve under Article III—do we have the province and duty to pronounce the law. For the views of our early Court more precisely addressing the question before us here, the majority ought instead to have consulted the opinion of Chief Justice Taney in *Lord* v. *Veazie*, 8 How. 251 (1850):

> "The objection in the case before us is . . . that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.
>
> "A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible . . . . A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed." *Id.*, at 255–256.

There is, in the words of *Marbury*, no "necessity [to] expound and interpret" the law in this case; just a desire to place this Court at the center of the Nation's life. 1 Cranch, at 177.

B

A few words in response to the theory of jurisdiction set forth in JUSTICE ALITO's dissent: Though less far reaching in its consequences than the majority's conversion of constitutionally required adverseness into a discretionary element of standing, the theory of that dissent similarly elevates the Court to the "primary" determiner of constitutional questions involving the separation of powers, and, to boot, increases the power of the most dangerous branch: the "legislative department," which by its nature "draw[s] all power into its impetuous vortex." The Federalist, No. 48, at 309 (J. Madison). Heretofore in our national history, the President's failure to "take Care that the Laws be faithfully executed," U. S. Const., Art. II, § 3, could only be brought before a judicial tribunal by someone whose concrete interests were harmed by that alleged failure. JUSTICE ALITO would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional

powers to act, but to correct a perceived inadequacy in the execution of its laws.[3] This would lay to rest Tocqueville's praise of our judicial system as one which "intimately bind[s] the case made for the law with the case made for one man," one in which legislation is "no longer exposed to the daily aggression of the parties," and in which "[t]he political question that [the judge] must resolve is linked to the interest" of private litigants. A. de Tocqueville, Democracy in America 97 (H. Mansfield & D. Winthrop eds. 2000). That would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking.

JUSTICE ALITO's notion of standing will likewise enormously shrink the area to which "judicial censure, exercised

[3] JUSTICE ALITO attempts to limit his argument by claiming that Congress is injured (and can therefore appeal) when its statute is held unconstitutional without Presidential defense, but is *not* injured when its statute is held unconstitutional *despite* Presidential defense. I do not understand that line. The injury to Congress is the same whether the President has defended the statute or not. And if the injury is threatened, why should Congress not be able to participate in the suit from the beginning, just as the President can? And if having a statute declared unconstitutional (and therefore inoperative) by a court is an injury, why is it not an injury when a statute is declared unconstitutional by the President and rendered inoperative by his consequent failure to enforce it? Or when the President simply declines to enforce it without opining on its constitutionality? If it is the *inoperativeness* that constitutes the injury—the "impairment of [the legislative] function," as JUSTICE ALITO puts it, *post*, at 805—it should make no difference which of the other two branches inflicts it, and whether the Constitution is the pretext. A principled and predictable system of jurisprudence cannot rest upon a shifting concept of injury, designed to support standing when we would like it. If this Court agreed with JUSTICE ALITO's distinction, its opinion in *Raines* v. *Byrd*, 521 U. S. 811 (1997), which involved an original suit by Members of Congress challenging an assertedly unconstitutional law, would have been written quite differently; and JUSTICE ALITO's distinguishing of that case on grounds quite irrelevant to his theory of standing would have been unnecessary.

by the courts on legislation, cannot extend," *ibid.* For example, a bare majority of both Houses could bring into court the assertion that the Executive's implementation of welfare programs is too generous—a failure that no other litigant would have standing to complain about. Moreover, as we indicated in *Raines* v. *Byrd*, 521 U. S. 811, 828 (1997), if Congress can sue the Executive for the erroneous application of the law that "injures" its power to legislate, surely the Executive can sue Congress for its erroneous adoption of an unconstitutional law that "injures" the Executive's power to administer—or perhaps for its protracted failure to act on one of his nominations. The opportunities for dragging the courts into disputes hitherto left for political resolution are endless.

JUSTICE ALITO's dissent is correct that *Raines* did not formally decide this issue, but its reasoning does. The opinion spends three pages discussing famous, decades-long disputes between the President and Congress—regarding congressional power to forbid the Presidential removal of executive officers, regarding the legislative veto, regarding congressional appointment of executive officers, and regarding the pocket veto—that would surely have been promptly resolved by a Congress-vs.-the-President lawsuit if the impairment of a branch's powers alone conferred standing to commence litigation. But it does not, and never has; the "enormous power that the judiciary would acquire" from the ability to adjudicate such suits "would have made a mockery of [Hamilton's] quotation of Montesquieu to the effect that 'of the three powers above mentioned . . . the JUDICIARY is next to nothing.'" *Barnes* v. *Kline*, 759 F. 2d 21, 58 (CADC 1985) (Bork, J., dissenting) (quoting The Federalist No. 78 (A. Hamilton)).

To be sure, if Congress cannot invoke our authority in the way that JUSTICE ALITO proposes, then its only recourse is to confront the President directly. Unimaginable evil this is not. Our system is *designed* for confrontation. That is

what "[a]mbition . . . counteract[ing] ambition," The Federalist No. 51, at 322 (J. Madison), is all about. If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding. (Nothing says "enforce the Act" quite like " . . . or you will have money for little else.") But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so. Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. And by the way, if the President loses the lawsuit but does not faithfully implement the Court's decree, just as he did not faithfully implement Congress's statute, what then? Only Congress can bring him to heel by . . . what do you think? Yes: a direct confrontation with the President.

II

For the reasons above, I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal. Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

A

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the

Constitution," and that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism" because "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import." *Ante*, at 768. But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of "the usual tradition of recognizing and accepting state definitions of marriage" continue. See, *e. g.*, *ante*, at 770. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of "marriage" in federal statutes is unsupported by any of the Federal Government's enumerated powers,[4] nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Equally perplexing are the opinion's references to "the Constitution's guarantee of equality." *Ibid.* Near the end of the opinion, we are told that although the "equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved"—what can *that* mean?—"the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does." *Ante,* at 774. The only possible interpretation of

[4] Such a suggestion would be impossible, given the Federal Government's long history of making pronouncements regarding marriage—for example, conditioning Utah's entry into the Union upon its prohibition of polygamy. See Act of July 16, 1894, ch. 138, § 3, 28 Stat. 108 ("The constitution [of Utah]" must provide "perfect toleration of religious sentiment," "*Provided*, That polygamous or plural marriages are forever prohibited").

this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), *Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973), and *Romer* v. *Evans*, 517 U. S. 620 (1996)—*all* of which are equal-protection cases.[5] And those three cases are the *only* authorities that the Court cites in Part IV about the Constitution's meaning, except for its citation of *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (not an equal-protection case) to support its passing assertion that the Constitution protects the "moral and sexual choices" of same-sex couples, *ante*, at 772.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below, compare Brief for Respondent Bipartisan Legal Advisory Group of U. S. House of Representatives (merits) 24–28 (no), with Brief for Respondent Windsor (merits) 17–31 and Brief for United States (merits) 18–36 (yes); and compare 699 F. 3d 169, 180–185 (CA2 2012) (yes), with *id.*, at 208–211 (Straub, J., dissenting in part and concurring in part) (no). In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. See *United States* v. *Virginia*, 518 U. S. 515, 567–570 (1996) (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion

[5] Since the Equal Protection Clause technically applies only against the States, see U. S. Const., Amdt. 14, *Bolling* and *Moreno*, dealing with federal action, relied upon "the equal protection component of the Due Process Clause of the Fifth Amendment," *Moreno*, 413 U. S., at 533.

does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework. See *Heller* v. *Doe*, 509 U. S. 312, 320 (1993) (a classification "'must be upheld . . . if there is any reasonably conceivable state of facts'" that could justify it).

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," *ante*, at 774; that it violates "basic due process" principles, *ante*, at 769; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment," *ante*, at 768. The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "'ordered liberty.'" *Id.*, at 721 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)).

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare . . . desire to harm'" couples in same-sex marriages. *Ante*, at 770. It is this proposition with which I will therefore engage.

B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence* v. *Texas*, 539 U. S. 558, 599 (2003) (SCALIA, J., dissenting). I will not swell the U. S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968). Or at least it *was* a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare . . . desire to harm a politically unpopular group." *Ante*, at 770. Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn, see, *e. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578 (1987)), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evi-

dence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. See *ante*, at 771. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. See, *e. g.*, Baude, Beyond DOMA: Choice of State Law in Federal Statutes, 64 Stan. L. Rev. 1371 (2012). Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." Ala. Code § 30–1–19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? See *Godfrey* v. *Spano*, 13 N. Y. 3d 358, 920 N. E. 2d 328 (2009). DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-

tax exemption would exist for spouses, this exemption reached only *opposite-sex* spouses—those being the only sort that were recognized in *any* State at the time of DOMA's passage. When it became clear that changes in state law might one day alter that balance, DOMA's definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation. See, *e. g.*, Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with *malice*—with *the "purpose"* (*ante*, at 775) "to disparage and to injure" same-sex couples. It says that the motivation for DOMA was to "demean," *ante*, at 774; to "impose inequality," *ante*, at 772; to "impose . . . a stigma," *ante*, at 770; to deny people "equal dignity," *ibid.*; to brand gay people as "unworthy," *ante*, at 772; and to "*humiliat[e]*" their children, *ibid.* (emphasis added).

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans *this institution*. In the majority's judgment, any resistance to its holding is beyond the pale of rea-

soned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with *the purpose* to "disparage," "injure," "degrade," "demean," and "humiliate" our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.

* * *

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." *Ante*, at 775. I have heard such "bald, unreasoned disclaimer[s]" before. *Lawrence*, 539 U. S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*, at 578. Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects," *ante*, at 772—with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with.

I do not mean to suggest disagreement with THE CHIEF JUSTICE's view, *ante*, at 776–778 (dissenting opinion), that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples—or even that this Court could *theoretically* do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "'bare . . . desire to harm'" couples in same-sex marriages. *Supra*, at 795. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today's opinion, *ante*, at 772:

> "~~DOMA's~~ *This state law's* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities."

Or try this passage, from *ibid.*:

> "~~[DOMA]~~ *This state law* tells those couples, and all the world, that their otherwise valid ~~marriages~~ *relation-*

> *ships* are unworthy of ~~federal~~ *state* recognition. This places same-sex couples in an unstable position of being in a second-tier ~~marriage~~ *relationship*. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence* . . . ."

Or this, from *ibid.*—which does not even require alteration, except as to the invented number:

> "And it humiliates ~~tens of~~ thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. *Ante*, at 775. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples, see *ibid.* The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society's debate over

marriage—a debate that can seem in need of our clumsy "help" only to a Member of this institution.

As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place for some, see North Carolina Const., Amdt. 1 (providing that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State") (approved by a popular vote, 61% to 39% on May 8, 2012),[6] are offset by victories in other places for others, see Maryland Question 6 (establishing "that Maryland's civil marriage laws allow gay and lesbian couples to obtain a civil marriage license") (approved by a popular vote, 52% to 48%, on November 6, 2012).[7] Even in a *single State*, the question has come out differently on different occasions. Compare Maine Question 1 (permitting "the State of Maine to issue marriage licenses to same-sex couples") (approved by a popular vote, 53% to 47%, on November 6, 2012) [8] with Maine Question 1 (rejecting "the new law that lets same-sex couples marry") (approved by a popular vote, 53% to 47%, on November 3, 2009).[9]

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[6] North Carolina State Board of Elections, Official Results: Primary Election of May 8, 2012, Constitutional Amendment.

[7] Maryland State Board of Elections, Official 2012 Presidential General Election Results for All State Questions, Question 06.

[8] Maine Bureau of Elections, Nov. 6, 2012, Referendum Tabulations (Question 1).

[9] Maine Bureau of Elections, Nov. 3, 2009, Referendum Election Tabulations (Question 1).

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

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

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting § 3 of the Defense of Marriage Act (DOMA), 110 Stat. 2419, which defines the meaning

of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

I

I turn first to the question of standing. In my view, the United States clearly is not a proper petitioner in this case. The United States does not ask us to overturn the judgment of the court below or to alter that judgment in any way. Quite to the contrary, the United States argues emphatically in favor of the correctness of that judgment. We have never before reviewed a decision at the sole behest of a party that took such a position, and to do so would be to render an advisory opinion, in violation of Article III's dictates. For the reasons given in JUSTICE SCALIA's dissent, I do not find the Court's arguments to the contrary to be persuasive.

Whether the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has standing to petition is a much more difficult question. It is also a significantly closer question than whether the intervenors in *Hollingsworth* v. *Perry*, *ante*, p. 693—which the Court also decides today—have standing to appeal. It is remarkable that the Court has simultaneously decided that the United States, which "receive[d] all that [it] ha[d] sought" below, *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 333 (1980), is a proper petitioner in this case but that the intervenors in *Hollingsworth*, who represent the party that lost in the lower court, are not. In my view, both the *Hollingsworth* intervenors and BLAG have standing.[1]

[1] Our precedents make clear that, in order to support our jurisdiction, BLAG must demonstrate that it had Article III standing in its own right, quite apart from its status as an intervenor. See *Diamond* v. *Charles*, 476 U. S. 54, 68 (1986) ("Although intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III" (citation omitted)); *Arizonans for*

A party invoking the Court's authority has a sufficient stake to permit it to appeal when it has " 'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.' " *Camreta* v. *Greene*, 563 U. S. 692, 701 (2011) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992)). In the present case, the House of Representatives, which has authorized BLAG to represent its interests in this matter,[2] suffered just such an injury.

In *INS* v. *Chadha*, 462 U. S. 919 (1983), the Court held that the two Houses of Congress were "proper parties" to file a petition in defense of the constitutionality of the one-house veto statute, *id.*, at 930, n. 5 (internal quotation marks omitted). Accordingly, the Court granted and decided petitions by both the Senate and the House, in addition to the Executive's petition. *Id.*, at 919, n. That the two Houses had standing to petition is not surprising: The Court of Appeals' decision in *Chadha*, by holding the one-house veto to be unconstitutional, had limited Congress' power to legislate. In discussing Article III standing, the Court suggested that Congress suffered a similar injury whenever federal legislation it had passed was struck down, noting that it had "long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs

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Official English v. *Arizona*, 520 U. S. 43, 64 (1997) ("Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome" (internal quotation marks omitted)); *id.*, at 65 ("An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III" (internal quotation marks omitted)).

[2] H. Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(B) (2013) ("[BLAG] continues to speak for, and articulates the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States").

that the statute is inapplicable or unconstitutional." *Id.*, at 940.

The United States attempts to distinguish *Chadha* on the ground that it "involved an unusual statute that vested the House and the Senate themselves each with special procedural rights—namely, the right effectively to veto Executive action." Brief for United States (jurisdiction) 36. But that is a distinction without a difference: Just as the Court of Appeals decision that the *Chadha* Court affirmed impaired Congress' power by striking down the one-house veto, so the Second Circuit's decision here impairs Congress' legislative power by striking down an Act of Congress. The United States has not explained why the fact that the impairment at issue in *Chadha* was "special" or "procedural" has any relevance to whether Congress suffered an injury. Indeed, because legislating is Congress' central function, any impairment of that function is a more grievous injury than the impairment of a procedural add-on.

The Court's decision in *Coleman* v. *Miller*, 307 U. S. 433 (1939), bolsters this conclusion. In *Coleman*, we held that a group of state senators had standing to challenge a lower court decision approving the procedures used to ratify an amendment to the Federal Constitution. We reasoned that the senators' votes—which would otherwise have carried the day—were nullified by that action. See *id.*, at 438 ("Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes"); *id.*, at 446 ("[W]e find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed con-

stitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision"). By striking down § 3 of DOMA as unconstitutional, the Second Circuit effectively "held for naught" an Act of Congress. Just as the state-senator-petitioners in *Coleman* were necessary parties to the amendment's ratification, the House of Representatives was a necessary party to DOMA's passage; indeed, the House's vote would have been sufficient to prevent DOMA's repeal if the Court had not chosen to execute that repeal judicially.

Both the United States and the Court-appointed *amicus* err in arguing that *Raines* v. *Byrd*, 521 U. S. 811 (1997), is to the contrary. In that case, the Court held that Members of Congress who had voted "nay" to the Line Item Veto Act did not have standing to challenge that statute in federal court. *Raines* is inapposite for two reasons. First, *Raines* dealt with individual Members of Congress and specifically pointed to the individual Members' lack of institutional endorsement as a sign of their standing problem: "We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." *Id.*, at 829; see also *ibid.*, n. 10 (citing cases to the effect that "members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take" (internal quotation marks omitted)).

Second, the Members in *Raines*—unlike the state senators in *Coleman*—were not the pivotal figures whose votes would have caused the Act to fail absent some challenged action. Indeed, it is telling that *Raines* characterized *Coleman* as standing "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the

ground that their votes have been completely nullified." 521 U. S., at 823. Here, by contrast, passage by the House was needed for DOMA to become law. U. S. Const., Art. I, § 7 (bicameralism and presentment requirements for legislation).

I appreciate the argument that the Constitution confers on the President alone the authority to defend federal law in litigation, but in my view, as I have explained, that argument is contrary to the Court's holding in *Chadha*, and it is certainly contrary to the *Chadha* Court's endorsement of the principle that "Congress is the proper party to defend the validity of a statute" when the Executive refuses to do so on constitutional grounds. 462 U. S., at 940. See also 2 U. S. C. § 288h(7) (Senate Legal Counsel shall defend the constitutionality of Acts of Congress when placed in issue).[3] Accordingly, in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.

II

Windsor and the United States argue that § 3 of DOMA violates the equal protection principles that the Court has found in the Fifth Amendment's Due Process Clause. See Brief for Respondent Windsor (merits) 17–62; Brief for United States (merits) 16–54; cf. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). The Court rests its holding on related arguments. See *ante*, at 774–775.

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

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[3] *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*), is not to the contrary. The Court's statements there concerned enforcement, not defense.

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court's holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," *ante*, at 774, suggests that substantive due process may partially underlie the Court's decision today. But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' " *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997); *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934) (referring to fundamental rights as those that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental"), as well as " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' " *Glucksberg*, *supra*, at 721 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937)).

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.[4]

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from un-

[4] Curry-Sumner, A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe, in Legal Recognition of Same-Sex Relationships 71, 72 (K. Boele-Woelki & A. Fuchs eds., rev. 2d ed. 2012).

elected judges. Faced with such a request, judges have cause for both caution and humility.

The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.[5] There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. See, *e. g.*, S. Girgis, R. Anderson, & R. George, What is Marriage? Man and Woman: A Defense 53–58 (2012); Finnis, Marriage: A Basic and Exigent Good, 91 The Monist 388, 398 (2008).[6] Others

[5] As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society. See generally J. Wallerstein, J. Lewis, & S. Blakeslee, The Unexpected Legacy of Divorce: The 25 Year Landmark Study (2000).

[6] Among those holding that position, some deplore and some applaud this predicted development. Compare, *e. g.*, Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J. L. & Pub. Pol'y 771, 799 (2001) ("Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of 'anything goes' in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative

think that recognition of same-sex marriage will fortify a now-shaky institution. See, *e. g.*, A. Sullivan, Virtually Normal: An Argument About Homosexuality 202–203 (1996); J. Rauch, Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America 94 (2004).

At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.

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responsibility"), and Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U. St. Thomas L. J. 33, 58 (2005) ("If the idea of marriage really does matter—if society really does need a social institution that manages opposite-sex attractions in the interests of children and society—then taking an already weakened social institution, subjecting it to radical new redefinitions, and hoping that there are no consequences is probably neither a wise nor a compassionate idea"), with Brownworth, Something Borrowed, Something Blue: Is Marriage Right for Queers? in I Do/I Don't: Queers on Marriage 53, 58–59 (G. Wharton & I. Philips eds. 2004) (Former President George W. "Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been"), and Willis, Can Marriage Be Saved? A Forum, The Nation, p. 16 (2004) (celebrating the fact that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart").

III

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. They argue that § 3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of "heightened" scrutiny, and that § 3 cannot survive such scrutiny. They further maintain that the governmental interests that § 3 purports to serve are not sufficiently important and that it has not been adequately shown that § 3 serves those interests very well. The Court's holding, too, seems to rest on "the equal protection guarantee of the Fourteenth Amendment," *ante*, at 774—although the Court is careful not to adopt most of Windsor's and the United States' argument.

In my view, the approach that Windsor and the United States advocate is misguided. Our equal protection framework, upon which Windsor and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is.

Underlying our equal protection jurisprudence is the central notion that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed* v. *Reed*, 404 U. S. 71, 76 (1971) (quoting *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920)). The modern tiers of scrutiny—on which Windsor and the United States rely so heavily—are a heuristic to help judges determine when classifications have that "'fair and substantial relation to the object of the legislation.'" *Reed*, *supra*, at 76.

So, for example, those classifications subject to strict scrutiny—*i. e.*, classifications that must be "narrowly tailored" to achieve a "compelling" government interest, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007) (internal quotation marks omitted)—are those that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440 (1985); cf. *id.*, at 452–453 (Stevens, J., concurring) ("It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right").

In contrast, those characteristics subject to so-called intermediate scrutiny—*i. e.*, those classifications that must be "'substantially related'" to the achievement of "important governmental objective[s]," *United States* v. *Virginia*, 518 U. S. 515, 524 (1996); *id.*, at 567 (SCALIA, J., dissenting)—are those that are *sometimes* relevant considerations to be taken into account by legislators, but "generally provid[e] no sensible ground for differential treatment," *Cleburne*, *supra*, at 440. For example, the Court has held that statutory rape laws that criminalize sexual intercourse with a woman under the age of 18 years, but place no similar liability on partners of underage men, are grounded in the very real distinction that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse." *Michael M.* v. *Superior Court, Sonoma Cty.*, 450 U. S. 464, 471 (1981) (plurality opinion). The plurality reasoned that "[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Ibid.* In other contexts, however, the Court has found that classifications based on gender are "arbitrary," *Reed*, *supra*, at 76,

and based on "outmoded notions of the relative capabilities of men and women," *Cleburne*, *supra*, at 441, as when a State provides that a man must always be preferred to an equally qualified woman when both seek to administer the estate of a deceased party, see *Reed*, *supra*, at 76–77.

Finally, so-called rational-basis review applies to classifications based on "distinguishing characteristics relevant to interests the State has the authority to implement." *Cleburne*, *supra*, at 441. We have long recognized that "the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage[s] to various groups or persons." *Romer* v. *Evans*, 517 U. S. 620, 631 (1996). As a result, in rational-basis cases, where the court does not view the classification at issue as "inherently suspect," *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 218 (1995) (internal quotation marks omitted), "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued," *Cleburne*, *supra*, at 441–442.

In asking the Court to determine that § 3 of DOMA is subject to and violates heightened scrutiny, Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the "traditional" or "conjugal" view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. Brief for Respondent BLAG (merits) 2 (citing *Hernandez* v. *Robles*, 7 N. Y. 3d 338, 361, 855 N. E. 2d 1, 8 (2006) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex")). And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Brief for Respondent BLAG 44–46, 49. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, *e. g.*, Girgis, Anderson, & George, What is Marriage? Man and Woman: A Defense, at 23–28. While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the "consent-based" vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to

this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore.[7] Because our constitutional order as-

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[7] The degree to which this question is intractable to typical judicial processes of decisionmaking was highlighted by the trial in *Hollingsworth* v. *Perry*, *ante*, p. 693. In that case, the trial judge, after receiving testimony from some expert witnesses, purported to make "findings of fact" on such questions as why marriage came to be, *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 958 (ND Cal. 2010) (finding of fact no. 27) ("Marriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family"), what marriage is, *id.*, at 961 (finding of fact no. 34) ("Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents"), and the effect legalizing same-sex marriage would have on opposite-sex marriage, *id.*, at 972 (finding of fact no. 55) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages").

At times, the trial reached the heights of parody, as when the trial judge questioned his ability to take into account the views of great thinkers of the past because they were unavailable to testify in person in his courtroom. See 13 Tr. in No. C 09–2292 VRW (ND Cal.), pp. 3038–3039.

And, if this spectacle were not enough, some professors of constitutional law have argued that we are bound to accept the trial judge's findings—

signs the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

Legislatures, however, have little choice but to decide between the two views. We have long made clear that neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution. See, *e. g.*, *Rust* v. *Sullivan*, 500 U. S. 173, 192 (1991) ("[T]he government may 'make a value judgment favoring childbirth over abortion'" (quoting *Maher* v. *Roe*, 432 U. S. 464, 474 (1977))). Accordingly, both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage. And given the size of government and the degree to which it now regulates daily life, it seems unlikely that either Congress or the States could maintain complete neutrality even if they tried assiduously to do so.

Rather than fully embracing the arguments made by Windsor and the United States, the Court strikes down § 3 of DOMA as a classification not properly supported by its objectives. The Court reaches this conclusion in part because it believes that § 3 encroaches upon the States' sovereign prerogative to define marriage. See *ante*, at 771 ("As the title and dynamics of the bill indicate, its purpose is to

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including those on major philosophical questions and predictions about the future—unless they are "clearly erroneous." See Brief for Constitutional Law and Civil Procedure Professors as *Amici Curiae* in *Hollingsworth* v. *Perry*, O. T. 2012, No. 12–144, pp. 2–3 ("[T]he district court's factual findings are compelling and should be given significant weight"); *id.*, at 25 ("Under any standard of review, this Court should credit and adopt the trial court's findings because they result from rigorous and exacting application of the Federal Rules of Evidence, and are supported by reliable research and by the unanimous consensus of mainstream social science experts"). Only an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously.

discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was 'to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws'" (quoting *Massachusetts* v. *United States Dept. of Health and Human Servs.*, 682 F. 3d 1, 12–13 (CA1 2012))). Indeed, the Court's ultimate conclusion is that DOMA falls afoul of the Fifth Amendment because it "singles out a class of persons deemed *by a State* entitled to recognition and protection to enhance their own liberty" and "imposes a disability on the class by refusing to acknowledge a status *the State finds* to be dignified and proper." *Ante*, at 775 (emphasis added).

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in today's opinion of the Court will soon be scattered to the wind.

In any event, § 3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. Section 3 does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that § 3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the

Constitution to enact the laws affected by §3, Congress has the power to define the category of persons to whom those laws apply.

* * *

For these reasons, I would hold that §3 of DOMA does not violate the Fifth Amendment. I respectfully dissent.

Reporter's Note

The next page is purposely numbered 901. The numbers between 818 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 17 THROUGH OCTOBER 1, 2013

JUNE 17, 2013

Certiorari Granted—Vacated and Remanded

No. 12–1056. DUNN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Peugh* v. *United States*, 569 U. S. 530 (2013). Reported below: 698 F. 3d 416.

No. 12–9747. GONZALEZ-ZAVALA *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Peugh* v. *United States*, 569 U. S. 530 (2013). Reported below: 703 F. 3d 1053.

Vacated and Remanded After Certiorari Granted

No. 12–623. UNITED STATES FOREST SERVICE ET AL. *v.* PACIFIC RIVERS COUNCIL ET AL. C. A. 9th Cir. [Certiorari granted, 568 U. S. 1228.] Motion of respondent Pacific Rivers Council to vacate judgment below and dismiss as moot granted. Judgment vacated, and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the Eastern District of California to dismiss case as moot in its entirety.

Certiorari Dismissed

No. 12–10109. RENNEKE *v.* FLORENCE COUNTY, WISCONSIN. Ct. App. Wis. 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–2713. IN RE DISCIPLINE OF FIELD. Charles W. Field, of Lawrenceville, Ga., 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–2714. IN RE DISCIPLINE OF OHL. Wayne Iven Ohl, of Honeoye, 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–2715. IN RE DISCIPLINE OF CASALE. Michael A. Casale, of Fairfield, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2716. IN RE DISCIPLINE OF LIBERACE. Gerald Carl Liberace, of Upper Darby, 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–2726. IN RE DISCIPLINE OF PARAGANO. Vincent D. Paragano, of Jersey City, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2727. IN RE DISCIPLINE OF DICKSON. Mark F. Dickson, of Pembroke Pine, Fla., 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–2728. IN RE DISCIPLINE OF CLAFFEY. Kevin P. Claffey, of Brooklyn, 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–2729. IN RE DISCIPLINE OF SIGMAN. Scott Philip Sigman, of Philadelphia, 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–2730. IN RE DISCIPLINE OF ALESSANDRO. Joseph S. Alessandro, of Bronx, 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–2731. IN RE DISCIPLINE OF CHESLEY. Stanley M. Chesley, of Cincinnati, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2732. IN RE DISCIPLINE OF GOLD. Allen S. Gold, of Copiague, 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. 12M134. SAID ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 12–7515. BURRAGE *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 569 U. S. 957.] Motion of petitioner for appointment of counsel granted. Angela L. Campbell, Esq., of Des Moines, Iowa, is appointed to serve as counsel for petitioner in this case.

No. 12–8619. BROWN *v.* MCKEE, WARDEN. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [569 U. S. 915] denied.

No. 12–9964. SANDERS *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 8, 2013, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 12–10408. IN RE BARLEY; and
No. 12–10425. IN RE ISLEY. Petitions for writs of habeas corpus denied.

No. 12–9734. IN RE SPAULDING; and
No. 12–9749. IN RE HIEN ANH DAO. Petitions for writs of mandamus denied.

No. 12–9829. In re Barksdale. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 12–992. Ray Haluch Gravel Co. et al. *v.* Central Pension Fund of the International Union of Operating Engineers and Participating Employers et al. C. A. 1st Cir. Certiorari granted. Reported below: 695 F. 3d 1.

No. 11–1507. Township of Mount Holly, New Jersey, et al. *v.* Mt. Holly Gardens Citizens in Action, Inc., et al. C. A. 3d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 658 F. 3d 375.

No. 12–315. Air Wisconsin Airlines Corp. *v.* Hoeper. Sup. Ct. Colo. Certiorari granted limited to the following question: "Whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false." Reported below: 320 P. 3d 830.

No. 12–5196. Law *v.* Siegel, Chapter 7 Trustee. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 435 Fed. Appx. 697.

Certiorari Denied

No. 12–846. Jimenez-Galicia *v.* Holder, Attorney General. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 3d 1207.

No. 12–918. Estate of Hage et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 687 F. 3d 1281.

No. 12–987. Boland *v.* Doe et al. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 3d 877.

No. 12–998. Eche et al. *v.* Holder, Attorney General, et al. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 3d 1026.

No. 12–1053. Keller Foundation/Case Foundation et al. *v.* Tracy et al. C. A. 9th Cir. Certiorari denied. Reported below: 696 F. 3d 835.

No. 12–1085. CURCIO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 3d 217.

No. 12–1114. SWEARINGEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 12–1129. ORTIZ *v.* CAIN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 2002–0601 (La. 9/12/12), 98 So. 3d 808.

No. 12–1201. CHIN ET AL. *v.* RUTHERFORD. C. A. 9th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 677.

No. 12–1232. CARWIE, CONSERVATOR ON BEHALF OF HARRIS *v.* PETER KNUDSEN, A/S. Sup. Ct. Ala. Certiorari denied. Reported below: 116 So. 3d 206.

No. 12–1234. LEIGH ET AL. *v.* KEMP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 610.

No. 12–1237. MILLER ET AL. *v.* WRIGHT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 3d 919.

No. 12–1244. BARTH *v.* BARTH ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied. Reported below: 210 Cal. App. 4th 363, 147 Cal. Rptr. 3d 910.

No. 12–1246. ROBINSON ET AL. *v.* COOK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 706 F. 3d 25.

No. 12–1247. D. A. OSGUTHORPE FAMILY PARTNERSHIP *v.* ASC UTAH, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 705 F. 3d 1223.

No. 12–1249. DENISON ET AL. *v.* MARINA MILE SHIPYARD, INC. C. A. 11th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 882.

No. 12–1257. BROWN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BROWN, DECEASED, ET AL. *v.* BOLIN. C. A. 5th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 309.

No. 12–1259. POWE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 106 So. 3d 940.

No. 12–1260. PILLA *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 479 Fed. Appx. 275.

No. 12–1267. CAMPOS-MERINO *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 266.

No. 12–1273. LOREN DATA CORP. *v.* GXS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 275.

No. 12–1275. SMAKAJ ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 478.

No. 12–1293. TOKPAN *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 846.

No. 12–1336. KONOWALOFF *v.* METROPOLITAN MUSEUM OF ART. C. A. 2d Cir. Certiorari denied. Reported below: 702 F. 3d 140.

No. 12–1337. BRADISON *v.* MINNESOTA COMMISSIONER OF REVENUE. Sup. Ct. Minn. Certiorari denied. Reported below: 825 N. W. 2d 747.

No. 12–1358. SPRINT SPECTRUM, L. P. *v.* AYYAD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 210 Cal. App. 4th 851, 148 Cal. Rptr. 3d 709.

No. 12–7438. JOHNS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 093398–U.

No. 12–8819. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 504 Fed. Appx. 213.

No. 12–8945. CASEY *v.* CASEY. Sup. Ct. N. H. Certiorari denied.

No. 12–9223. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 702 F. 3d 604.

No. 12–9298. SIDIAKINA *v.* NAVID. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 12–9500. MCCONNEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 488 Fed. Appx. 291.

No. 12–9703. LAWRENCE *v.* MELLOS ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–9711. TRZECIAK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 130 So. 3d 1284.

No. 12–9713. RIVERA *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 464 Mass. 56, 981 N. E. 2d 171.

No. 12–9717. MENDIOLA *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 630.

No. 12–9720. BRYANT *v.* DONALD ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9722. THON *v.* HEATH, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9723. WILLIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 071333–U.

No. 12–9724. WALKER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 103 So. 3d 169.

No. 12–9731. MCKINNON *v.* ST. JOHNS COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9733. KESSLER *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 12–9735. CASEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 100 So. 3d 687.

No. 12–9736. CASTERLINE *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 500.

No. 12–9739. NOGUEZ *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 12–9740. MITCHELL *v.* KJMC 89.3 FM ET AL. C. A. 8th Cir. Certiorari denied.

No. 12–9741. POPAL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 12–9742. CONGER *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 12–9745. BOATENG *v.* FAIRFAX COUNTY POLICE DEPARTMENT. C. A. 4th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 376.

No. 12–9751. MAXWELL *v.* GOLDEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 490 Fed. Appx. 845.

No. 12–9753. JONES *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 3d 1093.

No. 12–9759. MOORE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 12–9763. PUGH *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 101 So. 3d 682.

No. 12–9765. MONIZ *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9769. MARTINEZ *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 12–9773. FENDER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 519.

No. 12–9775. MARTIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 107 So. 3d 281.

No. 12–9778. PACHECO *v.* RODEN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 12–9780. RICHARDS *v.* COBB COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 556.

No. 12–9784. ROSADO *v.* UNGER, SUPERINTENDENT, WYOMING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9785. SHAW *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–9786. VALENCIA *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 12–9800. WIGGINS *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9804. BRYAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 12–9816. CASEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 100 So. 3d 687.

No. 12–9822. SAMUELSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 12–9837. MCGEE *v.* KIRKLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 588.

No. 12–9843. BENNER *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–9853. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 99 So. 3d 953.

No. 12–9860. SANTANA *v.* NEVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 675.

No. 12–9949. GARNER *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9979. BIGGS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 101 So. 3d 850.

No. 12–9984. HALL *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 753.

No. 12–9987. GOODWINE *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. Ct. App. N. Y. Certiorari denied. Reported below: 20 N. Y. 3d 949, 982 N. E. 2d 82.

No. 12–10001. NEWSOME *v.* DZURENDA, INTERIM COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied.

No. 12–10032. BOURNE *v.* SCHOOL BOARD OF BROWARD COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 907.

No. 12–10045. LEON *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–10097. ARDIS *v.* PENSACOLA STATE COLLEGE. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 109 So. 3d 782.

No. 12–10099. RAIHALA *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 12–10101. JORDAN *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 404 S. W. 3d 292.

No. 12–10106. MURDOCK *v.* COLSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–10112. LOBLEY *v.* BAENEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 12–10133. BIR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 104 So. 3d 1082.

No. 12–10144. ZAVALIDROGA *v.* CUOMO ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–10208. JONES *v.* SEXTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–10216. SMITH *v.* WEISER SECURITY SYSTEMS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 775.

No. 12–10263. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 410.

No. 12–10273. GARCIA MEDRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 377.

No. 12–10277. SANCHEZ LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 610.

No. 12–10280. SANTILLANA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–10284. CRUZ-RASCON, AKA CRUZ-RAZON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 356.

No. 12–10286. LINEBERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 702 F. 3d 210.

No. 12–10289. MORENO-CARRASCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–10290. GAMBOA MOSQUERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 Fed. Appx. 429.

No. 12–10293. STAMPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 723.

No. 12–10301. GRIMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 702 F. 3d 460.

No. 12–10304. VANCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 12–10305. GOFF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 517 Fed. Appx. 120.

No. 12–10309. FETTERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 698 F. 3d 653.

No. 12–10310. HALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 776.

No. 12–10311. INFANTE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 701 F. 3d 386.

No. 12–10313. ANTONIO BENITEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–10315. WHERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 518 Fed. Appx. 434.

No. 12–10346. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–10348. TATUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 Fed. Appx. 402.

No. 12–10369. FLORES MIRANDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 671.

No. 12–10375. STEPHENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 932.

No. 12–10376. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 269.

No. 12–10377. LINDSEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 702 F. 3d 1092.

No. 12–10380. MCWHORTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 515 Fed. Appx. 511.

No. 12–10382. MURILLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 526 Fed. Appx. 192.

No. 12–10386. GEE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 54 A. 3d 1249.

No. 12–10292. KOPP *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 12–8086. WILSON *v.* ARKANSAS, 568 U. S. 1200;

No. 12–8753. RALSTON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 569 U. S. 949;

No. 12–8758. HUNT *v.* MICHIGAN ET AL., 569 U. S. 949;

No. 12–8766. WOODS *v.* PUBLIC EMPLOYMENT RELATIONS BOARD, 569 U. S. 949;

No. 12–8950. NIEMIEC *v.* MICHIGAN ET AL., 569 U. S. 934;

No. 12–9067. JENNINGS *v.* HAGEL, SECRETARY OF DEFENSE, 569 U. S. 964;

No. 12–9074. DANIELS *v.* WRIGHT, WARDEN, 569 U. S. 964; and

No. 12–9512. CAMPOS *v.* UNITED STATES, 569 U. S. 968. Petitions for rehearing denied.

No. 12–8852. SABER ET AL. *v.* SABER ET AL. (two judgments), 569 U. S. 954. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

JUNE 24, 2013

Certiorari Granted—Reversed and Remanded. (See No. 12–1084, *ante*, p. 521.)

Certiorari Granted—Vacated and Remanded

No. 11–9873. DOTSON *v.* UNITED STATES. C. A. 6th Cir.;

No. 12–6558. DELEON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 678 F. 3d 317;

No. 12–7274. GRAHAM *v.* UNITED STATES. C. A. 2d Cir. Reported below: 691 F. 3d 153 and 493 Fed. Appx. 162;

No. 12–7398. MUBDI *v.* UNITED STATES. C. A. 4th Cir. Reported below: 691 F. 3d 334;

No. 12–7525. SHAVERS, AKA COLZIE, AKA LEWIS, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Reported below: 693 F. 3d 363;

No. 12–7568. ASTORGA *v.* KANSAS. Sup. Ct. Kan. Reported below: 295 Kan. 339, 284 P. 3d 279;

No. 12–7769. BARNES *v.* UNITED STATES. C. A. 1st Cir.;

No. 12–8236. BARTON *v.* UNITED STATES. C. A. 1st Cir.;

No. 12–8298. JORDAN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 488 Fed. Appx. 358;

No. 12–8317. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 690 F. 3d 912;

No. 12–8411. SMARR *v.* UNITED STATES. C. A. 11th Cir. Reported below: 488 Fed. Appx. 358; and

No. 12–8683. ABRAHAMSON *v.* UNITED STATES. C. A. 8th Cir. Reported below: 685 F. 3d 777. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Alleyne* v. *United States*, *ante*, p. 99.

No. 12–245. MERCK & CO., INC. *v.* LOUISIANA WHOLESALE DRUG CO., INC., ET AL.; and

No. 12–265. UPSHER-SMITH LABORATORIES, INC. *v.* LOUISIANA WHOLESALE DRUG CO., INC., ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *FTC* v. *Actavis, Inc.*, *ante*, p. 136. JUSTICE ALITO took no part in the consideration or decision of these petitions. Reported below: 686 F. 3d 197.

Certiorari Dismissed

No. 12–9940. GRANDISON *v.* SAAR, FORMER SECRETARY, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ET AL. Ct. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 429 Md. 83, 54 A. 3d 760.

No. 12–9975. FRANZA *v.* SHEAHAN. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 20 N. Y. 3d 1032, 984 N. E. 2d 320.

No. 12–10110. STAFFNEY *v.* MACLAREN, WARDEN. Ct. App. Mich. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 12–10400. JONES *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 12M135. LOYAL *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 12M136. THOMAS *v.* OLSON;

No. 12M137. MORALES *v.* DISTRICT ATTORNEY OF LEHIGH COUNTY, PENNSYLVANIA, ET AL.; and

No. 12M139. MITCHELL *v.* FLANNERY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 12M138. DRUAN *v.* NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 12M140. IN RE GRAND JURY PROCEEDINGS. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 12–786. LIMELIGHT NETWORKS, INC. *v.* AKAMAI TECHNOLOGIES, INC., ET AL.; and

No. 12–960. AKAMAI TECHNOLOGIES, INC., ET AL. *v.* LIMELIGHT NETWORKS, INC. C. A. Fed. Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. JUSTICE ALITO took no part in the consideration or decision of these petitions.

No. 12–872. MADIGAN ET AL. *v.* LEVIN. C. A. 7th Cir. [Certiorari granted, 568 U. S. 1228.] Motion of petitioners to dispense with printing joint appendix granted.

No. 12–1078. SAMANTAR *v.* YOUSUF ET AL. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–8561. PAROLINE *v.* UNITED STATES ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* granted, and the order entered June 10, 2013, [569 U. S. 1028,] is vacated.

No. 12–9771. FENTON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [569 U. S. 993] denied.

No. 12–9994. ETTLIN *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir.; and

No. 12–10107. SARRESHTEDARI *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 15, 2013, 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. 12–10479. IN RE DAVIDSON; and

No. 12–10533. IN RE CONCEPCION. Motions of petitioners for leave to proceed *in forma pauperis* denied, and petitions for writs of habeas corpus dismissed. See this Court's Rule 39.8.

No. 12–9811. IN RE BLACK. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 12–99. UNITE HERE LOCAL 355 *v.* MULHALL ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 667 F. 3d 1211.

No. 12–515. MICHIGAN *v.* BAY MILLS INDIAN COMMUNITY ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 695 F. 3d 406.

No. 12–930. MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL. *v.* CUELLAR DE OSORIO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 695 F. 3d 1003.

No. 12–1168. MCCULLEN ET AL. *v.* COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 708 F. 3d 1.

No. 12–1200. EXECUTIVE BENEFITS INSURANCE AGENCY *v.* ARKISON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC. C. A. 9th Cir. Certiorari granted. Reported below: 702 F. 3d 553.

No. 12–1208. UBS FINANCIAL SERVICES INCORPORATED OF PUERTO RICO ET AL. *v.* UNION DE EMPLEADOS DE MUELLES DE PUERTO RICO PRSSA WELFARE PLAN ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 704 F. 3d 155.

No. 12–820. LOZANO *v.* MONTOYA ALVAREZ. C. A. 2d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 697 F. 3d 41.

No. 12–1182. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* EME HOMER CITY GENERATION, L. P., ET AL.; and

No. 12–1183. AMERICAN LUNG ASSN. ET AL. *v.* EME HOMER CITY GENERATION, L. P., ET AL. C. A. D. C. Cir. Certiorari granted limited to the questions presented by the petition in No. 12–1182, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 696 F. 3d 7.

No. 12–1281. NATIONAL LABOR RELATIONS BOARD *v.* NOEL CANNING ET AL. C. A. D. C. Cir. Certiorari granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions." Reported below: 705 F. 3d 490.

Certiorari Denied

No. 11–1485. YOUNG, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF YOUNG *v.* FITZPATRICK ET AL. Ct. App. Wash. Cer-

tiorari denied. Reported below: 164 Wash. App. 343, 262 P. 3d 527.

No. 11–1536. Lucas *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 3d 784.

No. 12–300. Pfizer, Inc. *v.* Law Offices of Peter G. Angelos. C. A. 2d Cir. Certiorari denied. Reported below: 676 F. 3d 45.

No. 12–573. Village of Palatine, Illinois *v.* Senne. C. A. 7th Cir. Certiorari denied. Reported below: 695 F. 3d 597.

No. 12–865. Westmoreland Coal Co. *v.* Sharpe, on Behalf of and as Widow of Sharpe, et al. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 3d 317.

No. 12–980. Nevada et al. *v.* Reliant Energy, Inc., et al. Sup. Ct. Nev. Certiorari denied. Reported below: 128 Nev. 483, 289 P. 3d 1186.

No. 12–986. Wilson *v.* Flaherty, Superintendent, Virginia Department of State Police. C. A. 4th Cir. Certiorari denied. Reported below: 689 F. 3d 332.

No. 12–1016. Polypore International, Inc. *v.* Federal Trade Commission. C. A. 11th Cir. Certiorari denied. Reported below: 686 F. 3d 1208.

No. 12–1025. PlainsCapital Corp. et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 692 F. 3d 378.

No. 12–1033. Momenta Pharmaceuticals, Inc., et al. *v.* Amphastar Pharmaceuticals, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 686 F. 3d 1348.

No. 12–1044. Donaldson *v.* Department of Homeland Security. C. A. Fed. Cir. Certiorari denied. Reported below: 495 Fed. Appx. 53.

No. 12–1055. Grocery Manufacturers Assn. et al. *v.* Environmental Protection Agency et al.;

No. 12–1167. Alliance of Automobile Manufacturers et al. *v.* Environmental Protection Agency et al.; and

No. 12–1229. American Fuel & Petrochemical Manufacturers et al. *v.* Environmental Protection Agency et al.

C. A. D. C. Cir. Certiorari denied. Reported below: 693 F. 3d 169.

No. 12–1073. City of Los Angeles, California *v.* Lavan et al. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 3d 1022.

No. 12–1118. Apuzzo *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 3d 204.

No. 12–1151. Pitts *v.* Shinseki, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 700 F. 3d 1279.

No. 12–1158. Mirror Worlds, LLC *v.* Apple Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 692 F. 3d 1351.

No. 12–1175. Jefferson County School District R–1 *v.* Elizabeth E., By and Through Her Parents, Roxanne B. et al. C. A. 10th Cir. Certiorari denied. Reported below: 702 F. 3d 1227.

No. 12–1250. Book *v.* Parks et al. C. A. 2d Cir. Certiorari denied.

No. 12–1258. Hill *v.* Schilling et al. C. A. 5th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 480.

No. 12–1262. Campbell et al. *v.* Commercial Service of Perry, Inc. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 103 So. 3d 173.

No. 12–1263. Hall *v.* Seabolt, Warden. Sup. Ct. Ga. Certiorari denied. Reported below: 292 Ga. 311, 737 S. E. 2d 314.

No. 12–1264. Garcia *v.* City of Laredo, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 702 F. 3d 788.

No. 12–1266. Holkesvig *v.* Moore. Sup. Ct. N. D. Certiorari denied. Reported below: 2013 ND 2, 828 N. W. 2d 546.

No. 12–1277. Vuyyuru et al. *v.* Jadhav et al. C. A. 4th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 294.

No. 12–1288. Adams et al. *v.* Raintree Vacation Exchange, LLC, et al. C. A. 7th Cir. Certiorari denied. Reported below: 702 F. 3d 436.

No. 12–1289. INSTANT REPLAY SPORTS, INC., ET AL. *v.* ALLSTATE INSURANCE CO. Sup. Ct. La. Certiorari denied. Reported below: 2012–2181 (La. 12/14/12), 104 So. 3d 419.

No. 12–1304. ROSELLINI ET AL. *v.* JACK SILVERMAN REALTY & MORTGAGE CO., LLC, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 508 Fed. Appx. 131.

No. 12–1333. MCDONALD *v.* COOPER. C. A. 6th Cir. Certiorari denied. Reported below: 471 Fed. Appx. 494.

No. 12–1340. AUSTAL USA, LLC *v.* ADAMS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 699.

No. 12–1357. MARTINEZ ET AL. *v.* MAVERICK COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 446.

No. 12–1360. BOWERS *v.* BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 906.

No. 12–1365. CLEARPLAY, INC. *v.* NISSIM CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 963.

No. 12–1373. MITAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 499 Fed. Appx. 187.

No. 12–1379. HUNTER *v.* VIRGINIA STATE BAR. Sup. Ct. Va. Certiorari denied. Reported below: 285 Va. 485, 744 S. E. 2d 611.

No. 12–6571. DORSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 677 F. 3d 944.

No. 12–6807. LARIOS SANTACRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 480 Fed. Appx. 441.

No. 12–7971. SKINNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 690 F. 3d 772.

No. 12–8414. RIZK *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 285.

No. 12–8731. CAGE *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 692 F. 3d 118.

No. 12–8807. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 258.

No. 12–8823. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 482 Fed. Appx. 997.

No. 12–8866. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 686 F. 3d 182.

No. 12–9340. MARTINEZ *v.* DISTRICT ATTORNEY OF SAN JOAQUIN COUNTY ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9341. JENKINS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 102 So. 3d 1063.

No. 12–9354. GRIM *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 102 So. 3d 1073.

No. 12–9386. PONTICELLI *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 3d 1271.

No. 12–9391. BOYD *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 697 F. 3d 1320.

No. 12–9524. SINGLETARY *v.* NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES/INFANT TODDLER PROGRAM. C. A. 4th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 340.

No. 12–9790. DILBERT *v.* DAVIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9793. TREVINO *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9799. SARTORI *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Buncombe County, N. C. Certiorari denied.

No. 12–9809. RUSHING *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 353 S. W. 3d 863.

No. 12–9810. BRATTON *v.* PEREZ ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9814. DeSue *v.* Florida Department of Corrections. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 108 So. 3d 1081.

No. 12–9817. Torres *v.* Hartley, Warden. C. A. 9th Cir. Certiorari denied.

No. 12–9821. Santos *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 12–9830. Brown *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 109 So. 3d 791.

No. 12–9839. Lesure *v.* Atchison, Warden. C. A. 7th Cir. Certiorari denied.

No. 12–9840. Jones *v.* Toll Brothers. C. A. 5th Cir. Certiorari denied.

No. 12–9845. Carter *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 101378–UB.

No. 12–9851. Jemison *v.* Culliver et al. C. A. 11th Cir. Certiorari denied.

No. 12–9852. Lovato Lucero *v.* New Mexico Department of Workforce Solutions et al. Ct. App. N. M. Certiorari denied.

No. 12–9868. Estrin *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 12–9869. Mack *v.* Biter, Warden. C. A. 9th Cir. Certiorari denied.

No. 12–9870. Lewis *v.* City of Waxahachie, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 249.

No. 12–9872. Robinson *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 12–9878. Kanode *v.* Swope, Judge, Circuit Court of West Virginia, Mercer County, et al. C. A. 4th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 217.

No. 12–9883. ROBLES *v.* STATE FARM INSURANCE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 748.

No. 12–9884. SCOTT *v.* MULE CREEK STATE PRISON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 658.

No. 12–9889. MOORE *v.* ZAPPA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 702.

No. 12–9893. BUSH *v.* STEVENSON COMMONS ASSOCIATES, LLP, ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–9926. PHILLIPS *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 12–9973. HOARD *v.* KLEE. C. A. 6th Cir. Certiorari denied.

No. 12–10000. JOHNSON *v.* CHAPPIUS, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 508 Fed. Appx. 23.

No. 12–10009. ODOM *v.* DOAR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 497 Fed. Appx. 88.

No. 12–10059. JENNINGS *v.* HAGEL, SECRETARY OF DEFENSE. C. A. 7th Cir. Certiorari denied. Reported below: 492 Fed. Appx. 698.

No. 12–10117. EDWARDS *v.* SCUTT, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–10127. WASHINGTON *v.* EAST BATON ROUGE PARISH SCHOOL SYSTEM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 350.

No. 12–10131. WADDELL-EL *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 368.

No. 12–10137. MOFFAT *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–10174. THOMAS *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 107 So. 3d 1046.

No. 12–10177. ADAMS *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–10200. WILLIAMS *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 466.

No. 12–10210. BALLINGER *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 3d 558.

No. 12–10256. JOHNSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 12–10259. BAKER *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 771.

No. 12–10269. BHAMBRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 670.

No. 12–10302. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 663.

No. 12–10312. SHELTON *v.* ROHRS ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–10318. COOPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 735.

No. 12–10320. CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–10323. SCHNEIDER ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 704 F. 3d 1287.

No. 12–10324. SLAUGHTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 3d 1208.

No. 12–10335. ARRIAGA-MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 380.

No. 12–10337. CARRERA-DIAZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 768.

No. 12–10341. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 611.

No. 12–10342. SNEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 231.

No. 12–10343. THREATT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–10345. WADE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 512 Fed. Appx. 11.

No. 12–10360. CONNER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 512 Fed. Appx. 984.

No. 12–10363. KENNEDY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 12–10373. ASAR, AKA GIST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 256.

No. 12–10374. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 668.

No. 12–10383. LLOYD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 330.

No. 12–10385. LONDONO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 12–10387. LOWERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 12–10389. AKITI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 3d 883.

No. 12–10391. CAUDILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 3d 444.

No. 12–10392. DARDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 3d 1225.

No. 12–10393. CORDOVA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 741.

No. 12–10394. CARTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–10401. ALBERTO RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–10404. REID *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 209.

No. 12–10406. ARMENDARIS-RAMOS, AKA LARA-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 380.

No. 12–10407. DOWD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 652.

No. 12–10409. VAUGHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 512 Fed. Appx. 459.

No. 12–10410. WITHERSPOON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 481 Fed. Appx. 70.

No. 12–10415. SPRAGLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–10419. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–10422. TURNER *v.* PASTRANA, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 3d 1328.

No. 12–10431. MIGUEL MARTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 12–10432. TANH HUU LAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–10438. LEGRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 Fed. Appx. 6.

No. 12–10439. RAMIREZ-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 376.

No. 12–10450. ERHABOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 664.

No. 12–10452. CONZELMANN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 514 Fed. Appx. 598.

No. 12–10453. MELENDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 233.

No. 12–10455. GARCIA-ROQUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 Fed. Appx. 501.

No. 12–10456. GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 707 F. 3d 1190.

No. 12–10460. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 515 Fed. Appx. 486.

No. 12–10461. CARAWAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–10462. CAVOUNIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 12–10467. BLOUNT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 Fed. Appx. 469.

No. 12–10471. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–10472. WILSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 512 Fed. Appx. 75.

No. 12–10473. ROWAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 870.

No. 12–10480. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–1057. ALLISON ENGINE CO., INC., ET AL. *v.* UNITED STATES EX REL. SANDERS ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 703 F. 3d 930.

No. 12–1092. LATTIMORE ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 696 F. 3d 436.

No. 12–1294. NADER *v.* SERODY ET AL. Ct. App. D. C. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 43 A. 3d 327.

No. 12–1302. GARCIA *v.* LOUISIANA. Sup. Ct. La. Motion of Ethics Bureau at Yale for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 2009–1578 (La. 11/16/12), 108 So. 3d 1.

No. 12–8932. OBAYDULLAH *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Motion of respondents for leave to file brief in opposition under seal granted. Motion

of petitioner for leave to file reply brief under seal granted. Certiorari denied. Reported below: 688 F. 3d 784.

No. 12–10222. Heredia Santa Cruz *v.* California. C. A. 9th Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition.

No. 12–10319. Downs *v.* United States. C. A. 5th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 12–10421. Thomas *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 713 F. 3d 165.

No. 12–10448. Schotz *v.* Apker, Warden. C. A. 9th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 503 Fed. Appx. 512.

No. 12–10457. Billups *v.* United States. C. A. 4th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 511 Fed. Appx. 237.

Rehearing Denied

No. 12–1021. Pierce *v.* Woldenberg, 569 U. S. 958;

No. 12–8707. Blanton *v.* Caruso et al., 569 U. S. 931;

No. 12–8792. Hotchkiss *v.* Clay Township Board et al., 569 U. S. 932;

No. 12–8856. Edwards *v.* Florida, 569 U. S. 951;

No. 12–8933. McKenzie *v.* Raines et al., 569 U. S. 934;

No. 12–9009. Francis *v.* Kentucky River Coal Corp., 569 U. S. 963;

No. 12–9069. Jennings *v.* City of Indianapolis, Indiana, et al., 569 U. S. 977;

No. 12–9103. McIlvoy *v.* Norman, Superintendent, Jefferson City Correctional Center, 569 U. S. 952;

No. 12–9165. Stenson *v.* Heath, Superintendent, Sing Sing Correctional Facility, 569 U. S. 979;

No. 12–9263. Ditto *v.* Patent and Trademark Office, Board of Patent Appeals and Interferences, 569 U. S. 965;

No. 12–9481. Mohammed *v.* United States, 569 U. S. 967;

No. 12–9623. TILLERY *v.* UNITED STATES, 569 U. S. 985; and No. 12–9707. CONDREY *v.* UNITED STATES, 569 U. S. 988. Petitions for rehearing denied.

No. 12–112. ROE ET AL. *v.* UNITED STATES ET AL., 568 U. S. 1258. Motion of petitioners for leave to file petition for rehearing under seal with redacted copies for the public record granted. Petition for rehearing denied.

No. 12–8352. ERCOLE *v.* LAHOOD, SECRETARY OF TRANSPORTATION, 568 U. S. 1203. Motion for leave to file petition for rehearing denied.

JUNE 25, 2013

Dismissal Under Rule 46

No. 12–1381. BARDOS *v.* TWENTY-NINE PALMS ENTERPRISES CORP. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari dismissed under this Court's Rule 46.1. Reported below: 210 Cal. App. 4th 1435, 149 Cal. Rptr. 3d 52.

JUNE 27, 2013

Vacated and Remanded on Appeal

No. 12–496. TEXAS *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Judgment vacated, and case remanded for further consideration in light of *Shelby County* v. *Holder*, *ante*, p. 529, and the suggestion of mootness of appellee Wendy Davis et al. Reported below: 887 F. Supp. 2d 133.

No. 12–1028. TEXAS *v.* HOLDER, ATTORNEY GENERAL. Appeal from D. C. D. C. Judgment vacated, and case remanded for further consideration in light of *Shelby County* v. *Holder*, *ante*, p. 529. Reported below: 888 F. Supp. 2d 113.

Certiorari Granted—Vacated and Remanded

No. 12–804. GROUNDS, ACTING WARDEN *v.* SESSOMS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Salinas* v. *Texas*, *ante*, p. 178. Reported below: 691 F. 3d 1054.

No. 12–6355. MARRERO *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Descamps* v. *United States*, *ante*, p. 254. Reported below: 677 F. 3d 155.

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, dissenting.

The Court's decision to grant, vacate, and remand shows that the Court's elaboration of its "modified categorical" approach has completely lost touch with reality.

In this case, the Court of Appeals for the Third Circuit held that petitioner qualifies as a career offender for purposes of the United States Sentencing Commission, Guidelines Manual § 4B1.1 (Nov. 2012), based in part on a prior conviction under Pennsylvania law for simple assault, Pa. Stat. Ann., Tit. 18, § 2701(a) (Purdon 2000), which applies to a defendant who "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." Based on what petitioner said when he pleaded guilty to this offense, the Court of Appeals concluded that petitioner had admitted—and had thus been convicted of—intentional or at least knowing conduct and not simply reckless conduct. See 677 F. 3d 155, 160–162 (2012). I see nothing lacking in the Court of Appeals' analysis.

The Pennsylvania statute is "divisible" because it contains alternative elements. See *Descamps* v. *United States*, *ante*, at 257, 262. Under this Court's precedents, the modified categorical approach applies to divisible statutes, see *Descamps*, *ante*, at 262, 278, and courts applying that approach may consult the plea colloquy to "determin[e] which statutory phrase . . . covered a prior conviction," *Nijhawan* v. *Holder*, 557 U. S. 29, 41 (2009); see *Shepard* v. *United States*, 544 U. S. 13, 20 (2005).

When petitioner pleaded guilty, this is what was said:

> "'[Assistant District Attorney]: On . . . April 27, 2004, . . . [petitioner] grabbed Mrs. Marrero by the neck, attempting to drag her upstairs to the second floor. When she tried to make a phone call, he ripped the phone cord out of the wall as she was attempting to call 911.
>
> "'The Court: Do you admit those facts?
>
> "'The Defendant: Yes, Sir.'" 677 F. 3d, at 158 (quoting plea colloquy).

In sending this case back to the Third Circuit for a second look, this Court is apparently troubled by the possibility that petitioner was convicted merely for reckless conduct, and it is of course true that he did not say expressly that he intentionally or knowingly grabbed Mrs. Marrero by the neck or that he intentionally or knowingly attempted to drag her up a flight of stairs. The Court may be entertaining the possibility that what petitioner meant was that he grabbed what he believed to be some inanimate object with a neck—perhaps a mannequin named Mrs. Marrero—and attempted to drag that object up the steps. In that event, his conduct might have been merely reckless and not intentional or knowing.

The remand in this case is pointless. I would deny the petition and therefore dissent.

Certiorari Granted—Question Certified

No. 12–1094. CLINE ET AL. *v.* OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE ET AL. Sup. Ct. Okla. Certiorari granted. This Court, pursuant to the Revised Uniform Certification of Questions of Law Act, Okla. Stat., Tit. 20, § 1601 *et seq.* (West 2002), respectfully certifies to the Supreme Court of Oklahoma the following question: "Whether H. B. No. 1970, ch. 216, § 1, Okla. Sess. Laws 2011 prohibits: (1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration; and (2) the use of methotrexate to treat ectopic pregnancies." Further proceedings in this case are reserved pending receipt of a response from the Supreme Court of Oklahoma. Reported below: 2012 OK 102, 292 P. 3d 27.

Miscellaneous Order

No. 12–7822. FERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 569 U. S. 993.] Motion of petitioner for appointment of counsel granted. Gerald P. Peters, Esq., of Thousand Oaks, Cal., is appointed to serve as counsel for petitioner in this case.

Certiorari Granted. (See also No. 12–1094, *supra.*)

No. 12–794. WHITE, WARDEN *v.* WOODALL. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 685 F. 3d 574.

No. 12–8561. PAROLINE *v.* UNITED STATES ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U. S. C. § 2259." Reported below: 701 F. 3d 749.

Certiorari Denied

No. 12–23. BREWER, GOVERNOR OF ARIZONA, ET AL. *v.* DIAZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 3d 1008.

No. 12–63. WINDSOR, AS EXECUTOR OF THE ESTATE OF SPYER *v.* UNITED STATES ET AL.; and

No. 12–785. BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES *v.* WINDSOR, AS EXECUTOR OF THE ESTATE OF SPYER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 699 F. 3d 169.

No. 12–150. CHUEN PIU KWONG *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 3d 872.

No. 12–765. HOMA *v.* AMERICAN EXPRESS CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 494 Fed. Appx. 191.

No. 12–6314. BORG *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 12–8664. REEDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 487.

No. 12–13. BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES *v.* GILL ET AL.;

No. 12–15. DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. *v.* MASSACHUSETTS ET AL.; and

No. 12–97. MASSACHUSETTS *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions. Reported below: 682 F. 3d 1.

No. 12–16. OFFICE OF PERSONNEL MANAGEMENT ET AL. *v.* GOLINSKI. C. A. 9th Cir. Certiorari before judgment de-

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

No. 12–231. PEDERSEN ET AL. *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL.; and

No. 12–302. OFFICE OF PERSONNEL MANAGEMENT ET AL. *v.* PEDERSEN ET AL. C. A. 2d Cir. Certiorari before judgment denied.

No. 12–689. COALITION FOR THE PROTECTION OF MARRIAGE *v.* SEVCIK ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 12–862. LANUS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LANUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 492 Fed. Appx. 66.

JUSTICE THOMAS, dissenting.

Petitioner Linda Lanus asks the Court to revisit our decision in *Feres* v. *United States*, 340 U. S. 135 (1950), which interpreted the Federal Tort Claims Act (FTCA) to deny military personnel the ability to recover for injuries resulting from the negligence of federal employees. I would grant the petition to reconsider *Feres*' exclusion of claims by military personnel from the scope of the FTCA.

The FTCA is a sweeping waiver of sovereign immunity that, under specified circumstances, renders the Government liable for money damages for a variety of injuries caused by the negligence of Government employees. 28 U. S. C. § 1346(b)(1). As written, the FTCA "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *United States* v. *Johnson*, 481 U. S. 681, 693 (1987) (SCALIA, J., dissenting). While the FTCA contains a number of exceptions to this broad waiver of immunity, "none generally precludes FTCA suits brought by servicemen." *Ibid.* Congress contemplated such an exception, *Feres*, *supra*, at 139, but codified language that is far more limited. See § 2680(j) (excluding from waiver "[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*" (emphasis added)).

Nevertheless, in *Feres*, the Court held that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to

service." 340 U. S., at 146. There is no support for this conclusion in the text of the statute, and it has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees. I tend to agree with JUSTICE SCALIA that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Johnson*, *supra*, at 700 (internal quotation marks omitted). At a bare minimum, it should be reconsidered.

The instant petition asks the Court to do just that. I would grant this request. Private reliance interests on a decision that *precludes* tort recoveries by military personnel are nonexistent, and I see no other reason why the Court should hesitate to bring its interpretation of the FTCA in line with the plain meaning of the statute. I, therefore, respectfully dissent from the Court's decision to deny this petition.

No. 12–7516. GALLOW *v.* COOPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 285.

Statement of JUSTICE BREYER, with whom JUSTICE SOTOMAYOR joins, respecting the denial of the petition for writ of certiorari.

Petitioner Elrick Gallow, like the petitioner in the recently decided case of *Trevino* v. *Thaler*, 569 U. S. 413 (2013), alleges that he received ineffective assistance of counsel both at his criminal trial and during his first state postconviction proceeding. Specifically, petitioner's trial counsel has admitted in an affidavit and testimony before the State's disciplinary board that "he was unable to effectively cross-examine the victim because he was suffering from panic attacks and, more importantly, is related to the victim. Because of this, [he] advised Gallow to plead guilty despite Gallow's reluctance to do so, and failed to inform both Gallow and the State that he had evidence to impeach the victim's testimony." 1 App. to Pet. for Cert. 3. In reliance on this conflicted advice, Gallow pleaded guilty midway through trial. His trial counsel was subsequently disbarred. When Gallow, represented by a different attorney, filed for state postconviction relief, his new attorney failed to bring forward "any admissible evidence" to support his claim of ineffective assistance of trial counsel. *Id.*, at 15. Namely, in state court Gallow's habeas counsel repeatedly neglected to subpoena the trial counsel, which led the state court to reject the counsel's affidavit on state evidentiary

grounds. This meant that Gallow was left with a claim that had virtually no evidentiary support.

In my view, a petitioner like Gallow is in a situation indistinguishable from that of a petitioner like Trevino: Each of these two petitioners failed to obtain a hearing on the merits of his ineffective-assistance-of-trial-counsel claim because state habeas counsel neglected to "properly presen[t]" the petitioner's ineffective-assistance claim in state court. *Martinez* v. *Ryan*, 566 U. S. 1, 5 (2012). A claim without any evidence to support it might as well be no claim at all. In such circumstances, where state habeas counsel deficiently neglects to bring forward "any admissible evidence" to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim. The ineffective assistance of state habeas counsel might provide cause to excuse the default of the claim, thereby allowing the federal habeas court to consider the full contours of Gallow's ineffective-assistance claim. For that reason, the Fifth Circuit should not necessarily have found that it could not consider the affidavit and testimony supporting Gallow's claim because of *Cullen* v. *Pinholster*, 563 U. S. 170 (2011).

Nonetheless, I recognize that no United States Court of Appeals has clearly adopted a position that might give Gallow relief. But I stress that the denial of certiorari here is not a reflection of the merits of Gallow's claims.

July 1, 2013

Miscellaneous Order. (For revisions to the Rules of this Court effective this date, see 569 U. S. 1041.)

July 16, 2013

Certiorari Denied

No. 13–5316 (13A66). Quintanilla *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied.

No. 13–5338 (13A75). Quintanilla *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional In-

STITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JULY 18, 2013

Certiorari Denied

No. 12–10154 (12A1086). ROSS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 511 Fed. Appx. 293.

JULY 22, 2013

Appointment Order

It is ordered that Scott S. Harris be appointed Clerk of this Court to succeed William K. Suter, effective at the commencement of business September 1, 2013, and that he take the oath of office as required by statute.

Dismissal Under Rule 46

No. 12–650. AGRIUM INC. ET AL. *v.* MINN-CHEM, INC., ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 683 F. 3d 845.

Miscellaneous Orders

No. 12A1045. GRIFFIN ET AL. *v.* ABN AMRO MORTGAGE GROUP, INC., ET AL. C. A. 5th Cir. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 12A1141. SPRINT COMMUNICATIONS CO., L. P. *v.* IOWA UTILITIES BOARD ET AL. Dist. Ct. Polk County, Iowa. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 12A1164 (12–10575). SMITH ET UX. *v.* REGIONS BANK ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 13A13. MANAGED PHARMACY CARE ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir.

Application for stay, addressed to JUSTICE ALITO and referred to the Court, denied.

No. D–2711. IN RE DISBARMENT OF DONOFRIO. Disbarment entered. [For earlier order herein, see 568 U. S. 1226.]

Rehearing Denied

No. 11–796. BOWMAN *v.* MONSANTO CO. ET AL., 569 U. S. 278;

No. 12–1066. SMITH *v.* WRIGHT ET VIR, 569 U. S. 973;

No. 12–1105. FOURNIER ET AL. *v.* UNITED STATES; DAHLBERG ET AL. *v.* UNITED STATES; KETTLE ET AL. *v.* UNITED STATES; GLASS ET AL. *v.* UNITED STATES; and MCCANN ET AL. *v.* UNITED STATES, 569 U. S. 958;

No. 12–1124. HOLKESVIG *v.* WELTE ET AL., 569 U. S. 974;

No. 12–1130. WALKER *v.* SELDMAN ET AL., 569 U. S. 994;

No. 12–1155. DAY *v.* UNITED STATES, 569 U. S. 959;

No. 12–1213. JAIYEOLA *v.* FEDERAL-MOGUL CORP., 569 U. S. 1005;

No. 12–7388. MOHAMADI *v.* UNITED STATES, 569 U. S. 959;

No. 12–7894. BLANCHARD *v.* STEPHENS, WARDEN, 569 U. S. 960;

No. 12–8253. DAUGHERTY *v.* THE HEIGHTS ET AL., 569 U. S. 976;

No. 12–8459. HARRIMAN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 569 U. S. 907;

No. 12–8715. MULLINS *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY, 569 U. S. 931;

No. 12–8784. SWIFT *v.* EAST BATON ROUGE JUVENILE COURT ET AL., 569 U. S. 932;

No. 12–8801. LIU *v.* SPENCER, 569 U. S. 950;

No. 12–8806. COOPER *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, 569 U. S. 933;

No. 12–8831. JACKSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 569 U. S. 950;

No. 12–8884. JACQUES *v.* PUGH, WARDEN, 569 U. S. 960;

No. 12–8893. FLOWERS *v.* RICH ET AL., 569 U. S. 961;

No. 12–8958. BEHIS *v.* TEXAS (two judgments), 569 U. S. 962;

No. 12–9002. GANT *v.* NORTH CAROLINA, 569 U. S. 963;

No. 12–9005. MOSLEY *v.* ANDERSON, SHERIFF, TARRANT COUNTY, TEXAS, ET AL., 569 U. S. 963;

No. 12–9019. JOHNSON *v.* MICHIGAN, 569 U. S. 963;

No. 12–9066. KWONG *v.* CONNECTICUT, 569 U. S. 952;

No. 12–9108. Oberwise *v.* Crews, Secretary, Florida Department of Corrections, et al., 569 U. S. 978;

No. 12–9119. Bartlett *v.* Robeson et al., 569 U. S. 978;

No. 12–9120. Berry *v.* Illinois, 569 U. S. 964;

No. 12–9139. Anderson et al. *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 569 U. S. 978;

No. 12–9182. Jackman *v.* Lappin et al., 569 U. S. 979;

No. 12–9205. Williams *v.* Peel et al., 569 U. S. 980;

No. 12–9206. Vazquez *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 569 U. S. 980;

No. 12–9216. Davis *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 569 U. S. 980;

No. 12–9296. Kwong *v.* Connecticut Commissioner of Motor Vehicles, 569 U. S. 997;

No. 12–9321. Celestine *v.* Social Security Administration, 569 U. S. 981;

No. 12–9328. Taylor *v.* Obama, President of the United States, et al., 569 U. S. 981;

No. 12–9365. Salazar *v.* Sears, Roebuck & Co., 569 U. S. 982;

No. 12–9426. Cleveland *v.* Credit Based Asset Servicing et al., 569 U. S. 1007;

No. 12–9439. Ali *v.* United States, 569 U. S. 965;

No. 12–9451. Kemache-Webster *v.* United States, 569 U. S. 966;

No. 12–9474. Kumvachirapitag *v.* Gates et al., 569 U. S. 1019;

No. 12–9495. Edmond *v.* Allen, Warden, 569 U. S. 1008;

No. 12–9526. Pavulak *v.* United States, 569 U. S. 968;

No. 12–9558. Harper *v.* United States, 569 U. S. 983;

No. 12–9587. Robinson *v.* United States, 569 U. S. 984;

No. 12–9592. Gssime *v.* Pizzotto et al., 569 U. S. 984;

No. 12–9689. Marquez *v.* United States, 569 U. S. 988;

No. 12–9709. Russell *v.* United States, 569 U. S. 988;

No. 12–9712. Wilson *v.* Hines, Superintendent, Wayne Correctional Center, et al., 569 U. S. 1009;

No. 12–9728. In re Wells, 569 U. S. 971;

No. 12–9777. McBride *v.* United States, 569 U. S. 989;

No. 12–9818. WILSON *v.* UNITED STATES, 569 U. S. 999;
No. 12–10026. HEWLETT *v.* UNITED STATES, 569 U. S. 1012; and
No. 12–10033. IN RE BOYD, 569 U. S. 1003. Petitions for rehearing denied.

No. 12–9525. PELULLO *v.* UNITED STATES, 569 U. S. 989;
No. 12–9806. DANIELS *v.* SEPANAK, WARDEN, 569 U. S. 1001; and
No. 12–9937. HINES *v.* UNITED STATES, 569 U. S. 1013. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

No. 12–5362. SABER ET AL. *v.* BANK OF AMERICA ET AL., 568 U. S. 908; and
No. 12–8634. DOE *v.* CITY OF NEW YORK, NEW YORK, ET AL., 569 U. S. 929. Motions for leave to file petitions for rehearing denied.

JULY 31, 2013

Miscellaneous Order

No. 13A133. FELDMAN *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

AUGUST 2, 2013

Miscellaneous Order

No. 13A57. BROWN, GOVERNOR OF CALIFORNIA, ET AL. *v.* PLATA ET AL. D. C. E. D. & D. C. N. D. Cal. Application for stay, presented to JUSTICE KENNEDY and by him referred to the Court, denied. JUSTICE ALITO would grant the application for stay.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

When this case was here two Terms ago, I dissented from the Court's affirmance of the injunction, because the District Court's order that California release 46,000 prisoners violated the clear limitations of the Prison Litigation Reform Act, 18 U. S. C. § 3626(a)(1)(A)—"besides defying all sound conception of the proper role of judges." *Brown* v. *Plata*, 563 U. S. 493, 564 (2011).

The Court's opinion approving the order concluded with what I described as a "bizarre coda," *id.*, at 560, which said that "[t]he State may wish to move for modification" of the injunction, and that the District Court "may grant such a request provided that the State satisfies necessary and appropriate preconditions," *ibid.* (internal quotation marks omitted). More specifically, the opinion suggested that modification might be in order if the State makes "significant progress . . . toward remedying the underlying constitutional violations" and "demonstrate[s] that further population reductions are not necessary." *Id.*, at 544. These "deliberately ambiguous . . . suggestions on how to modify the injunction," were, I observed, "just deferential enough so that [the Court] can say with a straight face that it is 'affirming,' just stern enough to put the District Court on notice that it will likely get reversed if it does not follow them." *Id.*, at 562 (dissenting opinion). That was in my view "a compromise solution" that is "unknown in our legal system," which does not permit appellate courts to prescribe in advance the exercise of district-court discretion. *Ibid.* I warned, moreover, that "the judges of the District Court are likely to call [the Court's] bluff, since they know full well it cannot possibly be an abuse of discretion to refuse to accept the State's proposed modifications in an injunction that has just been approved (*affirmed*) in its present form." *Ibid.*

The bluff has been called, and the Court has nary a pair to lay on the table. The State, seeking to invoke the *ex ante* appellate control of district-court discretion, and to compel the modification decreed by the Court's raised eyebrow, provided evidence that it has made meaningful progress and that population reductions to the level required by the injunction are unnecessary. But the latter argument was made and rejected in the last round, and the former hardly requires (*demands*) modification of the injunction. It was predictable two Terms ago that the State *would* make progress—indeed, it promised to do so. If the reality of incremental progress makes the injunction now invalid, the probability (indeed, one might say the certainty) of incremental progress made the injunction an overreach two Terms ago. Surely it is not the case that when a party subject to an injunction makes substantial progress toward compliance it is an abuse of discretion not to revise the injunction.

But as I suggested in my dissent, perhaps the Court never meant to follow through on its revision suggestions. Perhaps

they were nothing more than "a ceremonial washing of the hands—making it clear for all to see, that if the terrible things sure to happen as a consequence of this outrageous order do happen, they will be none of this Court's responsibility. After all, did we not want, and indeed even suggest, something better?" *Ibid.* So also today, it is not our fault that California must now release upon the public nearly 10,000 inmates convicted of serious crimes—about 1,000 for every city larger than Santa Ana—three-quarters of whom are moderate (57%) or high (74%) recidivism risks. Reply in Support of Application 34.

It appears to have become a standard ploy, when this Court vastly expands the Power of the Black Robe, to hint at limitations that make it seem not so bad. See, *e. g.*, *Lawrence* v. *Texas*, 539 U. S. 558, 604 (2003) (SCALIA, J., dissenting); *United States* v. *Windsor*, *ante*, at 802 (SCALIA, J., dissenting). Comes the moment of truth, the hinted-at limitation proves a sham. As for me, I adhere to my original view of this terrible injunction. It goes beyond what the Prison Litigation Reform Act allows, and beyond the power of the courts. I would grant the stay and dissolve the injunction.

No. 13A115. BIRTH FATHER ET AL. *v.* ADOPTIVE COUPLE ET AL. Sup. Ct. N. C. Application for stay of judgment, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Motion of guardian ad litem for leave to file a response with exhibits under seal with redacted copies for the public record granted. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would grant the application for stay.

AUGUST 5, 2013

Certiorari Denied

No. 13–5507 (13A116). FERGUSON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Motions of American Bar Association and National Alliance on Mental Illness et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these motions, this application, and this petition. Reported below: 716 F. 3d 1315.

AUGUST 12, 2013

Rehearing Denied

No. 11–10325. ACASIO *v.* GUITTARD CHOCOLATE CO. ET AL., 568 U. S. 840;

No. 12–1047. YEAGER ET AL. *v.* BOWLIN ET AL., 569 U. S. 958;

No. 12–1077. SCOTT ET AL. *v.* SAINT JOHN'S CHURCH IN THE WILDERNESS ET AL., 569 U. S. 1029;

No. 12–1097. MOORE *v.* WILLIAMSBURG COUNTY SCHOOL DISTRICT ET AL., 569 U. S. 974;

No. 12–1227. VOTER VERIFIED, INC. *v.* PREMIER ELECTION SOLUTIONS, INC., ET AL., 569 U. S. 1030;

No. 12–1228. VOTER VERIFIED, INC. *v.* ELECTION SYSTEMS & SOFTWARE, INC., 569 U. S. 1030;

No. 12–1260. PILLA *v.* HOLDER, ATTORNEY GENERAL, *ante*, p. 906;

No. 12–1273. LOREN DATA CORP. *v.* GXS, INC., *ante*, p. 906;

No. 12–1337. BRADISON *v.* MINNESOTA COMMISSIONER OF REVENUE, *ante*, p. 906;

No. 12–7682. BRADLEY *v.* MISSISSIPPI, 568 U. S. 1170;

No. 12–8872. BRZOWSKI *v.* ILLINOIS DEPARTMENT OF CORRECTIONS ET AL., 569 U. S. 960;

No. 12–8876. HARVEY *v.* COLORADO, 569 U. S. 960;

No. 12–8885. JACKSON *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL., 569 U. S. 960;

No. 12–9095. MAY *v.* CULLIVER, 569 U. S. 977;

No. 12–9151. BETETA *v.* DIAZ, WARDEN, 569 U. S. 979;

No. 12–9171. WEST *v.* TEXAS, 569 U. S. 979;

No. 12–9222. MANUEL VILLARRUEL *v.* HOLLAND, ACTING WARDEN, 569 U. S. 980;

No. 12–9373. SOUTHERN *v.* ATLANTIC INDUSTRIAL SERVICES, INC., 569 U. S. 997;

No. 12–9392. AGUIRRE *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL., 569 U. S. 1006;

No. 12–9398. BOYD *v.* KLLM TRANSPORT SERVICES, INC., ET AL., 569 U. S. 1007;

No. 12–9419. TAJIDDIN *v.* NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE ET AL., 569 U. S. 1007;

No. 12–9480. MARKOGLU *v.* FEDERATED FINANCIAL CORPORATION OF AMERICA, 569 U. S. 1020;

No. 12–9534. Gssime *v.* Martuscello, Superintendent, Coxsackie Correctional Facility, 569 U. S. 1020;

No. 12–9543. Perez Goni *v.* Florida, 569 U. S. 1021;

No. 12–9617. Page *v.* King, 569 U. S. 1033;

No. 12–9624. Waver *v.* Tibbals, Warden, 569 U. S. 985;

No. 12–9644. Robinson-Reeder *v.* Kearns et al., 569 U. S. 1033;

No. 12–9665. In re Sterling, 569 U. S. 1029;

No. 12–9690. Koch *v.* Estrella et al., 569 U. S. 1009;

No. 12–9700. Craddock et al. *v.* Beaufort County Sheriff's Department et al., 569 U. S. 1034;

No. 12–9720. Bryant *v.* Donald et al., *ante*, p. 907;

No. 12–9749. In re Hien Anh Dao, *ante*, p. 903;

No. 12–9796. Edwards *v.* United States, 569 U. S. 998;

No. 12–9798. Nie *v.* Clarke, Director, Virginia Department of Corrections, 569 U. S. 1009;

No. 12–9805. Ryahim *v.* Hobbs, Director, Arkansas Department of Correction, et al., 569 U. S. 1022;

No. 12–9814. DeSue *v.* Florida Department of Corrections, *ante*, p. 921;

No. 12–9829. In re Barksdale, *ante*, p. 904;

No. 12–9959. Bates *v.* United States, 569 U. S. 1012;

No. 12–9997. McAllister *v.* Cross, Warden, 569 U. S. 1012;

No. 12–10048. Martorano *v.* United States, 569 U. S. 1024;

No. 12–10067. Evans *v.* Birkett, Warden, 569 U. S. 1036;

No. 12–10124. Alexander *v.* Murdoch et al., 569 U. S. 1036;

No. 12–10170. Thornberg *v.* United States, 569 U. S. 1036;

No. 12–10216. Smith *v.* Weiser Security Systems, Inc., *ante*, p. 910;

No. 12–10315. Wherry *v.* United States, *ante*, p. 911; and

No. 12–10408. In re Barley, *ante*, p. 903. Petitions for rehearing denied.

No. 12–9441. Clark *v.* Cheeseboro et al., 569 U. S. 997. Motion for leave to file petition for rehearing denied.

No. 12–9729. Kerns *v.* United States, 569 U. S. 990; and

No. 12–9890. Phillips *v.* United States, 569 U. S. 1013. Petitions for rehearing denied. Justice Kagan took no part in the consideration or decision of these petitions.

August 15, 2013

Dismissal Under Rule 46

No. 13–5302. Capalucci *v.* Massachusetts. App. Ct. Mass. Certiorari dismissed under this Court's Rule 46. Reported below: 83 Mass. App. 1115, 982 N. E. 2d 1225.

August 21, 2013

Dismissal Under Rule 46

No. 12–1428. Wanken *v.* Wanken et al. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 511 Fed. Appx. 363.

August 26, 2013

Dismissal Under Rule 46

No. 12–1208. UBS Financial Services Incorporated of Puerto Rico et al. *v.* Union de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan et al. C. A. 1st Cir. [Certiorari granted, *ante,* p. 916.] Writ of certiorari dismissed under this Court's Rule 46.1. Reported below: 704 F. 3d 155.

August 30, 2013

Miscellaneous Orders

No. 12A1078 (12–8616). Koumjian *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay, addressed to Justice Ginsburg and referred to the Court, denied.

No. 13A34. Torres-Coronado *v.* Holder, Attorney General. C. A. 5th Cir. Application for stay, addressed to Justice Ginsburg and referred to the Court, denied.

No. 12–79. Chadbourne & Parke LLP *v.* Troice et al.;

No. 12–86. Willis of Colorado Inc. et al. *v.* Troice et al.; and

No. 12–88. Proskauer Rose LLP *v.* Troice et al. C. A. 5th Cir. [Certiorari granted, 568 U. S. 1140.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 12–414. BURT, WARDEN *v.* TITLOW. C. A. 6th Cir. [Certiorari granted, 568 U. S. 1191.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 12–536. MCCUTCHEON ET AL. *v.* FEDERAL ELECTION COMMISSION. D. C. D. C. [Probable jurisdiction noted, 568 U. S. 1156.] Motion of Senator Mitch McConnell for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 12–609. KANSAS *v.* CHEEVER. Sup. Ct. Kan. [Certiorari granted, 568 U. S. 1192.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Rehearing Denied

No. 11–9540. DESCAMPS *v.* UNITED STATES, 567 U. S. 964;

No. 12–150. CHUEN PIU KWONG *v.* HOLDER, ATTORNEY GENERAL, *ante*, p. 931;

No. 12–1056. DUNN ET AL. *v.* UNITED STATES, *ante*, p. 901;

No. 12–1084. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* SCHAD, *ante*, p. 521;

No. 12–1304. ROSELLINI ET AL. *v.* JACK SILVERMAN REALTY & MORTGAGE CO., LLC, ET AL., *ante*, p. 919;

No. 12–1360. BOWERS *v.* BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA ET AL., *ante*, p. 919;

No. 12–1373. MITAN *v.* UNITED STATES, *ante*, p. 919;

No. 12–8270. MCDONALD *v.* UNITED STATES, 569 U. S. 1031;

No. 12–8436. LAMPON *v.* LAVALLEY, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, 569 U. S. 1019;

No. 12–8683. ABRAHAMSON *v.* UNITED STATES, *ante*, p. 913;

No. 12–8850. GABBARD *v.* TENNESSEE ELECTIONS COMMISSION ET AL., 569 U. S. 951;

No. 12–9338. LITTLE *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL., 569 U. S. 1006;

No. 12–9434. HOUCK *v.* BALL ET AL., 569 U. S. 1007;

No. 12–9488. LUH *v.* MISSOURI, 569 U. S. 1020;

No. 12–9506. HUGHES *v.* OKLAHOMA DEPARTMENT OF TRANSPORTATION ET AL., 569 U. S. 1020;

No. 12–9539. PITTER *v.* UNITED STATES, 569 U. S. 983;

No. 12–9696. PANNELL *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 569 U. S. 1034;

No. 12–9699. SHOWERS *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL., 569 U. S. 1034;

No. 12–9722. THON *v.* HEATH, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, *ante*, p. 907;

No. 12–9765. MONIZ *v.* MCKEE, WARDEN, *ante*, p. 908;

No. 12–9787. WILLS *v.* FLORIDA, 569 U. S. 1009;

No. 12–9852. LOVATO LUCERO *v.* NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS ET AL., *ante*, p. 921;

No. 12–9870. LEWIS *v.* CITY OF WAXAHACHIE, TEXAS, ET AL., *ante*, p. 921;

No. 12–9889. MOORE *v.* ZAPPA ET AL., *ante*, p. 922;

No. 12–9893. BUSH *v.* STEVENSON COMMONS ASSOCIATES, LLP, ET AL., *ante*, p. 922;

No. 12–9927. IN RE MCCLOUD, 569 U. S. 1003;

No. 12–9950. GANDY *v.* REID, SHERIFF, HAMILTON COUNTY, FLORIDA, 569 U. S. 1035;

No. 12–10131. WADDELL-EL *v.* YOUNG, WARDEN, *ante*, p. 922;

No. 12–10157. DOBY *v.* UNITED STATES, 569 U. S. 1026;

No. 12–10174. THOMAS *v.* MISSISSIPPI, *ante*, p. 922;

No. 12–10182. MCCAULEY *v.* GEORGIA ET AL., 569 U. S. 1037;

No. 12–10208. JONES *v.* SEXTON, WARDEN, *ante*, p. 910;

No. 12–10267. MADRID *v.* UNITED STATES, 569 U. S. 1038;

No. 12–10320. CRUZ *v.* UNITED STATES, *ante*, p. 923;

No. 12–10389. AKITI *v.* UNITED STATES, *ante*, p. 924; and

No. 12–10410. WITHERSPOON *v.* UNITED STATES, *ante*, p. 925. Petitions for rehearing denied.

No. 12–8338. SCHMITT *v.* MORGAN, WARDEN, 568 U. S. 1253;

No. 12–9567. CARR *v.* UNITED STATES, 569 U. S. 1021; and

No. 12–9595. IN RE HEXIMER, 569 U. S. 957. Motions for leave to file petitions for rehearing denied.

SEPTEMBER 13, 2013

Dismissal Under Rule 46

No. 13–5927. LETZGUS *v.* MICHIGAN STATE TREASURER. Sup. Ct. Mich. Certiorari dismissed under this Court's Rule 46.1.

SEPTEMBER 19, 2013

Certiorari Denied

No. 13–6444 (13A282). LEOS GARZA *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 13–6445 (13A283). LEOS GARZA *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 20, 2013

Miscellaneous Order

No. 13A243. STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION *v.* GONGORA. C. A. 5th Cir. Application to recall and stay the mandate, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

SEPTEMBER 26, 2013

Dismissal Under Rule 46

No. 13–55. TOLL BROTHERS, INC., ET AL. *v.* NOOHI ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 708 F. 3d 599.

Certiorari Denied

No. 13–6541 (13A307). DIAZ *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 731 F. 3d 370.

OCTOBER 1, 2013

Miscellaneous Order

No. 12A1235. GORE *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 13A322. GORE *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 11–965. DAIMLER AG *v.* BAUMAN ET AL. C. A. 9th Cir. [Certiorari granted, 569 U. S. 946.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 12–682. SCHUETTE, ATTORNEY GENERAL OF MICHIGAN *v.* COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) ET AL. C. A. 6th Cir. [Certiorari granted, 568 U. S. 1249.] Motions of respondents for divided argument granted, and the time is to be divided as follows: 15 minutes for respondents Chase Cantrell et al. and 15 minutes for respondent Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) et al. JUSTICE KAGAN took no part in the consideration or decision of these motions.

No. 12–729. HEIMESHOFF *v.* HARTFORD LIFE & ACCIDENT INSURANCE CO. ET AL. C. A. 2d Cir. [Certiorari granted, 569 U. S. 917.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 12–929. ATLANTIC MARINE CONSTRUCTION CO., INC. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS ET AL. C. A. 5th Cir. [Certiorari granted, 569 U. S. 903.] Motion of Professor Stephen E. Sachs for leave to participate in oral argument as *amicus curiae* and for divided argument denied. The parties, however, should be prepared to address at oral argument the arguments raised in the brief for Professor Stephen E. Sachs as *amicus curiae* in support of neither party.

Certiorari Granted

No. 12–1163. HIGHMARK INC. *v.* ALLCARE HEALTH MANAGEMENT SYSTEM, INC. C. A. Fed. Cir. Certiorari granted. Reported below: 687 F. 3d 1300.

No. 12–1173. MARVIN M. BRANDT REVOCABLE TRUST ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. Reported below: 496 Fed. Appx. 822.

No. 12–1184. OCTANE FITNESS, LLC *v.* ICON HEALTH & FITNESS, INC. C. A. Fed. Cir. Certiorari granted. Reported below: 496 Fed. Appx. 57.

No. 12–1315. PETRELLA *v.* METRO-GOLDWYN-MAYER, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 695 F. 3d 946.

No. 12–1371. UNITED STATES *v.* CASTLEMAN. C. A. 6th Cir. Certiorari granted. Reported below: 695 F. 3d 582.

No. 11–681. HARRIS ET AL. *v.* QUINN, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir. Motion of Center for Constitutional Jurisprudence et al. for leave to file brief as *amici curiae* granted. Certiorari granted. Reported below: 656 F. 3d 692.

No. 12–1408. UNITED STATES *v.* QUALITY STORES, INC., ET AL. C. A. 6th Cir. Certiorari granted. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 693 F. 3d 605.

No. 12–9490. PRADO NAVARETTE ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari granted limited to Question 1 presented by the petition.

Certiorari Denied

No. 12–10915. GORE *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–6619 (13A315). GORE *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 120 So. 3d 554.

No. 13–6634 (13A318). GORE *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2010, 2011, AND 2012

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2010	**2011**	**2012**	**2010**	**2011**	**2012**	**2010**	**2011**	**2012**	**2010**	**2011**	**2012**
Number of cases on dockets	4	3	3	1,895	1,867	1,806	7,167	7,082	6,997	9,066	8,952	8,806
Number disposed of during term	2	1	0	1,580	1,564	1,503	6,245	6,090	6,099	7,827	7,655	7,602
Number remaining on dockets	2	2	3	315	303	303	922	992	898	1,239	1,297	1,204

	TERMS		
	2010	**2011**	**2012**
Cases argued during term	86	* 79	77
Number disposed of by full opinions	83	73	76
Number disposed of by per curiam opinions	3	5	1
Number set for reargument	0	1	0
Cases granted review this term	90	66	93
Cases reviewed and decided without oral argument	84	137	83
Total cases to be available for argument at outset of following term	43	31	45

* Affordable Care Act cases counted as four cases for argument.

JUNE 27, 2013

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